THE
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INSIDE

Will virtual judges replace humans?

Legal implications of machine learning systems

AI assisted online dispute resolution

ARTIFICIAL INTELLIGENCE

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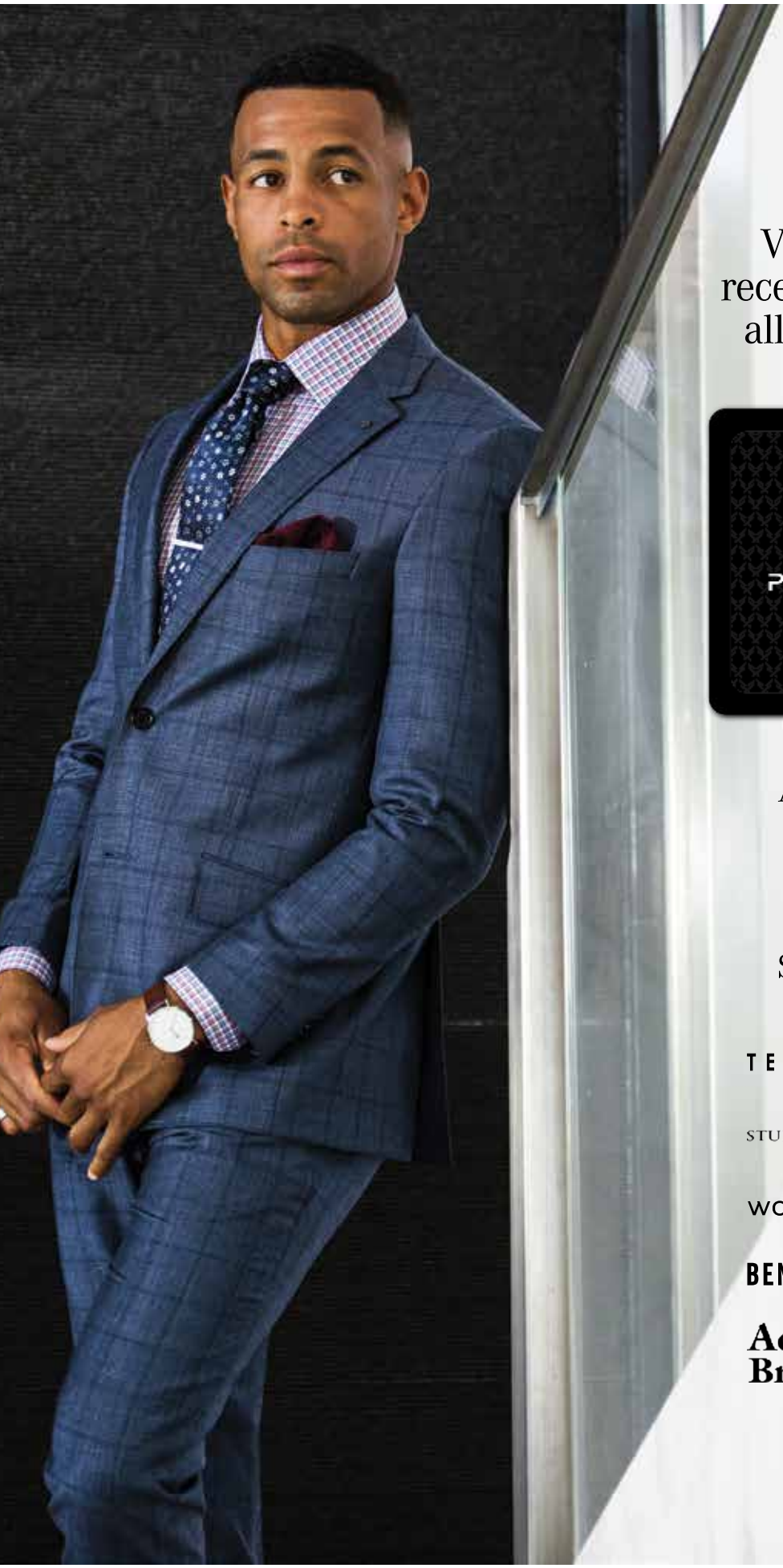

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CONTENTS

ARTIFICIAL INTELLIGENCE

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Adapt or perish: The rise of AI in the legal profession

MICHAEL ESPOSITO, EDITOR

There is no universal definition of artificial intelligence, but for the purposes of this edition we can take it to mean functions performed by machines that mimic or simulate human intelligence. If we consider this very broad definition, then term "artificial intelligence" can apply to functions that range from the basic to the incredibly complex.

The use of AI in the legal profession is not new. Law practices have been using AI-based technologies to perform tasks such as reviewing documents and conducting legal searches. These are generally mundane, time-consuming tasks for humans and employing technology-based solutions makes total sense - it's more efficient, more cost effective, and machines generally perform these relatively simple tasks better then humans.

In a paper by Professor Michael Legg and Dr Felicity Bell, the authors state that "AI currently works best with focused, precisely defined tasks, and most current legal applications fall into this category".

But we are rapidly moving towards more sophisticated forms of AI, categorised as "strong" and "general" AI. These systems have the ability to think for themselves, so to speak. When we consider how AI might affect the legal profession in the future, much of the discussion is around machine learning.

Instead of relying on rules applied to a system by a human, a machine learning program can look for patterns in data and improve its decision-making ability without being explicitly programmed.

Daniel Kiley, in this edition, explores the legal implications the rise of machine learning systems and notes that the law will need to play catch up as machine learning will only become more widely used as its potential is realised.

Professors Mirko Bagaric and Dan Hunter from Swinburne Law School also write about the implications of machine learning and explore how these systems have the potential to transform the criminal law. They posit that machine learning AI systems can overcome the limitations of human decision making and produce fairer outcomes in the justice system, so long as the proper safeguards are in place.

The authors say that sentencing will be changed by AI systems, but the chance of machines replacing human judges anytime soon is low. Indeed, a common anxiety among lawyers and workers of all stripes is that technology will one day replace them. The nature of human labour has and always will evolve with technology. A contemporary example is the online dispute resolution service provided by the Legal Services Commission. It is essentially an algorithm that moderates disputes between separating couples. The need for a human mediation is minimal or non-existent, and more often than not parties are able to resolve their issues.

The benefits of these AI applications are obvious – better access to justice, cheaper services, greater efficiencies, better outcomes. But what does this mean for the profession? Does the rise of AI spell the end of lawyers?

Two authors in this edition, Morry Bailes and Adrian Cartland deliver a comforting and resounding response in the negative, but identify the need for both the legal profession and the legislature to adapt. B

IN THIS ISSUE

The time for action on bullying & harassment in the profession is now

AMY NIKOLOVSKI, PRESIDENT, LAW SOCIETY OF SOUTH AUSTRALIA

In August 2018 the Law Society conducted a survey into bullying, harassment and discrimination within the legal profession. This survey was conducted parallel to the International Bar Association's (IBA) global survey, with the survey data then submitted to the IBA for inclusion its own survey. In October 2018 the Society announced the key outcomes of our State based survey which revealed a concerning level of discrimination and harassment within the legal profession, with 64% of respondents reporting having experienced bullying (3 in 4 women and 1 in 2 men), and 40% of those reporting bullying in the last 12 months.

With respect to sexual harassment, a third of the South Australian legal profession have reported being a victim of sexual harassment (2 out of 5 women and 1 in 10 men). As a woman in the legal profession for 13 years, I can confirm that I have been subjected to unwanted sexual harassment and advances over the years.

The harassment that I've been subjected to has decreased in recent times, however this is more likely due to my seniority rather than an indication that this kind of behaviour is becoming less common in the legal profession.

Based on the survey results, it is the young practitioners who are reporting the higher incidences of sexual harassment and bullying. With the profession now being made up of more women than men, for the first time in our history, it is concerning to see that our young female practitioners continue to be reporting sexual harassment and bullying in such high numbers.

The IBA released their report on 15 May 2019, Australia had the highest number of respondents to the global survey, with 13% of the total sample coming from Australia. Of the Australian respondents 61.4% reported being victims of workplace bullying, while 29.6% reported being victims of sexual harassment.

The IBA report is consistent with the results of our own survey. Although the report shows high incidents of reporting of bullying and harassment in the legal profession in Australia, it also suggests that there is a "perception paradox", whereby jurisdictions such as Australia, which are seen to be progressive when it comes to bullying and harassment also have recorded higher rates of reporting.

The results appear to indicate two notable aspects about the Australian experience. That is that Australian practitioners are better than average in reporting inappropriate behaviour in the workplace and that Australia still has a long way to go in addressing reports of mistreatment in a meaningful way.

What is the Society doing about the results? As set out by Immediate-Past President Tim Mellor, the Society has set up a bullying, harassment and discrimination working group to develop strategies and recommendations to address these problems in the legal profession. I have been tasked to Chair the working Group and have been working closely with Dr Niki Vincent, the Equal Opportunity Commissioner and her office to develop a program and strategy for the legal profession.

The proposal was submitted to the Law Foundation for funding, in hope that we would be able to roll out the programme across the State at no cost or very minimal cost to practitioners.

Unfortunately, we have recently been advised by the Law Foundation that the grant application was not successful. This will mean that we will need to find another means to deliver this important programme across the profession. Alternatively it will need to be on a user pays model.

The Society remains deeply concerned by respondents reports of inappropriate and intimidating behaviour within the legal profession. The only acceptable level of bullying, harassment and discrimination is zero and the only way we as a profession can reach our target is through education and training. What was once considered appropriate in a workplace may no longer be the case. By educating and raising awareness we hope to be able to stamp out the high levels of bullying and harassment being reported by our members.

I hope to be able to report in the coming months of further development of resources, guidelines and the education program to help combat a growing concern for our profession and the mental health and wellbeing of our practitioners. B

CORRESPONDENCE

LETTER TO THE EDITOR: Funding of the Conduct Commissioner's Office

In her President's Message in the last Bulletin, the President alerted members of the Society "*to the ongoing decline of the Fidelity Fund, the major causes of the decline in financial performance of the Fund and the resultant financial implications for practitioners*".

One of the two causes she identified was the "*increased cost of the operation of the office of the Legal Profession Conduct Commissioner compared to the cost of the previous Board*".

The President then noted that the Fidelity Fund had decreased by nearly $10 million in the period from the end of YE 2014 (when my office replaced the old Conduct Board) to the end of YE 2018.

I would like to put all of that into some context, particularly for the benefit of members of the profession who might otherwise think that my office is receiving excessive or unnecessary funding from the Fidelity Fund, or is not otherwise being run efficiently and effectively.

In the last year of the Board (YE 2014) its operating expenditure was about $3.5 million. In the first year of my office (YE 2015), my operating expenditure was just under $3.9 million. That operating expenditure has increased over the years since then to just under $4.6 million in YE 2018.

In the same period of time, the number of complaints received has increased from 445 in the last year of the Board to, at its peak, 632 complaints in YE 2017. Based on figures to the end of April, I expect to receive just under 600 complaints in YE 2019. Over that period of time staffing levels have remained commensurate, with little increase in those levels despite the increasing workload.

To summarise the position over the last 5 years:

There were two items of one-off expenditure associated with the establishment of my office that totalled about $1.5 million. That involved the relocation of my office to what are now acceptable premises, and the adoption of a new complaints management system.

So, while it is correct to say that the cost of operating my office is greater than the cost of operating the Board's office in its final year, to say, in isolation, that the current state of the Fidelity Fund can be attributed (as one of only two factors) to the increased cost of operating my office is in my view overly simplistic and not supported by the objective facts. It does not reflect or acknowledge the increased workload my office has faced, or expenditure that related to two one-off items associated with the cost of establishing my office. It also ignores the fact that, had the Board continued, its costs would inevitably have increased over the last 5 years too.

In my view, the funding of my office is one of the ways the Fidelity Fund carries out its role in maintaining public confidence in the profession – and not only by providing the compensation mechanism referred to by the President. The Fidelity Fund has paid out just under $900,000 in claims over the last 5 years, to 5 claimants. While that compensation mechanism is clearly an important function of the Fidelity Fund, I suggest that it is just as important in maintaining public confidence in the profession, if not more so, that the Fidelity Fund appropriately funds a complaints system that deals with 500 to 600 complaints every year.

I am very much aware that my funding comes from the Fidelity Fund, I make my budget projections accordingly, and my budget is in any event ultimately subject to the approval of the Attorney-General.

Greg May
Legal Profession Conduct Commissioner

	NO. OF COMPLAINTS	OPERATING EXPENDITURE '000S	TOTAL STAFF NUMBERS
YE 2014 (Board)	445	$3,550	20
YE 2015 (LPCC)	505	$3,876	21.2
YE 2016 (LPCC)	616	$4,232	21.2
YE 2017 (LPCC)	632	$4,457	22
YE 2018 (LPCC)	551	$4,599	20.7

FROM THE ATTORNEY GENERAL: Next stage of jurisdictional transfers to SACAT

I would like to update you on SACAT legislative reform which will be of particular interest to Law Society members, and which has been ongoing for many years.

The fourth stage of planned jurisdictional transfers to the South Australian Civil and Administrative Tribunal (SACAT) are due to be considered by the Parliament over the coming months. This follows on from three previous tranches of transfers to the SACAT from our courts. The upcoming transfers will include a wide range of administrative reviews currently heard by the Administrative and Disciplinary Division of the District Court and the Supreme and Magistrates Courts but will also include the review and disciplinary functions of certain boards such as the Health Practitioner Regulation National Law, Architectural Practice Board and the Veterinary Surgeons Board of SA. My office has undertaken extensive consultation with a wide range of organisations that will be affected by the proposed changes to refine the model to be presented to the Parliament in the middle of this year.

Of particular interest to Members would be the transfer of the work of the Health Practitioners Tribunal, which has always been intended for transfer to SACAT at the appropriate stage. In those States and Territories that already had generalist civil and administrative tribunals at the time of enactment of the Health Practitioner Regulation National Law, the relevant jurisdiction was conferred on those tribunals, whereas South Australia did not at that time have SACAT and so the specialist Health Practitioners Tribunal needed to be established.

SACAT undertakes incredibly important work for the community and I thank all who appear at SACAT, with within and contribute to their ongoing functions.

Vickie Chapman MP
Attorney-General
Deputy Premier

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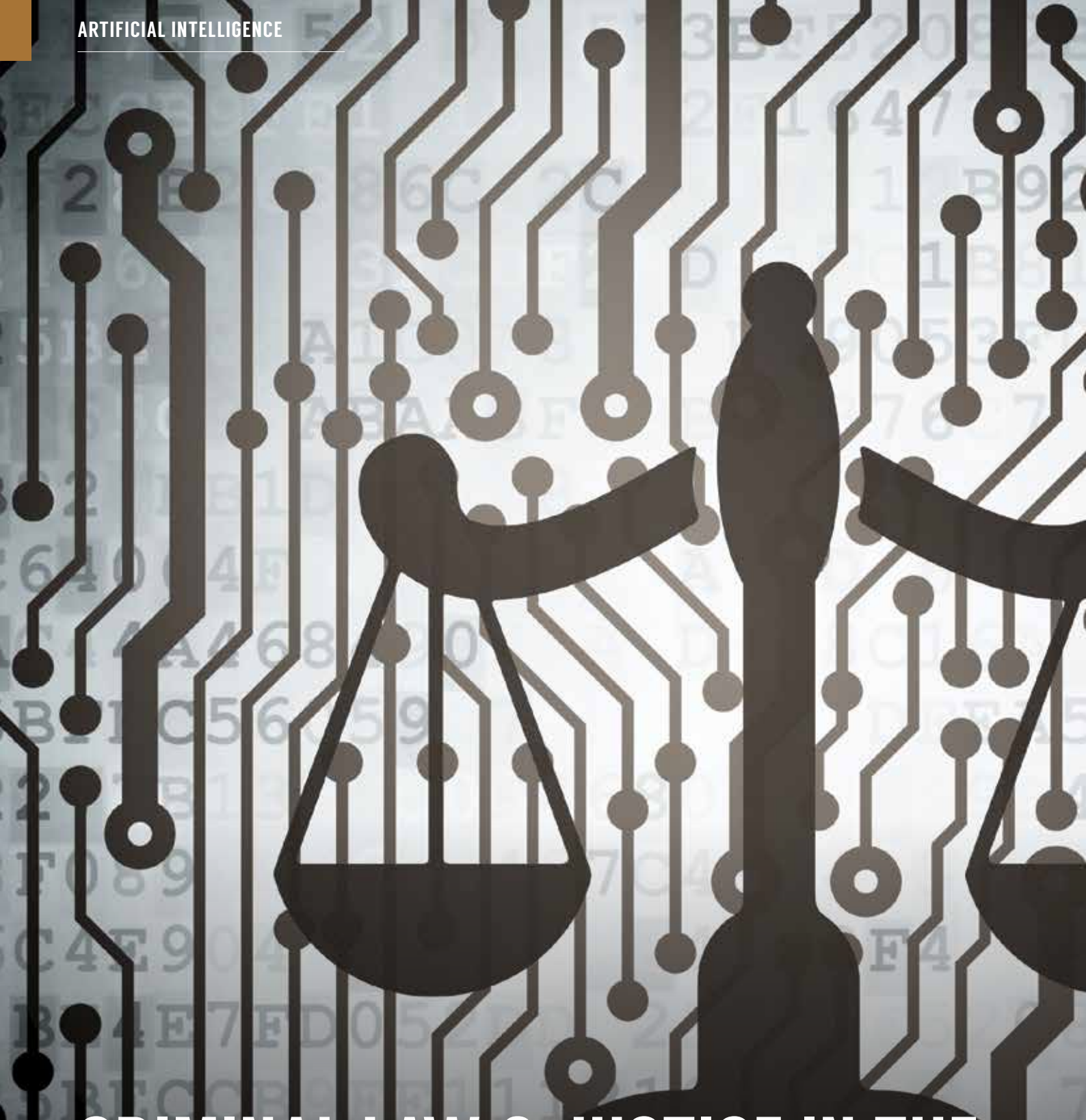

CRIMINAL LAW & JUSTICE IN THE MACHINE LEARNING ERA

PROFESSOR MIRKO BAGARIC AND PROFESSOR DAN HUNTER, SWINBURNE LAW SCHOOL

Machine learning and AI could revolutionise the criminal law system and could one day replace sentencing judges. But a number of technological and ethical safeguards will need to be developed to ensure that AI overcomes the limitations of human decision making, without eliminating the human qualities that are essential to the operation of the justice system.

