



LEGAL SERVICES  
**BOARD**

# PERSPECTIVES ON LAWTECH AND REGULATION

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How can legal services regulation support responsible technological innovation that improves access to justice?

APRIL 2020



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LSB Chief Executive Matthew Hill

## Foreword

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### Leading the way on lawtech

One of the Legal Services Board's roles is to help foster a regulatory climate that supports innovation and increases access to legal services for everyone who needs them, while maintaining high standards. We plan to lead the way by instigating informed debate and we will support and challenge the regulatory bodies to respond effectively to lawtech developments.

The regulatory models that exist in legal services will determine the way technology impacts the sector and consumers, and the extent to which society more embraces it. We do not want to stifle innovation by preserving or introducing barriers that prevent new technologies from thriving. Equally, technology will not thrive if either consumers or providers of legal services do not trust it. Therefore, ethics and innovation must go hand in hand. By ensuring technology is used ethically, regulation can build trust through responsible innovation.

Indeed, rather than block innovation, a proportionate regulatory framework that addresses the ethical implications of technology will help to unlock innovation.

Responsible technological innovation can make a real contribution to increasing access to justice. However, we are acutely aware that technology risks leaving some people behind or otherwise disadvantaging them, especially the most vulnerable. This plays to a wider need we have identified for a strategic reshaping of legal services to better meet society's needs.

### Perspectives papers collection

As the implications and potential of technology are yet to be realised, competing interests are at play. Hearing the different perspectives of the various participants in the market will enrich the debate and identify solutions for ways forward.

The idea behind this collection of short articles is to bring together some of the key leaders and influencers in the legal services sector to offer their different perspectives on one central question. For us, this question goes to the heart of the challenge that lawtech poses regulators. The question is:

***“How can legal services regulation support responsible technological innovation that improves access to justice?”***

In the pages that follow, we hear from authors in the judiciary, regulators, bodies representing consumers and providers, lawtech businesses and others. We are extremely grateful to them for setting down their thoughts to help stimulate debate. We hope that this proves a useful resource that regulators and others can use to help develop their own approaches to technology regulation.



At a glance, a few common themes from the papers emerge:



Future regulation of lawtech should be carefully designed to protect consumers without stifling innovation.



Regulatory clarity may facilitate outcomes that work for everyone: consumers, service providers and regulators.



Emergence of AI is clear: AI and how it may be combined with human intervention to best facilitate the decision-making process, should be carefully considered.



Regulators need to act as a catalyst to tackle the information asymmetry that contributes to the access to justice gap.



Technology has a role in improving access to justice. However, technology by itself is not the silver bullet to making the justice system and legal services market more accessible.

## Further reading

### Read our other papers on technology and regulation, and listen to the associated podcasts

Alison Hook, Lessons from abroad – international approaches to regulating legal technology

Professor Roger Brownsword, What can legal services regulators learn from medicine and finance?

Professor Noel Semple, Technological innovation and the Legal Services Act

Dr Anna Donovan, Blockchain: Developing regulatory approaches for the use of technology in legal services

## Coming soon...

Dr Adam Wyner, Regulatory issues in legaltech education

Professor Lisa Webley, Ethics, technology and regulation

<https://www.legalservicesboard.org.uk/our-work/current-work/technology-and-regulation>

## Next steps

We will publish a report which distils the learning from our work on technology and regulation over the last 18 months. In addition to this collection of short articles, this includes our market research on innovation and technology, and papers and podcasts from leading experts in the field (see box, above). All this information is available on a dedicated section of our website.

Over the next 12 months, we will publish further analysis of the individual legal needs survey that we published in January 2020<sup>1</sup> to explore people's experiences of legal services delivered online. We also plan to research public attitudes towards the ethical dimensions of developments in lawtech.

We will also provide practical support to regulators by setting up an expert reference group to share knowledge, consider issues and act as route for external partners to engage with the legal regulators collectively. The group will involve technology experts and practitioners from outside of the regulatory bodies as well as staff at the regulators.

Please get in touch if you are interested in collaborating with us on these issues – [lawtech@legalservicesboard.org.uk](mailto:lawtech@legalservicesboard.org.uk)

<sup>1</sup> <https://www.legalservicesboard.org.uk/online-survey-of-individuals-handling-of-legal-issues-in-england-and-wales-2019>



Owen Derbyshire

## Legal Services Consumer Panel

### Introduction

The Legal Services Consumer Panel exists to ensure that the rights and interests of consumers are fully considered in the context of legal services regulation.

One of the ways we do this is through our tracker survey, an annual survey which explores the issues that matter most to the consumers of legal services. This survey has proven to be tremendously successful, and we recently published the eighth edition, a copy of which can be found here [Tracker Survey 2019](#).

Our survey findings influence the direction of our research, and ensure we prioritise the emerging issues that matter most to consumers, and – clearly – the rise of LawTech is a development worth exploring in a bit more detail.

To that end, we published a discussion paper in May 2019 that sought to address some key questions around legal technology and to better understand its potential impact on consumers. We were particularly interested in understanding how effective regulation could ensure that emerging technology solutions put consumer principles at the heart of their products in a way that both enhanced the delivery of legal services, whilst also protecting the rights of service users.

As part of this work, we considered whether the current regulatory framework effectively supports the development of consumer-centric LawTech, and we did so by using the well-established Consumer Principles to explore the following:



**Access** – Does current regulation support the widest possible range of access to consumers, including access to vulnerable consumers?



**Choice** – Do consumers have a choice over whether to use LawTech-based services or not?



**Information** – Does current regulation ensure there are clear transparency standards for the use of LawTech?



**Quality** – Are LawTech services of sufficient quality?



**Fairness** – Are the risk factors identified and addressed?



**Redress** – Can consumers access redress when services go wrong?



**Representation** – Do regulators provide guidance around consumers' involvement in product development, testing and evaluation?



## Findings

Our 2019 tracker survey found that the proportion of consumers who have their services delivered online has increased over the past eight years from 21% in 2011 to 33% in 2019, and we are in no doubt this a trend that is set to continue. This is only one small step towards the development of more technology-based service delivery.

And, with every step, the regulatory framework should be designed to maximise the opportunities and to mitigate the risks.

In terms of potential opportunities, these include (but are not limited to) improved access to justice, enhanced public legal education and better tailored legal services that deliver both positive consumer outcomes, and increased profitability for businesses.

Regulators could, – and we believe should, explore incentivizing providers to use LawTech to widen access to legal services.

On the other side of the coin, these new technologies do present risks for consumers, providers, and regulators; risks that can be mitigated if supported by a robust regulatory framework, as we will discuss later.

Consideration should also be given to the genuine accessibility of technology-reliant services. For example, the accessibility of these services for consumers in rural areas and areas with inadequate digital connectivity, as well as the accessibility of services for older people and consumers who may be less digitally engaged.

It may surprise you to learn that 9% of the UK population are considered to have no digital skills whatsoever, with a further 21% lacking basic digital skills. A recent government white paper also acknowledged that 70% of the UK population may be either “digital with assistance” or “digitally excluded”, a statistic that is certainly worth bearing in mind when discussing the future provision of legal services.

## Artificial Intelligence

But, for those of us who can successfully engage with these new technologies, we are no doubt familiar with the emergence of AI and the unique challenges it provides regulators, in particular those challenges relating to transparency.

As a Panel, we have always recommended that providers using LawTech to deliver services should ensure that the data used to inform the algorithms that generate AI solutions are both traceable and auditable.

The challenge for AI-driven services is that, in many ways, technologies can reflect the worldview of their creators, and – like it or not – AI technologies may well have built-in biases which, when combined with hidden layers of complexity, can influence the outcomes of the service in ways that disadvantages certain consumers.

It is therefore crucial that providers can explain to consumers (in plain English!) how these services are delivered, including detail of how the algorithms used in the delivery of LawTech services arrive at their conclusions.

This presents a challenge to providers, but one that is critical to ensure consumers' rights are protected, and that service users are empowered to make well-informed purchasing decisions. Transparency of this nature would also aid investigation by the regulators or the Legal Ombudsman when something goes awry.

To achieve this, we recommend that regulators consider a minimum set of regulatory guidance for LawTech providers, ensuring a high quality of both service and compliance from day one.



## Regulation

As a Panel, we believe that regulators should do more to take ownership of the LawTech agenda, regulating the market proactively instead of being reliant on a reactive, fire-fighting approach.

We would also encourage regulators to be considerate in their approach by avoiding a one size fits all approach to LawTech regulation, and to look to regulate solutions according to their level of risk.

