

**South Australian Bar Association**  
**2017 Annual Conference – Keynote Address**

**"SOUTH AUSTRALIA'S UNIQUENESS:  
CHALLENGES AND OPPORTUNITIES FOR  
THE SOUTH AUSTRALIAN BAR"**

**Justice Michelle Gordon\***

Introduction

South Australia is unique – environmentally, culturally and economically. It is known both nationally and internationally for its wine-growing regions, pristine and abundant fishing and agricultural resources, cultural and sporting festivals, as well as a striking and varied landscape, to name just a few of its renowned features and delights. It is neither possible, nor appropriate, to define South Australia by looking at any one of those aspects in isolation. But any such definition of South Australia is also incomplete. It omits another essential, and important, element – its intellectual capital. I wish to explore today the idea that South Australia's uniqueness creates challenges as well as enormous opportunities for the members of the South Australian Bar.

South Australia's intellectual capital provides the foundation for the small, medium and large enterprises that operate in this State. Small and

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\* Justice of the High Court of Australia. The author acknowledges the assistance of her Associates, Thomas Wood and Simon Frauenfelder, in the preparation of this paper. The errors are the author's alone.

medium enterprises (or SMEs) play a critical role in the South Australian economy. They are its backbone.

And there is much potential for growth. In KPMG's 2016 "Competitive Alternatives Report", Adelaide was ranked the most cost competitive city in Australia – overtaking Melbourne since the previous report in 2014 – and 23rd in the world out of 111 cities in 10 different countries<sup>1</sup>. Labour costs are 11% below the Australian average<sup>2</sup>. Tax reforms over the next few years – including the phasing out of payroll tax – will make South Australia the lowest taxing state for business<sup>3</sup>.

The issues faced by SMEs in South Australia are unique – there are significant numbers of SMEs in the winemaking, food and fishing industries – industries with products that are exported interstate and internationally. There is a significant energy and minerals sector. There will continue to be a large Defence presence with the Future Submarines project<sup>4</sup>.

I pause for a moment to observe that South Australia's fishing export market had a role to play in fundamentally reshaping the interpretation of s 92 of the Constitution. That case was *Cole v Whitfield*<sup>5</sup> and had its genesis in a Tasmanian company purchasing crayfish in South Australia. The report of the case in the Commonwealth Law Reports also records that it was a member of

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1 KPMG, *Competitive Alternatives* (2016) at 12.

2 Investment Attraction South Australia, *Opening Doors* (November 2016) at 7.

3 See <http://invest.sa.gov.au/why-south-australia/>

4 Investment Attraction South Australia, *Opening Doors* (November 2016) at 20.

5 (1988) 165 CLR 360; [1988] HCA 18.

this Bar, Mr Doyle QC as Solicitor-General for the State, who urged the Court to consider the Convention Debates in the interpretation of s 92<sup>6</sup> – although he later credited the idea to another influential South Australian, Mr Selway<sup>7</sup>. The High Court indeed did rely on the Convention Debates in its decision, a marked departure from previous practice. Unfortunately for South Australia (and for Mr Doyle and Mr Selway, who again represented the State), the next major s 92 case – *Castlemaine Tooheys Ltd v South Australia*<sup>8</sup> – resulted in the invalidity of a South Australian law.

Why do I mention this? Because it is just one example of the South Australian Bar's contribution to this nation's legal framework. The breadth of the legal knowledge of the South Australian Bar is second to none. Its experience in, and ability to deal with, complex legal disputes is second to none. But with that knowledge must come the acknowledgment that the South Australian Bar is not immune from the greater shifts that affect not only the legal profession, but indeed all professions.

#### Problems with the professions

Our profession, like other professions, is in a process and stage of transformation. By and large, the professions are "failing in six ways: economically, technologically, psychologically, morally, qualitatively, and in terms of their inscrutability"<sup>9</sup>. This observation underpins the thesis of

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<sup>6</sup> (1988) 165 CLR 360 at 372.

