

**VICBAR JUNIOR BAR CONFERENCE:**  
**THE IMPLICATIONS OF TECHNOLOGY FOR THE JUNIOR BAR**

**The Hon Justice Michelle Gordon**  
**High Court of Australia**

Introduction

Technology has its obvious effects on our everyday lives and our legal practice. But for the professions – the legal profession included – technology's effects need and deserve closer scrutiny. A general failure by the professions in moving with the times has given rise to serious questions about whether the legal profession – including the Bar – is serving the public interest in the ways that it can and should. For instance, does the legal profession make its expertise available in useful and accessible ways? Are legal services affordable for those that need them? Is the legal profession open to public scrutiny and assessment?

I want to talk today about how these and other questions might shape your current and future practices, and how they relate to advancing technology. I want look at some local and international developments in how technology is answering those questions, and consider how you might harness technology to your advantage.

As newer members of the Bar, technological changes will have the greatest effect on your practice, now and into the future. You are at a point of change; one that presents both serious challenges and potential opportunities. It is time to think closely about your profession and its future.

### Problems with the professions

Why? Because our profession, like other professions, is in a process and stage of transformation. By and large, the professions are "failing in six ways: economically, technologically, psychologically, morally, qualitatively, and in terms of their inscrutability"<sup>1</sup>. This observation underpins the thesis of Professor Richard Susskind and his son Daniel in their 2015 book, *The Future of the Professions*. Their thesis is apposite to all professions, especially the legal profession.

First, there is the *economic* problem. Many people and organisations simply cannot afford legal services<sup>2</sup>, or at least cannot afford them to the full extent they might need.

Second, the legal profession has been slow to embrace *technology* – particularly the internet – and the opportunities it provides<sup>3</sup>. Many counsel embrace technology in their own professional practice. I would suggest that the Junior Bar is at the forefront of incorporating new technology into their working practices. But technology offers much more, especially in its potential to disseminate information widely. Today, too much information sits idle or little used, hidden away in chambers or buried

---

1 Susskind and Susskind, *The Future of the Professions*, (2015) at 33; see also at 34.

2 Susskind and Susskind, *The Future of the Professions*, (2015) at 33.

3 Susskind and Susskind, *The Future of the Professions*, (2015) at 34.

### 3.

in publications of limited circulation. Too much more resides only in professionals' heads. People today access and consume information differently. This is something that is important for the professions to recognise.

Third, there is a *psychological* problem<sup>4</sup>. Given the way people access information in the modern world, the legal profession is not organised in a way that encourages people to solve or engage with their own legal problems. There is no doubt that some legal problems require attention from lawyers. But there is something to be said for the satisfaction that can be gained from solving a person's own problems where possible, perhaps with the guidance of a lawyer.

The Susskinds' fourth criticism is a *moral* one<sup>5</sup>. The legal profession generally serves an important role in society. The independent Bar serves its own particular and important role. Your undertaking to practise as a barrister carries with it a re-emphasis of your obligation to provide the very best assistance to the Courts<sup>6</sup> and to give strong independent advice to your clients<sup>7</sup>. Courts and clients rely upon it. In the complex world in which we

---

4 Susskind and Susskind, *The Future of the Professions*, (2015) at 35.

5 Susskind and Susskind, *The Future of the Professions*, (2015) at 35.

6 See rr 23-34 of the Legal Profession Uniform Conduct (Barristers) Rules 2015.

7 See r 35 of the Legal Profession Uniform Conduct (Barristers) Rules 2015.

#### 4.

live, the courts and clients look for and expect to receive assistance that is independent, intelligent and realistic. This role is an important component of the rule of law in this country.

The moral dimension for the Susskinds is that the legal profession has the opportunity to do good, and that if it does not adapt and take advantage of opportunities by making legal knowledge more accessible, the profession commits a "sin of omission"<sup>8</sup>. In the Susskinds' view, the profession should be looking to share its expertise with society more widely than it currently does.

Fifth, the professions need constantly "to strive to bring the best of their knowledge and experience to all of their clients"<sup>9</sup>. They need to not only *say* that this is what they do – they need to do it.

Finally, the legal profession has to be open to scrutiny. It can be difficult for clients to evaluate the quality of the work and whether a lawyer has, in truth, done a "good job". This is compounded by a degree of mystery surrounding the work actually undertaken by lawyers. Raw outcomes are not always reflective of the quality of work put in – a "win" is more likely to follow from the best work, but a win can also, on occasion, follow from less than stellar skill and preparation.

