

# CREATIVE CONSEQUENCES P/L

LAW, BUSINESS AND REGULATION ADVISORY

14 October 2016

Mr Gary Ulman  
President  
Law Society of New South Wales  
170 Phillip Street  
Sydney NSW 2000

Dear Mr Ulman,

## **Submission to the FLIP Commission of Inquiry**

Thank you for providing Creative Consequences with the opportunity to make a submission to the FLIP Commission of Inquiry.

Creative Consequences applauds the Law Society and the work of the Commission in considering the developments that legal practitioners are currently having to face and what legal practitioners will face in the future. Creative Consequences has attended a number of FLIP hearings and has found the hearings to be extremely informative.

The Commission of Inquiry has called for submissions in relation to a number of themes. The themes include, inter alia, client expectations, technological innovation, globalisation, changing legal structures, segmentation and diversity, non-lawyer legal service delivery and increased compliance. In this submission Creative Consequences be addressing two themes – technological innovation and non-lawyer legal service delivery.

## Creative Consequences

Creative Consequences is a boutique advisory and consultancy firm working domestically and internationally to provide high level regulation and policy assistance and advice to public and private organisations including regulators of professions and industry groups, educational institutions, religious orders and firms in the following four areas – Regulatory Assessment, Design and Implementation; Complaint Investigation Review and Reform; Practice Management Course Accreditation and Ethics.<sup>1</sup>

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<sup>1</sup> See [www.creativeconsequences.com.au](http://www.creativeconsequences.com.au)

Steve Mark and Tahlia Gordon are the Directors of Creative Consequences.

Steve is a lawyer by profession, and was the New South Wales Legal Services Commissioner from 1994 to August 2013. Prior to being appointed Legal Services Commissioner of New South Wales, Steve was President of the New South Wales Anti-Discrimination Board from 1988 to 1994.

Tahlia Gordon is a lawyer by profession and was the Research and Projects Manager of the Office of the Legal Services Commissioner from 2005 to 2013. Prior to joining the OLSC, Tahlia was the Executive Director of the Legal Profession Advisory Council in Sydney and the Policy Officer at the NSW Bar Association. She has also worked at the Australian Mission to the United Nations in New York.

Steve and Tahlia have worked with regulators in England, Scotland, Ireland, Canada, the United States and Asia to improve regulatory processes to benefit the profession and the community. Steve and Tahlia have published and spoken widely about regulatory design and assessment, professionalism, ethical infrastructure and ethics. While Steve and Tahlia's main focus has been on setting effective and proactive regulatory frameworks, promoting high ethical standards and developing ethical infrastructure, the breadth of their knowledge and experience extends to virtually any group, firm or industry that wishes to improve its standards, integrity, service delivery and professionalism in the community.

#### Technological Innovation and New Business Systems

The impact of technology on the legal profession has been profound. Technology has caused unprecedented disruption to the practice of law which has both helped and hindered the ability of lawyers to provide legal services. One of the greatest disruptors to the legal profession is the impact of Artificial Intelligence (AI) or as it is sometimes called "cognitive computing."

AI is not new to the legal profession. Law firms have been utilising aspects of AI since they first started using computers, particularly as a method of collecting, accessing and analysing information in the discovery process. However, new developments in AI have taken lawyers far beyond the traditional use of simple Boolean word searches in discovery and document review. AI today allows lawyers to search for concepts through pattern recognition, perform complex research tasks, detect and learn behaviour and even predict legal outcomes. This new and improved AI is a result of more powerful computer processing power and more sophisticated algorithms. AI today focuses on deterministic outcomes and allows lawyers to ask any question and have that question answered by a machine.

The benefits of AI to the profession, clients and the general public are vast. Apps and platforms have been developed to revolutionise e-discovery, legal research, compliance checks, marketing, HR issues, measuring workflows and answering legal questions allowing lawyers to focus on other more complex legal work. The cost to clients is relatively cheap and AI is today seen as an effective mechanism to improve access to justice.

A number of law firms both large and small have embraced AI as an effective and efficient disruptor. Denton's, for example, the world's biggest law firm has created an independent innovation company called "NextLaw Labs" as a subsidiary designed to disrupt the legal

industry<sup>2</sup>. Riverview Law, a U.K. based firm known for its progressive ideas, recently launched its virtual assistant “Kim”, which stands for knowledge, intelligence and meaning.<sup>3</sup> Linklaters is currently developing an AI tool called “Verifi” that can search 14 UK and European regulatory registers to check client names for banks.<sup>4</sup> Several smaller law firms have signed licenses to use ROSS Intelligence, an AI legal assistant that is built upon Watson, IBM's cognitive computer.