Advances in artificial intelligence, machine learning, and big data promise to transform the legal and judicial process. Over the last five years, machine learning-based AI methods have made it possible to build autonomous decision-making systems that are derived from, and mimic, human behaviour. This is most obvious in the development of self-driving cars which are, in essence-autonomous systems that pilot large hunks of metal around at great speed, based on billions of past decisions made by human drivers. These technologies are now finding their way into all areas where there are large datasets of previous decisions; and law is, of course, one of those areas.

Research in AI and law is well-established, stretching back to seminal work in automating US taxation law decisions by Thorne McCarty in 1972. However, the initial AI and law research—and the dominant paradigm up until as recently as five or ten years ago—was in symbolic systems. These approaches represent law as rules, cases, or arguments within the computer, and decisions from these systems involve firing rules based on facts, in a way that makes sense to human lawyers.

More recent work in machine learning systems—also known as deep, layered, or convolutional neural networks—have used huge datasets to model intelligent behavior. Unlike symbolic systems, machine learning techniques involve algorithms and statistical models that can make decisions or perform functions without explicit instructions, relying instead on patterns and inference derived from large scale data analysis. Machine learning algorithms generally build a mathematical model based on sample or "training" data, where the correct outcome is known, in order to make predictions or decisions where the decision is unknown. Although various types of machine learning approaches have been in existence for more than fifty years, it's only been in the last decade that revolutions in neural network architecture and processing power have meant that AI systems have come to rival, and even outperform, human reasoning capabilities.

Machine learning systems have meant a revolution in accuracy of AI systems, but has also generated a set of systems that behave in ways that are clearly intelligent, but don't do so in a human way. These systems also cannot "explain" their decision-making in ways a human being can understand; at best they can just say that a particular decision was made based on similarities between previous examples and the current situation. A self-driving car doesn't avoid running you down in the street because it knows that you are human; it just knows that, in millions of previous cases, it was trained to shy away from human-shaped objects on the road, and so it should avoid you because you look human-shaped. We are therefore faced, for the first time, with systems that are demonstrably intelligent and extremely useful, but which are utterly Delphic in their pronouncements.

These systems promise to transform all areas of law. However, the field where machine learning will change the law most obviously, and most quickly, is in the criminal justice sector. This is true in large part because the functioning of the criminal justice system is largely grounded in making predictions of human behavior based on past events. As Ric Simmons notes:

> "The criminal justice system has always been concerned with predictions. Police officers on patrol predict which suspects are engaged in criminal activity in order to determine where to focus their investigative efforts. Magistrates deciding whether to grant a search warrant predict the odds that contraband will be found based on the facts presented in a warrant application. Judges conducting bail hearings predict the chances that a defendant will return to court for trial, and sentencing judges try to determine whether a convicted defendant is likely to reoffend if he is given a non-incarceration sentence.[1]"

Data-driven, machine learning systems can, and will, be applied to almost every part of the criminal justice system. The fundamental question is whether this will be a good or bad thing for the society. And further: what will it mean for the people—judges, prosecutors, defence lawyers, defendants, prisoners, and others—involved throughout the criminal justice system?

MACHINE LEARNING, PREDICTIVE POLICING AND JUDICIAL DECISION-MAKING

The first area of criminal justice affected is in the pre-trial phase, where machine learning techniques have been applied to predict when and where crime will occur; and will soon be used to make decisions about whether to monitor, arrest, and search a suspect, and whether to charge or indict them. This technology has been become quite widespread within the United States, and the problems with it have exposed some of the fault lines with machine learning. Because these approaches rely on data about past behavior, historic datasets involving arrest records are likely to be infected with racial bias.

Initial systems within this arena relied on uncleaned data, which enshrined historically discriminatory treatment based on race and class. If we merely taught systems to replicate this kind of discrimination, then the prospects for a better, AI-led future would be bleak indeed. But one of the great virtues of relying on data is that it is possible to use data analytics and machine learning to expose these kinds of biases. And so, although the machine learning techniques of themselves are unable to correct for past human discrimination, coupling their use with advanced data techniques promises a fairer, more just pre-trial process in criminal justice. Which is not to say that we have nothing to worry about; but at least we know what is possible within this arena.

Machine learning will also affect decisions within courts. The courts have deliberately left flexible the way in which courts can interpret the enormous range of considerations and variables that impact

criminal matters. Accordingly, these actors within the criminal justice system have used their own interpretation of facts, and have relied on their own subjective beliefs in making their predictions about, for example, the likelihood of an offender re-offending for the purposes of a bail decision, or the appropriate length of a prison sentence. The rise of data-centric machine learning systems promises to change the intuitive approach that we have allowed within criminal law and criminal justice.

Thus, during the parole and sentencing phases of criminal matters, big data methods are currently being used to assess recidivism likelihood, and will increasingly be used to provide guidance to judges in their sentencing process. The likelihood of offending is also a key consideration at the bail stage of the criminal justice process. While bail, sentencing, and parole decisions occur at different stages of the criminal justice system and have different objectives, there is one key integer which plays a defining role at all of these stages in terms of determining whether a defendant will be imprisoned: community safety. In crude terms this requires an assessment of whether there is a meaningful risk that the defendant will commit a serious offence in the foreseeable future. If there is a significant risk of this occurring, the defendant will be likely to be refused bail or parole, and in the sentencing context they will likely receive a prison term, quite often for a lengthy period. Risk assessment tools relying on the reoffending patterns of other offenders and particular traits of the defendant are already used extensively in many US jurisdictions to inform parole decisions and they are starting to be used in sentencing cases. It cannot be long before we will see these used significantly within Australia.

It is in relation to judicial decisions that machine learning is likely to have the greatest role in the near future. In the context of bail, not only are machine learning systems likely to determine the risk that a defendant will commit an offence, but they will also predict the likelihood that he or she will abscond. Thus, all of the key variables that determine bail and parole outcomes could soon be determined by computers. The concerns that have rightly been raised within the US in relation to these sorts of systems—focused around Northpoint's COMPAS system, the subject of the notable case of *Loomis v. Wisconsin*—have been concentrated on the lack of transparency of the algorithm and the data used by this system. This arises because of two features of the case: the commercial nature of the COMPAS system that means that the company has resisted inspection of its systems, and the relatively simplistic algorithm that it uses, which all-but-ensures that young, black offenders are tagged as recidivists. Calls to open up both the data and the algorithm should be encouraged, and are almost certain to be significant features of any comparable system developed within the Australian context. As for our observations about predictive policing, appropriate data hygiene methods can expose prior discrimination and can enshrine better, evidence-based decision-making going forward.

Sentencing is the final area that will be changed by machine learning. There have already been calls for sentencing to be done automatically by AI systems, but the likelihood of this happening soon is low. One of the key difficulties is the innate human preference for decisions to be made by people instead of computers. People are far more accepting and tolerant of errors that been made by humans, than they are of the same mistakes made by computers. This phenomenon is termed 'algorithmic aversion' and is well-known in a range of areas, ranging from air traffic control accidents to washing machine overflows. Although we are currently involved in a number of research projects involving machine learning techniques in sentencing, we predict that the uptake of these methods will be very slow among the judiciary. An earlier stage in the development of these approaches will involve data analytics and visualization methods for judges in the sentencing process. But even that relatively minor change is likely to involve a lot of soul searching on the part of the judiciary.

THE FUTURE

Machine learning and AI have vast potentials within the criminal justice system, and they promise enormous benefits in the fullness of time. But they also generate troubling questions about the automatic encoding of systematic bias and the absence of transparency of the algorithms; together with issues of liability for biased decisions and concerns about the ethics of automated decision-making by machines over people's lives. Moreover, sentencing, parole, and bail decisions are, of course, political hot buttons. Likely advances in the availability of data and access to AI systems will mean that political action groups, parliament, and the executive will be able to use recidivism and sentencing prediction systems to advance political agendas against judicial officers whom they see as too tough or, more likely, too soft on crime. This has serious implications for the judiciary, and is likely to increase pressure on judges.

These are potentially difficult and worrying movements, and there are numerous points of concern. However, there are a range of interventions that can be made to ensure a just system in a world dominated by AI and data. The thoughtful and considered application of this technology, might make it possible to ensure fairness and parity of decision-making within criminal justice. But it will require a deep understanding of both the data and the algorithms to safeguard this. Indeed, machine learning can be used to control for some of the more troubling aspects of decision-making by law enforcement, prosecutors, and judges. There is a broad literature from cognitive science, social psychology, sociology, and criminology, which shows that limitations in human decision-making can lead to numerous forms of injustice. AI techniques have the potential to safeguard against this if properly deployed. Understanding the interactions between technology, decision-making, the justice system, and the wider systems of control are necessary to control the future that we face in an data-driven and machine learning-based future. B

Endnotes

1 Ric Simmons, Quantifying Criminal Procedure: How To Unlock The Potential Of Big Data In Our Criminal Justice System 2016 MICH. ST. L. REV. 947, 947-48

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AI AND LEGAL SERVICES: AN END TO LAWYERS?

MORRY BAILES. MANAGING DIRECTOR. TINDALL GASK BENTLEY

As President of the Law Council of Australia last year, I took a particular interest in the future of legal services not only from the perspective of the legal profession itself, but from the perspective of consumers, the unique characteristics of the profession itself, and the ethical and regulatory environment in which we provide legal services. Technology innovation was recognised as significant, but not the only driver.

A lot has been said by futurists and other commentators about "big trends" facing in the legal profession that will fundamentally change our profession and the way law is practised. Depending upon the commentator these trends are sometimes three, sometimes nine and sometimes 10 and are described as "ground-breaking". Sweeping statements abound such as "digital transformation is revolutionising every industry – product and services industries alike"; "relentless disruption"; "the legal profession is undergoing a paradigm shift"; and "legal hyper-change becomes the rule, not the exception".

Of course these kinds of grand statements are not particularly helpful, and it is important to step back from the hype promulgated by commentators and futurists.

CONSUMER PERSPECTIVE

When considering the future of legal services it is critical to start with the consumer perspective. The Law Council looked at how AI and associated technologies and other trends and developments might impact consumers.

It is clear that consumer expectations are changing in a host of other industries, so why not with respect to accessing legal services?

What is not entirely understood however is the existence of the significant digital divide in Australia. The Australian Digital Inclusion Index 2017 reported that in general Australians with low levels of income, education and employment are significantly less digitally included, and that the gap is widening. There is a disparity amongst the community of access, affordability and digital ability that needs to be addressed and considered, and inevitably leads to a conclusion that for some consumers the traditional "bricks and mortar" personalised legal services model will survive for some period of time yet.

ARTIFICIAL INTELLIGENCE

As to artificial intelligence there is also misunderstanding or lack of definition around what the term actually means. The Australian Human Rights Commission released an Issues Paper in July 2018 on *Human Rights and Technology,* which made the point that there is no universally accepted definition of AI. Instead, AI is a convenient expression that refers to a computerised form of processing information that more closely resembles human thought than previous computers were ever capable of. That is, AI describes "the range of technologies exhibiting some characteristics of human intelligence".

However, a critical distinction needs to be made between "narrow AI" and "artificial general intelligence". "Narrow AI" refers to today's AI systems, which are capable of specific, relatively simple tasks – such as searching the internet or navigating a vehicle.

"Artificial general intelligence" on the other hand, is largely theoretical today. It would involve a form of AI that can accomplish sophisticated cognitive tasks on a breadth and variety similar to humans. It is difficult to determine when, if ever, artificial general intelligence will exist, but predictions tend to be between 2030 to 2100.

The commission's paper went on to note that AI applications that are being integrated into daily life are examples of narrow AI. All so-called AI tools currently in use are examples of narrow AI. The logic of such systems is programmed into the system – the intelligence really lies in the human programmer (and others that they may consult) rather than the system itself. Nevertheless, such tools can replace roles that might otherwise have been played by a lawyer or by administrative staff.

LIMITATIONS, RISKS AND CHARGES

While technology tools can improve efficiency and reduce the cost of legal services, we need to keep in mind limitations and risks of relying too heavily on narrow AI based tools.

One of the limitations is that, in general, the community's knowledge of the law and of legal process is variable – while people are aware they have obligations, rights and protections under the law, they may not know the intricacies sufficiently well enough to traverse the labyrinth of legal principles required to advocate for the protection of their rights. The current crop of technology-based tools can assist in straight-forward tasks but are not capable of dealing with the complexity and nuances of the law and its application. Another way of putting this is that we need to keep in mind the practice of law is essentially a human practice. Providing legal advice and legal services is not a transactional process that can be completely, if ever automated.

A good example is "Ross" developed by IBM. It is a tool that allows legal practitioners to use natural language to ask questions, rather than use keywords. Ross then provides citations and suggests topical readings from a variety of sources. Importantly these types of systems are designed to simulate human thinking, but not creative or independent thought, both qualities that are essential for the legal profession and legal practice.

The Courts have recognised this, for example in the 2016 US case of *Wisconsin v Loomis*[1] finding that procedural safeguards need to be in place for the use of an algorithm-based system called COMPAS, used by a sentencing Court to predict an offender's likelihood of reoffending. The appeal court found further that such AI could only provide a statistically based prediction and could not be a substitute for a Judge's intuition, instinct and sense of justice in determining the sentence.

REGULATING THE USE OF TECHNOLOGY

From a regulatory perspective, we recognise that regulation of the legal profession and the provision of legal services has, generally speaking, evolved in response to problems *after* they have emerged.

One of our key challenges as a profession is to work towards shaping a regulatory and ethical framework that is not simply reactive, but which fosters and accommodates innovation, so that benefits of developing and deploying new technology-based tools, as well as new ways for lawyers to work, organise and provide legal services, are encouraged and realised.

We must ensure that we do not "regulate away" the benefits for consumers, courts and the profession, nor should we stifle innovation and competition. If we are too conservative, we run the risk of devising overly protective and controlling regulatory measures. On the other hand, regulation of the legal profession and the provision of legal services serves the public interest in the administration of justice and the protection of consumers by ensuring quality - of both the knowledge and skills of legal practitioners, and services they provide.

Maintaining quality therefore means turning our attention to particular risks and challenges with technology-based products and services. For example:

- How might we ensure that technology-based tools and services are the product of the application of highly specialised legal knowledge and skill by their creators?
- To what extent might legal practitioners be held responsible and accountable for the legal correctness of the technology-based products they use?
- How might we ensure that a technology-based tool, particularly one that is designed for consumers to use without the concurrent advice of a legal practitioner, is actually fit for purpose?
- How might we ensure that technology-based tools remain current given that the law is constantly developing?
- Should a consumer be indemnified (and if so how) if a technology-based product fails to deliver correct and valid outcomes?
- How do we ensure that technology-based tools and new ways of working in law appropriately protect client confidentiality, avoid conflicts of interests and meet our ethical duties?
- How do we ensure that lawyers using technology-based tools have a sufficient understanding of what such tools do, how they work and hence what their limitations are?

WILL AI BRING ABOUT THE END OF LEGAL PROFESSION?

Returning now to the original question, will AI bring about the end of the legal profession, my answer is an unequivocal "no". Technology-based legal tools – and other drivers – are bringing about positive change in the profession, the practice of law and the value proposition for consumers. Opportunities are being presented to practice law in alternate ways, and to reduce the costs of legal services. New ways to interact with clients are providing opportunities for consumers both to access legal services and to undertake straightforward legal transactions themselves.

Our challenge as a profession is to embrace the benefits of technological innovation and change while also recognising and accommodating the limitation and risks.

We need to ensure we do not get carried away by the hype that surrounds Artificial Intelligence but approach it with our eyes wide open.

Additional interesting reading may be found in an article published by Rodney Brooks in the November/December 2017 issue of the MIT Technology Review entitled "The Seven Deadly Sins of AI Predictions". I do not have space to recite "the sins" in this article, however they serve as another reminder that AI can be both overblown by commentators and misunderstood by lawyers and the public. B

Endnotes

1 *881 N.W.2d 749 (Wis. 2016).* For a detailed analysis see *Wisconsin Supreme Court Requires Warning Before Use of Algorithmic Risk Assessments in Sentencing* at URL https://harvardlawreview.org/2017/03/state-v-loomis/

Online Dispute Resolution: a marriage of law and AI technology

GABRIELLE CANNY, DIRECTOR, LEGAL SERVICES COMMISSION OF SA

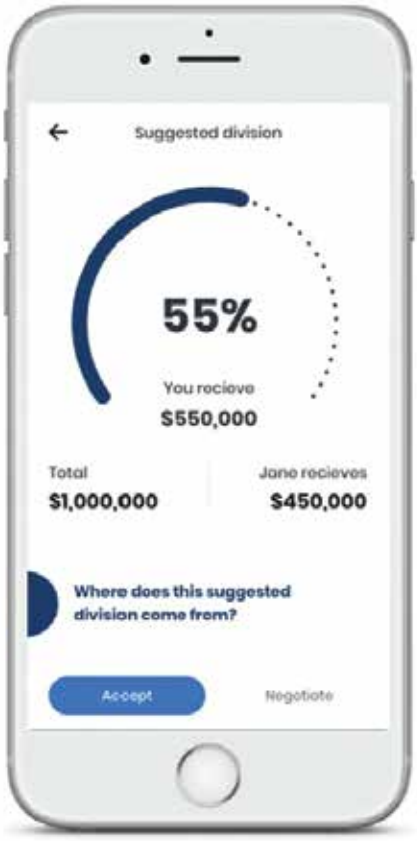
When love goes wrong, technology and the law must join forces to put things right. This union, of the digital and the legal, results in changes that lawyers need to understand and embrace.