<sup>7</sup> Doyle, "Bradley Maxwell Selway", eulogy delivered in Adelaide, 14 April 2005 quoted in Williams, "Bradley Maxwell Selway: A Personal Tribute", (2005) 33 *Federal Law Review* 181 at 185.

<sup>8</sup> (1990) 169 CLR 436; [1990] HCA 1.

<sup>9</sup> Susskind and Susskind, *The Future of the Professions*, (2015) at 33.

Professor Richard Susskind and his son Daniel in their 2015 book, *The Future of the Professions*. Their thesis is apposite to all professions, including the legal profession.

First, there is the *economic* problem. Many people and organisations simply cannot afford legal services<sup>10</sup>, or at least cannot afford them to the full extent they might need.

Second, the legal profession has been slow to embrace *technology* – particularly the internet – and the opportunities it provides<sup>11</sup>. Many counsel embrace technology in their own professional practice, but technology offers much more, especially in its potential to disseminate information widely. Today, too much information sits idle or little used, hidden away in chambers or buried in publications of limited circulation. Too much more resides only in professionals' heads. People today access and consume information differently. This is something that is important for the professions to recognise.

Third, there is a *psychological* problem<sup>12</sup>. Given the way people access information in the modern world, the legal profession is not organised in a way that encourages people to solve or engage with their own legal problems. There is no doubt that some legal problems require attention from lawyers. But there is something to be said for the satisfaction that can be gained from

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

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

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

solving a person's own problems where possible, perhaps with the guidance of a lawyer.

The Susskinds' fourth criticism is a *moral* one<sup>13</sup>. The legal profession generally serves an important role in society. The independent Bar serves its own particular and important role. Your undertaking to practise as a barrister carries with it a re-emphasis of your obligation to provide the very best assistance to the Courts<sup>14</sup> and to give strong independent advice to your clients<sup>15</sup>. Courts and clients rely upon it. In the complex world in which we live, the courts and clients look for and expect to receive assistance that is independent, intelligent and realistic. This role is an important component of the rule of law in this country.

The moral dimension for the Susskinds is that the legal profession has the opportunity to do good, and that if it does not adapt and take advantage of opportunities by making legal knowledge more accessible, the profession commits a "sin[] of omission"<sup>16</sup>. In the Susskinds' view, the profession should be looking to share its expertise with society more widely than it currently does.

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<sup>13</sup> Susskind and Susskind, *The Future of the Professions*, (2015) at 35.

<sup>14</sup> rr 25, 27-28, 31, 33, 36 of the South Australian Barristers' Rules.

<sup>15</sup> r 37 of the South Australian Barristers' Rules.

<sup>16</sup> Susskind and Susskind, *The Future of the Professions*, (2015) at 36 quoting Kenny, *What I Believe*, (2006) at 123.

Fifth, the professions need constantly "to strive to bring the best of their knowledge and experience to all of their clients"<sup>17</sup>. They need to not only *say* that this is what they do – they need to do it.

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

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

These issues are what the Australian independent bars, including the South Australian Bar, must address, sell and solve. Some issues may require merely minor reorganising of day-to-day business; some issues may require a serious shift in how business is won and done; and some issues may even require structural change to the profession. But *all of these issues* will require close and complex consideration of how lawyers, and in particular, barristers are succeeding and failing in providing the important services that they do. Lawyers – and the knowledge they possess – need to be accessible. They (the lawyers and their knowledge) have to be accessible in terms of cost, and they

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<sup>17</sup> Susskind and Susskind, *The Future of the Professions*, (2015) at 36.

have to be accessible in the sense that people need to understand what lawyers do.