Furthermore, it is our view that regulators should consider closer collaboration on developing guidance as a way of clearly setting out their expectations to providers. Without a common approach, there is a very real risk that individual regulators will act in isolation from one other, leading to a duplication of effort and confusion among providers and consumers.

Such guidance could also enhance confidence in LawTech services, thereby improving engagement from both consumers and legal service providers, leading to further investment in the sector and benefitting the LawTech ecosystem as a whole.

The experience of other sectors (such as the financial services and healthcare sectors) suggests that regulators need to open themselves up to external influence where appropriate. What that means is that regulators must engage with potential entrants much more deeply, and rethink how they regulate, rather than simply extrapolate from their existing toolkit.

One oft-cited example of good practice in a similar field is the Financial Conduct Authority (FCA), which has issued detailed and technological-specific guidance to clarify its expectations from providers using financial technology.

That type of regulatory clarity gives investors, entrepreneurs, and legal service providers the confidence they need to drive forward and allow these potential benefits to be realised in a way that works for everyone: service providers, regulators, and – crucially – consumers.

[To read the report in full, click here](#)





Julia Salasky

## Legl

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### The problem we're trying to solve at Legl

The legal system does not work for those who need to use it. As the Legal Services Board found, one in two adults with a legal issue do not get professional help and yet six in ten experienced a legal issue in the last four years<sup>1</sup>. For consumers, accessing legal services is expensive, time-consuming and untransparent. For those providing legal services, it is a fiercely competitive market with a relentless cost pressure from clients.

At Legl, our mission is to make it easier for everyone to use the law. To help achieve this we give law firms the tools to succeed in a digital-first world. Not only do these tools make it easier for people to access and use legal services, but by modernising outdated processes Legl helps law firms become more efficient and increase profitability. Our tools include the following.



**Engage:** An onboarding tool using market-leading digital ID verification technology to enable firms to onboard clients quickly and securely. Accessing legal services is hard enough; requiring clients to take time off work to go in person to their solicitor with ID documents creates more friction in an already difficult process. Engage helps firms create better and more efficient compliance processes and makes it easier for people to get professional legal help.



**Fund:** Alternative funding options for clients including CrowdJustice, the only crowdfunding platform for legal costs. CrowdJustice has been used by thousands of people to raise over £10 million. This technology has fundamentally changed how people take legal action and interact with the law.



**Pay:** An online payments tool tailored for law firms which enables them to accept payment of their invoices, or money on account, online via a debit or credit card (or digital wallet via mobile phone). With over 60% of smartphone owners using their phone to make payments, not giving clients the option to pay online is simply out of step with reality.

### Challenges we've faced when introducing new technologies

Since launching in 2015 we have worked with over 350 law firms and processed over £10 million directly to firms' client accounts. And yet this success has not come without challenges. When speaking with firms about introducing new technology we have been met with a range of misinformation, misunderstanding and uncertainty, largely based on firms not understanding how regulators will perceive the use of technology. In our experience, "naysaying" statements regarding the use of technology are often supported by a blanket statement of "we do it this way for

<sup>1</sup> <https://www.legalservicesboard.org.uk/online-survey-of-individuals-handling-of-legal-issues-in-england-and-wales-2019>



compliance reasons". However, after engaging further with the law firm what becomes clear is that "doing it this way for compliance reasons" are often just buzzwords or a different way of saying "this is not how we do things therefore it must be wrong". In short, a huge part of our sales process is educating law firms on how their objections are misplaced and without foundation, in order to help them adopt new technology. We set out some examples below.

When introducing Pay, an application of existing payments technology to legal services we heard the following objections to adopting technology:

- Some firms believe invoices must be "wet signed" (i.e., signed and scanned in) by a partner to be an effective method of invoicing a client. They do not think requesting a payment via an email is sufficient. This is incorrect. As set out in section 69(2B) of the Solicitors Act 1974, an electronic signature is sufficient<sup>2</sup>.
- Pay enables firms to nominate which account they want payment to be directed to: office or client. Despite this, some firms do not believe that it is permitted under regulation to accept money on account via a debit card.
- Some firms believe that they need to speak to the person who is making the payment on the phone "for compliance reasons", without actually being able to verify who the person on the phone is.
- By contrast, many firms accept payment over the phone, but without fully considering the risks involved – for example, not having a way to verify that the person making payment over the phone is actually the card owner.

When introducing Engage, our client onboarding tool which automates ID verification in the same way leading FCA regulated banks do, some firms were anxious about whether this was as good for the regulator as manual ID checks or the emailing round of a passport. In reality, the current KYC processes of many firms are not only slow – they invite a huge degree of human error.

## How can regulation help?

We think there is a lot that regulation can do to encourage legal service providers to adopt new technology. And by technology, as a first step we mean the basic and proven technology which is currently used across other regulated industries – like accepting payments online or completing ID verification checks online. This technology does not fundamentally change how legal services are delivered. Rather, it makes legal services more accessible and user-friendly. Given the Legal Service Board's findings on unmet legal needs<sup>3</sup>, and the need for law firms to embrace the way their clients live in a digital world in order to stay current, we think there is a case for regulation to adopt a more proactive approach to encouraging firms to adopt technology.

Some practical ways regulation can support the adoption of technology include:

1. Give law firms practical examples of how they can use technology, and give examples of specific technologies (not specific vendors) that are, in principle, acceptable: for example, the use of digital identity checks for KYC. Whilst not formally being an "endorsement", we think a regulator explaining different use cases will assist in the adoption of technology and help dispel some myths.
2. Develop a simple and short process where law firms or suppliers can request clarification of a specific question via an "open letter". For example "Do invoices need to be wet signed in order for them to be effective?"

## Conclusion

We know that there is a huge problem in England and Wales when it comes to unmet legal need. We also know that law firms have been slow to adopt new technology, some of which would have a direct and immediate impact on helping more consumers access legal services. We think there is an opportunity for regulation to "lead from the front" and encourage legal service providers to adopt new technology, or at the very least clarify the misinformation which exists.

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2 <https://www.legislation.gov.uk/ukpga/1974/47/section/69>

3 <https://www.legalservicesboard.org.uk/online-survey-of-individuals-handling-of-legal-issues-in-england-and-wales-2019>



Chris Handford

## Solicitors Regulation Authority

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There is a significant legal access gap in England and Wales. Despite our world-class legal system and status as a global hub for commercial law, only one in ten individuals or small businesses use a regulated individual when they have a legal problem. People are more likely to ask a friend or do nothing; small businesses are more likely to turn to an accountant for legal advice.

Affordability is a key issue – nobody wants to see a society in which only the well-off, or the small numbers who have access to publicly funded legal aid, can easily access expert advice to help them enforce and defend their rights. People are increasingly looking at what technology can do to help.

After all, we have seen technology change the shape of many sectors, including banking, accountancy and insurance.

Mobile banking is now the norm. People manage their money and access services at the touch of a button. From Quickbooks to KashFlow, many small businesses use tech to manage their finances, only employing an accountant's expertise for more complex work or advice.

And most of us buy at least some of our insurance online, checking for the right deal as and when we need it.

Yet technology has made fewer inroads into how most people experience legal services.

There has been record external investment going into UK legal tech start-ups, but the benefits are being felt most keenly in the corporate sector – helping firms improve internal processes and services for big commercial clients.

### Potential barriers

There are a range of barriers which could be underlying the slow progress in the adoption of digital technologies in people-facing legal services.

As part of our collaboration with Nesta Challenges to deliver our Legal Access Challenge we have been exploring these barriers. Examples include:

- the fragmentation of the legal sector with lots of smaller firms, which individually have lower capacity to invest in innovative technology
- lack of resource for not-for-profit advice centres
- challenges in developing financially sustainable business models for consumer-facing lawtech products
- difficulty in securing investment
- a potential lack of awareness or trust in technology-driven legal services among customers.



## Our journey as a regulator

We are keen to make sure that regulation is not one of the barriers getting in the way of the sort of legal technology that could benefit the public.

We want to encourage innovation. And if someone comes to us with a new idea, our message is clear: our door is open and we want to help make new ideas work.

In 2016, we launched our SRA Innovate programme, offering to help people get their ideas for a new business – or a change in their current business – to work from a regulatory perspective. We established an innovation space where forward thinking businesses could test their ideas and the boundaries of regulation.

We have helped organisations, including local authorities and legal businesses, expand their services to meet consumer need, offering tailored support and waiving regulatory rules that got in the way.