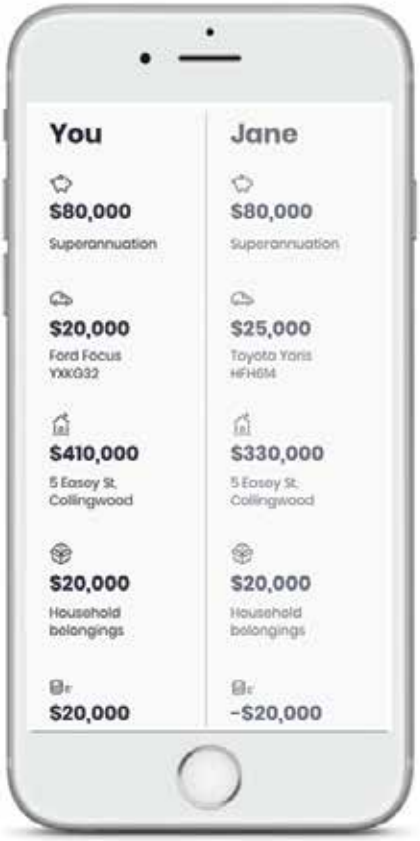
SA is leading a national project to help Australians deal with relationship breakdowns using online legal tools that harness the power of Artificial Intelligence. With Commonwealth seed funding, the Legal Services Commission (LSC) has built a prototype system to enable separating couples to resolve their family law disputes *online*. The project is being undertaken by the Commission on behalf of National Legal Aid, the peak body for Australia's legal aid commissions.

The Online Dispute Resolution (ODR) technology being developed helps separating couples identify their differences and work through them. At this stage of the project, the online tool focuses on the resolution of disputes over the division of property - including homes, cars, investments and superannuation. With further development, it will also help couples resolve disagreements about the care of their children.

The prototype we've designed allows separating couples to take part in an informed dispute resolution process from the privacy and security of their own homes - and at their own speed. It enables them to identify their legal problems, explore their needs and consider their options. It empowers them to begin a resolution process - involving dialogue and negotiation with the other person - to help them systematically work through the areas where they agree and where they disagree. The software can make legal processes less adversarial and easier to navigate. If the online approach is not working for either party, they can withdraw from it at any time.

This digital platform does not leave separating couples on their own. At many stages of the process, it provides information about professionals and services that can help the parties sort out their various issues. This ensures they have access to lawyers, mediators, counsellors and other social services assistance when required.





Artificial Intelligence (AI) and Machine Learning are a key part of the prototype now being tested. The system learns from a database of authoritative Australian family law court cases. Equipped with this data, it uses AI to give people an indication of what might happen if they go to court and what a judge's decision might be. It also shows them the types of agreements that are commonly reached by separating couples in similar situations.

WHY MUST WE CHANGE?

Traditional approaches are being challenged at a time when our justice system is grappling with fundamental flaws that are continuing to worsen. The cost and complexity of the current system means that too many couples are unable to access justice and engage in legal processes that uphold their rights and help them resolve the disputes that arise in their lives. We must relentlessly consider how justice can be better delivered – and that requires us to think outside the traditional court systems we have known for so long.

78% SUPPORT

The LSC commissioned independent social research that reveals strong community demand for an online service of this sort. Most of the people surveyed had experienced family law problems. 78% of people surveyed said they would use an Online Dispute Resolution system. The remaining 22% were intrigued and could see that parts of the system could assist them with their family law problems.

The research shows Australians want online family law assistance that provides:

- clear and comprehensive information that is free of legal jargon

- easy access to support services (e.g. lawyers, mediators, counsellors, social workers etc.)
- online tools that help them resolve disagreements without court action.

1) Information without jargon

Users want clear, legally accurate information that is free of jargon. They want to know about the steps involved in a separation process, and they require information about their rights, obligations and options – especially in regard to children and property.

> *"I didn't know where to go (for information)… it was all over the place."*
> (Female interviewee, low income, regional area)

2) Dispute resolution tools

Many interviewees said they would use Online Dispute Resolution tools that help them start a dialogue with their partner and work through their differences. This includes people who are not on speaking terms but are prepared to communicate online.

> *"It would help take away some of the emotion and put it back to facts."*
> `(Female interviewee, medium income, metropolitan area)

Our research also shows some people, who have a *relatively* cooperative relationship with their former partner, wanted an online system with as few steps as possible. They wanted to dissolve their partnership quickly and were comfortable doing things online.

"I think for couples who are on the same page, who agreed that the relationship is to be terminated and… they're quite clear as to whose contribution was what, I think it could just simplify it."

(Female interviewee, medium income, metropolitan area)

3) Help when it's needed

People also want the system to connect them to specialist assistance if they require it. This could include legal advice and assistance, counselling, mediation, financial guidance, domestic violence services, mental health assistance and child support information.

> *"We didn't really know what was out there. There was no sort of guidebook which outlined how you get a divorce… (so) you just talk to your friends and family and those who have been through it."*
> (Male interviewee, high income, metropolitan area)

HELPING THE *MISSING MIDDLE*

This online tool is not foreign to the legal mind. It draws on traditional legal concepts and combines them with service-delivery technology that will increase access to justice for many people who currently miss out on the opportunity to engage in legal processes to which they are entitled.

Online Dispute Resolution can particularly help the *missing middle* – those Australians who are not poor enough to qualify for legal aid but not wealthy enough to afford a lawyer. As a consequence, they either ignore their legal problems - with sometimes disastrous results - or they grapple with them without the benefit of legal advice. In contrast, this technology offers them clear information, guided assistance and a platform to resolve their dispute in a fair and equitable manner.

ODR users put forward solutions to suit their unique family situation; as part of that process, they are guided by template agreements that have worked for other couples. The system puts a suggested offer to the parties to help them resolve their dispute. This proposed split of assets helps to guide and foster the negotiation process - but it does not replace independent legal advice.

The technology also ensures participants receive information that is tailored to their specific situation. The system puts questions to users and, based on their answers, gives them information that is relevant to their circumstances. For instance, if there are no children from the relationship, the parties are not given information about the care of children.

Online Dispute Resolution allows people to set out their concerns, and their responses, at a *pace* that suits them and in a place that suits them. When a couple separates, they are both very emotionally fragile and often more confident behind a keyboard than in face-to-face discussions about the dispute.

CHECKS AND BALANCES

Technology of this sort is already operating in some countries to resolve legal issues relating to landlord and tenant disagreements, debt and consumer matters, family law problems and employment disputes.

The Australian model is at a prototype stage and, when fully implemented, the agreements it produces for couples would be ratified by lawyers, or a court, to ensure they are fair and legal. This is particularly important in disputes where there is the potential for a substantial power imbalance between the two parties.

LAWYERS ARE NOT UNDER ATTACK

Technology, including Artificial Intelligence software and so-called *robot lawyers*, is not designed to replace lawyers and cannot resolve all family law disagreements. But it can empower couples to reduce the areas of dispute. That can only be a good thing.

This technology would reduce the pressures on family law courts – allowing them to focus on more complex matters that cannot be resolved online – and it would reduce the pressure on legal aid commissions.

We live in a complex world and one that often involves disputes with other people, whether it is about neighbourhood fences or more complicated matters such as a marriage breakdown. The starting point should always be that everybody embraces the concept of dispute resolution - and that people be empowered to solve the problem themselves before they look to courts to do it for them.

We need to consider fresh approaches to fix fundamental problems within our family law system, embrace disruptive technological change and work with, not against, it. Innovation can improve access to justice, make the legal system more efficient, and empower people to resolve their own disputes using online tools.

There are more than 80,000 family law disputes in Australia each year. It is appropriate for the Commonwealth government to carefully consider new approaches and new technology to help people resolve those disputes. I commend the Commonwealth for supporting this project.

We are duty-bound to make the law accessible, especially for low-income and disadvantaged Australians, and so we must embrace the opportunities that technology presents. B

The Unique Risks of Technology and the Need for Further Regulation

ADRIAN CARTLAND. PRINCIPAL. CARTLAND LAW

Technological changes have an emergent nature and are therefore inevitable. Emergence is the co-ordination and ordering out of a disordered situation by "spontaneous" creation, in the absence of centralised institutions. For example: social conventions, language, flocks of birds, or ecological systems.[1]

Although history remembers the winners, if that "winner" were not to exist someone else would have taken their place. A number of people developed lightbulbs,[2] combustion engines,[3] and powered aircraft at approximately the same time. While Google is the dominant search engine, Facebook the dominant social media platform and Uber the dominant ride sharing service, it could have equally been AltaVista, Myspace and Lyft or Biadu, Weibo and Didi.

Emergence should also inform the regulation of new technology. A regulator could not have stopped the emergence of search engines, social media, or ride-sharing[4] as technologies. But a regulator could stop a particular non-core practice or a particular company. Just as music peer-to-peer file sharing services Napster and Limewire were shut down but eventually Spotify and Apple Music emerged with music streaming.

PULLING THE STRING

Regulation is like a string: the string can be pulled and innovation discouraged, but it is difficult to push on the string and encourage innovation. No amount of hackathons or TED style speeches can change the inherent disincentives to legal innovation. There is a cost to innovating and many reasons why lawyers would be reluctant to do so.

Firstly, law is traditionally a stable career option that will reliably produce an above average income whereas a career in technology will more likely lead to failure and a loss of money invested.

Secondly, it is easier to make innovation once one has acquired an amount of knowledge which would typically be achieved part-way into an otherwise promising legal career, heightening the opportunity cost for the lawyer-come-technologist.

Thirdly, it is advantageous as lawyers to be risk averse, making many lawyers temperamentally unsuited to high risk/high reward endeavours.

Finally, there is an uncertain regulatory landscape and additional pressures lawyers may face, such as disciplinary procedures or loss of right to practice, which are not risks to non-lawyers.[5]

Of course, pulling on the string cannot prevent an emergent order but merely ensure that it occurs elsewhere. That is, the effect of an unwelcoming regulatory regime in any field will ensure that the technology is created in another jurisdiction and entirely out of the influence of the regulators.

Regulation does not need to be expressly antagonistic towards innovation to discourage it. A mere lack of clarity can discourage lawyers. A lawyer with a conservative attitude would respond to uncertainty as to whether or not something is permissible by saying the answer is no, whereas a technologist with a higher tolerance for risk will be more likely to see uncertainty as an opportunity. Regulatory uncertainty therefore encourages Uber-like technologists to take the place of lawyer-technologists.

IMPORTANCE OF INNOVATIVE LAWYERS

Why should this matter? Put simply, because the creator of any product subtly impresses it with their own morality. Technology (and especially artificial intelligence) is created because it "just works"[6] and there are thousands of minute decisions made during that process that will influence its outcome. This means that an Australian lawyer will subtly make different decisions in the creation of technology than would a venture capital backed Stanford technology drop-out or a company owned by an authoritarian government regime.

It is not technically difficult to undetectably[7] change a machine learning algorithm used in a legal process to maximise the generation of profit rather than fairness. Or to discriminate against people who hold anti-government beliefs.

Then what is to stop such unpleasantness? Only by having the technology created by lawyers who hold a rigorous training in the rule of law.

Besides obviously bad examples of technology, the future of law might still not be desirable to the present profession (myself included). For example, I've met blockchain enthusiasts who are openly anarchists who believe that all of law and government can and should be replaced with an algorithm on the blockchain ledger. Other legal technologists wish to provide law for free (a noble desire) but state a business model of cross selling financial and other products to clients and earning referral fees.[8] In my view, technology and lawyers should act symbiotically and for mutual benefit.[9] But I could be wrong and views which would potentially destroy the profession as we know it might win out - there has certainly been significant money invested by successful people behind them.

DO TECHNOLOGISTS HATE REGULATION?

We do not need to break the regulatory wall down and let everything in. Instead, we can significantly reduce the barriers for lawyers innovating by increasing clarity around legal regulation, removing inappropriate restrictions and making regulations that deal with the unique risks of technology. That is, regulators should set out clearly what is allowed and what is not if they wish to provide an environment suitable to Australian lawyers taking part in legal innovation. Indeed, a bright-line "no" in relation to technology at least provides clarity so that those guidelines may be built around, or technology forced to emerge in other jurisdictions.

Even better would be a process by which some specific certainty could be obtained, such as seeking regulatory

approval for a particular technology, or time limited sandboxes which allow new technology for a period, giving the regulator time to assess the technology in the real world rather than as a hypothetical.

LAWNMOWERS V TERRORISTS

Kim Kardashian tweeted an observation by the US Statistician General on how more people were killed by lawnmowers in the US in 2017 (69) than Americans killed by terrorists (9). The suggestion is that lawnmowers pose a greater risk than terrorists.

The statistics and risk theorist Nassim Taleb responded quite correctly there is a big difference between these: namely lawnmowers aren't trying to kill you![10] More technically, the probability densities[11] of lawnmowers are normally distributed, as per a "bell curve". Terrorist attacks have a fat-tailed distribution.

So while the likelihood of any particular number of people dying from terrorist attack may be small, there is a non-zero chance of something extreme happening. In fact, there is a non-zero chance of millions of deaths from terrorist attacks. But there *is* a zero chance that such immense numbers of people will die from lawnmower accidents.

REGULATING DIFFERENT RISKS

Effective regulation of normally distributed risks is very different from fat-tailed risks. Indeed, regulations that are effective in normal distributions will often merely mask long-tailed risks. For example, the probability density of road deaths caused by individual drivers is normally distributed. Autonomous vehicles may reduce the average number of road deaths.[12] However if the roads were full of driverless cars under centralised control there is a non-zero probability of a software malfunction to cause every car to simultaneously crash!

Human lawyers present normally distributed risks. Misappropriating trust funds, negligent practice and dishonesty are all risks of human lawyers. Present regulations are reasonably suited to mitigate these risks.

Technology will typically have safeguards against these risks already built in to it, so the regulation will at best be redundant. But legal technology presents long-tailed (low probability – high impact) risks. The long-tail risks are accelerated by the asymmetry of penalties for failing. If a failure is big enough it is common for government to intervene and soak up the losses, which leads to a distortion of incentives for the creators of the technology. For example banks will pay big bonuses to executives who grow their business and take hidden systemic risks. And when the banks fall over the government intervenes to stop widespread catastrophe.[13]

The best prevention against long-tailed risks is to create "skin-in-the-game". There would be far fewer banking collapses if instead of bailing out failed bankers the government allowed them to fail and jailed the executives.

THE FAILED BLOCKCHAIN HYPOTHETICAL

At the Australian Judicial Administration Conference n 2018, futurist Mark Pesce proposed a blockchain-based smart contract that holds fund in escrow until certain conditions are met. The blockchain would provide a transparent ledger (preventing fraud and enabling trust in the system without any regulatory supervision), automate the transaction (reducing transaction time and cost and uncertainty for the parties) and not be susceptible to the interference of an individual (e.g. dishonest or even merely frustrating behaviour).

Notwithstanding these potential benefits it would be practically impossible for a South Australian lawyer to comply with their trust account obligations vis-à-vis such a system. For example, each "smart contract" transaction would breach Reg 28(2) *Legal Practitioner Regulations 2014 (SA)* because funds in escrow are "trust money" and there is no BSB number to record, notwithstanding that recording, say, the "public key" – a blockchain address – is actually more accurate. This is assuming that the funds used are even Australian dollars, let alone cryptocurrency – which would almost certainly render the whole trust account non-compliant.[14]

A discourse on the potential legal regulatory breaches of this one example is deserving of a separate paper. The regulatory string has been pulled on those hypothetical smart contracts in South Australia and their development and nature ceded to non-lawyers and non-residents. The string cannot be pushed either: a law firm could not be forced to create this hypothetical system, nor the consumer market forced to use it.

But we still would face the systemic risks of such a system, which would include the loss of all funds and contracts on it from the non-zero risk of total failure. There have been many high-profile failures, including MTGox, DAO and widespread market manipulation.

THE CONUNDRUM OF SEARCH ENGINES

Internet searches are the starting point for most consumer legal queries. They are usually the finishing point too. Even for lawyers it is the starting point for most legal research, before moving on to traditional sources such as legislation, published commentary and cases.

Modern internet searches go well beyond their original keyword search modified by web-links ranking system. Each search may have data fed into the algorithm based on: past searches of the user and others; past browsing history of the user; age, gender, location, wealth, nationality, interests of the user; email, documents, videos and pictures browsed by the user. This is far from a complete list. Chatbots built by search engine companies can also interact with humans to the extent that they are difficult to distinguish as robots. The tailoring of a "simple" internet search uses information beyond what many lawyers would obtain before giving legal advice. The results will often highlight a particular result as being the favoured one. That information provided may or may not be legally correct, and may or may not be relied upon for the basis of informing legal decision making.

Whether a modern internet search constitutes the provision of a legal service should be an intellectual dividing point: if you think AI could constitute the provision of legal services then surely AI in a modern internet search is already doing so. Alternatively, if it is not then we do not need to bother with debates on whether the automatic provision of legal services is caught under present definitions – as most specific legal technologies are less advanced.