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

For several reasons, the South Australian Bar is in a unique position to help pave the way. First, because of South Australia's particular commitment to a fused profession, there is flexibility in how members of the Bar can engage with clients. Second, geographically, South Australia is vast. Not all businesses are based in the Adelaide CBD. There are potential clients out there who consider distance a barrier to obtaining appropriate legal services. Technology can help break down that barrier. To that end, the South Australian Government is investing in South Australia's technology infrastructure. Adelaide is the first Australian city to join the global "GigCity" network – offering certain precincts network speeds of up to 100 times the national average<sup>18</sup>. South Australia is also home to the Innovation & Collaboration Centre, a strategic partnership between the University of South Australia, the South Australian Government and Hewlett Packard. It is an initiative designed to foster business innovation and growth through technology; to assist SMEs and others to develop their products and businesses<sup>19</sup>.

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18 See <http://gigcity.com.au/about/>

19 See <https://icc.unisa.edu.au/about/>

With these challenges and these opportunities, what are the alternatives to the current set-up? What should our new mindset be? At the outset, we need to think about what it is that the legal profession provides to society. The Susskinds consider that we provide "knowledge", in the sense of "practical expertise"<sup>20</sup>. They give an illustration<sup>21</sup>. Executives of a power tool company are in a room. A slide is put up on the wall. It is of a power drill. They are asked – is this what you sell? They say "yes". The slide is replaced by a new one – it is of a hole in the wall. They are told – "this is what you really sell".

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

### Direct briefing

One of those ways is direct briefing. Direct briefing and similar initiatives are not simply about inverting or, to use an in-vogue term, "disrupting" traditional client-solicitor-counsel arrangements. Nor are they about pitting the independent bar against solicitors or those practising as

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<sup>20</sup> Susskind and Susskind, *The Future of the Professions*, (2015) at 188.

<sup>21</sup> Susskind and Susskind, *The Future of the Professions*, (2015) at 37-38.

amalgams. Rather, they are about providing fit-for-service legal services in appropriate situations in ways that benefit clients and counsel alike. They are, in truth, not a great departure from the status quo. Nevertheless, they help provide clients with greater choice in how they obtain legal services. There is much work that can be done to formalise and promote such arrangements.

Direct briefing, in its most usual sense, is the practice of legally trained clients – often government lawyers and corporate in-house counsel – directly engaging independent counsel, either to advise on discrete issues or, where appropriate, appear in proceedings where no instructing solicitor is also engaged. In a jurisdiction like South Australia, with its strong tradition of a fused profession, these arrangements may not seem so foreign to clients. But they represent a significant opportunity for counsel at the independent bar.

To many counsel who have already formed direct relationships with these kinds of clients, such arrangements may seem like old news. Indeed, many of you work closely and directly with government lawyers and in-house counsel, whether it be assisting with internal investigations, sitting on industry disciplinary boards and tribunals, or in more formal arrangements, such as being a member of statutory bodies such as the parole board. They know you, they know of your expertise, and they know well how you as independent counsel can assist them.

But there are ways to promote and formalise these arrangements; to allow a broader group of clients to tap directly into the vast collective and individual knowledge of counsel. These arrangements can be extended by raising awareness with legally trained clients about the benefits of the process, by facilitating direct contact between clients and counsel and by educating

clients who may be unfamiliar with litigation processes about how counsel can be used.

To this end, a number of independent bars throughout Australia have readily available information kits and contact points to assist in-house counsel and government lawyers to both get directly in contact with counsel, and to know how to brief you once they are in contact. These independent bars also hold regular online and in person CPD seminars, which serve the dual purpose of assisting legally trained clients to meet their CPD obligations, while also providing direct contact between the Bar and clients.

There may be commercial obstacles to direct briefing, but they are not insurmountable. For instance, some larger corporate and government clients have limited capacity to be flexible in briefing because of structured, complex legal service panel arrangements, usually with firms of solicitors. But as I mentioned at the beginning, the SME sector in this State is incredibly important. SMEs are typically flexible and they usually operate without complex legal panel arrangements.