---

8 Susskind and Susskind, *The Future of the Professions*, (2015) at 36 quoting Kenny, *What I Believe*, (2006) at 123.

9 Susskind and Susskind, *The Future of the Professions*, (2015) at 36.

## 5.

For this reason, transparency is important. It is important because it helps clients, or potential clients, make choices about obtaining legal services – who should they engage, where and when they should engage them, and how much will it cost?

As newer members of the Bar, these are the issues that you will need to consider and solve. Some issues may require merely minor reorganising of day-to-day business; some issues may require a serious shift in how business is won and done; and some issues may even require structural change to the profession. But *all of these issues* will require close and complex consideration of how lawyers, and in particular, barristers are succeeding and failing in providing the important services that they do. Lawyers – and the knowledge they possess – need to be accessible. They (the lawyers and their knowledge) have to be accessible in terms of cost, and they have to be accessible in the sense that people need to understand what lawyers do.

We need to shift our thinking from containing all of our knowledge in separate silos, and think about how we can deliver it differently. We need to think outside the square. We need to think about, and develop, new and alternative ways to deliver legal services.

But what should be done? What are the alternatives to the current set up? What should our new mind set be? We need to think about what it is that the legal profession provides to society.

## 6.

The Susskinds consider that we provide "knowledge", in the sense of "practical expertise"<sup>10</sup>. They give an illustration<sup>11</sup>. Executives of a power tool company are in a room. A slide is put up on the wall. It is of a power drill. They are asked – is this what you sell? They say "yes". The slide is replaced by a new one – it is of a hole in the wall. They are told – "this is what you really sell".

So, what does the Junior Bar sell? What is the "hole in the wall"? The answer is not the equivalent of the power drill – ie, we give advice about X, we go to court to make submissions on X. It is your "knowledge" that is important. And that knowledge is not one dimensional. It is not just black letter law. It extends to and includes procedural knowledge, risk assessments, negotiations, advocacy, the ability to communicate complex ideas simply, and the list goes on. It is, and must be, multi-faceted. And there are different ways in which that "knowledge" (in respect of all of its facets) can be provided to, and used by, clients.

### Technology: Two levels of impact

With those issues and ideas at the forefront of your thinking, how can technology *change* and *improve* your practice?

---

10 Susskind and Susskind, *The Future of the Professions*, (2015) at 188.

11 Susskind and Susskind, *The Future of the Professions*, (2015) at 37-38.

## 7.

I want you to think about technology and your practice on two levels. *First, there are technological shifts that assist and help your research, advice and submissions.* They make business as usual better. This is what Professor Susskind calls using technology for "automation" – to streamline and improve existing ways of working<sup>12</sup>. But technology can go further. In Professor Susskind's words, it can be used for "innovation", where it fundamentally changes past practices or allows us to work in ways that simply were not possible. He gives the basic example of the ATM – it did not replace bank tellers, it opened up a new way of providing banking services altogether<sup>13</sup>. Technology can open up the possibility of a more fundamental shift in how disputes are decided and information shared. I want to explore each level in turn.

Technology has developed rapidly in recent times. And it is still developing. We cannot predict the future of technology with any degree of certainty<sup>14</sup>, and we do not know how it will affect our profession. Consider this – the first iPhone was released less than 10 years ago. It was not long ago that Twitter became a prominent online service. And things are becoming automated: self-driving

---

12 See Susskind, A Submission the House of Lords, Select Committee on the Constitution, *Legislative Process Inquiry* (November 2016) at 1 [4].

13 See Susskind, A Submission the House of Lords, Select Committee on the Constitution, *Legislative Process Inquiry* (November 2016) at 1 [4].

14 See Susskind and Susskind, *The Future of the Professions*, (2015) at 154.

## 8.

cars are on the horizon – already, all Tesla cars are equipped with the hardware for full self-driving capability<sup>15</sup>.

In law, rapidly developing technological tools can assist in conducting our existing work more efficiently. You will be aware of the rapid progression of case law and legislation research databases. Citators have, for years, collected and catalogued how cases interact. The continually improving JADE platform collates subsequent citations at the page or paragraph level and provides direct links to passages that cite a given authority, allowing propositions to be traced through at great speed<sup>16</sup>. In the United States, a legal research and analytics platform called "Court Analytics", which was launched in late 2016, promises new capabilities made possible by data science, natural language processing and machine learning<sup>17</sup>. It has the new abilities to view historical trends on the success rates of certain motions across different courts and different judges, and to view data-based statistical analyses of how the different courts in the complex US judicial hierarchy cite and rely on each other's decisions<sup>18</sup>. And this service is not alone. A similar platform "Legal Analytics" by the US company Lex Machina provides similar insights into the judges, lawyers, parties, and the subjects of the cases themselves, drawn

---

15 See <https://www.tesla.com/autopilot>.

16 See <https://jade.io/>.

17 See <http://ravellaw.com/introducing-court-analytics/>.

18 See <http://practicesource.com/us-publisher-ravel-law-launches-new-analytics-for-us-court-system/>.



from thousands of court decisions and filings and analysed using automated data mining techniques<sup>19</sup>.