I am of the view that modern internet searches do not constitute legal services, and proceed on that basis. But I acknowledge that there is an alternative view that may be reasonably taken.

BENEFITS AND RISKS OF TECHNOLOGIES

Advancements in searching technology makes law more accessible – it is certainly a net benefit to the public, the profession and the function of law. However, there are of course long tail risks that would not be present from human provided legal services. While long tail risks are by definition difficult to predict, one example is the risk dissemination of widespread incorrect information – at a scale of error that would be impossible for an individual or law firm to fail at.

This is not a hypothetical – modern internet search engines are almost universally used and utilise advanced artificial intelligence to satisfy legal needs. How they are regulated (or not) sets an important precedent that will inform future legal technology regulation.

If there is to be any regulation of legal technology (and I think there should be) then it must somehow be capable of regulating the mega-technologies that are present today. Besides the problems of emergence and string pulling, it is practically difficult to force technologies such as internet search engines into the existing regulatory mould: their products and revenue models are radically different; their location base changeable by a movement of a server; their size and popularity would likely lead to popular legislative reaction against regulator enforcement, to mention but a few problems.

SUGGESTED NEW REGULATIONS

A separate set of regulations should be created for "law-ish" services i.e. services that assist in the provision of legal services but are not legal services in the traditional sense. These should include:

- A mechanism to provide certainty that new legal technology is permissible and separate to the existing set of human-centric regulations. This is needed so that the regulator does not force the emergence of the technology to be outside of its control, or by non-lawyers. Simple examples include a 'regulatory sandbox' for new technologies and binding regulatory rulings that developers can seek.
- Separate regulations to counter specific potential harms of legal technology that become evident through use. For example, providers of legal information might be required to monitor it for correctness so that misleading information does not arise. Or providers of templates or legal automation might have a requirement to monitor that it is being used only for purposes for which it is suitable.

A new offence of 'causing systemic risk'. Say, an *in personam* penalty against the creators of a technology if it causes a widespread harm. This is to ensure 'skin-in-the-game' and motivate the creators of new technologies to act in ways that align with the interests of the legal system - they are the best placed people to understand that harm during its development and prevent it.

Adrian Cartland is the Creator of Ailira, an Artificial Intelligence that automates legal information and research. B

Endnotes on page 27

Digital topic aims to equip law students for the future

ALICE WOODS, HWL EBSWORTH

Semester 1 of 2019 saw the pilot of the new Flinders University topic "Law in a Digital Age". The University has partnered with AI software creator Neota Logic to deliver the topic using its AI platform. Local not-for-profit organisations come to the students with real problems which students solve by developing apps using Neota's system.

The system utilises rules-based logic and is well suited to procedural issues. It allows developers to input the relevant law into the system, translating legal provisions from prose into code. To the end user, the app appears as a series of questions which produces an answer or product. For example, a group of students in the inaugural class are developing an app for disability not-for-profit Community Bridging Services Inc., which asks the end user a series of questions to help them ascertain their eligibility for the Disability Support Pension.

I had a conversation with the topic's lecturers, Associate Professor and Dean of Law, College of Business, Government and Law at Flinders University, Tania Leiman and IT specialist turned lawyer turned lecturer, Mr Mark Ferraretto about the new topic, why it is so important and the role of technology in the legal profession's future.

A STEP IN THE RIGHT DIRECTION

The topic was run for the first time this year as an option in the Bachelor of Laws and Legal Practice degree at Flinders University, and next year will be compulsory for all Law students at Flinders. The topic is the first of its kind in South Australia and one of only a few Australia-wide.

Associate Professor Leiman says this topic is the University's first step "…in really thinking quite differently about legal education" and how we can equip 2019's law students with the skills they will need when they graduate in 2023 and beyond.

In 2020 Flinders University plans to roll out a series of topics specifically dealing with technology law, and will focus on embedding innovation and enterprise training in all students to encourage them to engage with technology-related problems differently. One of these topics will allow collaboration with students from other disciplines like Engineering, IT and Visual Media to "get lawyers in at beginning of innovative ideas", as would hopefully be the case in the real world.

A LAW TOPIC TO DEVELOP APPS – NO TECH BACKGROUND NECESSARY

The topic has been extremely popular with 59 students enrolling and only 24 places, leading to the topic being broken into two streams, Stream A run by Associate Professor Leiman and Stream B run by Mark Ferraretto.

Stream A is a high-level introduction to technology in law, exposing students to a range of issues around emerging technology, disruption and change. Stream A focuses on the new skills that will be required in future legal practice, teaching students to critique the legal implications of new technology, consider whether the technology is achieving the desired purpose and learn new ways of interacting with clients. Students can choose the format of their major assessment from a variety of options including "FLED Talks" (the Flinders University version of TED Talks) or undertaking their own legal innovation challenge.

Stream B is the software development stream and students work on Neota's AI platform, commissioned by real clients, to develop real apps to solve real problems. The assessments cover all areas, including the delivery of a "Lean Canvas" business plan where the students identify problems, target customer segments, potential solutions and set measures for the app's success , then develop a prototype app before a "pitch" to their client.

WHY? AND WHY NOW?

Lecturer and experienced IT professional, Mark Ferraretto, says that when he completed his legal studies about three years ago he found himself practising alongside graduates less than half his age who did not have sufficient background in technology. Mark says this left them "…really badly placed to evaluate anything to do with advanced technology… understanding the underlying technology so you could make an intelligent decision as to why/how you would adopt those platforms. That grounding just wasn't there…. [and] just wasn't being taught in law schools - so that is what we're trying to address. We're trying to give students some exposure to what is coming up on the horizon and what they need to be ready for…"

Mark says technology is available to make a lawyer's life more efficient but is not being used "…simply because nobody knows about it, and that includes the graduates coming out of law school who are presumed to be technologically literate, yet they are not."

According to Associate Professor Leiman, the topic is so important now because it exposes students to technology-related changes not only in the legal profession but also in adjacent industries, and gets them thinking about what these changes mean for them in making their own career paths.

CRYSTAL BALL GAZING…

Associate Professor Leiman predicts that in 30 years' time many fewer firms will look like the law firms of today and the biggest fee earners will not be lawyers but those with the skills to scale AI/IT knowledge.

Associate Professor Leiman says legal practice, the profession and the legal industry are changing and "… increasingly clients will be using their own technology including machine learning technology, other forms of search capabilities, analytics, and they will be expecting the people who give them legal advice (notice I didn't call them lawyers) will be skilled at using those devices as well." Legal technology and document automation start-ups "…will be the gold of the future - use of and access to data will be critical".

Associate Professor Leiman says this topic had already really taken students out of their comfort zone but "… if we keep on teaching the same old law topics we're not equipping people for the future."

‘Guard your front door’ & other steps to improve your online security

MARK FERRARETTO, LECTURER IN LAW, FLINDERS UNIVERSITY

Contrary to popular belief, hacking is not an art, it’s exploitation. We may think of hacking as geeks locked away in dark rooms breaking into your defenceless system. That’s not really the case. It’s not your computers that are the weakest part of your IT infrastructure – it’s you!

By focussing on your firm’s security practices, you can quite easily, and for almost no cost, defend yourself against security breaches. Here are five tips that will help you achieve a more secure IT system.

DON’T TRUST EMAILS

Email is the front door into your IT system and it’s a door that’s almost always open. So, be careful who you let in!

By far the most common way to break in to an IT system is via an email, so good email practices can significantly reduce your risk of a break-in.

In essence, don’t trust emails. You may already know that you shouldn’t click on links from strange emails, but you should use the same practice for emails you “trust” also. A common way of breaking into a firm is to break into a firm’s client and then send what looks like genuine email. Doing so bypasses the usual spam and phishing protections that you may have in place.

If you receive an email from a client and it seems a bit strange, well it may really be so. Call your client and make sure the email really comes from them. And, of course, don’t click on anything. Call before you click!

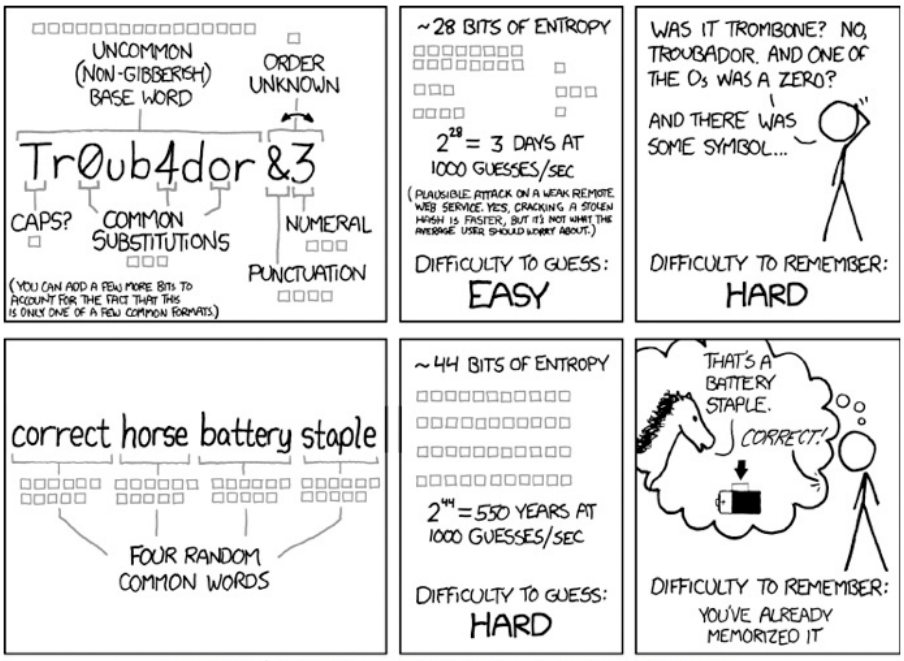
USE MULTIFACTOR AUTHENTICATION

Multifactor Authentication (“**MFA**” and sometimes called Two-Factor Authentication, or “**2FA**”) uses more than one way to authenticate you to your IT system. A popular example is logging in with your password (something you know) and then being asked to input a code sent to your phone (something you have).

MFA helps to mitigate against the risk of passwords being hacked or stolen. With MFA enabled, a hacker would need to have guessed your password *and* be in possession of your phone. The chances of this are obviously far slimmer than only gaining access to your password.

MFA is available on most cloud-based systems for free. If you are using services such as Office365, Google G-Suite or Zoho Office, all you need to do is turn it on (or get your IT provider to help).

MFA is simple, free and dramatically reduces the risk of your systems being breached if someone steals your password. MFA is a must-have for today’s IT infrastructure.



Source: https://www.xkcd.com/936/

USE LONG, STRONG PASSWORDS

When it comes to passwords, size does matter! The longer the password the exponentially more difficult it is to crack. Long passwords are also easier to remember than short passwords. This graphic provides a good explanation of good strong password practice.

PASSWORDS ARE TOO PRECIOUS TO SHARE

I once worked for an employer who subjected employees who shared passwords to disciplinary action, even up to termination. That employer was correct in doing so. Passwords are critical part of your security infrastructure and must be kept as secure as possible.

Password-sharing should be a real

no-no in *any* firm, let alone a legal practice. Password sharing is unnecessary and it promotes a lax security culture. Almost all software provides for individual passwords for individual users. Not sharing passwords reduces the risk of unauthorised disclosure of passwords. How do you manage shared passwords when an employee leaves your firm? Sharing passwords also makes it more difficult to audit who has done what in your software systems. This is important should you experience a breach but it is also important in day-to-day tasks, such as working out who it really was who put in that cheque requisition.

If you really must share passwords use a password manager (see below). Otherwise, keep your password to yourself!

DON'T RE-USE PASSWORDS & USE A PASSWORD MANAGER

For quite obvious reasons you should not use the same password to access different sites or systems. If one IT system gets compromised, the last thing you want is the hacker trying your same password on every other IT system and breaking into to that too. This is particularly important if you use cloud-based systems (eg: Office365, Dropbox, LEAP) in your practice.

Using different passwords everywhere leads to the problem of how to remember them. The solution to this problem is a password manager. A password manager is software that securely stores your passwords in the cloud. Only you can access your passwords using a strong "master password".

There are many password managers available. Reputable ones include LastPass (lastpass.com), 1Password (1password.com) and Dashlane (dashlane.com). They are usually a subscription service, but the cost is not excessive, particularly when weighed against the risk of a password breach.

Your IT provider can help you set up a password manager for everyone in your business.

SECURITY CAN BE EASY

Cyber-security has a mystique about it. Yet good cybersecurity practices are surprisingly simple and cheap.

Guard your front door. Be careful with emails. Use good password practices. None of this is complicated or expensive. These practices *are*, however, an effective way of significantly improving the security of your IT systems.

This article gives you the first and basic steps to a secure practice. These steps are simple, cheap and can go a long way to improving your cyber-security practices. For more information consult best practice resources such as Five Safes (**www.fivesafes.org**) and the Australian Cyber-Security Centre's Essential Eight (**https://www.cyber.gov.au/publications/essential-eight-explained**). You should also speak with your IT provider or an IT security specialist as part of establishing a best-practice cyber-security policy for your firm. B

Legal Issues Raised by Machine Learning Systems

DANIEL KILEY, SENIOR ASSOCIATE AND STEPHANIE LEONG, LAW GRADUATE, HWL EBSWORTH LAWYERS

Artificial intelligence is a broad concept, used to describe any techniques whereby machines are imparted with some sort of human intelligence. Many recent developments in AI have focussed on a particular field known as "machine learning", where systems evolve as they learn from examples or experience, giving rise to some interesting legal questions.

One particular machine learning technique is a system known as a "neural network". These systems seek to mimic, in a very rudimentary way, the way human brains make decisions, with software approximations of neurons and synapses. A neural network is trained by providing sets of known examples, with the expected output fed back into the system to tweak the interactions of the artificial neurons.

A neural network might be trained to identify cats, for example, by supplying it with hundreds of categorised animal photographs. Unlike some other approaches to classification, which might involve attempts to specifically identify features like whiskers and ears, the network will have a fuzzier approach to its understanding. In much the same way as a human will simply recognise a cat as such, rather than running through a checklist of essential features of a cat, the neural network will form its view without being able to provide coherent reasons.

Even pocket-sized devices now rely upon these machine learning techniques for fundamental functionality, such as recognising faces for biometric authentication.

The University of Adelaide's newly established Australian Institute for Machine Learning has been applying machine learning to pathology samples. Its system takes images of pathological culture plates used for screening, and analyses and interprets microbial growth in conjunction with patient data to formulate a diagnosis. The Institute hope that the system will save time, cost and lives, particularly in rural or under-resourced hospitals, where traditional pathology labs are less readily available.

While machine learning techniques such as neural networks have proven to be effective and useful in a range of different scenarios, some of their characteristics can lead to interesting legal consequences. In particular:

- A machine learning system will be reliant on data supplied in order to learn and develop. As a result, inadequacies, flaws or biases in that data may be learnt by the system, and become manifest in its functionality.
- When a machine learning system does make a decision, it is typically difficult to ascertain how or why that decision was made.
- By their very nature, machine learning systems will continue to evolve over time, which may result in very different outcomes.

This potential for unpredictability, opacity and fluidity can run up against areas of the law focussed on the foreseeable or transparent.

Under the *Civil Liability Act 1936* (SA), for example, a person will not be found negligent in failing to take precautions against a risk of harm unless the risk was foreseeable.[1] In circumstances where the behaviour of a software system can change over time, it may be difficult to foresee precisely what risk may be involved as a result. However, although it may be that specific risks are not necessarily foreseeable, there is an obvious inherent risk of some malfunction associated with machine learning systems. In many applications this may not have major consequences, but where a machine learning system controls significant physical elements (for example, in autonomous machinery) or is to be relied upon for important decisions (for example, medical diagnosis or other professional advice, which may be subject to a higher standard at law), the potential for injury or loss could be significant.

The *Civil Liability Act* does provide that no person will be held liable for harm suffered as a result of the materialisation of an inherent risk, but only where such risk cannot be avoided by the exercise of reasonable care and skill, and without excluding a duty to warn of risk. This may help developers of machine learning systems avoid being potentially liable for some issues, but only to the extent that they may have been able to prevent against such risk by taking reasonable steps such as including 'fail safe' checks on the output of their software.

There is also difficulty in determining which party is responsible for the conduct of machine learning systems. Arguably a range of different parties could be in a position to take steps to prevent against foreseeable risks arising from machine learning systems, including:

- the developers of those systems;
- the manufacturers of products that incorporate those systems;
- the users adopting those systems; and
- the persons training those systems.

In addition, where consumer products rely upon machine learning for their functionality - for example, to implement "smart" features in household appliances - there could possibly be issues in meeting the standards required by the consumer guarantees set out in the Australian Consumer Law (**ACL**). One

such guarantee requires that consumer goods are of acceptable quality, including by being fit for purpose, free from defects, safe, and durable.[2] Relevant products using machine learning have the potential to vary in these respects over time, or even become defective or unsafe at a later stage. The time at which acceptable quality is determined is when the goods are supplied to the customer,[3] but a product prone to fault might not be deemed sufficiently durable. However, determinations as to acceptable quality must also take into account any statements and representations by the manufacturer, and so developers may need to ensure that they accurately convey the limitations of their machine learning functionality.

Some goods that may incorporate machine learning elements are also subject to licensing or certification schemes in other contexts. For example, there are already medical devices that benefit from machine learning techniques, which would need to be registered on the Australian Register of Therapeutic Goods (ARTG).