Working together helps us and firms understand how to make sure consumers are appropriately protected, while helping people access legal services in new ways.

And in November, we introduced our new Standards and Regulations. They are less prescriptive, shorter and easier to understand and place more emphasis on the professional judgement of the solicitor to do right by their client. They get rid of unnecessary bureaucracy and give firms – and individual solicitors – more flexibility to work in new ways, helping to increase access for the public.

## The Legal Access Challenge

As well as getting out of the way where we can, in the last year we have looked to also be a catalyst for change, particularly for tech innovation.

We teamed up with Nesta Challenges, the innovation foundation, to deliver the Legal Access Challenge. It was made possible by a grant from the Regulators' Pioneer Fund launched by The Department for Business, Energy and Industrial Strategy (BEIS) and administered by Innovate UK.

The Challenge focuses on providing support – through funding, expertise and developing

networks – for technology that improves the way people and small businesses can access legal services.

The initial signs are positive. We had 117 entrants – from legal tech start-ups to law firms, charities to law schools – with an expert judging panel selecting eight finalists. The quality of entrants shows that there is no shortage of innovators or ideas that could help improve access to legal services.

There is a mix of winners offering solutions that will benefit people in different situations: people in their personal and working lives, some of the most vulnerable – victims of domestic violence and those with learning disabilities – as well as small businesses.

The winners are also using tech in different ways: from helping people collate evidence to using artificial intelligence to predict the likely chance of success in an employment case; from providing tailored information in an easily digestible format to developing a platform to help people come together to bring group litigation orders.

Each finalist is now getting support for innovations that will make legal services more accessible and affordable for individuals, families and small businesses. This includes a £50,000 grant and an expert support programme. For example, support on regulatory and data protection issues. Entrants have found this access to free expert help invaluable in helping them get their product right. We will share what we have learnt from this, so we can help other innovators as well.

Each finalist will have until March 2020 to develop their solution. Two of the most promising finalists will be awarded additional £50,000 prizes for further development and to bring their solutions to market.

Since our finalists were announced, they have been making good progress developing their ideas. One has already launched their product and many of the others are well on their way.

The Challenge is not just about helping support tech solutions come to market, but also about building sustainable networks, bringing innovators together. We have been encouraged by the collaborations – and conversations – the Challenge has helped facilitate.

## Learning from innovators

The Legal Access Challenge is also an excellent opportunity for us to understand the sort of issues innovators face when considering entering the legal market, and the implications for how we regulate.

The types of issues we have seen innovators face include understanding:

- what the boundary is between offering legal advice and guidance
- which regulator or regulators, if at all, they may come under depending on what their product offers
- where an artificial intelligence (AI) system is fully autonomous or is far removed from human decision making, the requirements around holding client data and data privacy
- our expectations about due diligence that regulated firms should carry out if using AI to deliver legal services. This might include the steps they should take to understand the risks of these new technologies – for example bias in algorithm underpinning them and working to reduce them

## Next steps

Innovation and how we regulate technology is one of our three objectives in our proposed corporate strategy for 2020 – 2023.

We are looking at what we can do to promote and support the adoption of legal technology and other innovation, that helps to meet the needs of the public, business community, regulated entities and the economy. While recognising there are risks to manage, the emphasis is on the potential for technology to increase access to legal services.

We have got feedback on our proposed approach from hundreds of legal professionals, including innovators and entrepreneurs, as well as members of the public.

We are developing our thinking. Following the conclusion of the Legal Access Challenge, we will be sharing our learnings, as well as looking at what other resources, such as guidance, we can develop straight away in order to help innovators who are entering the market. We will also be finalising our strategy – which has been informed by the Challenge – and a programme of work to deliver it.

Collaboration is key. So we will be doing further work to build on the relationships we have built through the Legal Access Challenge, and will approach other groups to discuss the issues they face surrounding legal technology and the environment in which it can operate. These organisations include innovators and start-ups, legal entrepreneurs, not-for profit groups and other representative consumer bodies. From the Ministry of Justice to the Lawtech Delivery panel, we want to work closely with agencies operating in the law tech space.

There is also the potential for tech to help deliver public legal education. We are working together with other regulators to develop the Legal Choices website, including developing online tools to help people when they have a legal problem, for instance when faced with the threat of eviction.

Regulation will not create a tech revolution in the legal sector, but we can help. Likewise, technology alone will not solve our all society's access to justice problems, but it could play a big part in helping many access the legal help they need.

We want to work with others to help unlock that potential, while making sure the public still have appropriate protections in place, and solicitors and law firms carry on meeting the high standards we require, and the public expect.



Felix Brown

## CILEx Regulation

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### Introduction

Regulation, on the face of things, could be considered the natural enemy of innovation. After all, the market dictates the nature and direction of new technologies, while regulation seeks to impose conditions on their usage, albeit for the public good.

However, as legal services continue to be revolutionised by novel technological solutions, regulators have not sought to limit the potential of such innovation. We have reached the point whereby the potential for technological benefit warrants significant exploration, especially amongst legal services, where uptake has been notably slow in comparison to other sectors. This considered, the purpose of regulation isn't simply to protect from harm; over-regulation can cause just as much damage as under-regulation in the wrong circumstances. Where the attainable benefit of technology holds the potential to ease the burden on stakeholders, the responsibility of regulators is to act in the public interest.

Put simply, the role of the legal services regulator is not to curb technological innovation, but to ensure that it grows in a way that is conducive to the needs of the consumer. Accordingly, there are at least three important factors to be considered in order to fully utilise the scope and role of legal services regulation:

1. The problem of perception.
2. The central role of the regulator.
3. The future legal landscape.

Once these considerations have been addressed, regulators hold the potential to channel innovative efforts into the areas most underserved by technology, or indeed toward those who are in most dire need of it.

### The problem of perception

With regard to the first point, I think there is an important argument to be made that despite many formal moves having been made to open up the regulatory environment to the possibility of innovation, such changes are only relevant if the regulated community has an awareness of, and confidence in, these changes. Whilst views on regulation have not remained static, attitudes are slow to shift, and the naturally risk-averse nature of the legal profession remains a barrier. As such, more can be done to accelerate this process and promote the role of regulation as being conducive to innovation rather than acting to its detriment.

One way this may be achieved is through the adoption of an extensive communications policy. CILEx Regulation (CRL) has sought to encourage greater awareness and inform public and professional attitudes through the increased use of our 'Regulation Matters' website – a resource intended to provide targeted regulatory updates in an accessible format. By raising awareness of issues in the legal sector, providing in-depth case studies, and promoting the responsible use of legal technology, we intend to open up the regulatory landscape and facilitate greater connection between many of the disparate stakeholders to legal services.

In this way, it seems there is potential for CRL and other frontline regulators to act as a catalyst between legal service providers and consumers, thereby mitigating the vast asymmetry of information currently contributing to the access to justice gap. While perceptions of regulation remain an issue, it is hoped that our efforts will lay the groundwork for an environment more conducive to technological innovation – allaying some of the fears currently preventing uptake in the sector and increasing the knowledge base of consumers.

## A revised role?

As discussed above, if regulators are to strike the proper balance between safeguarding consumer protection and encouraging innovative practice, it is essential to shift mindsets purely from mitigating harm, to promoting the public interest. Indeed, once perceptions of regulation have been sufficiently improved, there is greater scope for regulators to play a wider role in bridging the knowledge gap between innovators, providers, and consumers.

The importance of this role becomes even more prevalent when viewed through the lens of access to justice. This is because as technology increasingly impacts the legal services market, investment will inevitably be guided toward the practice areas yielding the highest profit. Free market competition is thereby insufficient to drive responsible technological innovation; it does not forge a natural pathway to overcoming gaps in access to justice, and certain practice areas will continue to be underserved by technology unless guided by an external influence. The current environment means that smaller firms and high-street partnerships, many of whom serve the most vulnerable clients in our society, are unable to utilise technology due to cost and resourcing considerations, or a lack of initiatives satisfying their particular needs.

Moreover, even where legal services may be streamlined by way of technological innovation, this does not necessarily result in maximum benefit for consumers. For example, whilst it may be desirable to automate legal tasks through the use of AI, it may work to the detriment of consumer interests if the human aspects of legal services are not adequately safeguarded. It is therefore paramount

that legal services regulators understand, as far as possible, the potential implications of novel technological innovations. In this way a greater balance can be struck between access to disruptive technologies and maintaining consumer protection. This will require a policy of significant cooperation and communication, continual research and development, and a flexible regulatory framework capable of withstanding and reacting to the changing face of legal services provision.

