

INNOVATION AND DISRUPTION: EXPLORING THE POTENTIAL OF CLINICAL LEGAL EDUCATION

Mary Anne Noone*

Introduction¹

It's a great privilege to deliver this year's Susan Campbell Oration. I, like many others, had the pleasure of working with Sue on a range of activities. In 2007, Sue conducted a review of the La Trobe Law School Clinical program which was instrumental in helping ensure the program remained an integral aspect of the La Trobe University law course. I hope what I have to say honours Sue's memory and her contributions to legal education and clinical legal education in particular².

My focus in this presentation is on how Australian clinical legal education responds to the various innovations and disruptions occurring in the legal arena. The scope and breadth of innovations is mindboggling. There are many predictions about what the future holds for the legal profession, from gloom and doom to utopia, and there

* Mary Anne Noone is an Emerita Professor in the School of Law, La Trobe University, Australia.

¹ This paper was delivered in September 2019 for the Monash Law School, Susan Campbell Oration, <https://www.monash.edu/law/monash-law-alumni/donations-and-bequests/the-susan-campbell-memorial-fund>

² For example: Susan Campbell 'Blueprint for a Clinical Program' (1991) 9(2)*The Journal of Professional Legal Education* 121 ; Susan Campbell and Alan Ray, 'Specialist Clinical Legal Education: An Australian Model' (2003) 3 *International Journal of Clinical Legal Education* 67; Judith Dickson and Susan Campbell, 'Professional Responsibility in Practice: Advocacy in the Law School Curriculum' (2004) 14(2) *Legal Education Review*, 5; Ross Hyams, Susan Campbell, Adrian Evans *Practical Legal Skills* (4th Edition 2014) Oxford Uni Press; Susan Campbell, *Review of legal education report : pre-admission and continuing legal education* 2006 Victoria. Dept. of Justice.

is a growing body of literature discussing the implications for the legal profession and legal education. In reality, it is impossible to envisage what the legal world will look like in ten years let alone thirty and that poses a real challenge for those involved in legal education, including clinical legal education. How best to prepare today's students for the unknown future?

Given that I have no expertise in digital technology and am certainly not a futurologist my comments relate to those areas about which I have some background: access to justice, social security and clinical legal education. I briefly outline the variety and scope of innovations occurring in the legal world, discuss two related aspects namely access to justice and government decision making, using the example of Robodebt, and then examine the potential for clinical legal education in these disruptive times.

I argue that clinical legal education is well placed to take a more central role in Australian law schools and the training of 21st century legal workers.

Context

Clearly the theme of innovation and disruption extends beyond the legal sector – the current era is sometimes referred to as the fourth industrial revolution³, or the digital revolution. Innovation and disruption are the buzz words of the decade if not the first part of the 21st century.

³ Klaus Schwab *The Fourth Industrial Revolution* 2017 Penguin Books Ltd

If I ask you to think about what disruption means in our times, many would talk about climate change and global warming⁴, others might refer to the threats to our democratic traditions including attacks on the media and journalists, or the erosion of rights under various forms of legislation and shifts in global power. However, that is not the form of disruption I am talking about. My focus is specifically on disruption and innovations in the legal arena.⁵ In preparing this talk, I was conscious that in the audience there would a diverse range of awareness of these developments. Accordingly, I have provided a general outline of the scope of changes. I then identify two specific areas of concerns that warrant caution.

To begin, it is relevant to clarify the terms I am using. Disruptors are innovators, but not all innovators are disruptors. Innovation refers to when a new idea is translated into a new device or way of doing something: new products, processes, services, technologies, or business models.⁶ There is an assumption that innovation is good and represents progress. Most would understand to disrupt is to throw into turmoil or disorder; to interrupt the progress of an event.⁷ However in contemporary usage, disruption most often is about displacing an existing market, industry, or technology which supposedly produces something new and more efficient and worthwhile.