Under the *Therapeutic Goods Act 1989* (Cth), medical devices are classified and regulated in accordance with their potential to cause harm. Those with the lowest risk of causing harm are deemed 'Class I' and do not require third party oversight prior to inclusion on the ARTG. As the regulations only account for possible harm caused by physical interactions, all software as medical devices are currently Class I devices and require little oversight. In a February 2019 consultation paper, the Therapeutic Goods Administration noted concern that software that incorporates machine learning capabilities is inadequately classified, and that software capable of "learning" and changing over time may need to be subject to ongoing performance monitoring.[4]

Even where machine learning systems are functioning without overt failures, and accurately following their training, they can reflect flaws in what they have been taught.

Last year Reuters reported that Amazon had abandoned efforts to have machine learning technology rank job candidates after its system was found to have begun discriminating against females. The system was trained against Amazon's past job applications and the resulting hires, and reportedly began to overtly reflect the historically male skew in the industry.[5]

Organisations relying upon machine learning systems in order to make decisions about individuals will need to be vigilant to ensure that they do not breach any anti-discriminatory legislation, such as the *Equal Opportunity Act 1984* (SA), *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Age Discrimination Act 2004* (Cth), and relevant provisions of the *Fair Work Act 2009* (Cth). Because systems based on technologies like neural networks do not readily provide reasons for their decisions, it may be difficult to eliminate the possibility that prohibited matters have been taken into account.

When machine learning is applied in a public decision-making context, the lack of transparency becomes even more acute, given obligations to afford procedural fairness.

Perhaps one of the highest profile examples has been in the United States, where the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) algorithm is being used by a number of US Courts to provide judges with a prediction of the likelihood of criminal reoffending for use in sentencing and probation decisions. Third party research has alleged that the algorithm is more likely to incorrectly classify African Americans as high risk repeat offenders of violent crimes than Caucasians.[6] These findings were denied by COMPAS's developer, but the software is proprietary and not readily able to be examined. Even if this were not the case, the system may not be capable of providing logical reasoning for its decisions.

Notwithstanding these potential issues, the frequently impressive results of modern machine learning techniques will continue to see them increasingly used, even as we wait for the law to catch up. In the interim, those developing and deploying these systems should ensure that they are clear about their limitations, that care is taken in the manner in which they are trained, and that the output of these systems is subject to manual review or other robust protections against anomalous results. B

Endnotes

1 *Civil Liability Act 1936* (SA) s 32(1).
2 ACL s 54.
3 *Medtel Pty Ltd v Courtney* [2003] FCAFC 151.
4 Therapeutic Goods Administration, 'Consultation: Regulation of software, including Software as a Medical Device (SaMD)' (Australian Government, Department of Health, February 2019) 5.
5 Jeffery Dastin, 'Amazon scraps secret AI recruiting tool that showed bias against women', *Reuters* (online, 10 October 2018) https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G
6 Jeff Larson et al, 'How We Analyzed the COMPAS Recidivism Algorithm', *ProPublica* (23 May 2016) **https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm**.

Can blockchain prevent conflicts of interest?

BARBARA VRETTOS, STUDENT OF BACHELOR OF LAWS AND LEGAL PRACTICE (HONS), FLINDERS UNIVERSITY

When an individual is in a position of trust and has interests that can impact their duties in that position, conflicts of interest may arise.[1] These take different forms through corporate law, family law, property law and more. Blockchain technology, however, presents an opportunity to trust data rather than a person. This has the potential to change the role of individuals in these circumstances and even prevent the ability for conflicts to arise in the first place.

Typically, regulation targets conflicts of interest by mandating disclosure of these interests. This assumes that people will act honestly and disclose any personally beneficial circumstances. If this were the case, conflicts of interest would rarely yield personal benefits.

Blockchain technology can provide a verifiable way to check if individuals have conflicting interests and also limit the situations where conflicts of interest arise – rather than merely relying on voluntary disclosure. A blockchain is a shared ledger of information that is time-stamped, approved by a network of participants, and can only be added to. This creates a chain of secure information that can't be altered. These features can help detect conflicting interests and execute transactions without human intervention.

This article will provide a high-level overview of how blockchain technology has the potential to address old problems in new ways.

DIRECTORS' DUTIES: AVOIDING SELF-INTERESTED TRANSACTIONS[2]

Consider a company's bank account. These are already effectively shared ledgers among directors. Directors can see where funds are moving and see if any funds are being misused or illegitimately transferred to personal accounts. It makes sense to have a company account visible to all directors as they all have a duty to monitor it.

The same does not apply for a director's personal investments. A director, let's call her Jane, cannot let her private interests' conflict with the company's interests, but Jane would not be mandated to disclose all of her personal investments. Jane's personal investments may not be relevant, and she should be able to maintain her privacy. As such, Jane must only disclose interests that conflict with impending transactions.

However, if Jane held her assets on the blockchain the other directors could simply send a query to the blockchain to find out whether she had a conflicting interest. This could give the directors a yes/no answer whilst simultaneously not seeing all of Jane's investments.

A common example of this process is where Jane, who keeps her government issued ID on the blockchain, could prove to a bouncer that she is over the age of 18 without providing any other details such as her address, date of birth and full name currently on a traditional ID. Here, the bouncer could ask the blockchain, through a simple mobile application, if Jane was over 18 years old and it could return a yes/no answer after finding the certified information on the blockchain.[3]

The same could apply for directors. A query to the blockchain could look for certified shareholding statements, such as ASX statements, and answer whether Jane had any material interests in a company of interest. These conflicting interests could be searched for prior to finalising any transactions. Thus, these safeguards could effectively prevent a conflict of interest.

EXECUTING A WILL

Not only can blockchain record secure data in a shared ledger, it can also prevent and facilitate transactions. Transactions are not limited to digital money trading hands. Transactions can also transfer the title of assets.

Adelaide Blockchain start-up Willbits[4] is building a platform where a testator, for example Bob, could put his testamentary wishes and assets directly on a blockchain. Upon Bob's death, any assets in his estate, as well as any digital money he held, could immediately transfer to his proposed beneficiaries. Bob could verify these coded wishes and trusted parties could certify the title of his assets, such as the Land Titles Office. Here Bob's family could trust the blockchain to distribute an estate rather than an executor. Radically, this effectively sidesteps probate. The conflicts of interest between executors also being beneficiaries would no longer arise.

LAND TRANSACTIONS

The example of estate distribution also raises the important concept that land transactions can occur on the blockchain. The NSW Land Registry is experimenting with blockchain and due to test its blockchain based e-conveyancing system this year.[5] Additionally, OpenLaw, a platform that executes legal agreements, facilitated the first Australian end-to-end real-estate transaction using blockchain

in 2018.[6] The OpenLaw model departs from standard e-conveyancing and would, in theory, not require practitioners to assist the execution of land transactions. The potential conflict of a lawyer acting as a conveyancer for both parties would effectively dissipate.

LIMITATIONS

Many challenges still exist with blockchain technology. For example, digitally distributed estates may still struggle to execute subjective statements such as "to be used for the best interests of…" as this cannot be neatly broken down into coded instructions. Additionally, the above scenarios will work best when all of the relevant information is stored on the blockchain. For example, a blockchain cannot answer a query unless the answers are stored on the blockchain and it cannot distribute assets that it doesn't hold the title to.

CONCLUSION

Whilst the limitations of blockchain technology are recognised, so is its potential. The above examples illustrate how trusting data, rather than individuals, can allow information to be verified differently and transactions to be executed in a new way. These new avenues create an opportunity to rethink many old problems and consider them with a blockchain lens. Whilst blockchain may not always be the answer, the discussions that arise from its consideration often, usefully, deconstruct the legal issue. Considering how these issues can be addressed in new ways is certainly a worthwhile discussion. B

Endnotes

1 Legal Aid Queensland, *Conflict of Interest* (2019) <http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/Applying-for-aid/Conflict-of-interest>.

2 *Transvaal Lands Co v New Belgium (Transvaal) Land & Development Co* [1914] 2 Ch 448.

3 Kyle Kemper, *The Unified Walled: Unlocking the Digital Golden Age* (Peacock Books, 2019) 41.

4 Hybrid World, *Lab Participants* (2018) <https://hybridworldadelaide.org/hwalab/lab-participants/>.

5 Michael Bleby, *NSW Land Registry to test blockchain waters on e-conveyancing with ChromaWay* (15 October 2015) *Australian Financial Review* <https://www.afr.com/real-estate/nsw-land-registry-to-test-blockchain-waters-on-econveyancing-with-chromaway-20181015-h16nnq>.

6 Steve Randall, *Corrs Partners for Ground-Breaking Blockchain Transaction* (19 June 2018) Australasian Lawyer <https://www.nzlawyermagazine.co.nz/news/morning-briefing/historic-gender-shift-hailed-by-law-society-251229.aspx>.

Jury Visualisation of Crime Scenes in Virtual Reality

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Judicial discretion allows for a viewing by the jury of a criminal scene outside the courtroom[1]. How the view is utilised in a trial varies between federal and state legislation and common law. At the viewing the jury can be asked to view perspectives that may have been given or are to be given in evidence. In South Australia, Western Australia and Queensland and at common law, a view is not evidence but is to assist the jury to understand the evidence. The aim is to help the jury to understand the circumstances being presented in the court room. The *Uniform Evidence Act (Cth) s54* allows the view to be evidence and allows the jury to make an inference from what they see.

At the University of South Australia, we are investigating if Virtual Reality (VR) could offer a cost-effective option to jury viewings. Virtual Reality provides an immersive, interactive view of a computer-generated space, and so could be ideal for taking jurors to crime scenes that no longer exist, or are difficult or costly to access. We are conducting a range of studies that measure the effectiveness of VR on memory and understanding of a crime scene. The first of these was a pilot study on how well participants could recall items that were taken from an environment. This research is being developed with support of Australian law enforcement, law professionals and the Institute of Environmental Science and Research (ESR) in New Zealand.

Law enforcement already has the capabilities to generate virtual copies of crime scenes with the help of laser scanning technology. Laser scanners send out laser beams into a scene and record the real environment as 3D points in space, referred to as a point cloud. These 3D points represent the shape, size and location of surfaces and objects found in the scene. Combined with camera images, a 3D point cloud can be used to create an almost photorealistic copy of the real scene. The advantage of such digital recordings is that they provide highly accurate measurements and can be viewed from any angle.

A virtual reconstruction of a crime scene

Virtual Reality (VR) technology enables the viewer to be put into the 3D computer-generated scene and interact with it, receiving feedback as if they were in the same real scene. This creates an illusion of feeling present in the digital space. Combining VR with the viewing of digital scene recordings could enable the juror to view the crime scene in the same state as it was when the police arrived, including a sense of spatial dimensions and distances. In the case of *R v Hawi (No 7)* [2011] NSWSC1653 issues arose from the scene at the Qantas Sydney Domestic Terminal being significantly renovated since the crime took place, creating the potential for the view to be "misleading because the place to be inspected has materially altered[2]". Using VR could overcome issues such as this, providing a permanent record of the crime scene at the time of the crime.

VIEWING OF A SIMULATED BURGLARY SCENE

We conducted an experiment comparing three different mediums for viewing a scene: VR, photographs, and a physical viewing. Generally, jury viewings are carried out when a serious crime has occurred. These events can come with a high level of complexity and so it was decided to focus on a simplified scenario that provides less ambiguity on the effect on memory, but maintain the relevance of spatiality and how the objects in the scene relate to each other.

The scene in question was an office on the Mawson Lakes campus. A digital copy of the scene was created using a 3D camera, the Matterport Pro3D. In addition, we took traditional 2D photographs of the scene, and had people visit the location.

Thirty mock jurors were invited to participate in the study, where they each experienced one of the three mediums that was assigned to them. Every participant was given a statement of facts to give context of what occurred in this simulated scenario, describing two youths who entered an office building on campus and carried out a robbery. After reading the statement of fact, participants were asked to immediately recall the event from memory before being shown the environment where it occurred. The viewing condition was either an exposure in the VR environment, a visit to the real office, or a set of photographs. Following the exposure to the scene they were asked to recall what they remembered from the statement of facts, as well as marking the location of the items that were taken from the scene on a blueprint of the office.

OUTCOME

All participants were actively engaged in attempting to find the meaning behind the scenario they read and that their viewing behaviour differed depending on the medium. Despite the simplicity of this scenario, this was considered by participants to be a challenging task.

Recalling spatial locations differed

depending on the viewing medium. Those who viewed the set of photographs struggled to create a mental image of the location and would spend most of their viewing time trying to understand the layout of the room. Behaviour also differed between people viewing the physical and virtual locations, with people in the physical room being most inquisitive in exploring the scene. In VR, people would be more hesitant in their exploration. However, people paid more attention to detail in the virtual world, often being able to recall random details of the scene which were not recalled in the other viewing conditions.

In terms of recalling object spatial locations, the largest variability of responses was found for the set of photographs. This suggests that VR has the potential to provide a more reliable response for when physical viewings are not possible. VR environments can be improved by identifying current limitations in how spatial information is encoded, whereas photographs cannot be improved further.

FALSE MEMORY OBSERVATIONS

We observed an interesting pattern where some of the participants would add information to the described events. In academic literature a popular model for explaining jury decision making is called the Story Model. This is built on the assumption that every juror creates a mental model of the narrative which makes most sense to them. If an element deemed important to create a narrative is missing as evidence, the juror will likely infer the gap in information. For example, in our case the statement did not mention how these two youths left the building, which caused some participants to unknowingly fill the gap. Some reported that the perpetrators climbed out of a window and others described an eye witness that saw them running out of the building. People who had forgotten the spatial locations of items attempted to deduce the correct answer by what they felt made most sense to them, which did not always yield the correct location.

WHERE TO GO FROM HERE

An upcoming study will build on this research further and implement a more realistic scenario of a hit and run case, where the intent is not clear. The mock jurors will be hearing prosecution and defence opening statements and ultimately be asked to make a decision after viewing the scene and listening to a statement by a witness who was present was present, but did not view the incident.

A third study will focus on the understanding of forensic expert statements which include a spatial component. In cooperation with the ESR, this study is going to examine the understanding of a statement around bloodstain spatter patterns. The participant will be able to listen to the expert statement while viewing the crime scene in a virtual three-dimensional space, followed up by a range of forensic science questions. Most academic literature focuses on self-reported opinions on how well the jurors believe they understand the evidence. This study will objectively test how well the information was transported in different mediums.

An example of how Virtual Reality could be employed today is the coronial inquest into the Lindt Café siege that used a three-dimensional digital reconstruction of the crime scene and exhibits to recreate the conditions of the event. This assisted the NSW Coroner, and made it possible to give a thorough understanding of the tragic event, which might otherwise not have been possible. Virtual Reality could provide an even better way to understand the viewpoint of eye witnesses and recreate a jury viewing virtually with depth information where spatial information is considered particularly important. This may result in more accurate juror recall of evidence and better understanding of what happened, producing better case outcomes. B

Endnotes

1 Juries Act 1927 (SA) s 88—View during trial. In any criminal trial, the court or judge may, at any time before verdict, order a view of any place or property by the jury and may make such orders binding on the sheriff or any other person and give such directions as the court or judge thinks necessary for the purposes of the view, and the view will be held accordingly.

2 R A Hulme J 16

The Unique Risks of Technology and the Need for Further Regulation (cont..)

Endnotes

1 A helpful primer article is *The emergence of consensus: a primer* by Andrea Baronchelli 21 February 2018 https://royalsocietypublishing.org/doi/10.1098/rsos.172189 There is also an excellent example of the prairie as a metaphor for emergent order in *Competing on the Edge* by Shona Brown and Kathleen Eisenhardt 1998.

2 Thomas Edison is credited as the inventor of the "light bulb" but other persons who invented competing "light-bulbs" include Humphry Davy and his 'electric arc lamp', British scientist Warren de la Rue, English physicist Joseph Wilson Swan, and Toronto medical electrician Henry Woodward and his colleague Mathew Evans who eventually sold their patent to Thomas Edison. See further https://www.bulbs.com/learning/history.aspx

3 John Stevens, Philippe LeBon D'Humberstein, Nicéphore Niépce, and François Isaac de Rivaz are all contemporaries who independently developed their own versions of the internal combustion engine.

4 The Wright Brothers made their famous flight at Kitty Hawk, but many debate whether Samuel Pierpont Langley, or Gustave Whitehead made the first powered flight

5 See for example *How Uber and Lyft bent the rules and won* by Jeffrey Meitrodt Star Tribune March 19, 2017

6 For further discussion on the barriers to innovation in law see: Intelligent law: The rise of artificial intelligence in the legal profession Bulletin.

7 https://www.quora.com/Why-is-Deep- Learning-rather-like-an-art-than-science

8 An examination of the discussion over Facebooks alleged political bias should make such capacity clear.

9 Just as it is improper for lawyers to say something negative about others in the profession, so too do I think that applies to legal technologists and so I shall not provide examples.

10 *Forget robot lawyers – AI is your R2D2 – Legalpreneurs spotlight – Adrian Cartland* by Centre for Legal Innovation 19th April 2018 https://www.cli.collaw.com/latest-on-legal-innovation/2018/04/19/legalpreneurs-spotlight---adrian-cartland

11 For a more detailed analysis see: Are lawnmowers a greater risk than terrorists? Norman Fenton and Martin Neil, 3 January 2018 http://www.eecs.qmul.ac.uk/~norman/papers/lawnmowers.pdf

12 Probability Density is the number of times of any particular probability happening.

13 *To Save the Most Lives, Deploy (Imperfect) Self-Driving Cars ASAP* Wired, 7 November 2017 https://www.wired.com/story/self-driving-cars-rand-report/

14 See further discussion in *Gambling with Other People's Money: How Perverse Incentives Caused the Financial Crisis* by Russ Roberts, Hoover Institution Press 2019

Risk Management Resources Road Map

GRANT FEARY, DEPUTY DIRECTOR, LAW CLAIMS

The Society's website www.lawsocietysa.asn.au contains a wealth of Risk Management information to assist practitioners. This month's Riskwatch is a brief "road map" to assist practitioners find this material.