However, it is not just law firms who are embracing AI. Last year LexisNexis acquired Lex Machina, an AI-powered engine that applies natural language processing to public court documents to predict outcomes in intellectual property litigation.<sup>5</sup> In addition, Thomson Reuters, publishers of Westlaw recently announced a collaboration to use Watson across Thomson Reuters information businesses.<sup>6</sup>

There is no doubt that the number of law firms embracing AI will exponentially increase over the next few years. Many commentators agree that AI will revolutionise the legal services marketplace even further as AI becomes the norm. Creative Consequences sees considerable benefits in the use of AI by law firms but is equally concerned about the impact of AI on the legal profession.

Whilst the use of AI to perform legal tasks will reduce costs for law firms and their clients, AI will ultimately result in the elimination of entry level jobs and eventually senior lawyer roles. Richard and Daniel Susskind warn that lawyers, among other professionals, face a future in which “increasingly capable machines, autonomously or with non-specialist users, will take on many of the tasks that are currently the realm of the professions.”<sup>7</sup>

Secondly, AI may make lawyers more risk averse. The use of AI to predict legal trends or precedents may cause reluctance amongst lawyers to take on matters that are controversial or risky. This may ultimately affect case law. As Remus and Levy argue:

“If clients increasingly rely on software predictions in determining a course of action—in deciding, for example, whether to file a complaint, to defend a case, or to pursue a particular corporate transaction—the software predictions, by virtue of their influence over conduct, will influence the law in action. Without anyone realizing it, factors encoded into those predictions—including discriminatory or otherwise problematic

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<sup>2</sup> NextLaw Labs, About NextLaw Labs, <http://www.nextlawlabs.com/>

<sup>3</sup> Riverview Law, Meet Kim – the power behind Riverview Law's Legal Virtual Assistant plans, 7 December 2015, <http://www.riverviewlaw.com/meet-kim-the-power-behind-riverview-laws-legal-virtual-assistant-plans/>

<sup>4</sup> J. Croft, Legal firms unleash office automatons, The Financial Times, 17 May 2016, <https://www.ft.com/content/19807d3e-1765-11e6-9d98-00386a18e39d>

<sup>5</sup> Lex Machina, LexisNexis Acquires Premier Legal Analytics Provider Lex Machina, 23 November 2015, <https://lexmachina.com/media/press/lexisnexis-acquires-lex-machina/>

<sup>6</sup> Thompson Reuters, Thomson Reuters and IBM Collaborate to Deliver Watson Cognitive Computing Technology, 8 October 2015, <http://thomsonreuters.com/en/press-releases/2015/october/thomson-reuters-ibm-collaborate-to-deliver-watson-cognitive-computing-technology.html>

<sup>7</sup> RICHARD SUSSKIND & DANIEL SUSSKIND, THE FUTURE OF THE PROFESSIONS, HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS 231 (Oxford Univ. Press 2015).

factors—could then become encoded into broader swaths of law”<sup>8</sup>

The impact of AI, could also adversely impact the relationship between the lawyer and his/her client. During the course of the traditional lawyer/client engagement the client will typically discuss his/her matter with the lawyer and the lawyer would have a conversation with the client about the best or most appropriate course of action. Discussions would then ensure about how the matter is progressing and what needs to occur. AI may stifle such discussion and engagement because once a lawyer uses AI to obtain an answer in relation to his/her client's issue and an answer is provided there is little incentive for the lawyer to provide the client with an explanation of the answer or provide some context as to why a course of action is taken or a decision has been made. Alternatively, the client may obtain answers to their questions using AI and goes to his/her lawyer with that answer that may be incorrect which could present a dilemma for the lawyer.

Thirdly, AI can present a myriad of ethical dilemmas for lawyers. Whilst AI can effectively and efficiently analyse large amounts of data and provide reliable answers, sometimes the answers can be wrong. This is because AI still requires the use of humans. Humans have to create the AI software, write the programs and feed in the data. What if the lawyer using AI, accidentally feeds in the wrong data, and asks the wrong question? The lawyer may see the answer and question its validity and try the search again but what if the lawyer doesn't and accepts the answer as gospel because machines don't fail? What are the consequences for the client? What if the person using AI was not a lawyer but a non-lawyer legal service provider? What is the role of the regulator? Who will regulate the providers and require quality standards? These are some of the questions that have yet to be answered and remain unknown.