Disruption can result from the adoption of innovations but not necessarily – to

⁴ I will not directly address this but encourage you to have a look at Professor Adrian Evan's recent work in this area: Adrian Evans, 'The climate for whistle-blowing: Climate deterioration will challenge the courage of corporate lawyers' (2017) 27(2) *The Australian Corporate Lawyer* 34-37; <https://www.envirojustice.org.au/projects/growing-the-next-wave-of-climate-justice-lawyers/>

⁵ I am aware of the irony in giving an oration on innovation – an oration is a formal old fashioned concept – should really be something like a 'ted talk': www.ted.com

⁶ <https://dictionary.cambridge.org/dictionary/english/innovation>

⁷ <https://dictionary.cambridge.org/dictionary/english/disruption>

disrupt is to prevent something, especially a system, process, or event, from continuing as usual or as expected. Disruption is at once destructive and creative. The concept of disruptive innovation came from an article in the Harvard Business Review in 1995 relating to markets.⁸ Once upon a time to be called a disrupter was an insult but now for some people and businesses it is a compliment.

In relation to the legal arena, commentators suggest that we are in the throes of seismic change that will disrupt the legal marketplace; both legal practice and legal institutions as we know them.⁹ In an oft quoted prediction, Susskind in 2013, forecast that legal institutions and lawyers “are poised to change more radically over the next two decades than they have over the last two centuries”¹⁰. In the second edition of his book, in 2017, he documents pages of evidence to support his prediction.¹¹

To set the scene for the scope of change occurring, I want to take you back in time - ask you to imagine working in a clinical legal education program or some other form of legal practice in the early 1980s. Students are writing letters in long hand to be typed by the secretary; if they need to do legal research they read a limited number of hardcopy reports/book that might be on hand otherwise they have to travel to the university library, every day a full mail bag of letters and documents is delivered,

⁸ Clayton M. Christensen, Michael E. Raynor and Rory McDonald, What Is Disruptive Innovation? (2015) *Harvard Business Review* <https://hbr.org/2015/12/what-is-disruptive-innovation> : Christensen, C.M. Disruptive technologies: Catching the wave. *Harvard Business Review* 1995, 73

⁹ Richard Susskind, *The End of Lawyers? Rethinking the nature of legal services* (Oxford University Press 2010); Julian Webb, ‘Legal Technology: The Great Disruption?’ in Richard L. Abel et al (eds), *Lawyers in 21st Century Societies*, Vol II, (2020) Oxford: Hart Publishing,

¹⁰ Richard Susskind; *Tomorrow’s Lawyers* (2013) Oxford University Press, p xiii

¹¹ Richard Susskind; *Tomorrow’s Lawyers* 2nd Ed (2017) Oxford University Press p vii-vii

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sorted and another bag collected to be posted, getting a response to a letter of demand could take weeks. The only technology available is a landline telephone, an IBM electric typewriter and a photocopier. There was no internet, no computers, no fax machine, no mobile phones. For some in the room, imagining this scene might be easier than others – that was what Springvale Community Legal Centre (site of the Monash University clinical legal education program) was like when I began working there in the early 1980s.¹²



¹² Kerry Greenwood, *It seemed like a good idea at the time : a history of Springvale Legal Service 1973-1993* 1994 Springvale Legal Service

It is trite to say that in the intervening three decades, the development of the internet and technology has dramatically changed the way lawyers perform their work, has improved efficiency and speeded up processes. Nevertheless, during that time, the nature of the lawyer/client relationship has essentially not changed and our legal institutions have remained largely unaltered. This is despite, the application of competition policy and the shift to independent regulation of the legal profession, growth in large corporate law firms and the globalisation of legal services.¹³ Lawyers maintain their monopoly on the provision of legal services and the nature of the lawyer client relationship remains intact. Lawyers continue to have the same duties to the court, administration of justice and clients as they always have.¹⁴

But as I have already indicated, change is happening and gathering apace if the number of recent keynote addresses by senior members of the legal profession, the conferences, articles in legal profession journals, professional and academic endeavours are anything to go by.¹⁵ All seem to concede that the legal world is in a process of transformation.

¹³ Paula Baron and Lillian Corbin, *Ethics and Legal Professionalism in Australia* (2017) Oxford University Press pp 18 - 26; Vicki Waye, Martie-Louise Verreynne & Jane Knowler (2018) Innovation in the Australian legal profession, *International Journal of the Legal Profession*, 25:2, 213-242.

¹⁴ Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* 3rd Ed (2018) Cambridge University Press; Paula Baron and Lillian Corbin, *Ethics and Legal Professionalism in Australia* 2nd Ed (2017) Oxford University Press.