Having said that, there is nothing to lock counsel, chambers or Bar Associations out of legal panel arrangements. Recently, an initiative saw Insurance Australia Group and the Victorian Bar set up a formal direct briefing arrangement, akin to a panel arrangement. The initial six-month pilot program was reported as a success and has, since then, become "business as usual"<sup>22</sup>. Such arrangements recognise and draw on the same rationales that support the existence of Bar Associations themselves – while independence is

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<sup>22</sup> Victorian Bar, *Annual Report*, (2016) at 9.

crucial, there are benefits in appropriate collective action and collective commitment, whether that is on a chambers or Bar Association level.

But direct briefing and similar initiatives need not necessarily be limited to those practising in public and commercial law. Another Victorian initiative – Barrister Connect – has brought direct briefing to a less familiar situation – summary and Magistrates' Court-level criminal matters. The web service provides a portal for clients to describe their matter, register their details and even upload a copy of their charge sheet and other relevant documents. The service promises to put the client in contact with a barrister within one business day. Of course, it is still up to the client whether they ultimately engage a particular barrister, but the initiative provides clients with an opportunity they might not otherwise have had.

### Technology

Direct briefing is not new. It is a known product. But what about some more radical ideas? I say radical because, while some of the direct briefing initiatives utilise the internet and technology, they are more of a modification or natural development of the existing model for the delivery of services than an overhaul. This is what Professor Susskind calls using technology for "automation" – to streamline and improve existing ways of working<sup>23</sup>.

But technology opens up the possibility of a more fundamental shift. In Professor Susskind's words, it can be used for "innovation", where it fundamentally changes past practices or allows us to work in ways that simply

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<sup>23</sup> See Susskind, A Submission the House of Lords, Select Committee on the Constitution, *Legislative Process Inquiry*, (November 2016) at 1 [4].

were not possible. He gives the basic example of the ATM – it did not replace bank tellers, it opened up a new way of providing banking services altogether<sup>24</sup>.

In general, the law and our perceptions have been slow to embrace technology. I say "in general" because there is technology that exists or is being developed that some lawyers are using to change the way they work. This is happening now. This is not the stuff of science fiction. We need to take advantage of technology and the opportunities it provides to ensure our profession remains relevant.

I want to explore a number of ideas involving technology. I want to show that people are already thinking outside the square. They are taking advantage of what is on offer. I want to suggest that the South Australian Bar could be a leader in this area too.

### *Online dispute resolution*

"Online dispute resolution" or "ODR". It is what it says it is – dispute resolution, outside of the courts, based on online platforms<sup>25</sup>.

As the National Alternative Dispute Resolution Advisory Council recognised *back in 2002*, ODR can increase access to justice by using technology

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

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

to help overcome "geographical isolation; mobility impairment; confinement or imprisonment; sight or hearing impairment (eg through voice recognition software); language difficulties (through translating software); lack of confidence or competence in face-to-face communication; and physical violence or intimidation"<sup>26</sup>.

A simple example is the eBay online dispute resolution process. It resolves 60 million disagreements every year<sup>27</sup>. There are two processes. For simple disputes where the items delivered did not match the description or where payment has not been made, parties are encouraged to resolve the dispute themselves, with the help of structured, practical advice. If negotiation is unsuccessful, then the parties present their argument in an online "discussion area" and an eBay staff member makes a binding determination<sup>28</sup>.

Similar platforms are starting to creep into government. In the Netherlands, there is a platform offered by the Ministry of Justice and Security that uses algorithms to assess information provided by a couple who are separating or divorcing, and then to identify points of agreement and propose

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26 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution and Information Technology Principles for Good Practice* (Draft), (2002) at 7.

27 See Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims*, (February 2015) at 11 [4.2].

28 See Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims*, (February 2015) at 11-12 [4.2].

solutions. If the proposed solutions are not accepted, then the couple can request a mediation or adjudication<sup>29</sup>.