From the Society's Homepage a click on the heading *Lawyers* will take you to the following sub-headings

- Professional Indemnity Insurance Scheme
- Operating a Legal Practice
- Publications, Guidelines & Resources
- Practitioner Support

All of the other tabs under the heading Lawyers (e.g. *Admission*, *Practising Certificates*) contain much useful information, but the *Operating a Legal Practice* tab, the *Professional Indemnity Insurance Scheme* tab, the *Practitioner Support* tab and the *Publications, Guidelines & Resources* tab are the focus of this article.

The *Operating a Legal Practice* tab contains a further tab – *Establishing a New Legal Practice* – which contains information on opening and closing to the *Practice Management Directory* and the *Small Practice Kit*.

The *Practice Management Directory* is an extensive collection of links and resources for commencing and managing your practice.

The *Small Practice Kit* (available to Members only) is the product of a great deal of hard work by the Small Practice Committee and the Ethics and Practice Unit of the Society and is a useful quick reference guide on issues that the Small Practice Committee felt were most crucial to small or sole practice.

The *Operating a Legal Practice* tab also contains the tab for *Risk Management*. Under the *Risk Management* tab can be found:

- Schedule of Limitations Dates
- Riskwatch articles (as published in the Bulletin) and
- Riskwatch News

The Schedule of Limitation Dates contains a compilation of useful time limits as contained in State and Commonwealth legislation. This Schedule is updated annually and the current version was published in November 2018.

Riskwatch articles appear monthly in the Bulletin and address current issues relating to practice and practitioner liability. The last three years' worth of articles are available through the Risk Management page, and an archive of older articles is also available.

Riskwatch News is an annual compilation of useful and interesting cases and legislation. It is prepared in January each year and relates to cases decided and legislation passed in the previous calendar year. The most recent edition – Riskwatch News 2018 - is now available.

The *Professional Indemnity Insurance* section contains, amongst other things the PII Scheme Documents, both current and historical.

Another fertile area for practitioners to explore is the *Publications, Guidelines & Resources* tab which is also on the Home page under the heading *Lawyers*.

The *Publications, Guidelines & Resources* tab brings guidelines, articles and other resources from the Society's website to one centralised and searchable location. The *Guidelines* tab (click through from the *Publications, Guidelines &* Resources screen) contains a collection of Guidelines developed by the Ethics and Practice Unit on topics including Closing Files, Handling the departure of a legal practitioner, Access to Lawyers premises, Information Barriers and more. There are also Guidelines in other areas e.g. Client Capacity, Dealing with Aboriginal clients, Anti-money laundering etc.

- The *Publications* tab (also click through from the *Publications, Guidelines &* Resources screen) contains the following
- The Bulletin
- Special Interest Newsletters – being
- InBrief
- Small Practice Newsletter (members only)
- The Last Testament (members only)
- Family Law Newsletter (members only)
- Criminal Law Newsletter (members only)

As we all know, issues surrounding costs are important and can be complex. If you click on the *Operating a Legal Practice* tab, and then the *Practice Management and Marketing* tab you will find a tab entitled *Costs Disclosure Forms and Fact Sheets*. The tab contains information regarding lawyer's duties in this regard and the Forms/Fact Sheets required to be provided to clients under the *Legal Practitioners Act* 1981 (SA) including versions of those documents translated into a number of different languages.

Further information on Legal Costs is available through one of the common searches on the *Publications, Guidelines & Resources* page.

Of course, no survey of the on-line resources of the Society would be complete without mention of the Wellbeing & Resilience online programme, completion of which will give a practitioner a free MCPD point in the areas of Professional Skills or Practice Management. Also available is a Wellbeing & Resilience Guide which is a booklet devoted to keeping lawyers' bodies and minds together. These items can be found through the *Practitioner Support* tab (found on the *Lawyers* page) mentioned above.

The *Practitioner Support* tab also contains information about the Society's Law Care program, the Lawyers' Support Group, Young Lawyers Support Group and the Lawyers' Complaint Companion Service.

We encourage all practitioners to spend some time "*poking around*" on the Society's website to familiarise themselves with the range of useful material that is available: the resources mentioned in this article are the key Risk Management resources, and there is an enormous amount of other material also available.

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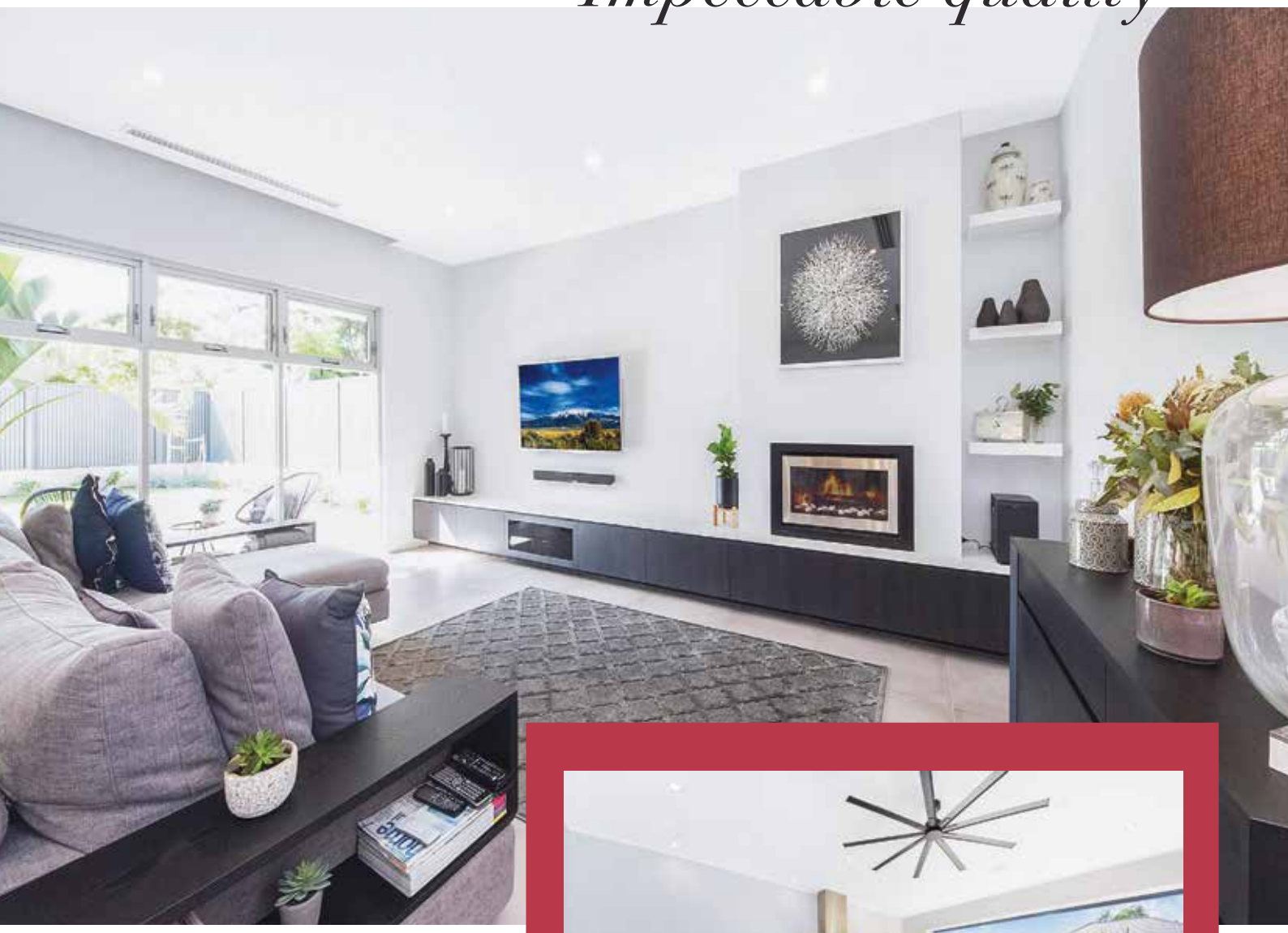

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Wellbeing & Resilience

Gut feeling: the importance of gut health

WELLBEING & RESILIENCE COMMITTEE

WHAT IS THE GUT MICROBIOME?

Your gut microbiome is the community of bacteria and other tiny microorganisms that live in your gastrointestinal tract, with most of them living in the large intestine. These microbes can weigh as much as one to two kilograms. The diversity and composition of your gut microbiome is unique to you and is constantly changing. Most of the focus in the literature around gut health focuses on the bacteria in your gut microbiome.

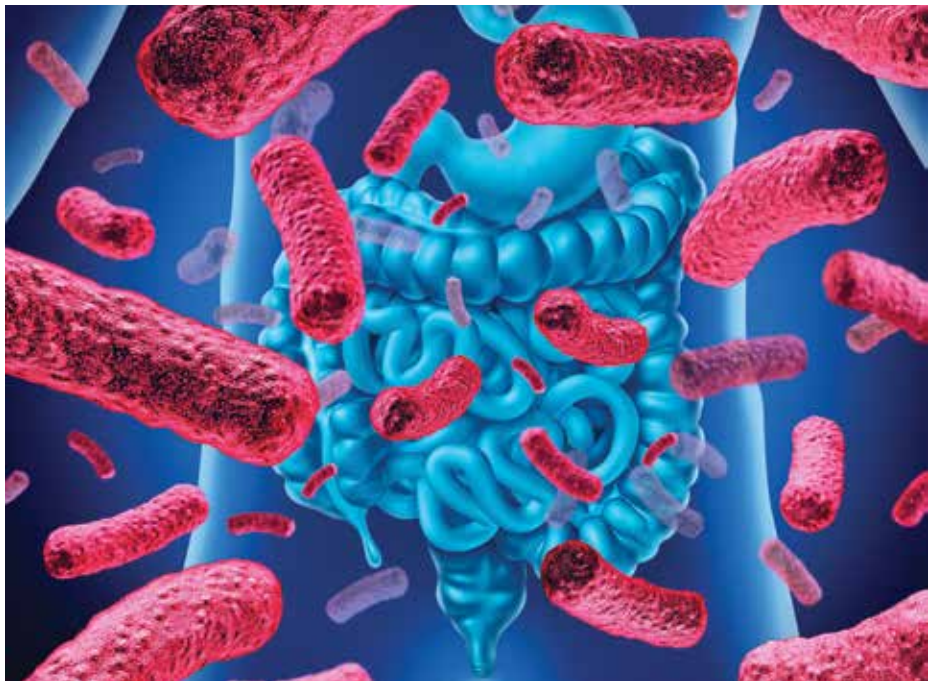
WHY IS GUT HEALTH IMPORTANT?

The "good" bacteria can, amongst other things, destroy harmful bacteria and assist with the production of essential vitamins such as B vitamins.

While the study of the effect that gut health has on overall health and wellbeing is still in its early days, it has already been shown that the health of your gut influences important aspects of our health and wellbeing.

Gut health has an impact on mental health. The gut has a two-way relationship with the central nervous system which allows the gut to send and receive signals to and from the brain. This is known as the "gut-brain axis". The gut microbiome has also been shown to influence the brain in other important ways. Recent studies have also shown that bacterial by-products from fibre digestion were an important factor in the production of serotonin – low levels of serotonin are believed to be associated with depression – and that people with depression had consistently lower than average levels of two particular types of bacteria in their digestive systems.

The gut also has an important role to play in the immune system. Signals from your intestinal bacteria help to regulate the development and function of immune cells. Studies have also suggested that the composition of the bacteria in your gut may influence whether or not you are more likely to gain weight.



HOW CAN I MAINTAIN GOOD GUT HEALTH?

As most of the bacteria in our gut microbiome live in our large intestine, they eat what you eat. In order to maintain good gut health, eat food that helps feed the friendly bacteria and minimise the less friendly bacteria.

Fibre-rich complex carbohydrates and prebiotic foods rich with resistant starch can help you feed your friendly bacteria. Research by the CSIRO showed that resistant starch promotes gut health by feeding the "good" bacteria that live in our large intestine. They can use resistant starch as food because it resists digestion in our small intestine, and moves on to the large intestine.

When the good bacteria in the large intestine ferment resistant starch, they make short chain fatty acids. One of these, called butyrate, supplies energy to the cells lining the large intestine, promoting their wellbeing. Good sources of resistant starch include rice and potatoes that have been cooked and then cooled, leeks, artichokes and green bananas.

Following the Mediterranean Diet may be beneficial in terms of increasing the presence of good bacteria in your gut and eating fermented foods may also have a beneficial effect. It seems that the jury is still out on probiotics but it has been demonstrated that the response to probiotics changes between individuals and that the health impact will depend on the bacteria that are already present in the gut.

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Help the RAH Research Fund purchase state-of-the art prostate cancer detection equipment

RAH Head of Urology Unit Mr John Bolt and patient, Arturo Prinzi

The Royal Adelaide Hospital (RAH) Research Fund is dedicated to raising funds for life-saving medical research, improved treatments and enhanced patient care at the RAH.

Many Law Society members have now pledged their support for the RAH Research Fund. Your commitment ensures our researchers will continue to make life-saving discoveries, find better treatments and ultimately, cures.

PIONEERING PROSTATE CANCER TREATMENT

Did you know the RAH pioneered prostate cancer treatment in South Australia?

For the last 15 years, the RAH has provided the largest volume of prostate cancer treatment in South Australia. We have led the way in treatment solutions for hundreds of South Australian men and saved countless lives.

Every year, more men die of prostate cancer than women do of breast cancer. In fact, prostate cancer is now the second leading cause of death in Australian males - and 1 in 5 men develop prostate cancer before they turn 85.[1]

This could be you, your partner, relative or friend. A swift and accurate diagnosis is absolutely critical.

Prostate cancer is a complex long-term disease. Treatment is dependent on the stage of the disease, the location of the cancer, the severity of symptoms and the health and wellbeing of each patient.

Given this reality, you and your firm have an opportunity to help with a donation towards state-of-the-art, diagnostic ultrasound equipment needed at the RAH. This equipment enables improved early detection, increased accuracy in diagnosis as well as greater safety.

Funds are administered with the highest level of governance. Donations made before 30 June are tax deductible[2] and you will receive a receipt from the RAH Research Fund team.

Your gift today will help us improve outcomes for South Australians living with prostate cancer. Will you please help us find the answers?

To donate online please visit: www.rahresearchfund.com.au

For more information, contact Gabrielle Cespi on **7074 1443** or via email contactus@researchfund.com.au

We thank you sincerely for your valued support.

Endnotes

1 https://prostate-cancer.canceraustralia.gov.au/statistics

2 Donations of $2 or more are tax deductible.

Case Law Update - Tax considerations following marriage breakdown

JOHN TUCKER AND BRIONY HUTCHENS, DW FOX TUCKER LAWYERS

Property settlements following marital and relationship breakdowns usually involve considerations as to property transfers between spouses or other entities that the spouses control and as to allocation of liabilities between the spouses or other entities. Tax implications of property settlements can be significant if not done correctly. There have been two recent cases dealing with tax aspects of relationship breakdowns. Firstly, the Full Federal Court decision in *Ellison v Sandini Pty Ltd* [2018] FCAFC 44, which deals with tax relief under Subdivision 126-A of the *Income Tax Assessment Act 1997* (ITAA 97), and secondly, the High Court decision in *Commissioner of Taxation v Tomaras* [2018] HCA 62, which deals with substitution of spouses in respect of tax liabilities. Both of these decisions are explained in detail below.

ELLISON V SANDINI PTY LTD

Subdivision 126-A of the ITAA 97 provides a capital gains tax (CGT) roll-over in respect of certain transfers made because of marital or relationship breakdown.

This Subdivision was recently considered by the Federal Court in *Sandini Pty Ltd v Commissioner of Taxation* [2017] FCA 287 and, on appeal, by the Full Federal Court in *Ellison v Sandini Pty Ltd.*

The brief facts of the case were that the Family Court made orders by consent that Sandini Pty Ltd, as trustee of the Ellison Family Trust, do all acts and things and sign all documents necessary to transfer certain shares to the wife. The wife requested that the shares be transferred to a trust controlled by her (not to herself personally) and the transfer proceeded in this manner. The orders, in referring to Sandini Pty Ltd in its capacity as trustee of the Ellison Family Trust as having the obligation to do all things necessary to transfer the shares, however, were incorrect. Sandini Pty Ltd did not act as trustee of the Ellison Family Trust. Instead, it acted as trustee of the Karratha Rigging Unit Trust and held the shares in that capacity.

The Court considered the following issues:

- Did the Court order cause CGT event A1 to happen in respect of the disposal of the shares? Or did it happen at the time of the transfer of the shares?
- Was there a CGT roll-over under Subdivision 126-A in respect of the share transfer?

At first instance, the Federal Court held that the court order resulted in beneficial ownership of the shares being vested in the wife and that this was enough, without a change in legal ownership, to trigger CGT event A1. Accordingly, Sandini Pty Ltd triggered a capital gain at that time, which was eligible for roll-over relief under s126-15 of the ITAA 97.

Alternatively, the Court held that s103-10 of the ITAA 97 applied to deem the wife to have received the shares because they were transferred for her benefit and at her direction, thereby satisfying any requirement of s126-15 that the transfer of the shares be to the former spouse.