There are no rules or guidelines about the use of AI for the legal profession in Australia or in any other jurisdiction around the world. Without such a regulatory framework lawyers may be tempted to use AI unethically or negligently to their or their client's detriment. Nor is there any requirement that lawyers undertake training in the use of AI in Australia. In the United States the situation is very different. Four years ago the American Bar Association (ABA) formally approved a change to the Model Rules of Professional Conduct to make clear that lawyers have a duty to be competent not only in the law and its practice, but also in technology. Model Rule 1.1. provides that to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

The amendment to the Model Rules by the ABA was significant and marked a watershed moment for the legal profession. The ABA recognised how integral technological innovation is to the practice of law.

### Recommendations

Creative Consequences is concerned about the ethical and practical problems that may arise if lawyers continue to embrace the use of AI in the practice of law.

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<sup>8</sup> Remus, Dana and Levy, Frank S., Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law (December 30, 2015). Available at SSRN: <http://ssrn.com/abstract=2701092> or <http://dx.doi.org/10.2139/ssrn.2701092>

Creative Consequences is of the view that the rapid pace of AI innovation warrants the formation of a specific Committee that focuses on the regulation, ethics and practical issues associated with the use of AI.

### Changes to Areas of Work which were Previously the Exclusive Domain of Lawyers

The past few decades have seen an immense growth in the delivery of legal services by non-lawyers. This phenomenon has been documented in a number of jurisdictions around the world. The existence of unregulated legal service providers can be attributed to the partial deregulation of the legal services market. Deregulation has seen a move away from the tradition of reserving legal work to lawyers and a move away from defining legal work as “work that lawyers do.” The impact of deregulation has resulted in a very different looking legal services marketplace in the 21<sup>st</sup> century. In Australia, for example, non-lawyers can provide advice in a range of areas including conveyancing, intellectual property, workplace relations, taxation and migration. The 2014 Access to Justice Arrangements Report of the Australian Productivity Commission observed that in some cases, non-lawyers can even appear in tribunals.

The trend of deregulating the legal profession has also spread to other jurisdictions around the world. In Washington State, for example, “Limited License Legal Technicians” are authorized to perform a range of legal functions. They can’t represent parties in court but they can consult, provide advice, complete forms, file documents, and help steer litigants through the family justice system.<sup>9</sup> Others states are looking into the LLLT model, including California, New York, Utah, Colorado and Oregon.<sup>10</sup> In Ontario, Canada “paralegals” are licensed as a separate and distinct legal discipline, regulated by the Law Society.<sup>11</sup> In British Columbia, Canada, “designated paralegals” may give legal advice, represent clients before a court or tribunal (as permitted by the court or tribunal), and represent clients at a family law mediation – all under the supervision of lawyers.<sup>12</sup> In the United Kingdom, deregulation has seen the introduction of Alternative Business Structures which permit non-lawyer ownership of law firms.<sup>13</sup>

In addition to the above, an array of unregulated non-lawyer legal service delivery providers have also hit the legal service marketplace. Online legal sites such as LegalZoom and *RocketLawyer* allow consumers to buy basic legal services like wills or company incorporations available online at a low cost. On LegalZoom, for example, you can download a basic will for as little as \$69 and a real estate lease for \$29. On *RocketLawyer*, you can get unlimited access to a number of legal documents for as little as \$7 a month.

Non-lawyer legal service providers can be a welcome addition to the community. Non-legal service providers can offer lower prices, on average, than lawyers leading to greater access to justice. Non-lawyer legal service providers may also offer services which utilise technological developments more than lawyers. However, the delivery of legal services by non-lawyer legal

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<sup>9</sup> Washington State Bar Association, Limited License Legal Technician Program,

<http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians>

<sup>10</sup> National Organisation of Bar Counsel, Jurisdictions’ Activity on Alternative Licensed Legal Professionals,

[http://c.ymcdn.com/sites/www.inbar.org/resource/resmgr/Conclave/Alt\\_license\\_table\\_May\\_18\\_\\_20.pdf](http://c.ymcdn.com/sites/www.inbar.org/resource/resmgr/Conclave/Alt_license_table_May_18__20.pdf)

<sup>11</sup> The Law Society of Upper Canada, Paralegal Licensing Frequently Asked Questions,

<http://www.lsuc.on.ca/licensingprocessparalegal.aspx?id=2147491230>

<sup>12</sup> <http://www.lawsociety.bc.ca/docs/home/blog/MOU-Notaries.pdf>

<sup>13</sup> Legal Services Act, 2007, c 29, ss 71–111 (UK).

service providers also presents a myriad of problems, particularly where the providers are not regulated. These problems include as follows:

- (a) Unregulated legal service providers may be less transparent about the services they offer and some advertise misleading claims on their websites;
- (b) Unregulated legal service providers may not hold indemnity insurance or other appropriate insurance;
- (c) Unregulated legal service providers do not have to comply with any regulatory frameworks in relation to their conduct.<sup>14</sup>; and,
- (d) Unregulated legal service providers mean less work for lawyers.