By establishing themselves as central figures to facilitating technological uptake, regulators will have greater scope to channel technological innovation into research-driven initiatives focused on access to justice. In this way, we can add legitimacy to responsible innovative development; that is, we can better ensure the quality of innovation, and reduce the likelihood that vulnerable consumers are subject to unnecessary or disproportionate risk.

## The future legal landscape

In order to truly affect responsible innovative practice, both regulators and providers will need to prepare for the future provision of legal services. In anticipation of this, CRL has sought to ready the next generation of CILEx practitioners for the increasing role that technology will play in the legal sector. By incorporating requirements of both technological and emotional competence into our proposed education standards, it is our intention that the skills of future lawyers will properly reflect the future legal environment. In turn, these standards will allow technology in the legal sector to be utilised to its maximum potential; by equipping practitioners with the necessary skills, we intend that they will be able to comfortably adapt and react to technological innovation as and when it is necessary.

While the full extent of technological impact on the future of legal services remains open-ended, many of the present solutions are focused on back-office process automation. As mentioned above, this is beneficial insofar as it enables legal service providers to apportion greater attention to the consumer-facing aspects of the role. As such, the emotional competency of practitioners will become ever more essential as automation eases the administrative burden. Indeed, one of the major barriers to access to justice is the

vast asymmetry of information present between practitioners and consumers; it is our intention that such deficiencies may be better addressed by employing a dual focus on technological and emotional competences.

While it is important to note that the potential for technology to transform legal services is large, it should never be used as a substitute for effective policymaking or proper funding, but rather be supplementary to it.

## Conclusions

The role of the legal services regulator is changing. The UK has fast become a world-leader in lawtech, and in order to maintain and utilise this status, the regulatory environment needs to reflect the sectors potential for growth.

Accepting a degree of risk in pursuing technological advancement is not a position that fits comfortably with traditional conceptions of regulation, nor should such risk be apportioned frivolously. Whilst it is essential for regulators to remain adaptable in light of these circumstances, the public good and consumer protection should never be ignored. This means that while responsible technological uptake may currently require incentivisation amongst legal services, the need to mitigate risk could become a priority again in the future when lawtech usage is more uniformly established. As such, upholding a data-driven policy on innovation is essential; maintaining the balance of risk against potential benefit should always remain a priority.

Furthermore, this information needs to be universal – the greatest assessment of balance can only be made with reference to a comprehensive, cohesive dataset shared between each organisation seeking to open up the legal sector to innovation. In this way, a more consistent industry consensus can be developed concerning what a truly responsible lawtech environment should look like. Moreover, it will provide an opportunity to corroborate the interests of multiple stakeholders to legal services across sectors. In this way, greater attention can be paid to incentivising specific initiatives, pooling resources, and hosting collaborative events, all geared toward improving access to justice.

Once perceptions have been abated, the revised role acknowledged, and the future profession ensured, the regulatory environment will be far better equipped to play a more active role in supporting technological applications which enhance access to justice.



Simon Davis

## The Law Society

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### Overview

The Law Society of England and Wales is pleased to contribute to the Legal Services Board (LSB) project entitled 'developing regulatory approaches for the use of technology in legal services'.

The purpose of this paper is to assist the LSB and relevant regulators in the formulation of future proposals. It summarises the Law Society's recommendations on the development of responsible legal technology in legal services and access to justice.

Two questions arise from the LSB's initial brief:

- In what way can or should legal services regulation support responsible technological innovation?
- How can legal services regulation of technological innovation improve access to justice?

### Legal services regulation which supports responsible technological innovation

Research from the Law Society published in January 2020, conducted by KPMG, showed that the legal sector contributes nearly £60bn of UK's Gross Value Added, £4.29bn to the balance of trade and employs over 550,000 people (directly and indirectly) across the country. Likewise, our research shows that lawtech is a booming sector in its own right. Global investments in lawtech currently stand at \$926m. The level of investment in fledgling lawtech companies is likely to grow in the coming years, as law firms seek to harness legal

technology to increase efficiency, reduce costs or provide a broader scope of services .

To enable lawtech and legal services to maintain its industry-leading position in the face of growing competition, market liberalisation and disruption, it is essential that future regulation of lawtech, if any is needed, is carefully calibrated to protect consumers without stifling innovation.

Some factors that the LSB and relevant regulators should take into account are:

- Most current lawtech products are aimed at assisting back-office processes products and models, with e-Discovery and legal research being the most popular ones, followed by contract management tools . These aim to make services more affordable to clients or for the non-profit organisations to make their operations more efficient (indirectly by reducing costs or saving time).
- Although some initiatives are underway to develop technology which provides legal services without human involvement, our research suggests that these are in early stages and not widespread. Chatbots, pre-populated contracts and predictive analytics could be considered under this category. Further thought is required on their applications and user engagement. In particular issues such as 'explainability' of automated decisions, potential bias and impact on privacy need to be taken into account, as highlighted in our report on the use of algorithms in the criminal justice system.



- Lawtech applications which are related to the provision of reserved legal services, as well as unregulated providers that use legal technology for the delivery of legal services. These should be further assessed through the prism of compliance with sector specific legal regulations and general consumer protection laws.

In the course of this project, we suggest that the LSB and regulators should pay due regard to the Legal Services Consumer Panel's underlying principles of access, choice, quality, fairness, redress and representation in the development of legal technology and how these can be applied to lawtech. The following issues should also be given a proper consideration:



Adequate but not overly burdensome requirements concerning transparency, traceability and auditability of data inputted in lawtech systems.



Appropriate quality assessment of lawtech solutions and how and at what development stages and subsequent use it should be conducted.



Adequacy of the existing redress mechanisms for consumers.



Appropriate training and competence to support the profession in using lawtech safely and effectively.



Provision of lawtech products and services outside the territorial jurisdiction of the UK regulators.

Further work is required to address the profession's concerns highlighted in the LSB's paper entitled 'Technology and Innovation in Legal Services' (2018) and particularly about the risks involved in using unproven technology, lack of IT expertise and potential for ethical problems. The Law Society is conducting additional work in these areas and further insight will be released during the course of 2020.

## Legal services regulation that improves access to justice

The Law Society conducted research to explore the question is technology the key to unlocking access to justice innovation. Our findings are in the report 'Technology, Access to Justice and the Rule of Law'.

Our research showed that a lot of great work is being done by firms, advice clinics and in-house teams to meet legal need, which is supported by technology. Lawtech is used in the advice sector (including law centres and pro bono clinics) not only to improve practice management but also to:

- Develop technologically enabled frontline services for clients or service users (front of office) through public legal education initiatives, information and advice tools.
- Improve user interaction methods for advice provision. This includes a combination of websites, mobile apps, live chat services, face-to-face, paper, telephone and videoconferencing.

Based on this, the main finding of our report was that technology has a role in improving access to justice. However, technology itself is not the silver bullet to making the justice and legal system more accessible.

Our study demonstrated that in most cases it is not a question of technology. Its use should be coupled with better data management, information sharing and co-ordination in the sector. Knowing who is developing what, and for what purpose, is an essential step to help vulnerable people to access justice.

Our main recommendations included:

- a. The Government to recognise that any technology-based initiative aiming to promote access to justice will only be successful if users are ultimately able to understand and access legal advice directly from a qualified lawyer who can help them resolve their problems.
- b. The advice sector and private practices to share information on the adoption and application of legal technology within their organisations, as well as any evaluation of these projects.

- c. Government bodies, private sector and third sector organisations offering funds for legal technology and access to justice initiatives to agree on a set of principles to encourage long-term investment in the sector through co-ordination and collaboration.
- d. The Ministry of Justice's Legal Support Advisory Group to build on previous work to develop a comprehensive list of problem statements, to develop the terms of reference of the £5 million innovation fund investment, and work together with the sector and the Law Society to create an Open Source Information Platform on access to justice and technology.

## Next steps

To conclude, responsible technological innovation in legal services and the justice system is underway. We emphasise that any form of regulation, if at all needed, must be carefully calibrated to enable the UK legal services to maintain its global leading position, as well as to avoid adversely impacting our strong and emerging lawtech sector.

We look forward to engaging with the LSB and all regulators in the next step of this project. We call on regulators to involve the Law Society, the Regulatory taskforce and Ethics taskforce of the Lawtech Delivery Panel and our members in the development of proposals.