Finally, even if a transfer of beneficial interest was not enough to trigger CGT event A1, the requirements of s126-15 were nevertheless satisfied on the transfer of the shares to the family trust as Ms Ellison was "involved" as a transferee by reason of her giving the direction that the shares be so transferred.

The case was appealed to the Full Federal Court, who overturned the decision of the Federal Court and held that the transfer did not satisfy the requirements of s126-15, thereby denying roll-over relief. In particular, the Full Federal Court held that while a change in beneficial ownership alone would be sufficient to cause CGT event A1 to happen, the Court order did not effect a change in beneficial ownership of the shares and therefore did not trigger CGT event A1. In coming to this conclusion, the Court noted that while the orders may have conferred some beneficial interest on the wife in respect of the shares, this was not sufficient to constitute beneficial ownership of the shares passing to her.

Discussion was also had in respect of the fact that the orders were incorrect in that they required Sandini Pty Ltd in its capacity as trustee of the Ellison Family Trust to do all things necessary to transfer the shares to the wife, whereas Sandini Pty

Ltd did not act as trustee of this trust and, instead, held the shares as trustee of the Karratha Rigging Unit Trust. Accordingly, the Court considered that the orders were ineffective and incapable of being performed or enforced which, in turn, also prevented the orders conferring any ownership interest in respect of the shares on the wife.

Instead, the Court held that CGT event A1 occurred on execution of the share transfer or, at the latest, registration of the share transfer.

In relation to the requirements of s126-15, the Court was clear that for the requirements to be satisfied, the transferee must be the spouse. The transfer to another entity at the direction of the spouse will not satisfy the requirements. Further, the Court called into question whether, even if the shares had been transferred to the wife, the transfer could have been "because of" the Court order given that the order was ineffective as a result of it referring to Sandini Pty Ltd in its capacity as trustee of the Ellison Family Trust, not in its capacity as trustee of the Karratha Rigging Unit Trust. The transfer by Sandini Pty Ltd in its capacity as trustee of the Karratha Rigging Unit Trust could not therefore be "because of" the order.

Accordingly, the requirements of s126-15 were not met and the roll-over relief was denied.

Finally, the Full Federal Court held that s103-10 did not operate in the manner applied by the Federal Court. However, given the conclusion made by the Court, as set out above in relation to the requirements of s126-15, this issue became largely irrelevant.

Sandini Pty Ltd sought to appeal the case to the High Court, however leave to appeal was refused.

COMMISSIONER OF TAXATION V TOMARAS

With property division following marital or relationship breakdowns, it has been the position that the tax liability of one spouse or partner is taken into consideration as part of the settlement as a liability of the marriage or relationship.

A debt owed by a party to a marriage or relationship is treated as property under s79 of the *Family Law Act* 1975 (FLA). Under s90AE(1) of the FLA, the Court has the power to make an order binding the creditor to substitute the other party or both parties to the marriage in relation to the debt owed to the creditor.

However, the Court may only make an order for substitution if (amongst other things):

- the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage;
- it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and
- the court is satisfied that, in all the circumstances, it is just and equitable to make the order.

The power has recently come under consideration in the High Court decision of *Commissioner of Taxation v Tomaras*. The debt under consideration in that case was an income tax debt owed to the ATO. The debt was owed by the wife, who sought for the husband to be substituted in respect of the debt in. The husband had been declared bankrupt and it was therefore foreseeable that if the husband was substituted in respect of the debt, it would not be paid in full. In addition, there were concerns that the husband would not be able to exercise any rights of appeal or objection against the assessments that gave rise to the debt and that the Commissioner's powers of recovery in respect of the debt would be adversely affected. Accordingly, it was determined that it would not be just and equitable for the husband to be substituted in place of the wife.

The case highlights that there are unlikely to be many circumstances in which the Court considers it appropriate to substitute parties to a debt, particularly if that debt is a tax debt. Parties will therefore ordinarily need to agree other arrangements in respect of undertaking liability for another party's tax debt.

Tax Files is contributed on behalf of the South Australian based members of the Taxation Committee of the Business Law Section of the Law Council of Australia. B

TOWARDS GREATER LEGAL PROTECTION OF ANIMALS

PAUL STEVENSON, CHIEF EXECUTIVE OFFICER, RSPCA SOUTH AUSTRALIA

RSPCA is the only non-government organisation charged with enforcing South Australian legislation, namely the *Animal Welfare Act*. This has been an important function of the Society throughout its 143 year history in this State, and today represents a cost of nearly $3 million per year. An inspectorate team of 10 staff covers the entire state, seven days a week, 24 hours a day. An internal legal counsel, supported by a number of probono and contracted external lawyers, oversees cases that progress to prosecution. Complementing the work of the Inspectorate and legal teams is a professional animal management group. At our main animal care centre in Lonsdale, a 12-member veterinary unit, four animal behaviour specialists and over 30 husbandry staff (together with several hundred volunteers) repair, rehabilitate and rehome about 10,000 animals every year. RSPCA SA also operates animal care centres in Whyalla and Pt Lincoln. The State Government contributes $1.1 million towards funding of the Inspectorate, with donations making up the $1.6 million shortfall.

The *Animal Welfare Act* gives rise to criminal offences and the RSPCA has an outstanding record in not having lost a trial during the last decade. In 2017/18 the RSPCA Inspectorate responded to 4,077 reports of cruelty from the public to our 24 hour call centre. Investigations resulted in 70 prosecutions of 79 defendants (some cases had multiple defendants). We pursue every alternative to prosecution in improving animal welfare standards in this State. However, when we deem it is appropriate to take a matter to court, our Inspectors (who are authorised by the State Minister for Environment and Water) have proven to be very skilled in accumulating the necessary evidence for successful criminal prosecutions.

Aside from law enforcement, another ongoing task for the RSPCA is to identify loopholes or legislative deficiencies that enable some cruelty perpetrators to escape prosecution. Laws must evolve in response to community expectations and unfortunately there is clear evidence SA's animal welfare laws have not kept up. Thanks to a recently completed study by Adelaide University researchers[1], there is now also evidence that some decisions made in regards to penalties for convicted animal cruelty perpetrators might have failed to meet community expectations too.

In South Australia, the most common penalties magistrates impose for animal welfare offences are fines, good behaviour bonds and – in the most serious cases - prison sentences. In 2008, public pressure to make the punishment better fit the crime resulted in amendments to SA's *Animal Welfare Act* that doubled all the maximum penalties for animal welfare offences.

The maximum time for imprisonment in SA jumped from one to two years, and the maximum fine increased from A$10,000 to A$20,000. The 2008 amendments also introduced a new aggravated offence for particularly horrific crimes against animals, which were deliberate or reckless. Those found guilty of this offence can receive a four-year prison sentence or a A$50,000 fine.

In the ten years since these changes came into effect, some people have claimed that decisions handed down in the Magistrates' Courts have ignored the legislative intent behind the increased penalties. In other words, magistrates have leant towards the lower end when determining penalties for convicted animal cruelty offenders.

In the Adelaide University research project (the first of its kind), academics from the University's School of Animal and Veterinary Sciences analysed the penalties imposed on more than 300 convicted animal cruelty offenders in South Australia to identify trends in sentencing data both before and after the 2008 amendments. These offenders faced court in a total of 264 cases, with multiple defendants in some of the cases.

The researchers collected pre-amendments data from cases finalised 2006–2009, and post-amendments data from cases finalised 2016–2018. At a time when public interest in animal welfare grows exponentially, the final report sheds valuable light on where SA's legal system sits in its response to individuals who commit crimes against animals.

Prior to the 2008 amendments, fines made up the majority of penalties, while good behaviour bonds and prison sentences were in the minority. Since the amendments, the imposition of fines has declined while the imposition of harsher penalties, in the form of good behaviour bonds and prison sentences, have both increased. Where fines and prison terms have been imposed, they have been higher and longer, respectively, post 2008.

In an article for The Conversation, published online on 17 January, 2019, the report's authors wrote that they "*found the average fine increased from A$700 to A$1,535 over the 12 year period, from before to after the law change with the average prison sentences doubling from 37 to 77 days. But, the maximum prison sentence ever handed down for animal cruelty in SA is still only seven months; 41 months shy of the maximum available.*". [2]

These findings appear to support the

idea that magistrates appreciate the intent behind the penalty increases, being to reflect community belief that ill treatment of animals warrants severe punishment. However, they remain reluctant to impose penalties available to them at the upper end of the ranges.

Aside from the eternal quest of making the punishment fit the crime (or be seen to fit the crime in the majority's view), our legal system also needs sufficient teeth to charge alleged offenders in the first place. Since the introduction of SA's *Animal Welfare Act* more than 30 years ago, the court of public opinion has not only ruled that crimes against animals warrant tougher penalties, but also that some practices society once accepted or condoned should now be illegal.

RSPCA South Australia is proposing a number of changes that would tighten existing legislation and introduce new laws, many of them designed to bring our legal protections for animals in line with those in other states. Some key proposed changes relate to court orders that prohibit convicted animal abusers from acquiring further animals, either for a specified time or indefinitely. The inclusion of intervention orders, for example, into the *Animal Welfare Act* would make it unnecessary to obtain a conviction simply to secure a prohibition order. This would reduce the demand on court time and may be a more appropriate approach than seeking convictions in animal cruelty cases arising from mental health and economic factors.

Recognition of interstate prohibition orders is also proposed. This would discourage people with prohibition orders relocating to another state and taking on ownership of new animals. We are now experiencing the phenomenon of large commercial animal breeding facilities, prosecuted in Victoria (where legislation identifies the facilities as "puppy farms"), simply moving over the border and starting up operations in SA.

Another legal change RSPCA SA regards as a high priority would enable the prosecution of people who subject animals to situations or treatment that is ***likely*** to cause harm. Both Western Australian and Victorian legislation recognises that cruelty may occur from an act or omission. Currently SA's Act only allows RSPCA to prosecute once harm has occurred. By this time, it is often too late to save the animal.

A recent case highlights the need to reword this section of the Act. RSPCA SA's legal counsel had no choice but to withdraw charges against the owner of a dog left in a vehicle. Soon after the dog was found dead in the car, a vet recorded its internal body temperature as 42C on a day when the maximum temperature was 30C. Despite this, the owner's lawyer successfully argued that there was insufficient proof that the dog had died from heat stress and not a pre-existing, but unidentified, condition.

Inclusion of fish and crustaceans in the definition of animals is among RSPCA SA's proposed additions to the existing Act. Queensland, New South Wales and Victoria already protect these animals, with no negative impact on recreational or commercial fishing. RSPCA SA also proposes a prohibition on the use of flank straps and spurs in rodeos, an approach several U.S. states have employed to make rodeos more humane. (RSPCA is opposed to many events at rodeos, including bull riding and calf roping, because these forms of entertainment have unavoidable negative impact on the welfare of the animals involved.)

Another example of a compromise position on RSPCA policy is a proposal to ban the use of shotguns in duck shooting within South Australia. (The 2019 SA duck shooting season is due to begin on March 16.) Shotguns spray shot and wound one duck for every one duck shot, leading to significant suffering of wounded animals. Recreational duck shooting is only legal in SA, Victoria and Tasmania, with RSPCA policy in support of a total ban.

Like duck shooting, jumps racing is an activity the RSPCA opposes because of the high likelihood of suffering for the animals involved. A University of Melbourne study[3] found that jumps horses are almost 19 times more likely to die during a race than horses competing on the flat. Only SA and Victoria still allow this activity, and RSPCA SA will again seek legislative change in late 2019 to see it end.

Clearly, we have much work to do, but RSPCA SA's proposed legal reforms – if adopted – will represent significant and much needed progress in catching up with interstate legislation. Amid a growing public appetite for putting animal welfare at the heart of government policies and legislation, anything that contributes to positive, lasting change for animals in our state will be widely welcomed by the community. **B**

Endnotes

1 https://www.mdpi.com/2076-2615/8/12/236/htm#B11-animals-08-00236

2 https://theconversation.com/penalties-for-animal-cruelty-double-in-sa-but-is-this-enough-to-stop-animal-abuse-108021

3 Boden LA et al. (2006) Risk of fatality and causes of death of Thoroughbred horses associated with racing in Victoria, Australia: 1989-2004. Equine Veterinary Journal 38:312-318

The lifesaving impact of bequests for St John Ambulance in its 135th year

When you think of St John Ambulance, you will likely recall seeing volunteers in their greens providing first aid at events, or perhaps you attended first aid training with St John, or you own one of their first aid kits. You may even remember the days when St John provided the state ambulance service.

Whichever image of St John springs to mind, 11th Century armoured Crusaders is probably not one of them. It was, however, these knights that helped the holy brothers in Jerusalem care for the sick and injured, also known as Knights Hospitallers. It was this partnership that would later evolve into the Order of St John.

Fast forward some 800 years to 1877 when St John Ambulance was established in England, with uniformed brigades of volunteers teaching and providing first aid to members of the public. Just over a decade later, the Order of St John was granted a Royal Order of Chivalry by the Queen.

135 YEARS OF SERVING AUSTRALIAN COMMUNITIES

The movement traversed the vast Indian Ocean, bringing St John Ambulance to Australia in 1883 and South Australia in 1885. Since then, the organisation has evolved from its first aid origins to establishing the state ambulance service in 1951. It later transitioned the service over to SA Ambulance Service in 1992 so that St John could once again focus on first aid provision, social inclusion and youth development.

As St John Ambulance celebrates 135 years of the organisation's tireless work in Australia, it is important to remember the rich history and origins of the organisation that still underpin its core values today. St John Ambulance has always been about caring for others, whether it be through providing first aid, equipping others in lifesaving first aid skills, training tomorrow's first responders through youth development programs, or reducing social isolation amongst vulnerable populations.

All of these services are still provided by St John Ambulance SA.

A SELF-FUNDED CHARITY DRIVEN BY VOLUNTEERS

A team of almost 2000 volunteers selflessly give their time, knowledge and skills to care for the South Australian community 365 days a year. Each one of these volunteers is highly trained and equipped, attending weekly skill development workshops and keeping ahead of the latest in first aid best practice. St John Ambulance SA is currently in the process of updating many of its fleet vehicles and equipment to state-of-the-art standards, including new mobile first aid units, a mobile communications centre, and CPR Lab fitted with Bluetooth manikins that provide live CPR feedback to participants via the vehicle's on-board television screen.

St John Ambulance SA is proud to provide this level of service to the South Australian community, but it does come at a substantial cost – a $10 million annual running cost to be specific. As a self-funded charity, public support of the organisation is imperative.

"When it comes to actively supporting our volunteers and putting them in communities to help protect and serve the public, we rely on the donations of individuals, the sponsorship of corporate partners and bequests", says Steven Yeo, St John Ambulance SA General Manager, Corporate and Commercial.

A LASTING LEGACY

Generous bequests received to date have played a critical role in providing the training and equipment needed for volunteers to deliver their vital service to the community. For example, a bequest received in 2017 enabled upgrades to be carried out on St John volunteer facilities. Bequests really do leave a lasting legacy – a legacy that lives on through each and every St John Ambulance SA volunteer; volunteers who help more than 50 South Australians per day on average.

What better gift to give and what better way to be remembered by than facilitating the training and equipment for those that save lives? Future bequests, planned today, will ensure St John Ambulance SA can continue to save lives and support the wellbeing of South Australians for years to come.

Visit **stjohnsa.com.au/donate** or call 1300 78 5646 for more information about the gift of a bequest. B

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Doing super better

ANDREW PROEBSTL, CHIEF EXECUTIVE, LEGALSUPER

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has concluded. What were the recommendations about super? What impacts will they have?

The final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry[1] makes a number of recommendations which, if implemented by Government, have the potential to further strengthen the super industry.

Tabled in Federal Parliament on 4 February of this year, the final report comes some 13 months after the Royal Commission commenced. During that time, the Commission, led by former High Court Judge the Honourable Kenneth Madison Hayne AC QC, reviewed over 10,000 submissions from the Australian public, completed 69 days of public hearings and considered thousands of documents provided by entities, regulators and consumer advocacy groups.

This column explains key recommendations in the final report about superannuation in the areas of default funds, advice fees, hawking and culture and governance.

DEFAULT FUNDS

Recommendation 3.5 of the final report is that a person should have only one default superannuation account and that processes should be developed to "staple" a person to a single default account.

This recommendation has been made to address the problem that has arisen with people having multiple super accounts, typically due to changes in employment.

According to the Australian Tax Office, as at 30 June, 2018, almost 40 per cent of Australians have more than one super fund account, with some having six or more accounts.[2]

Rather than keeping the same super account each time they change jobs, people have either chosen a new super fund or been signed up to a new super fund by their new employer.

While employees should, and do, have the right to change super funds, the problem with multiple accounts is that people end up paying multiple sets of fees and charges to different super funds. This can unnecessarily eat into their super fund account balance.

If recommendation 3.5 is implemented by the Government, people will retain the right to choose their own super fund, but the practice of new employers signing them up to a new default fund is likely to change such that the super fund account to which they are "stapled" will apply.

A further problem which arises from multiple accounts is that the more accounts an individual has, the increased likelihood that they will lose track of their super. As at 30 June, 2018, there were over 6.2 million lost and ATO-held super accounts and $17.5 billion waiting to be claimed.[3]

ADVICE FEES

Fees and charges charged by some funds in relation to their clients have rightfully come under intense scrutiny in recent years and this topic was a focus of the Royal Commission.

In particular, the Royal Commission found instances where fund members were charged fees for advice services when in fact these services were not delivered. In some instances, these advice fees were automatically deducted from a member's superannuation account.

As a result, the Royal Commission made recommendations to address the inappropriate charging of advice fees. These recommendations include a total ban on deducting advice fees from MySuper accounts (recommendation 3.2) and more stringent conditions on the charging of advice fees for Choice accounts (recommendations 2.1 and 3.3).