¹⁵ Thornton, M. (2019) "Towards the Uberisation of Legal Practice", *Law, Technology and Humans*, 1, pp. 46-63; Morry Bailes 'An End to Lawyers? Implications of AI for the Legal Profession', Speech delivered by, President of the Law Council of Australia at the Australian Defence Seminar, Australian Defence College, Canberra, 24 October 2018; Morry Bailes 'The Law and Legal Technology – Our Changing Work Practices', Speech delivered by, President-elect of the Law Council of Australia at the 2017 Australian Young Lawyers' Conference, Sydney; Australian Legal Technology Association <https://alta.law/>; Centre for Legal Innovation <https://www.cli.collaw.com/>; Australian Centre for

Innovation and disruption in legal arena

A measure of the extent of changes used by some commentators is the number of legal tech start-up companies developing. It is suggested there are currently between 93 and 111 legal technology firms in Australia alone and more than 1000 world-wide.¹⁶ I am sure many in the room have read about or attended presentations on one or more aspects of these technological innovations in the legal world. Developments relate both to how legal work is done, the location and form of legal practices and how individuals can access legal information and advice.

Some examples include:

- technology which automates what's called 'back of house' work practices; for instance the production of legal documents; assistance in discovery and legal research, workflow management systems; and document analysis;¹⁷
- front of house examples include legal expert systems and artificial intelligence that provides online targeted and relevant legal information to individuals as an alternative to seeking advice from a lawyer; these may or may not be

Justice Innovation (ACJI) - Faculty of Law <https://www.monash.edu/law/research/excellence/acji> ; Zach Warren, 'The Rising Tech Tide: Australia's Legal Tech Scene is Making Waves' <https://www.law.com/legaltechnews/2019/04/01/the-rising-tech-tide-australias-legal-tech-scene-is-making-waves/?slreturn=20200628005219>;

¹⁶ Jodie Baker 'Australia is leading the legal tech revolution, but what does this mean for lawyers, firms and clients?' January 17, 2019 <https://www.smartcompany.com.au/technology/australia-legaltech-revolution/> ; Susskind above n 11

¹⁷ Julian Webb, 'Legal Technology: The Great Disruption?' in Richard L. Abel et al (eds), *Lawyers in 21st Century Societies*, Vol II, (2020) Oxford: Hart Publishing; R Size, 'Taking Advantage of Advances in technology to enhance the rule of law' (2017) 91(7) *Australian Law Journal* 575

subscription based. This might also involve data analysis (using big data) that can predict litigation outcomes as well as be used in risk assessment;¹⁸ and

- processes like e-Conveyancing minimise the manual processes and paperwork associated with property settlements by enabling the lodgement of documents and completion of financial settlements electronically.¹⁹

A related form of innovation, often enabled by technology, is the rise of new forms of legal practice. This phenomenon called *NewLaw* covers aspects of how legal practices are structured, how and where legal services are delivered, how clients are charged and how lawyers are employed.²⁰ These changes manifest in virtual and online legal practices where all services are provided over the internet; outsourcing or contracting of aspects of legal processes to individuals often in a different country²¹; there is also the application of 'gig economy' principles to legal work where an individual lawyer is contracted to do work for a discreet transaction or section of the work; single principals with panels of freelance lawyers ; "alternative

¹⁸ Lyria Bennett Moses, 'Artificial Intelligence in the courts, legal academia and legal practice', (2017) *Australian Law Journal*, vol. 97, pp. 561 - 574, <http://sites.thomsonreuters.com.au/journals/2017/08/02/australian-law-journal-update-vol-91-pt-7/>; R Size, 'Taking Advantage of Advances in technology to enhance the rule of law' (2017) 91(7) *Australian Law Journal* 575

¹⁹ Rod Thomas, Rouhshi Low and Lynden Griggs "Electronic Conveyancing in Australia – is anyone concerned about security?" [2014] *Australian Property Law Journal* 1

²⁰ Thornton, M. (2019) "Towards the Uberisation of Legal Practice", *Law, Technology and Humans*, 1, pp. 46-63.; Rebecca Lim 'What is a True NewLaw Firm?';2016 <https://insight.thomsonreuters.com.au/legal/posts/true-newlaw-firm>

²¹ For example <https://www.strategicposolutions.com.au/>; Stacey Leeke, 'Legal Process Outsourcing: What You Need to Know' ThomsonReuters – *Legal Insight* 2015 <https://insight.thomsonreuters.com.au/legal/posts/legal-process-outsourcing-need-know>

fee arrangement"/time-based billers fixed fee services; and also multidisciplinary practices.²²