*Dr Birgit Clark*

## CITMA

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*With many thanks to Rachel Wilkinson-Duffy (Chartered Trade Mark Attorney), Of Counsel at Baker McKenzie for her comments.*

In the context of IP and trade mark law, artificial intelligence (AI) solutions support, enable and (potentially) replace human judgement at various stages of the lifecycle of a trade mark, which affects both trade mark practice and laws. The main reasons cited for using AI include gains in speed, efficiency and accuracy. The following considers how regulation of legal services may support responsible technological innovation in the field of trade mark law to improve access to justice.

### AI and IP Offices

AI technology is already in use to assist examiners at IP Offices to correctly classify trade mark specifications under the Nice and Vienna Classifications drawing from data on previously accepted, or lists of acceptable, terms. AI classification tools, such as the 'autochecker' software tool used by the Singapore IPO and the European Union Intellectual Property Office's (EUIPO) TM Class, can assist both applicants and examiners when it comes to classifying terms.

AI is increasingly used in trade mark clearance searches by commercial services and IP Offices alike, notably when it comes to the comparison of visual, aural and even conceptual similarity of trade marks. Intellectual property offices (IPOs), including the World Intellectual Property Organisation (WIPO) and the EUIPO, use AI image search applications, whereby image recognition software shows the closest – potentially conflicting

– matches revealed. IP Australia has developed a 'smart assessment toolkit' for its examiners, which automatically compares new (plain) word trade mark applications with earlier registered trade marks to produce a list of hits based on similarities of goods and services. IP Australia's toolkit includes an AI 'word analysis' solution, where a mark will be identified for potentially objectionable terms, including a distinctiveness assessment, and 'ownership', which compares ownership information against other data.

With AI technology applied by IPOs becoming more complex, automated decision-making risks becoming inscrutable. AI systems and predictive algorithms that use machine learning tend to be trained by using existing data sets and other historical information. Access to justice and transparency consideration may require that IPOs – and courts – should have a duty to give users an explanation for decisions that automated systems reach, as well as insights into the data sets used to train the algorithm to ensure fairness and lack of bias. Another open question is whether the decision of an AI tool should have prejudicial relevance and how this should be considered by examiners, notably under legal certainty considerations.

It should also be borne in mind that case law data sets are only relevant for the jurisdiction they are being used in. There is a risk that when using pre-trained tools from another IPO or a private provider could affect the law itself. With different offices, courts and private providers using different models, access to justice considerations may therefore include the creation of international quality standards for AI tools and transparency obligations.

## AI and trade mark rights management

AI based document review is already widely used in a due diligence and transactional IP context, where large amounts of trade mark portfolio information can be reviewed quickly. In the context of the management of IP rights, AI can provide insights which may otherwise be hidden within volumes of data; e.g. WIPO already leads and enables cooperation amongst various national IPOs in pursuit of the management of "IP big data" and the use of AI for IPO administration. When analysing the value of IP portfolios, commercial AI tools can determine which trade marks deliver most licencing revenues. Similarly, AI solutions may be used in the context of statistical correlation and prediction. AI tools that forecast a potential litigation outcome already exist. Using data from, e.g. existing case law, or a judge's or IP rights owner's previous actions, predictive tools can identify underlying trends. From an access to justice perspective, it is important to note that answers provided by an AI solution will only relate to the data sets provided to the machine and will not be able to predict an outlier event. Its accuracy may therefore be lower in more unusual legal scenarios areas where there is fewer case law data available.

## AI impact on trade mark law concepts

Trade mark laws are based on human perception and a human-centric consumer environment, e.g. it is "the average consumer" whose perspective is relevant when it comes to deciding on the similarity of trade marks in an opposition or an infringement scenario. While AI arguably does not work, act or perceive like a human, AI increasingly influences human decision making by providing product suggestions for consumers. AI is not as easily confused as a human and will not suffer from an imperfect recollection but can base its assessment on exact data: so whose perception will be relevant? Existing laws do not necessarily support a finding of trade mark infringement that is independent of human actions. What should be the outcome if AI "infringes" third party trade marks, e.g. in the sphere of product suggestions? Should use of AI be considered as use of a service or – more controversially – should AI be afforded so-called legal personhood? This too will require further thought well beyond the scope of IP law.

In this context, it also seems important to ensure that case law, court and other data is be freely available and there is a risk that a small number of commercial organisations developing AI tools may end up owning the data underpinning the AI legal decision-making process. While unlikely, there is a theoretical risk of disruption whereby commercial entities may be able to indirectly steer the law, e.g. on what constitutes a distinctiveness of a trade mark.



## Outlook: abundance of opportunities vs risks of a two-tiered system

When it comes to communication between AI and humans, IP Offices and courts may in the future decide to use chat bots to field some initial queries utilising natural language processing and speech recognition, e.g. EUIPO's last Strategic Plan discussed the possibility of having chat bots to provide guidance for SMEs. Current technology seems to be limited to unsophisticated guided pathways solutions. However, with technology improving, it may become necessary to educate users that they are interacting with a machine.

At the other end of the spectrum, it is equally conceivable that sophisticated AI solutions may in the not too distant future be used for preliminary decisions at court or the appeal stage of an IP office with formal decisions being made at a later stage by a human judge or appeal board. Utilising AI system could eventually result in a two-tier justice system whereby AI decisions could become the default and the involvement of human judges/examiners would be reserved for more complex cases or would only be available at a higher cost, thereby restricting access to justice. While this may well be the ultimate outcome, this should be a conscious and considered decision and there is a particular need to share international experience and discussion.

With technology evolving fast, AI offers exciting opportunities to make trade mark law faster and more efficient and can play an important role in promoting access to justice – within its own technical capabilities and the quality of the data sets provided to the tools. AI can provide opportunities to help users understand their rights and entitlements. At the same time, it will become increasingly important to educate IPOs, courts and users on how to use the tools and to their inherent limitations and to consider its effect on the material law itself.



*Chancellor of the High Court*

## Sir Geoffrey Vos

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### Introduction

Responsible technological innovation is vital to English law and to the UK's justice systems. Over many years, the UK has been a leading centre for national and international commercial court-based dispute resolution and arbitration. The UK will not retain its popularity with national and international business, unless it provides dispute resolution that makes appropriate use of new technologies. If it does, the costs and delays inherent in both the dispute resolution process and the delivery of legal advice will be reduced. Our Business and Property Courts are highly regarded internationally, but to stay ahead, technological innovation is a necessity.

There are competing tensions that need to be addressed. These tensions can be summarised as follows:

- (1) Financial and legal regulators are rightly keen to protect businesses and individuals from innovations that may cause harm.
- (2) Legal and financial services providers have an interest in preserving the established methods by which legal services are delivered and dispute resolution is undertaken.
- (3) Developers of technologically innovative products, such as cryptoassets, smart contracts and algorithms to streamline financial dealings, do not want their innovations bogged down in regulatory red tape and the need to engage multiple costly intermediaries.

- (4) Users of legal and financial service and dispute resolution processes do, however, want to avoid paying for lawyers to do what machines can do at a fraction of the cost, and in a fraction of the time.

The LawTech Delivery Panel ("LTDP") was created in late 2018 to bring together government, regulators, the City of London, practising lawyers, and the judiciary with a view to making the UK an hospitable environment for the use of LawTech and technologically enabled dispute resolution. In November 2019, the UK Jurisdiction Taskforce of the LTDP published its Legal Statement on the Status of Cryptoassets and Smart Contracts, which has been well received in the UK and in many countries internationally.

The Legal Statement makes clear that cryptoassets have all the legal indicia of property and are, as a matter of English legal principle, to be treated as property. First, it says that the novel features of some cryptoassets, such as intangibility, cryptographic authentication, use of a distributed transaction ledger, decentralisation, and rule by consensus, do not disqualify them from being property. Secondly, it says that they are not disqualified from being property either because they can be regarded as pure information, or because it might not be possible to classify them as being things in possession or things in action.



The Legal Statement describes rather than defines a smart contract as having a characteristic feature of automaticity. It suggests that a smart contract is performed, at least in part, automatically and without the need for, and in some cases without the possibility of, human intervention. These features mean that the terms of the smart contract must be recorded in computer-readable code. Many smart contracts are embedded in a networked system that executes and enforces performance using the same techniques as cryptoassets, namely cryptographic authentication, distributed ledgers, decentralisation, and consensus. The legal statement concludes that a smart contract is capable of satisfying the basic requirements of an English law legal contract.