The Civil Resolution Tribunal (or CRT) in British Columbia, Canada, employs a question and answer system – the "Solution Explorer" – at a preliminary stage to assist in resolving strata disputes or small claims by consent before a claim is commenced<sup>30</sup>. Commencing a dispute involves filling in an online application form, which is followed by the "case management phase"<sup>31</sup>. That phase involves an attempt to resolve the dispute with the assistance of a facilitator. Finally, if that phase fails to resolve the dispute, the dispute may proceed to the "tribunal hearing phase"<sup>32</sup>. Each phase may be conducted online<sup>33</sup>. And a "hearing" is different to how you might first imagine: "[i]n resolving a dispute, the tribunal may conduct a hearing in writing, by telephone, videoconferencing or email, or through use of other electronic communication tools, or by any combination of those means"<sup>34</sup>. This extends to the reception of evidence<sup>35</sup>. Further, in conducting the hearing it "is not necessary for the means of communication ... to allow all

29 See Legg, "The Future of Dispute Resolution: Online ADR and Online Courts", (2016) 27 *Australian Dispute Resolution Journal* 227 at 230. See also Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims* (February 2015) at 12 [4.3].

30 See Legg, "The Future of Dispute Resolution: Online ADR and Online Courts", (2016) 27 *Australian Dispute Resolution Journal* 227 at 230. See also Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims* (February 2015) at 12-13 [4.4].

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

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

33 s 19 of the CRT Act.

34 s 39(1) of the CRT Act.

35 s 42(3) of the CRT Act.

parties to the dispute to take part at the same time"<sup>36</sup>. To facilitate the whole regime, the online platform can be accessed at any time from a computer or mobile device that has an internet connection<sup>37</sup>.

Soon, we might expect something similar in the United Kingdom. Lord Justice Briggs recommended the creation of an Online Court for claims up to £25,000 – again involving an initial online interactive process, which creates a document that is effectively a simplified pleading<sup>38</sup>. One of the drivers for that recommendation was his Lordship's view that the existing court system is not adequately providing "access to justice for ordinary individuals and small businesses due to the combination of the excessive costs expenditure and costs risk of civil litigation about moderate sums, and the lawyerish culture and procedure of the civil courts, which makes litigation without lawyers impracticable"<sup>39</sup>. It is expected that certain aspects of this system will begin to be phased in this year<sup>40</sup>.

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

<sup>36</sup> s 39(2) of the CRT Act.

<sup>37</sup> See <https://www.civilresolutionbc.ca/disputes/>

<sup>38</sup> See Legg, "The Future of Dispute Resolution: Online ADR and Online Courts", (2016) 27 *Australian Dispute Resolution Journal* 227 at 231; Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, (2016) at 118-120 [12.15]. Lord Justice Briggs, *Civil Courts Structure Review: Interim Report* at 76-77 [6.8].

<sup>39</sup> Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, (2016) at 115 [12.4].

<sup>40</sup> Bindman, "Online Court 'Visible by September and No Big Bang'", top judge reveals, *Legalfutures*, 22 February 2017 <<http://www.legalfutures.co.uk/latest-news/online-court-visible-by-september-and-no-big-bang-top-judge-reveals>>

by the Susskinds. Compare the six issues I identified at the beginning with how the CRT spruiks its services<sup>41</sup>:

[The CRT] offers new ways to resolve your legal issues in a timely and cost-effective manner. The CRT encourages a collaborative, problem-solving approach to dispute resolution, rather than the traditional courtroom model. The CRT aims to provide timely access to justice, built around your life and your needs. It does this by providing legal information, self-help tools, and dispute resolution services to help solve your problem, as early as possible.

### *Online tools*

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

One example was launched by an Australian law firm last year, designed to assist unrepresented persons at sentencing hearings. The tool is provocatively named "Robot Lawyers" and there are a variety of robots available depending on the offence – the Drug Robot, the Assault Robot, the Theft Robot. Drawing on similar concepts to the initial stages of the online dispute resolution platforms, the free online service allows people to input the relevant information, and the service then produces a document which the unrepresented person can hand up to the magistrate<sup>42</sup>. At the time the tool was launched, Associate Professor Moses from the University of New South Wales aptly summed-up what it meant for the future of the legal profession. She said: "People entering the legal profession should not only know and

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<sup>41</sup> <https://www.civilresolutionbc.ca/disputes/>

<sup>42</sup> See <https://www.robot-lawyers.com.au>

understand the law, they should be proficiently skilled to be able to understand these kinds of systems and *ideally build them*" (emphasis added)<sup>43</sup>.