In addition to changes in legal practice and legal work, there are also changes occurring in relation to our legal institutions.²³ Courts are becoming paperless – for example the Australian Federal Court now has an E Court where all documentation is lodged and accessed electronically. As courts gain momentum in their use of technology, there will be a continued expansion of 'e-procedures' such as e-discovery and e-trials in a wider variety of matters²⁴. A related aspect is the development of virtual courtrooms where parties do not need to be all physically present in the court room.²⁵

There is also the development of Online dispute resolution which exists in Australia now outside the court system but developments in Canada and United Kingdom are adopting it as part of formal court systems.²⁶

²² Thornton, above n 15

²³ James Allsop (CJ) , 'Technology and the Future of the Courts' TC Beirne School of Law, Uni of Qld, Special Lecture Series, March 2019 <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20190326>

²⁴ Bennett Moses, above n 18; Size above n 18, p4-6

²⁵ Virtual courtrooms have become more common place in the current Covid 19 pandemic. See <https://www.supremecourt.vic.gov.au/law-and-practice/virtual-hearings>; Anne Wallace and Sharyn Roach Anleu and Kathy Mack, 'Judicial engagement and AV links: judicial perceptions from Australian Courts'2018 *International Journal of Legal Profession*

²⁶ Allsop above n. 23, 7; British Columbia Civil Resolution Tribunal <https://civilresolutionbc.ca> ; Courts and Tribunal Judiciary, ODR Review 2015 <https://www.judiciary.uk/reviews/online-dispute-resolution/> ; Carneiro, Davide ; Novais, Paulo ; Andrade, Francisco ; Zeleznikow, John ; José Neves, 'Online dispute resolution: an artificial intelligence perspective' 2014, Vol.41(2), *Artificial Intelligence Review*, pp.211-240; Tania Sourdin and Bin Li and Tony Burke, 'Just, Quick and Cheap? Civil Dispute Resolution and Technology'2019 19 *Macquarie Law Journal* 17 ; Roger Smith. *The Digital Delivery of Legal Services to People on Low Incomes*. London: The Legal Education Foundation, Annual Report

Perhaps one of the most challenging innovations is the use of Artificial Intelligence (AI)²⁷. As an example in US, AI is used in risk assessment and making predictive decisions in relation to bail, parole and some sentencing decisions²⁸. It is worth noting that at the end of 2018, the European Commission for the Efficiency of Justice published a charter into the use of AI in judicial systems. The charter calls for the adoption of core principles of non-discrimination, transparency, and respect for fundamental rights when AI is used in judicial systems. This charter was formulated in recognition of the changes already occurring.²⁹

Although many sections of the legal profession and legal educators are embracing the technological innovations not all are so convinced that the resultant disruption will bring benefits.³⁰ Any one of the innovations I have listed gives rise to critique, challenges and concerns. In particular much discussion is generated about what is the future of the legal profession, will these technologies lead to a decline in legal work, will there still be a need for lawyers if more non-lawyers are doing legal work and if so, what will be the role of a lawyer.³¹

Summer 2019. <https://www.thelegaleducationfoundation.org/wp-content/uploads/2019/09/Digital-Technology-Summer-2019-v2.pdf>

²⁷ Brian Simpson Algorithms or advocacy: does the legal profession have a future in a digital world?, (2016) 25 (1) *Information & Communications Technology Law*, 50-61,

²⁸ Bennett Moses above n. 18; Allsop above n 23, 8-9;

²⁹ European Commission For The Efficiency Of Justice (Cepej) *European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment* 2013 <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>

³⁰ Thornton above n. 15; Morry Bailes An End to Lawyers? Implications of AI for the Legal Profession, Speech delivered by, President of the Law Council of Australia at the Australian Defence Seminar, Australian Defence College, Canberra, 24 October 2018.

³¹ Susskind above n. 11.

The changes bring with them a range of new ethical and regulatory issues³². I focus on two aspects that warrant vigilance and are not receiving as much critical attention - the impact of innovations on access to justice and the use by government of automated tools to make decisions.