Online Dispute Resolution has been introduced in England & Wales for certain family cases, social security disputes and civil money claims up to £10,000. These processes will plainly increase access to justice, by allowing legal claims to be vindicated at a lower cost and with minimum delay.

The question is, bearing in mind these developments and the tensions mentioned above, how the regulators can promote responsible innovation?

There are several brief answers:

- (1) Technological developments need to be supported by a firm legal foundation, even if that requires legislation. The Legal Statement is a classic example of that approach. It has undoubtedly gone some way to providing legal confidence to potential investors in mainstream cryptoassets and smart contracts.
- (2) Investors need to be assured that legal remedies will be available if their investment in new technically advanced financial or legal products go wrong. It is for the regulators and the Law Commission to provide that assurance.
- (3) Regulators must provide a sandbox environment for new technological products and algorithms to be tested, without imposing rules that stifle innovation.

- (4) Regulation must supplement rather than prevent innovation.
- (5) Regulation is a comparative exercise. National and International businesses compare the regulatory environments in different countries. They will choose the most hospitable environment for their innovative projects. It is critical for UK regulators to make the right choices so that a balance is struck between adequate protection and promoting innovation.
- (6) Both newly trained and qualified lawyers need substantial training in how new technologies already are affecting, and will affect, the delivery of legal and financial services and appropriate dispute resolution in the 21st century.

To conclude, regulators can, by a combination of these interventions, create an environment where (a) innovation is encouraged, (b) legal services providers are incentivised to make use of innovative technologies to deliver legal services and resolve disputes, (c) investors are incentivised to make use of technologically advanced financial products, (d) investors and the users of legal services in the UK are protected against unethical conduct and financial harm, and (e) access to justice will be enhanced.

*Mariette Hughes*

## Legal Ombudsman

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The subject of lawtech is becoming increasingly prevalent in discussions around the legal services market. As our society becomes more technology-focused, the conversation naturally turns to how these technologies can be employed to improve outputs and increase efficiency. Although the actual use of lawtech, machine learning and artificial intelligence (AI) may not yet be commonplace in the legal services market, experience tells us that when change happens, it happens quickly – and we know that this is an area of interest and investment for many of service providers.

At the Legal Ombudsman our role is to investigate the service complaints that people have about their legal service provider, meaning that we play an important role in providing access to redress when things go wrong. Therefore, it is vital that we consider how advancements in technology might affect the way in which people access and experience legal services – and the impact this could have on the way we carry out our investigations.

As a body that makes decisions on customer service, complainants and legal service providers expect a high standard of customer service from us, so we are also looking to technology to see how it can support the service we provide.

### Will lawtech affect our jurisdiction?

In the first instance, it is important to set out that advancements in technology do not have a direct impact on the Legal Ombudsman's jurisdiction. It remains the case that we investigate complaints from people in relation to services provided. Our jurisdiction is set out in the Legal Services Act 2007 and is not affected by the introduction of new technologies – until such time as people are able to access advice from fully automated robot lawyers!

As things stand, there is still a relationship between the authorised person and their client. Going into the future, the difference may be the extent to which a provider provides some or all of the services requested with the help of technology. This might range from a conveyancing firm using a portal system to upload and receive important documents in the home buying process, to a firm of solicitors using AI to assess prospects of success of a new client's case.

In either of these scenarios, the provider is still responsible for the level of customer service provided to their client. If part of that service is being provided through a form of technology, we would consider that technology to be part of the overall service provided – and as such it would fall within our jurisdiction to investigate. In the event that the technology fails, it would be considered as part of our investigation.





As an example – if a conveyancing firm uses a portal system which crashes, this may be something over which they have very little control in the first instance. However, they have a responsibility to ensure that clients are still able to provide their documents and that their transaction is not adversely affected by the technological failure. If a firm of solicitors uses AI in order to reach a view as to the prospects of success, it is incumbent on them to ensure that the technology can be relied upon to make sound decisions. It is not possible for a lawyer to absolve themselves of responsibility for a service provided by technology.

As ever more law firms look to exploit technological advancements to assist in delivering their services, the Legal Ombudsman is keen to work with them to understand the implications and practical effect of this, to ensure that advancement does not come at the expense of good customer service.

## Technology for a modern office

Of course, whilst lawtech and AI may feel far off, the effects of technological advancements can already be seen in the operation of modern offices today.

The Legal Ombudsman is a paperless office, working within a Microsoft case management system. In terms of GDPR, this allows us to organise, delete and control access to data with far greater ease than paper-based records. However, this does require careful management to avoid common traps that actually increase data protection risks for an organisation.

Additional benefits include the ability to structure case-related data to support operational reporting, and the provision of management information that provides insights into the health and performance of the organisation. Electronic documents and customer information allow large teams to work on cases simultaneously – improving the collaboration and cooperation of staff. Conversely, it also allows us to restrict sensitive information to only those who need to see it.

In terms of data retention, electronic information is far easier to keep than paper records – it does not require physical storage and there are significant cost savings in terms of secure storage. Electronic documents are far easier to manage than bulky paper equivalents. Deleting unwanted documents is straightforward; provided that it is well managed and backed by clear retention policies, this can be a simple periodic exercise and may even be automated. By contrast, bad practice with paper records is often far more difficult to detect until a breach occurs. Many service providers we deal with are reliant on paper records but may be considering a move to a paperless environment, so these are all considerations to bear in mind.

## Opportunities for the Legal Ombudsman

The Legal Ombudsman deals with a high level of enquiries and contacts, of which about 7% turn into complaints which are ready for investigation. At the moment, much of the work to respond to these contacts is manual. Some of this work by its nature is time- and resource-intensive, but not necessarily complex. We are therefore currently exploring opportunities that robotic processing can provide at the initial stages of our own processes to realise greater efficiencies, whilst providing accurate and prompt customer service. We live and work in societies where we all expect a quick turnaround and response to our enquiries. We need to make sure we are able to keep up with these societal expectations of customer service – at least from the first point of contact.

One of the areas under consideration is automated case creation and assessment – in which all incoming email and document streams are dealt with using robotic processing. This system could also be employed in order to create new case files automatically within our case management system in response to incoming correspondence.



The efficiencies realised through use of this technology could result in staff being freed up to work on other tasks and cases which are slightly more complex, and to quality-check and assure the processing itself. This technology is already in action with other organisations – Cafcass currently provides around 60,000 court applications through robotic processing.

The other area under consideration is automating decisions about risk and complexity of cases, which then enables us to identify which of our staff groups should be investigating the case. Automating this area of work would mean things move more quickly through our process and would free up staff to focus on the investigation of complaints.

As thinking on these areas develops, this technology could then potentially be exploited in other areas of the business. Machine learning could be employed to identify patterns and trends between complaints made and outcomes reached and support the Legal Ombudsman’s objective to share learning and insight from cases with the profession. The technology could be used to suggest outcomes and make recommendations for resolution, based on the trends and correlations identified in existing data sets.

As we look into areas all of this, our decisions about whether to co-opt these technologies focus on two key questions: will it support and improve the service we deliver, and will it enable us to resolve complaints effectively? It is important to remember that effectiveness is not always about speed; it is also about accuracy and freeing people up to undertake the complex elements of our work, and to have the time to build relationships that can ultimately support the resolution of complaints.

*Stephen Ward*

## Clerksroom

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Clerksroom Barristers Chambers is a technology enabled Barristers chambers operating online, in the cloud, and has adopted the use of automation where possible. Our stated mission is to improve access to justice by using technology. Clerksroom currently provides Barristers (Advice & Advocacy) to 20,000 lawyers in England & Wales. Our members attend an average of 1,500 court hearings a month and provide advice and drafting for another 1,000 cases. Clerksroom also offer the largest public access portal for members of the public to obtain legal services directly from Barristers. Our portal has now managed over 10,000 instructions, has a 64% overall conversion rate from enquiry to instruction and has 1,000 public access qualified Barristers using the system from 250 chambers in England & Wales. Our services are regulated by the Bar Standards Board.

Clerksroom has no planned intention to use Blockchain technology, other than to consider its potential use for conditional fee agreements that self-execute depending on a final outcome of a judgement, or where there are circumstances where the conditional fee agreement might become determined due to other external circumstances. Blockchain might be a possible use of this technology.