Melbourne Law School offers a subject that provides practical experience in understanding the interface between technology and law, in which students design legal help websites. At the end, students compete in a "Bake-off" to have their ideas developed<sup>44</sup>. I expect we will see more subjects like this on offer at law schools across Australia in the near future.

But I would go a step further. It is not just those entering the profession who should be engaging with this technology – the onus is on those of us already in the profession to use our expertise and knowledge to assist in the development of platforms and tools. Thought could be given to ensuring there are ample CPD opportunities provided in this area. We should not be relying solely on the appetite for innovation of future practitioners to resolve the problems and take the risks.

Despite its name, Robot Lawyers is also a good example of how it should not be assumed that technology will automatically make lawyers redundant. As the website notes: "Robot Lawyers is not a lawyer. Robot Lawyers does not give legal advice". It is designed for unrepresented people; people who may not have had access to legal services because they cannot

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43 See Krynda, "Robot lawyer Designed to Help Unrepresented People State their Case in Court", ABC News, 29 November 2016 <<http://www.abc.net.au/news/2016-11-29/robot-lawyer-will-help-those-unable-to-afford-legal-fees/8074382>>.

44 See "Technical Know-how a First for Melbourne Law School", 23 May 2016 <<http://newsroom.melbourne.edu/news/technical-know-how-first-melbourne-law-school>>.

afford them. It presents an opportunity to provide a service to, and engage with, people who would otherwise not have been engaged at all. Technology can assist us in addressing latent demand<sup>45</sup> for legal services that might not otherwise be addressed. It presents an opportunity. It assists in addressing the moral deficit faced by our profession. Addressing that deficit may mean there is some short-term financial pain, but there is potential for there to be longer-term gain. Not only does it help clients, but it also helps reduce the burden on courts. That burden can be a heavy one, particularly in courts where the volume of matters is immense. And the more efficient and accessible the courts are, the more likely people will be to engage with their legal problems and obtain legal services.

But there are commercial opportunities too. And this is where the importance of SMEs in the South Australian economy comes into focus. SMEs have limited resources, and paying for lawyers might not always seem like the best use of those resources. But, the issues faced by SMEs are factually and legally difficult and, despite budget constraints, advice is needed to address those issues. For example, SMEs may need assistance with:

- Federal tax – income, GST, capital gains;
- State tax – land tax, payroll tax, stamp duties. Although the tax reforms I mentioned earlier include the phasing out of payroll tax, the phasing out itself will be something on which advice may be required;
- Trusts;

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<sup>45</sup> See Susskind and Susskind, *The Future of the Professions*, (2015) at 133.

- Employment – awards, entitlements, obligations, OH&S, superannuation;
- Corporations law – directors' duties, solvency;
- Competition and consumer law;
- Wills and estates; and
- Climate change.

A number of online service providers are targeted specifically at assisting SMEs. Services on offer include assessing the "legal health" of businesses, producing documents based on questions answered by the client online, and providing direct access to lawyers based on information provided by the clients online. The online service providers have additional information on their websites about various legal issues.

These services reflect broader trends in the professions. The availability of online documents reflects the shift away from the traditional bespoke service offered by the professions<sup>46</sup>. But they still provide options. In doing so, they take advantage of technology to use what are effectively mass-production techniques to offer a high degree of personalisation<sup>47</sup>. The online documents are not merely a standard form. The services use technology to adapt the standard form to the particular circumstances. And computers are only becoming more capable. They will get better at

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<sup>46</sup> Susskind and Susskind, *The Future of the Professions*, (2015) at 106.

<sup>47</sup> Susskind and Susskind, *The Future of the Professions* (2015) at 130.

customising documents and completing other more complex legal tasks – not just grunt work<sup>48</sup>.