Access to Justice and technology

When I refer to access to justice, I am not just meaning access to courts and tribunals. I take access to justice to encompass how people navigate and are treated in the many transactions (with legal consequences) that comprise everyday life particularly those that are administered or involve government agencies. It is in these encounters that 'equality and inequality before the law' is experienced by most people.³³

Certainly, in Australia we know that access to justice remains problematic for most in the community. Numerous government reports have documented the extent of unmet legal need and most recently the Law Councils Justice Project highlighted significant areas of injustice and limited access to justice. Discrimination is endemic in parts of our justice system: those who are indigenous, poor, disabled, live in rural and regional areas fare worse in accessing justice than others.³⁴

³² Paresh Kathrani (2017) An 'existential' shift? Technology and some questions for the legal profession, 20 (1) *Legal Ethics*, 144, ; Catherine Nunez (2017) Artificial Intelligence and Legal Ethics: Whether AI Lawyers Can Make Ethical Decisions 20 *Tulane. J. Tech. & intell. Prop* 189

³³ Mary Anne Noone & Lola Akin Ojelabi, L. (2020). Alternative dispute resolution and access to justice in Australia 16(2) *International Journal of Law in Context*, 108-127 ; Federal Attorney General's Department *A Strategic Framework for Access to Justice in the Federal Civil Justice System; Report by the Access to Justice Taskforce* 2009 p 4

³⁴ Law Council of Australia, (2018) *The Justice Project Final Report* <https://www.lawcouncil.asn.au/justice-project/final-report>; National Press Club Address 'Justice State

It is relevant to note just over 3 million (13.2%) Australians are living below the poverty line; that's one in eight adults living in poverty. Unsurprisingly, the group of people experiencing poverty the most are those relying on Government allowance payments such as Youth Allowance and Newstart which are notoriously low.³⁵

Innovations in technology, changes to the way legal services are delivered, the growth of virtual legal practice and a wide range of internet-based information and services present many exciting opportunities to enhance access to justice for those currently denied it.³⁶ Australian legal aid commissions and community legal centres are eager to explore these options and have been doing so since 1990s³⁷.

Some recent examples include Justice Connect's commitment to employing digital technology to increase the reach and scale of their legal services (including to regional areas); in a front of house example, they are exploring the role that online self-help resources can play in complementing and enhancing the value of direct legal advice; and back of house, the role that technology can play in reducing the

of the Nation' Speech delivered by Fiona McLeod SC, 14 March 2018

<https://www.lawcouncil.asn.au/media/speeches/national-press-club-address-justice-state-of-the-nation> .

³⁵ Australian Council of Social Service and University of New South Wales *Poverty in Australia 2018* https://www.acoss.org.au/wp-content/uploads/2018/10/ACOSS_Poverty-in-Australia-Report_Web-Final.pdf; please note this research is prior to current global pandemic – recent research suggests the gap between rich and poor is worsening see Australian Council of Social Service and University of New South Wales, *Inequality in Australia 2020*

<http://povertyandinequality.acoss.org.au/inequality/inequality-in-australia-2020-part-1-overview/>

³⁶ Roger Smith. *The Digital Delivery of Legal Services to People on Low Incomes*. London: The Legal Education Foundation, Annual Report Summer 2019.

<https://www.thelegaleducationfoundation.org/wp-content/uploads/2019/09/Digital-Technology-Summer-2019-v2.pdf>

³⁷ Mary Anne Noone (2001), 'State of Legal Aid' 29 *Federal Law Review* 37

burden of repetitive administrative tasks for staff so that they can more efficiently focus their time on the highest impact work.³⁸

National Legal Aid and the Legal Services Commission of South Australia has launched a new online service called 'amica' to help separating couples reach agreements about dividing their property and arrangements for their children. The secure digital service guides couples through a step-by-step process and offers information and support along the way. The technology provides users with templates highlighting parenting agreements that have worked for other couples and artificial Intelligence software can also assess previous family law court decisions to show couples how judges generally treat disputes that are similar to theirs.³⁹

Another example is the development of an online Legal Health Check devised by QPILCH but now readily available on National Association of CLCs website. The aim of this innovation is to assist legal and non-legal workers assess the extent of an individual's legal problems.⁴⁰

There is no end of potential for improving access to justice through digital technology and this is exciting however it is important to remember that those most in need of legal assistance are often also the most disadvantaged. One of the most

³⁸ <https://justiceconnect.org.au/about/digital-innovation/>

³⁹ <https://www.amica.gov.au/>

⁴⁰ <http://legalhealthcheck.org.au/>

significant challenges is how to ensure that the most disadvantaged continue to receive appropriate and targeted legal services.