Artificial Intelligence is an interesting term as the industry seems to be divided as to what it means with no clear definition in use that we can see. True artificial intelligence self learns and therefore once learned, it is no longer learning so no longer artificial intelligence. I struggle to see how a computer system can continue to self-learn without 3rd party intervention, checks and balances and continuous improvement. What I can see being used in the short to mid-term future of 1-5 years is the growing use of big data analysis and highly complex algorithms that enable complex calculations, checking of vast amounts of historical data to be fed into a decision making process and providing an instantaneous answer to the question. At Clerksroom, we are looking at ways of using our 18 years of market data to predict fees, review diaries whilst the question is being asked, work through millions of preferences set by each Barrister, previous booking patterns, geographical maps, train times and other factors that you might need to hand when looking to book the most efficient member of chambers for an enquiry. The system can look through past fee quotes and predict who would be willing to travel to a specific court, on a specific day, at a specific cost, distance or enabled with the correct level of experience, skill and knowledge. Our systems can



already do this, but we need regulatory assistance because the guidance and rules published by the BSB do not provide sufficient guidance as to what level of transparency, reporting and analysis would be needed if someone was to question the logic (algorithm).

If legal technologists want to explore the vast array of opportunity this expanding market has to offer, regulators will need to issue more detailed guidance as lawyers are naturally cautious, so constrained by the current regulatory framework, leaving the void for non-lawyers to come in and disrupt the market without full regard to the regulations. My assumption is that it will then become harder for regulators to regulate if the technology is not understood. I also fear that there will become more and more issues where innovators will not wish to explain algorithms as they will be protected IP. In my view, legal services regulators can support responsible technological innovation by engaging with innovators and building a growing environment of collaboration, engagement and support. The current situation of submitting a question and waiting 6 months for a response does not support innovation or technological advance as the industry moves much faster than that.

## Please note

I am a Barristers Clerk with 34 years' experience in Chambers, I am not a lawyer or I.T. professional.



*Elizabeth Comley*

## Slater & Gordon Group

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### Data Protection Law and the Civil Liabilities Act Reforms in Practice

The causes for preventing access to justice are complex, however the time it takes to deliver, and its cost are mainly driven by its basis in being a human-only endeavour. A key part of unlocking access to justice requires the process to be much faster and affordable. Automation technology is key to making legal services more accessible.

At one extreme, automated decision-making is the process of making a decision by automated means without any human involvement. Current practice requires that we keep a human in overall control, sometimes referred to as a “Human-in-the-loop”, whereby the automation element supports what ultimately remains a human-made or approved decision. Automated decisions enable decisions to be made without the human element allowing businesses to make sense of ever-increasing quantities of data. Technological advancement means they are inevitably here to stay in the business mainstream.

An automated decision might be informed by different data-sets. A decision might be based on factual data: for example, a bank might make a decision as to whether to award you a loan based on your credit history; it might be based on inferred data, such as an aptitude test which uses an algorithm to predict your suitability for a job role; or it might be informed by else digitally created data, for example when organisations obtain personal information about you from a variety of different sources and combine it to predict your spending habits.

As innovations in machine learning and artificial intelligence progress, the need to protect the data used to inform a decision, and safeguard the way decisions are made using a specific data-set must be paramount. Automated decision-making might be intended to lead to quicker, more consistent decisions, but how do we know the decisions made are fair and not discriminatory?

Enter data protection law and ‘the right to an explanation’.

Data protection law recognises that whilst automated decision-making techniques can be useful, there are potential issues. For example, the correlations detected by automated decision-making might well aid consistency in many cases, but these correlations might be meaningless in others and the predictions made by the process might not always be correct. In relation to decisions being made around access to justice, consideration of these potential issues becomes essential

Data protection law requires that, if a solely automated decision might have a legal or ‘similarly significant’ effect on an individual, a meaningful explanation should be delivered as to how a decision has been made and the information it was based on. In the case of solely automated decisions (that is, decisions whereby there is no human element involved in the decision being made at all), individuals can also challenge the decision and request human intervention. Further, if you are collecting and making decisions based on sensitive data categories (e.g. health data), organisations will require your explicit consent to make that decision.

But what does meaningful look like? How far do organisations have to go to ensure your explicit consent is informed, and therefore valid?

The Civil Liabilities Act will prevent law firms from recovering legal costs for lower-value personal injury claims, with those typically being Road Traffic Accident claims. Aimed at clamping down on the whiplash market, it will also lower the tariff limits on the amounts recoverable. So, with less incentive for claimants to make a claim, and far less financial incentive for law firms to handle these claims, personal injury law firms will need to step things up. For consent to be informed – how much does an organisation need to say about the logic used to make the decision?

The ICO offer some guidance. They indicate there is no need to ‘over-complicate’, and recommend you should focus on a high-level description of the type of information you might collect, why it’s relevant and the likely impact.

This, coupled with the GDPR requirement to ensure you have mechanisms in place to diagnose any quality issues or errors should offer the user of an application sufficient comfort. But does it? Perhaps not.

Despite the ICO’s allusion to a simpler explanation, machine learning is inevitably complex, and the ease of explaining it in a way that’s easy to understand represents a significant challenge. It’s well recognised that many machine-learning decisions are in fact a ‘black box’ of complication.

Perhaps it’s the case that organisations have a chance to develop an application that takes privacy concerns into consideration from inception, culminating in something that isn’t a black box, but offers transparency and simplicity with real

insight into the functioning. The development of an application that is accountable is the dream.

In reality, there will always be problems in explaining algorithms... and when we’re talking about access to justice, perhaps it might make more sense to explain the external inputs and outputs of the decision process, rather than all the inner workings of the application itself? Surely this type of explanation would be far more accessible to a potential claimant? A simple call for transparency doesn’t seem enough.

Demonstrating the transparency of automated decisions is difficult: “Neural networks, ..... pose perhaps the biggest challenge – what hope is there of explaining the weights learned in a multilayer neural net with a complex architecture?”

Put simply, organisations “would benefit from common, practical guidance on how to provide assurance to the public, customer businesses and regulators” .

Across the board, developing and establishing standards for explainability in this area would offer huge benefits to organisations and individuals alike. Guidance is essential for those aiming to deliver more accessible services.



Lorraine Robinson

## Farewill

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### Introduction

We'd like to express our appreciation to the Legal Services Board for both undertaking this project and for inviting our submission.

We have reflected on our story so far, and highlighted three areas where we see opportunity for regulation to be more supportive of innovation, namely:

- In certain circumstances, bringing into a regulatory framework otherwise unregulated businesses.
- Supporting multidisciplinary service delivery, including greater division of matters across regulated and unregulated businesses.
- Addressing barriers to start-up investment.

And to begin, here's a little about Farewill, what we do and how we do it.

### About Farewill

Our mission is to change the way the world deals with death.

What pops into your head when you think of death? Tombstones? Top hats? Grey, drab Victoriana?... It's probably not a cheery picture.

All of us are going to die. It's a fundamental, tragic, romantic part of what it is to be human – but the industry that sits on top of it isn't designed to make it easy. We challenge the status quo by building great product experiences that make dealing with death simpler, more personal, fairly-priced and accessible to everyone.

Our services include wills, probate and cremation. We believe that by equipping people to navigate some of life's hardest moments, we bring families together, help individuals face up to the fact that they're going to die, and make life, while it lasts, more meaningful.

We're backed by some of the best investors in the UK (from the founders of Transferwise and Zoopla, to Augmentum, Kindred, JamJar and SAATCHiINVEST), and we're growing at pace.

Since our founding in 2015 we have grown from 4 employees in 2016, to over 50 permanent employees today. We're a diverse team with shared goals and divergent perspectives – we're all pulling in the same direction but each bring something different to the table. Our team includes software engineering, design and user research, brand, acquisition and data analysis, sales and partnerships, customer operations and management functions across operations, legal, finance, talent and governance.

We grew in just over 18 months to become the largest will provider in the UK, now producing one in 30 wills, and we won the National Will Writing Firm of the Year at the 2019 British Wills and Probate Awards. In April 2019, we launched our probate service and in December 2019, we launched our cremation service.



## Our story

### We're stuck in the middle

Let's put it out there: regulation does not guarantee responsibility and equally unregulation doesn't mean irresponsibility.

We offer wills, probate and cremation services. Part of the probate process is a process only regulated businesses can offer (it's a 'reserved activity'). So, to deliver our probate service we have an SRA regulated business in our group.

Practically, the same commercial and ethical principles outlined in our mission above guide decision making across all our businesses, regulated or not. But, as an SRA authorised business Farewill Legal Services must operate independently, and various measures are in place internally to ensure that.

Whichever side of the regulatory line a matter sits it receives the same level of cross-disciplinary and customer-centric design and attention. The structure of our teams delivering wills and probate is not unrecognisable from those operating in many law firms delivering volume legal services: there are solicitors supervising teams of paralegals, but we call our paralegals specialists. What sets us apart is the design and technology we deploy in supporting our teams.