But if you don't want a computer to help you "create your document", as an alternative, one service allows a person to request a quote for a particular problem based on information they provide online, and within 4 hours they will receive 3 quotes from 3 different lawyers from a pool engaged by the service. The client can then choose which lawyer they would prefer to engage based on information provided about their respective experience, expertise and cost.

Tied up with the development of these online tools is the important question – how should people be charged to use them? Is the billable hour the best way to charge for legal services? The billable hour is based on input by lawyers – not on the output; not on the "hole in the wall"<sup>49</sup>. You might pay more for the hole in the wall because someone took longer to make it, even though at the end the hole in the wall is the same. This is not necessarily a positive result for clients.

Fixed pricing is one alternative. Some of the online services offer fixed prices for certain services and documents, and some law firms have already changed their pricing models. There is also the general marketing practice of penetration pricing – where lower prices are offered for a new service to attract new customers. The essential idea is that some short-term pain for the lawyer would be rewarded with a greater long-term gain. But pricing things

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<sup>48</sup> Susskind and Susskind, *The Future of the Professions* (2015) at 159.

<sup>49</sup> See Susskind, *Tomorrow's Lawyers: An Introduction to Your Future*, (2013) at 16.

differently is not something which should be considered in isolation – it is only part of the picture of making legal services accessible. There is also a need to *work differently*<sup>50</sup>. That is what many of these ideas seek to do.

### *Long-term*

These examples and ideas are simply the beginning. We also need to think long-term. Technology has developed rapidly in recent times. And it is still developing. Consider this – the first iPhone was released 10 years ago. It was not long ago that Twitter became a prominent online service. And things are becoming automated: self-driving cars are on the horizon – already, all Tesla cars are equipped with the hardware for full self-driving capability<sup>51</sup>. In that respect, it is notable that South Australia is the first jurisdiction in Australia to pass legislation allowing trials of driverless car technology<sup>52</sup>.

We cannot predict the future of technology with any degree of certainty<sup>53</sup>, and we do not know how it will affect our profession. There will be technological changes to come that we cannot yet conceive of. And no doubt, that technology will shape our society and how people work.

You will notice that the examples I have given are, at their core, focused on providing legal services to clients or potential clients. But we should also not neglect opportunities that technology offers for lawyers themselves.

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50 Susskind, *Tomorrow's Lawyers: An Introduction to Your Future*, (2013) at 19.

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

52 See *Motor Vehicles (Trials of Automotive Technologies) Amendment Act 2016* (SA).

53 See Susskind and Susskind, *The Future of the Professions*, (2015) at 153-154.

For example, rapidly developing technological tools can assist in conducting our existing work more efficiently. In the United States, a legal research and analytics platform called "Court Analytics", launched in late 2016, promises new capabilities made possible by data science, natural language processing and machine learning. It has the new abilities to view historical trends on the success rates of certain motions across different courts and different judges, and to view data-based statistical analyses of how the different courts in the complex US judicial hierarchy cite and rely on each other's decisions. And this service is not alone. A similar platform "Legal Analytics" by the US company Lex Machina provides similar insights into the judges, lawyers, parties, and the subjects of the cases themselves, drawn from thousands of court decisions and filings and analysed using automated data mining techniques.

The next step is the use of big data to make predictive judgments about court outcomes. An algorithm has been developed which uses natural language processing and machine learning which can predict the outcome in European Court of Human Rights cases with, on average, 79% accuracy<sup>54</sup>. We can also expect automated decision-making schemes to become more prominent<sup>55</sup>, including, perhaps, in the judicial context<sup>56</sup>.

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54 See Aletras et al, "Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective (2016) *PeerJ Computer Science*.

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

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

At a more human level, we can think of ways to use online platforms for collaboration and discussion amongst the profession – not just within a single jurisdiction but across the world. For instance, there exists a closed social network of 600,000 doctors in 30 countries<sup>57</sup>, designed to foster collaboration and discussion.