The next step is the use of big data to make predictive judgments about court outcomes. An algorithm has been developed, which uses natural language processing and machine learning which can predict the outcome in European Court of Human Rights cases with, on average, 79% accuracy<sup>20</sup>. We can also expect automated decision-making schemes to become more prominent<sup>21</sup>, including, perhaps, in the judicial context<sup>22</sup>.

Your role as junior barristers includes being aware of these constant developments, familiarising yourself with the databases' comparative strengths and weaknesses, and being confident in using them to support your research. They need to be used intelligently, and sometimes that means not at all. It is often quicker and easier to use a book, than simply type a stream of words into a database. Ask my associates – each year I compete with them on a research task where they use databases and I use the books. I inevitably win.

---

19 See <https://lexmachina.com/what-we-do/>.

20 See Aletras, Tsarapatsanis, Preotiuc-Pietro, Lamos, "Predicting judicial decisions of the European Court of Human Rights: A Natural Language Processing perspective (2016) *PeerJ Computer Science*.

21 See Perry, "iDecide: Administrative Decision-making in the Digital World (2017) 91 *Australian Law Journal* 29.

22 See Nettle, "Technology and the Law", paper presented at the Bar Association of Queensland Annual Conference, 27 February 2016.

The lesson – don't simply resort to technology on the assumption that it will always help.

Not all time saving or efficiency methods are good for your work. Some are definitely not. Some parts of your job will, and must, take time. For instance, dictaphones promised great efficiency in drafting documents and advice, but it is more often the case that the "streams of gold" that you think you are speaking into the little box is in fact a stream of something else entirely. At best, you will have a document that requires heavy amendment to get up to scratch; at worst, you will have completely wasted your time. A dictaphone's traps, despite its initial attractions, remain a salutary lesson about the unthinking use of technology.

Hands-on work is crucial to getting across the facts, the statute and authority within your brief. For my part, the process of understanding statutes is greatly enhanced by reading them in detail and reproducing their provisions by manually typing them into my judgments. It assists me to become familiar with the text and structure of the relevant Acts. I become familiar with what the provision actually says, rather than what I *think* it says or what I *remember* it says. The temptation to automate your learning or to copy and paste is strong, but resisting it will, in certain circumstances, improve your understanding.

The same goes for authority – you do not understand a case simply by saving it to your iPad or sticking it into a submission as part of a long list of authorities. You must engage with it and

understand its terms and its detail. For this there is little substitute for close reading and closer understanding.

### Radical ideas

But what about some more radical ideas? Some initiatives (such as Barrister-Connect) utilise the internet and technology have been established and are to be applauded – but they are more of a modification or natural development of the existing model for the delivery of services than an overhaul.

Once you move outside the first level of technology applied to our everyday practice, the law and our perceptions are, in general, yet to catch up. I say "in general" because there is technology that exists or is being developed that some lawyers are using to change the way they work in a serious and fundamental way. This is happening now. This is not the stuff of science fiction. We need to take advantage of technology and the opportunities it provides to ensure our profession remains relevant.

To this end, I want to explore a number of ideas involving technology where people are already thinking outside the square. They are taking advantage of what is on offer. I want to suggest that you, as members of the Junior Bar, need to be vigilant to understand these changes, and be ready to grasp the opportunities that they present for you.

*Online dispute resolution*

"Online dispute resolution" or "ODR" is what it says it is – dispute resolution, outside of the courts, based on online platforms<sup>23</sup>.

A simple example of ODR is the eBay online dispute resolution process. It resolves 60 million disagreements every year by presenting opposing parties with practical settlement advice, which proceeds to a binding determination in default of resolution by consent<sup>24</sup>.

Similar platforms are starting to creep into government as well. In the Netherlands, there is a separation and divorce platform offered by the Ministry of Justice and Security that uses algorithms to assess information provided by a couple who are separating or divorcing, and then to identify points of agreement and propose solutions. If the proposed solutions are not accepted, then the couple can request a mediation or adjudication<sup>25</sup>.