Research has shown that people with a disability and single parents are twice as likely to experience legal problems; unemployed and people living in disadvantaged housing also vulnerable; and Indigenous people are most likely to experience multiple legal problems.⁴¹

And if we are to rely on the internet for improving access to justice, worth noting UK research that shows those at the younger and older ends of the age spectrum, as well as those with lower education attainment are less likely to use the internet in relation to resolving a legal problem. Surprisingly young people, who we general assume to be the most digitally engaged struggle to interact with the internet as a legal information resource and use the internet without regard to the reliability or quality of the source material or the relevance of jurisdiction.⁴²

According to ABS figures almost 2.6 million Australians 10%, do not use the internet.

Nearly 1.3 million households are not connected.⁴³ Age is a critical factor but factors

⁴¹ Christine Coumarelos, Deborah Macourt, Julie People, Hugh M. McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsey, *Legal Australia-Wide Survey (LAW Survey) Legal Need in Australia 2012* Law and Justice Foundation of NSW

⁴² Catrina Denvir, (2016). Online and in the know? Public legal education, young people and the Internet. *Computers and Education*, 92-93, 204-220; Catrina Denvir, Nigel J Balmer, and Pascoe Pleasence, 'Portal or pot hole? Exploring how older people use the 'information superhighway' for advice relating to problems with a legal dimension (2014) 34(4) *Ageing and Society* 670-699.

⁴³ Australian Bureau of Statistics, 8146.0 – Household Use of Information Technology, Australia 2016-17; Allsop above n 23, 17

like where you live, whether you have a permanent home and whether you are literate are all relevant.⁴⁴

In a further note of caution about the impact of innovation on access to justice, Australian research looking at legal assistance innovations in 1990's, which included provision of information and advice on internet and advice by video links, revealed that many innovations had failed because they were designed more to satisfy the needs of the legal aid service providers than those of their consumers. That research recommended that new services should be designed in consultation with prospective users in order to ensure that their legal needs are most appropriately addressed.⁴⁵

More recently Denvir now at Monash University and former director of the Legal Innovation Centre at Ulster University, argued that in relation to technological innovations – often the developers are more focussed on the solution rather than clarifying the problem being addressed. She argues “there’s plenty of “bandwagon-jumping” going on when it comes to lawtech; “All too often, technology is seen as the answer when we don’t know what the question is”⁴⁶.

⁴⁴ Around 3.7% (620,000) of Australians aged 15 to 74 years had literacy skills at Below Level 1, a further 10% (1.7 million) at Level 1, 30% (5.0 million) at Level 2 (there are five levels). Australian Bureau of Statistics, *Programme for the International Assessment of Adult Competencies, Australia, 2011-12* (2013) <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4228.0Main+Features202011-12>

⁴⁵ Rosemary Hunter, Cate Banks, C. & Jeffrey Giddings, ‘Technology is the answer...but what was the question? Experiments in the delivery of legal services to regional, rural and remote clients’, in Pleasence, P., Buck, A. & Balmer, N. J. (eds.). (2007) *Transforming Lives: Law and Social Process*: The Stationary Office, UK p. 133-160

⁴⁶ Quoted in ‘More universities are teaching lawtech – but is it just a gimmick?’ *The Guardian* 12 Apr 2019 <https://www.theguardian.com/law/2019/apr/12/more-universities-are-teaching-lawtech-but-is-it-just-a-gimmick>

Given that we know that certain groups in our community suffer more from lack of access to justice than others, it is also critical to ensure that the digital revolution does not impact them more than others. For example, where they rely for income and services on government departments and agencies like Centrelink⁴⁷. That brings me to Robodebt .

Automated decision making – Robodebt ⁴⁸

Automated tools are now used to make or facilitate decisions in a range of government agencies, including decisions about welfare, tax, health, visas and veterans' affairs. Bennett Moses notes there are at least 29 Commonwealth Acts and instruments that specifically authorise automated decision-making⁴⁹ however it is not always appropriate for decisions to be made by a computer.⁵⁰ Centrelink's

⁴⁷ <https://www.servicesaustralia.gov.au/individuals/centrelink>

⁴⁸ Since I gave this oration, there have been a number of successful legal appeals against robodebt decisions <https://www.legalaid.vic.gov.au/about-us/news/i-hope-everyone-gets-opportunity-for-justice-win-for-deanna-amato-in-her-robo-debt-test-case> . The Federal Government has apologised to those affected for the 'harm or hurt' caused by the scheme and promised to pay back those who paid unlawful debts: Katherine Murphy 'Scott Morrison apologises for 'hurt or harm' caused by robodebt rollout' *The Guardian* <https://www.theguardian.com/australia-news/2020/jun/11/scott-morrison-apologises-for-hurt-or-harm-caused-by-robodebt-rollout> June 2020. Additionally a class action has been filed against the government <https://gordonlegal.com.au/robodebt-class-action/> .