### Conclusion

I raise these ideas neither to commend or laud them particularly, nor to suggest their adoption in South Australia. Rather, I refer to these ideas to suggest that by proactively developing new ways of engaging with those ultimately served by the Bar's work – clients – the Bar can add further strings to its bow.

The people behind these ideas have seized the opportunity to be a "first mover" and take advantage of the benefits that come along with it. They have recognised the potential behind one of the points I made earlier – people consume and share information differently in the modern world. So much of clients' lives is conducted on and through the internet. This includes some of the most personal parts of their lives – sending private correspondence, managing our money, or even looking for a partner. Clients – and I would suggest many of us – are comfortable in and familiar with the online environment. Clients may be less comfortable dealing with courts or attempting to find a lawyer through more traditional channels. There is logic to a service that meets clients in their comfort zone.

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57 <http://www.sermo.com>

These kinds of initiatives are part of the same spirit that inspired the "creation" of South Australia's independent bar just over 60 years ago, when a single practitioner broke away from the greater body of practising lawyers – a move that ultimately led to the creation of South Australia's independent bar and this Association. Such breaks with convention will often be controversial and "disruptive" at the time, and they may not always be as successful as founding South Australia's independent bar. But it is a privilege of independence to choose your own direction, to change course to seize a new advantage and to take risks in pursuit of greater reward.

As with any change, there will be a degree of anxiety and reluctance to embrace it. If information is accessible, what will separate lawyers from lay-people with access to legal knowledge from masquerading as lawyers? Will we become the equivalent of a traditional barista – replaced by a legal Nespresso machine?<sup>58</sup> How can machines ever replace humans? If we are replaced, will there be a role for lawyers in the future? There are questions of privacy, confidentiality, security (nothing is ever guaranteed to be completely secure once it is online) and, transparency.

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

I want to briefly say something more about transparency. It relates back to the "moral" aspect of our profession. The resolution of disputes in an

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58 Susskind and Susskind, *The Future of the Professions*, (2015) at 244-245.

open court is an important part of maintaining public confidence in the administration of justice and, consequently, the rule of law. We can see how disputes play out, how the parties manage their cases, and on what basis a court makes a decision. Ensuring a degree of openness is something we must be conscious of if we are to shift to more private modes of dispute resolution.

And for lawyers, the adoption of technology is not necessarily a zero-sum game. The Robot Lawyer example demonstrates that. Going back to the Netherlands divorce platform, if the machine system does not resolve the dispute, a mediator or adjudicator might be engaged. Those mediation and adjudication jobs might not have been created were it not for the design of the platform. And in the United Kingdom, Lord Justice Briggs explained: "It is not a design objective of the Online Court to exclude lawyers. The underlying rationale is that whereas the traditional courts are only truly accessible by, and intelligible to, lawyers, the new court should as far as possible be equally accessible to both lawyers and [unrepresented litigants]"<sup>59</sup>. Although it is envisaged that the Online Court could be used without lawyers, users of the system will still inevitably need help in one form or another<sup>60</sup>. His Lordship considered the success of the Online Court will be "critically dependent ... upon continuing improvement in public legal education"<sup>61</sup>.

In the end, "Yes but" is not an answer. The legal profession is not immune to the changing world. We cannot and should not sit idly by. South

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<sup>59</sup> Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, (2016) at 41 [6.22].

<sup>60</sup> See Legg, "The Future of Dispute Resolution: Online ADR and Online Courts", (2016) 27 *Australian Dispute Resolution Journal* 227 at 231.

<sup>61</sup> Lord Justice Briggs, *Civil Courts Structure Review: Final Report*, (2016) at 116 [12.9].

Australia is unique – it has its own distinct challenges but also extraordinary opportunities. As Alan Kay, a Silicon Valley pioneer once said, "[t]he best way to predict the future is to invent it"<sup>62</sup>.

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<sup>62</sup> Entry under "Alan Kay" in Shapiro (ed), *The Yale Book of Quotations*, (2006) at 415.