---

23 Legg, "The Future of Dispute Resolution: Online ADR and Online Courts", (2016) 27 *Australian Dispute Resolution Journal* 227 at 227 citing Julia Hörnle, "Online Dispute Resolution in the EU and Beyond – Keepings Costs Low or Standards High?" in Hodges and Stadler, *Resolving Mass Disputes*, (2013) at 294.

24 See Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims* (February 2015) at 11.

25 See Legg, "The Future of Dispute Resolution: Online ADR and Online Courts", (2016) 27 *Australian Dispute Resolution Journal* 227 at 230. See also Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims* (February 2015) at 12.

The Civil Resolution Tribunal (or CRT) in British Columbia, Canada, employs a question and answer system – the "Solution Explorer" – at a preliminary stage to assist in resolving strata disputes or small claims by consent before a claim is commenced<sup>26</sup>. Commencing a dispute involves filling in an online application form, which is followed by the "case management phase"<sup>27</sup>. That phase involves an attempt to resolve the dispute with the assistance of a facilitator. Finally, if that phase fails to resolve the dispute, the dispute may proceed to the "tribunal hearing phase"<sup>28</sup>. The Tribunal "hearing" may take place entirely over telephone, videoconferencing or email, including the reception of evidence.

Soon, we might expect something similar in the United Kingdom. Lord Justice Briggs recently recommended the creation of an Online Court for claims up to 25,000 pounds – again involving an initial online interactive process<sup>29</sup>, which creates a document that is effectively a simplified pleading. One of the drivers for that recommendation was his Lordship's view that the existing court system is not adequately providing "access to justice for ordinary

---

26 See Legg, "The Future of Dispute Resolution: Online ADR and Online Courts", (2016) 27 *Australian Dispute Resolution Journal* 227 at 230. See also Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims* (February 2015) at 12.

27 s 17(1)(a) of the *Civil Resolution Tribunal Act* 2012 (British Columbia) ("the CRT Act").

28 s 17(1)(b) of the CRT Act.

29 See Legg, "The Future of Dispute Resolution: Online ADR and Online Courts", (2016) 27 *Australian Dispute Resolution Journal* 227; Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, (2016) at 118-120 [12.15].

individuals and small businesses due to the combination of the excessive costs expenditure and costs risk of civil litigation about moderate sums, and the lawyerish culture and procedure of the civil courts, which makes litigation without lawyers impracticable."<sup>30</sup>

As his Lordship's comments suggest, the people designing and running these online platforms are aware of the difficulties that our profession faces. These platforms are already seeking to address some of the issues identified by the Susskinds.

### *Online tools*

There are also other online tools that can be used by lay people disconnected from a particular dispute resolution platform – that is, tools that assist people to work within the existing system.

One example was launched by a Melbourne law firm last year, designed to assist unrepresented persons at sentencing hearings. The free online service allows people to input the relevant information, and the service then produces a document which the unrepresented person can hand up to the magistrate<sup>31</sup>. At the time the tool was launched, Associate Professor Moses from the University of New South Wales aptly summed-up what it meant for the future of the legal profession. She said: "People entering the legal profession should not only know and understand the law, they

---

30 Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, (2016) at 115 [12.4].

31 See <https://www.robot-lawyers.com.au>.

should be proficiently skilled to be able to understand these kinds of systems and *ideally build them*" (emphasis added)<sup>32</sup>.

Melbourne Law School offers a subject that provides practical experience in understanding the interface between technology and law, in which students design legal help websites. At the end, students compete in a "Bake-off" to have their ideas developed<sup>33</sup>. I expect we will see more subjects like this on offer at law schools across Australia in the near future.

These lessons for you as junior barristers are important. As the future of the Bar, the success of your practice may depend on navigating these new forms of dispute resolution. You may even use your expertise and knowledge to assist in the development of platforms and tools, for profit, as well as for pro bono.

Do not be alarmed, however. A recently developed sentencing tool is a good example of how it should not be assumed that technology will automatically make lawyers redundant. The tool is provocatively named "Robot Lawyers" and there is a variety of robots available depending on the offence – the Drug Robot, the Assault Robot, the Theft Robot. But as the website notes: "Robot Lawyers is not a lawyer. Robot Lawyers does not give legal advice".

---

32 See Krynda, "Robot lawyer designed to help unrepresented people state their case in court", ABC News, 29 November 2016 <<http://www.abc.net.au/news/2016-11-29/robot-lawyer-will-help-those-unable-to-afford-legal-fees/8074382>>.

33 See <http://newsroom.melbourne.edu/news/technical-know-how-first-melbourne-law-school>

It is designed for unrepresented people; people who would not have had access to legal services because they cannot afford them.