MySuper accounts are the default super fund accounts to which people are allocated if they do not choose their own super fund. With Choice accounts, people actively choose their super fund.

NO HAWKING OF SUPERANNUATION

Recommendation 3.4 of the Royal Commission was to prohibit the practice of some businesses "cold-calling" or "hawking" people, seeking to sign them up to a particular super fund. Another scenario was ostensibly calling people about an unrelated product or service before changing tack and trying to persuade people to sign up to a superannuation fund.

CULTURE & GOVERNANCE

The Royal Commission recommended changes to further improve the culture and governance of super funds. These recommendations include:

- Reducing the potential for conflicts of interest for super fund trustees by prohibiting them from taking on any roles or responsibilities that have the potential to conflict with their duties as a trustee of a super fund (recommendation 3.1).
- Trustees and directors who breach certain obligations in relation to MySuper accounts should receive civil penalties for these breaches (recommendation 3.7).
- A ban on super funds providing incentives or rewards (financial or otherwise) to employers which might be seen as trying to influence the employer to choose one default super fund over another on behalf of the employees of the business (recommendation 3.6).
- A number of changes to the roles and powers of the *Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) to improve their performance as regulators of the superannuation industry.*

What action Government will take on the recommendations of the Royal Commission is yet to be decided. In the interim, your super fund should be keeping you up-to-date about any changes. If you have any questions about the recommendations as they stand, please contact your super fund for more information.

This information is of a general nature only and does not take into account your objectives, financial situation or needs. You should therefore consider the appropriateness of the information and obtain and read the relevant legalsuper Product Disclosure Statement before making any decision.

Andrew Proebstl is Chief Executive of legalsuper, Australia's industry super fund for the legal community. He can be contacted on ph 03 9602 0101 or via aproebstl@legalsuper.com.au. B

Endnotes

1 See https://treasury.gov.au/publication/p2019-fsrc-final-report/

2 See https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Super-statistics/Super-accounts-data/Multiple-super-accounts-data/

3 See https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Super-statistics/Super-accounts-data/Multiple-super-accounts-data/

Family Law Case Notes

ROB GLADE-WRIGHT, THE FAMILY LAW BOOK

PROPERTY – GRANTING OF APPLICATION FOR LEAVE TO PROCEED OUT OF TIME FILED AFTER RESPONDENT'S DEATH DURING CASE SET ASIDE FOR WANT OF JURISDICTION

In *Simonds (deceased) & Coyle* [2019] FamCAFC 47 (26 March, 2019) Ms Coyle instituted a de facto financial cause in May 2017. Two months later, her partner (Mr Simonds) died after filing a Response in which he alleged that separation occurred in October 2013, so that the application was out of time. In May 2018 (10 months after her partner's death) Ms Coyle filed an amended application for leave to proceed. Judge Egan found that separation did occur in October 2013 but s 44(6) of the *Family Law Act* granted Ms Coyle leave to continue the proceedings against the respondent's estate under s 90SM(8). The executors' appeal to the Full Court (Strickland, Murphy & Kent JJ) was allowed unanimously and Ms Coyle's property application was dismissed.

Strickland J said (from [25]):

> "… [H]is Honour did not have jurisdiction under s 39B(1) … to entertain the Amended Initiating Application filed by the de facto wife … because there was no financial de facto cause instituted. (…)
>
> [27] His Honour … failed to deal at all with the question of whether he had jurisdiction. Without addressing that issue his Honour simply proceeded on the basis that despite the death of the de facto husband, he could grant leave to the de facto wife to institute proceedings for property settlement (…)
>
> [30] His Honour has also sought to grant leave *'nunc pro tunc'*. That is a rule of practice and procedure to regularise the records of the court, and it cannot create jurisdiction where there is none. In other words, if there was no jurisdiction to entertain the [amended] application filed on 25 May 2018, the court still did not have jurisdiction at the time his Honour made the orders."

PROCEDURE – ADJOURNMENTS – DISMISSAL OF DORMANT PROCEEDINGS PURSUANT TO FCCR 13.12

In *Skivington* [2019] FamCAFC 36 (11 March, 2019) Ainslie-Wallace J allowed the wife's appeal against the dismissal of both parties' parenting and property applications for failure to advance their applications. After the case had been adjourned several times on the application of the parties to allow them time for mediation and a negotiation of their property matters, Judge Obradovic made an order ([9]) that "there be no further adjournments in this matter and that if the parties failed to prosecute their claim, the matter would be dismissed on the next occasion".

At the next return ([10]) the Court dismissed the applications despite submissions from each party's solicitor that parenting matters had been resolved and that a mediation had partially taken place but was incomplete due to the mediator's commitments.

Ainslie-Wallace J said (from [21]):

> "The procedure adopted by her Honour clearly fails to comply with the mandatory steps set out by the Rule [FCCR 13.12]. That, of itself, would be sufficient to allow the appeal on the basis of an error of law.
>
> [22] However, it was further contended by the appellant that the matter was not 'dormant' in the relevant sense. The notice of appeal particularises that the parties had in compliance with the order, attended mediation, but the mediation process was incomplete, not it seems through any recalcitrance of the parties but because of the mediator's other commitments.
>
> [23] This, it was asserted in the notice of appeal, meant that the parties were acting to progress the proceedings and thus had 'taken steps to advance the proceedings'.
>
> [24] Regrettably, her Honour's reasons do not illuminate why, in her view, the partial settlement and the incomplete mediation process were not sufficient to progress the matter in the proceedings or, put another way, why in this case, those steps were insufficient to prevent the proceedings being dismissed.
>
> [25] Albeit the appeal was not argued, it is plain that the parties had complied with the order to attend mediation, and while the process may have taken some time, it was still in process.
>
> [26] It is too to be observed that the parties had, in the interim periods, resolved the parenting issues and had agreed as to a process of valuing the property. Her Honour was told that the parties anticipated that on completing the mediation, the parties expected the matter to resolve.
>
> [27] Thus her Honour erred in failing to consider that those actions demonstrated that the parties were indeed prosecuting the proceedings." B

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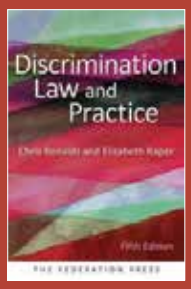

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3 APR 2019 – 2 MAY 2019

A MONTHLY REVIEW OF ACTS, APPOINTMENTS, REGULATIONS AND RULES COMPILED BY MELLOR OLSSON'S ELIZABETH OLSSON.

ACTS PROCLAIMED

Public Interest Disclosure Act 2018 (No 26 of 2018)
Commencement 1 July 2019
Gazetted: 18 April 2019, Gazette No. 18 of 2019

ACTS ASSENTED TO

Criminal Law (High Risk Offenders) (Psychologists) Amendment Act 2019, No. 3 of 2019
Gazetted: 11 April 2019, Gazette No. 16 of 2019

Rail Safety National Law (South Australia) (Miscellaneous) Amendment Act 2019, No. 4 of 2019
Gazetted: 11 April 2019, Gazette No. 16 of 2019

APPOINTMENTS

Auxiliary Appointments
District Court of South Australia
Judge
for a period commencing on 4 April 2019 and expiring on 30 June 2019Adelaide
Gordon Fraser Barrett
Peter Robert Brebner
Master
Mark Nicholas Rice
Licensing Court of South Australia
Judge
for a period commencing on 2 May 2019 and expiring on 30 June 2019
William David Jennings
Gazetted: 4 April 2019, Gazette No. 15 of 2019

Industrial Relations Court of South Australia
Commencing 18 April 2019
Judges
Mark Calligeros;
Margaret Julia Kelly.
Industrial Magistrates:
Michael Leslie Braim Ardlie;
Stuart Charles Cole.
Gazetted: 18 April 2019, Gazette No. 18 of 2019

Cross-border Magistrate
Youth Court of South Australia
Magistrate of the Court
Brionie Annmarie Ayling
Gazetted: 18 April 2019, Gazette No. 18 of 2019

Her Majesty's Counsel
in the State of South Australia
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Scott Grant Henchliffe
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Michael Robert Burnett
Rachael Frances Gray
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Gazetted: 26 April 2019, Gazette No. 19 of 2019

RULES

District Court Criminal Rules 2014
Amendment 7
Gazetted: 18 April 2019, Gazette No. 18 of 2019

District Court Criminal Supplementary Rules 2014
Amendment 6
Gazetted: 18 April 2019, Gazette No. 18 of 2019

Supreme Court Civil Supplementary Rules 2014
Amendment 12
Gazetted: 18 April 2019, Gazette No. 18 of 2019

Supreme Court Criminal Rules 2014
Amendment 7
Gazetted: 18 April 2019, Gazette No. 18 of 2019

Supreme Court Criminal Supplementary Rules 2014
Amendment 6
Gazetted: 18 April 2019, Gazette No. 18 of 2019

Magistrates Court Rules 1992
Amendment 71
Gazetted: 20 April, Gazette No. 20 of 2019

Magistrates Court Rules 1992
Amendment 72
Gazetted: 20 April, Gazette No. 20 of 2019

REGULATIONS PROMULGATED (3 APRIL 2019 – 2 MAY 2019)

REGULATION NAME	REG NO.	DATE GAZETTED
Criminal Law (Clamping, Impounding and Forfeiture of Vehicles) Act 2007	30 of 2019	11 April 2019, Gazette No. 16 of 2019
Controlled Substances Act 1984	31 of 2019	18 April 2019, Gazette No. 18 of 2019
Fines Enforcement and Debt Recovery Act 2017	32 of 2019	18 April 2019, Gazette No. 18 of 2019
Public Interest Disclosure Act 2018	33 of 2019	18 April 2019, Gazette No. 18 of 2019
Fisheries Management Act 2007	34 of 2019	26 April 2019 Gazette No. 19 of 2019
Fisheries Management Act 2007	35 of 2019	26 April 2019 Gazette No. 19 of 2019
National Parks and Wildlife Act 1972	36 of 2019	2 May 2019 Gazette No. 20 of 2019
National Parks and Wildlife Act 1972	37 of 2019	2 May 2019 Gazette No. 20 of 2019

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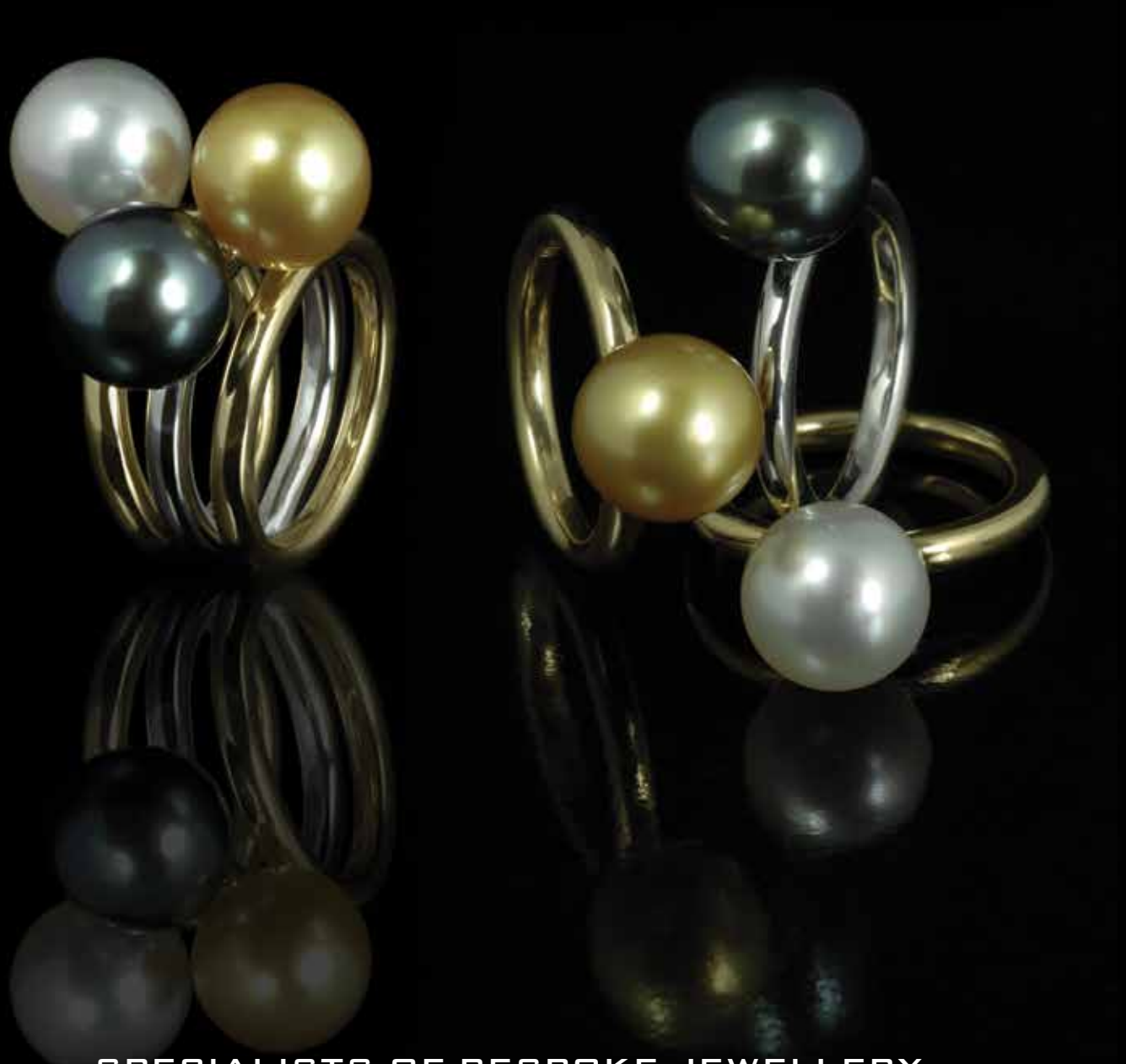

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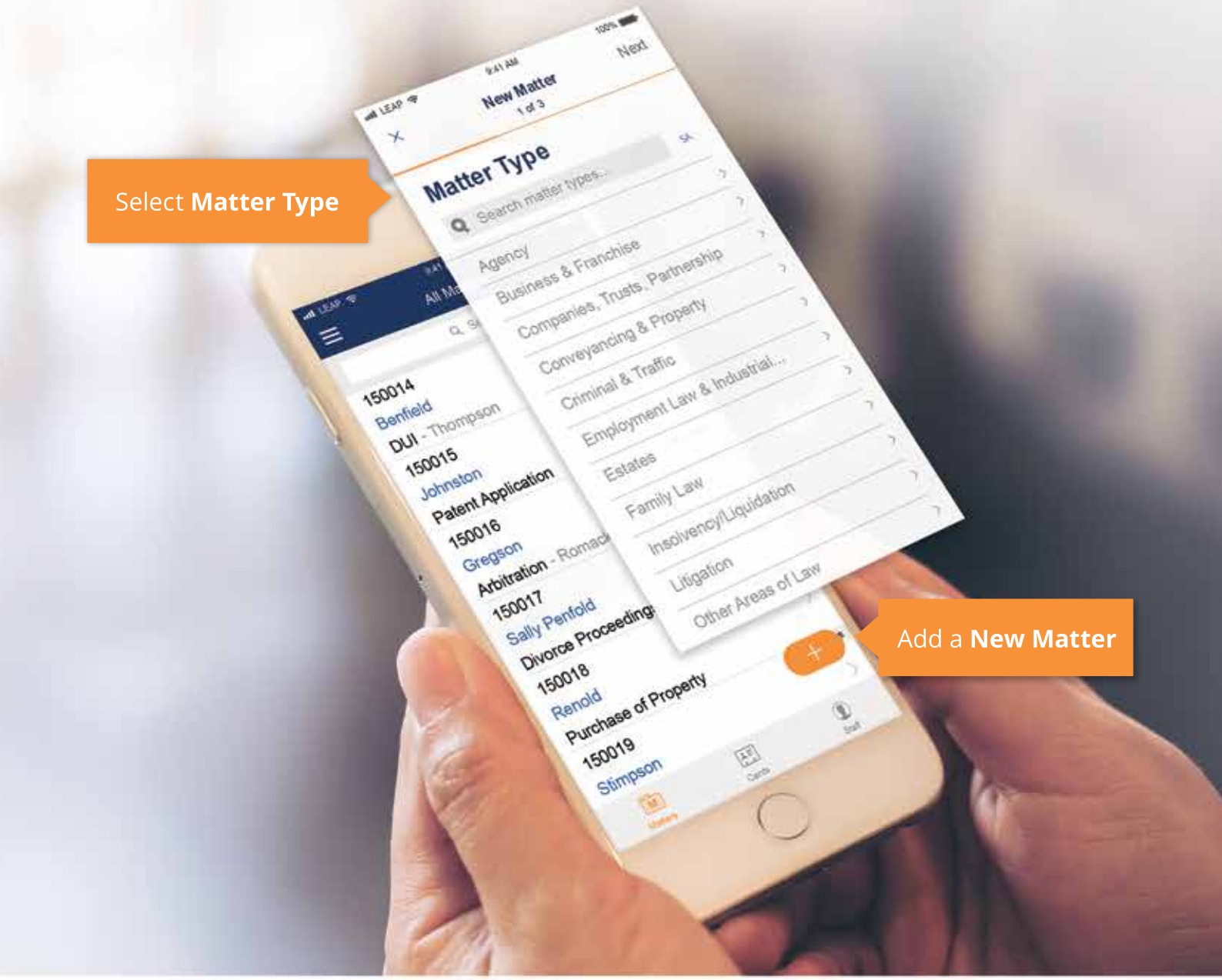

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