We see an opportunity here for regulation to be more supportive of us, for us to demonstrate our responsibility in delivering services from our unregulated business – for example by having minimum levels of professional indemnity, transparent pricing and a willingness to refer complaints to the Legal Ombudsman – and in return be permitted onto a regulated playing field in doing so.

We do two of the three examples here anyway. The Legal Ombudsman (LeO) is not an option for Farewill as an unregulated business, because the LeO only deals with complaints about regulated legal services.

We are proud to have served tens of thousands of customers to date whilst building a market-leading Trustscore of 4.9 after over 3000 reviews. But, without access to the Legal Ombudsman we've occasionally been unable to forge mutually beneficial commercial partnerships, and therefore reach more customers.

There are alternatives to the LeO: there are trade associations that offer independent complaints handling as a feature of membership. But, we feel our innovative model and level of in-house 'regulated' expertise aligns us more closely with regulated businesses.

Without recognition of our level of responsibility combined with the lack of access to the LeO we're obstructed from competing on a level playing field with regulated businesses.

### Our customers experience an interrupted journey

The only work we do which requires regulation is the preparation of probate papers, and it's only part of getting probate. But, once we're preparing the probate papers the customer passes entirely into our regulated business, Farewill Legal Services.

To deal with the customer from there on Farewill Legal Services must be set up for all aspects of the transaction, from day to day customer interactions to handling payment and fees. And it must do that in an SRA compliant way. That's another business unit and a separate compliance function, to service one element of a larger transaction.

For our customers it operates effectively as one-way street, they're acquired by Farewill, build trust and rapport with the Farewill team and are then referred to another Farewill group business for the duration of the transaction.

To meet regulatory requirements around separate businesses (Farewill and Farewill Legal Services are 'separate businesses' within the meaning of the SRA Standards and Regulations 2019) we have to introduce friction at this point into the customer journey, and at best it's unnecessary and at worst obstructing access to justice for vulnerable customers.





There has to be informed consent to referral, and it doesn't really make a whole lot of sense to them – to be honest it just sounds like a lot of lawyerly red-tape – as it's still a Farewill group business they're dealing with after all. Plus, they're bereaved and just want probate, not a lesson in legal services regulation..

We understand the rationale behind the separate business rules to prevent a regulated business using regulatory credentials to acquire customers and then hive the work off into unregulated businesses. We're different – our unregulated business is the flagship brand, acquiring customers across the group – and the referral is going up, rather than down, the regulatory ladder.

We believe it should be possible for a regulatory framework to operate to support separate businesses to play to their strengths in pursuit of greater access to justice. Farewill is great at technology and customer service and our legal team in Farewill are great at getting probate sorted. There should be a way through the regulatory framework where each can play to their strengths, and the customer gets what they need from the people who do it best.

There are also additional risks and costs to running separate business units with ethical walls between. These costs range from increased handling time, multiple systems and additional training to mitigate risks across the regulatory line, and greater regulatory overheads. They add to our bottom line and reduce the savings we can pass on to our customers.

It would be attractive to us to be able to deliver our entire portfolio of products to customers through one business but we don't think the answer is over-regulation of low-risk legal activities in order to access some sort of regulatory framework. So, we wouldn't want, and don't believe it would be in our customers' interests, to shift our current unregulated work into the current regulatory framework.

## There are barriers to investment

We're committed to delivering lasting change to our sector. It's a tough job, and no-one has to do it. At Farewill we recognise there is a massive opportunity to change an industry that is largely untouched by technological innovation.

However, start-ups need cash to get them started and generally investors are attracted to start-ups who qualify for SEIS or EIS funding schemes. These are Venture Capital schemes designed to help small or medium sized companies grow by offering tax reliefs to new investors.

But, offering as a substantial part of your business "services customarily provided by members of the legal profession" disqualifies your business from either the SEIS or EIS scheme. HMRC's interprets substantial as around 20% of the activities of the whole business.

So, if you want to disrupt services traditionally offered by solicitors you've got an investment problem to navigate first. And, a business less diverse or ambitious in its product offering than ours may struggle to structure their business in a way to attract early investment.

HMRC schemes are therefore effectively shielding services customarily provided by members of the legal profession from venture backed competition, and it's a barrier to technological innovation in the sector.

## Thanks for reading our submission

If you'd like to chat to us about any of the issues raised, please get in touch, we'd love to hear from you.

## Authors' biographies

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**Owen Derbyshire** has a background in communications and technology, and is currently Director and Principal Consultant at Twenty One, a management consulting firm based in Cardiff specializing in digital transformation. He recently served as Chief Executive and Founder at Properr Software Ltd, a venture capital-backed property technology business. Owen also holds a number of non-executive roles, including Non-Executive Director of S4C, the Welsh broadcaster, and a member of the Welsh Language Partnership Council.



**Julia Salasky** is the founder and CEO of Legl (legl.com). Legl simplifies legal services for lawyers and clients, from streamlined on-boarding to more convenient payment options. Julia was a lawyer at Linklaters and the United Nations, where she led on the UN's work on online dispute resolution and published on the topic of digital solutions to consumer legal issues.



**Chris Handford** is Director of Regulatory Policy. He leads the SRA's policy work aimed at ensuring that our regulation assures high professional standards and supports a diverse and innovative legal sector. With 20 years' experience in the legal service sector, Chris was previously Head of Research and Development at the Legal Services Board.



**Felix Brown** is the Policy Officer leading on the research and development of CILEx Regulation's policy positions with regard to LawTech and the future of legal services regulation. He has an academic background in Law and several years experience working internationally at a Beijing-based intellectual property firm. He is particularly interested in how technology can be used to facilitate greater access to justice outcomes.



**Simon Davis** became president of the Law Society of England and Wales in July 2019. Simon studied Law at Oxford and qualified as a solicitor in 1984. He has been a commercial litigation partner at the London office of Clifford Chance since 1994, having joined the firm in 1982. Simon was the firm's recruitment partner between 1995 and 2000 and spent two years as president of the London Solicitors' Litigation Association. Since 2008, Simon has also been a member of the Court of Appeal Mediation Panel. In 2014, Simon was appointed to conduct an inquiry into the circumstances surrounding the provision of potentially sensitive information to The Telegraph by the Financial Conduct Authority ("the Davis Review").



**Dr Birgit Clark** is based in Baker McKenzie's London Office and is the Lead Knowledge Lawyer for the firm's global Intellectual Property and Technology practice group. Birgit originally qualified as Attorney-at-Law in Germany and subsequently as UK solicitor and Chartered UK trade mark attorney. Birgit is an extensively published legal author and commentator with a particular focus on how modern technology interlinks with Intellectual Property law principles.



**Sir Geoffrey Vos** was appointed Chancellor of the High Court of England and Wales on 24 October 2016. He holds responsibility for the conduct of business in the Business and Property Courts and presides in the Court of Appeal. He is Editor-in-Chief of the White Book, a member of the UK Government's LawTech Delivery Panel and chairs its UK Jurisdiction Taskforce. He is Dean of Chapel and Keeper of the Black Books for Lincoln's Inn for 2020.



**Mariette Hughes** joined the Legal Ombudsman as an investigator in 2014. She is currently the Head Ombudsman for operational transformation, which involves identifying learning from our business processes and driving changes to improve our efficiency. She is also responsible for stakeholder engagement, research, feeding back to the profession and policy development, and speaks regularly at conferences and events in the legal sector.



**Stephen Ward** is the Co-Owner and Co-Founder of Clerksroom & Clerksroom Direct. Legal Innovator, Barristers' Clerk, Speaker & Author. His overarching goal is making access to Lawyers in the UK easier with award-winning tech. Focus is on solicitors, businesses and members of the public to find the right Barrister or Mediator in England & Wales for Civil, Commercial or Family disputes.



**Elizabeth Comley** was appointed as Head of Data and DPO at Slater and Gordon earlier this year. Elizabeth is a Corporate and Commercial Lawyer, now specialising in data protection and information security'.



**Lorraine Robinson** is a solicitor and Head of Legal at Farewill. Before Farewill, Lorraine's background was in private client and she spent over 10 years at a top 100 law firm, scaling systems and processes to deliver volume will writing services to tens of thousands of customers of financial institutions. Lorraine is also a member of the Law Society Wills & Equity Committee and full member of STEP and Committee member of STEP Wales.





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