In this way, technology assists in addressing latent demand<sup>34</sup> for legal services that might not otherwise be addressed. It presents an opportunity. It helps to assist in addressing the moral deficit faced by our profession. Addressing that deficit may mean there is some short-term financial pain, but there is potential for there to be longer-term gain. Not only does it help clients, but it also helps reduce the burden on courts. That burden can be a heavy one, particularly in courts where the volume of matters is immense. And the more efficient and accessible the courts are, the more likely people will be to engage with their legal problems and obtain legal services.

### Conclusion

I raise these more "radical ideas" neither to commend them particularly, nor to suggest that you adopt them in your practice. Rather, I refer to these ideas to suggest that by proactively developing new ways of engaging with those ultimately served by the Bar's work – clients – the Bar can add further strings to its bow.

The people behind these ideas have seized the opportunity to be a "first mover" and take advantage of the benefits that come along with it. They have recognised the potential behind one of the

---

<sup>34</sup> Susskind and Susskind, *The Future of the Professions*, (2015) at 133.



points I made earlier – people consume and share information differently in the modern world. So much of our lives, and your clients' lives, is conducted on and through the internet. This includes some of the most personal parts of their lives – sending private correspondence, managing our money, or even looking for a partner. Clients – and I would hope all of you – are comfortable in and familiar with the online environment. Clients may be less comfortable dealing with courts or attempting to find a lawyer through more traditional channels. There is logic to creating services that meet clients in their zone of comfort.

As with any change, there will be a degree of anxiety and reluctance to embrace it. As the poet and famed dictionary-writer Samuel Johnson said, "[c]hange is not made without inconvenience, even from worse to better"<sup>35</sup>. If information is accessible, what will separate lawyers from lay-people with access to legal knowledge from masquerading as lawyers? Will we become the equivalent of a traditional barista – replaced by a legal Nespresso machine?<sup>36</sup> How can machines ever replace humans? If we are replaced, will there be a role for lawyers in the future? There are questions of privacy, confidentiality, security (nothing is ever guaranteed to be completely secure once it is online) and, transparency.

---

35 Johnson, preface to *A Dictionary of the English Language* (1755) quoted in *The Oxford Dictionary of Quotation*, 5th ed (1999) at 409.

36 Susskind and Susskind, *The Future of the Professions*, (2015) at 244.

These are all big questions for lawyers, but we are not alone. Other professions face similar difficult questions. We can take comfort in that. We do not need to reinvent the wheel ourselves – we can look outside the legal profession for inspiration and guidance.

Transparency, however, is one issue that the legal profession cannot ignore. It relates back to the "moral" aspect of our profession. The resolution of disputes in an open court is an important part of maintaining public confidence in the administration of justice and, consequently, the rule of law. We can see how disputes play out, how the parties manage their cases, and on what basis a court makes a decision. And that learning is not limited to the participants in any particular dispute. The learning extends to and is used by the whole of society. As junior barristers, that process is absolutely vital for you to learn how to run your matters. Ensuring a degree of openness is something we must be conscious of if we are to shift to more private modes of dispute resolution.

And for lawyers, the adoption of technology is not necessarily a zero-sum game. The Robot Lawyer example demonstrates that. Going back to the Netherlands divorce platform, if the machine system does not resolve the dispute, a mediator or adjudicator might be engaged. Those mediation and adjudication jobs might not have been created were it not for the design of the platform. And in the United Kingdom, Lord Justice Briggs explained: "It is not a design objective of the Online Court to exclude lawyers. The underlying rationale is that whereas the traditional courts are only truly accessible by, and intelligible to, lawyers, the new court should as

far as possible be equally accessible to both lawyers and [unrepresented litigants]"<sup>37</sup>.

In the end, "Yes but" is not an answer. In a very different context in a very different time – 1908 – the writer, essayist and lay theologian G K Chesterton said "[a]ll conservatism is based upon the idea that if you leave things alone you leave them as they are. But you do not. If you leave a thing alone you leave it to a torrent of change"<sup>38</sup>.

Technology has bolstered that torrent immeasurably. It has raised questions about not only how we work day-to-day, but also the very legitimacy of our profession. The legal profession is not immune to the changing world. We cannot and should not sit idly by. As the future of the Bar, you have a responsibility to yourselves and the institution you have recently joined to ensure those questions are answered, and answered well.

---

<sup>37</sup> Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, (2016) at 41 [6.22].

<sup>38</sup> G K Chesterton, *Orthodoxy* (1908) at 7.