In addition, non-lawyer legal service providers present a dilemma for legal regulators. Legal regulators have no power to regulate non-lawyer legal service providers because they are not lawyers. They do not work in law firms. This dilemma has prompted many legal regulators to think about whether the traditional regulatory model that focuses on regulating law firms is appropriate and relevant today. Australia has been at the forefront of this discussion thanks to an innovative regulatory model that was developed by Steve Mark when he was the Legal Services Commissioner. This regulatory model, implemented in the early 2000's in relation to incorporated legal practices (ILPs), focused on the regulation of entities providing legal services rather than the regulation of lawyers. The model required that all ILPs in New South Wales implement and maintain appropriate management systems. The model encouraged all members of the entity (which included non-lawyers) who provide legal services to meet the high ethical duties of the profession.

The model developed in New South Wales has attracted considerable interest around the world and a number of jurisdictions have adopted or are developing a framework to implement entity regulation. In the United Kingdom, for example, in England and Wales, the Legal Services Act of 2007 requires all ABSs and traditional law firms are regulated as entities. Entity regulation was also introduced in England and Wales for barristers from March 2015.<sup>15</sup> In Nova Scotia entity regulation is being developed with the assistance of Creative Consequences.<sup>16</sup> The framework is due to be implemented in the next year. Entity regulation is also being developed in British Columbia as well as Singapore.<sup>17</sup>

The benefits of entity regulation are immense. Entity regulation removes the unfair situation of holding one lawyer in a firm responsible for system failures where others in the firm, or the firm itself could just as well be made accountable. Entity regulation allows a complaint to be made against the firm as a whole and clients would be relieved of the obligation to name specific individual(s). Entity regulation also requires that everyone in the entity, regardless of whether they are a non-lawyer or lawyer, comply with standards set by the regulator.

Whilst entity regulation provides an effective framework for regulating non-lawyers legal service delivery, it is limited by the fact that in New South Wales it will only apply to those non-lawyers that currently work in law firms. This is because the legal profession legislation in New South Wales, as it presently stands, still regulates "law practices", not entities

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<sup>14</sup> Legal Services Board United Kingdom, Unregulated Legal Service Providers, June 2016, at p.5-6, [http://www.legalservicesboard.org.uk/Projects/Unregulated\\_Legal\\_Services\\_Providers/](http://www.legalservicesboard.org.uk/Projects/Unregulated_Legal_Services_Providers/)

<sup>15</sup> See Bar Standards Board, For prospective entities, <https://www.barstandardsboard.org.uk/regulatoryrequirements/for-prospective-entities/>

<sup>16</sup> Nova Scotia Barristers' Society, Legal Services Regulation, <http://nsbs.org/legal-services-regulation>

<sup>17</sup> See Legal Profession Amendment Bill 2014.

delivering legal services. Online legal service providers will therefore not be covered by the Uniform Law.

Creative Consequences is of the view that a reconsideration of the current regulatory framework in New South Wales that moves away from the regulation of lawyers and law practices to the regulation of legal service providers.

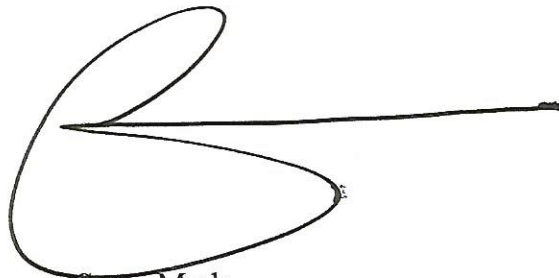
Recommendation

We recommend that the Law Society establish a specific Committee to explore the impact of unregulated non-lawyer legal service delivery and reconsider the regulatory approach in light of such developments.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tahlia Gordon', with a stylized, flowing script.

Tahlia Gordon  
Co-Director  
Creative Consequences

A handwritten signature in black ink, appearing to read 'Steve Mark', with a large, bold, stylized 'S' followed by a horizontal line.

Steve Mark  
Co-Director  
Creative Consequences