⁴⁹ Lyria Bennett Moses (2018), 'The Need for Lawyers', in Lindgren K; Kunc F; Coper M (ed.), *The Future of Australian Legal Education*, Lawbook Company, pp. 355 at358

⁵⁰ Commonwealth Ombudsman, *Lessons learnt about digital transformation and public administration: Centrelink's Online Compliance Intervention 2017*

https://www.ombudsman.gov.au/_data/assets/pdf_file/0024/48813/AIAL-OCI-Speech-and-Paper.pdf; Nicholas Diakopoulos "We need to know the algorithms the government uses to make important decisions about us" — <https://theconversation.com/we-need-to-know-the-algorithms-the-government-uses-to-make-important-decisions-about-us-57869>

“Robo-debt” system is a high profile example of what can go wrong with automated decision making.⁵¹

The official name for this system is the Online Compliance Intervention. A computer program at the Department of Human Services, which oversees Centrelink⁵², gathers data from other government agencies like the Australian Tax Office and then compares it with data that people have reported to Centrelink. The system is designed to quickly check whether the income that is reported to Centrelink – used to calculate what benefits an individual is entitled to – is the same as that reported by their employer has to the tax office.

This process is not new and data matching has been in use for some time but what is different now is that after the computer detects a discrepancy, without any human intervention – a letter is sent to the Centrelink recipient asking for an explanation. If the individual does not respond – an automated decision is made to raise a debt. There is no human intervention in this process. I am sure you will be aware, through media coverage of the consequences of this scheme.⁵³

⁵¹ <http://www.legalaid.vic.gov.au/find-legal-answers/centrelink/robo-debts>;
<https://www.abc.net.au/news/2019-06-27/centrelink-robo-debt-system-extortion-former-tribunal-member/11252306>; <https://www.notmydebt.com.au/>; <https://gordonlegal.com.au/robodebt-class-action/robodebt-faqs/>

⁵² Centrelink is the government agency that delivers social security payments and services to Australians <https://www.servicesaustralia.gov.au/individuals/centrelink>

⁵³ For example: Luke Henriques-Gomes, ‘Robodebt official challenged by mothers of two young men who took their own lives’ *The Guardian* 17 August 2020 <https://www.theguardian.com/australia-news/2020/aug/17/robodebt-official-challenged-by-mothers-of-two-young-men-who-took-their-own-lives> ; <https://www.abc.net.au/triplej/programs/hack/2030-people-have-died-after-receiving-centrelink-robodebt-notice/10821272> .

Before the system was automated, only 20,000 interventions were made a year but with automation, the system was running at 20,000 a week.⁵⁴ The Government said it was wrong to characterise these as "debt letters" — Centrelink is just trying to get more information about what's behind the discrepancy. However the new system effectively shifted the onus onto the Centrelink recipient to prove they owed no debt to the government.

There are a range of concerns with the scheme. O'Donovan argued that the Robo-debt system does not comply with administrative law principles such as reasonableness and procedural fairness.⁵⁵ And Carney, in a scathing assessment, argued that Centrelink's "Robo-debt" system is a form of illegal extortion allowed by failings across a "plethora" of democratic and legal institutions. He states that our rule of law institutions have failed to address the illegality of Centrelink's Robo-debt programme and its unethical character. He identifies serious structural deficiencies in the design of accountability and remedial avenues.

It is clear the 'Robo-debt innovation', which likely impacted more on poor and disadvantaged individuals, caused significant disruption, not only to the individuals

⁵⁴ Luke Henriques-Gomes, Robodebt: total value of unlawful debts issued under Centrelink scheme to exceed \$1bn *The Guardian* Wed 10 Jun 2020 <https://www.theguardian.com/australia-news/2020/jun/10/robodebt-total-value-of-debts-issued-under-unlawful-centrelink-scheme-to-exceed-1bn-refund>

⁵⁵ Darren O'Donovan, 'Lawfulness of debts raised through data matching alone' *Submission to the Senate Inquiry into the Department of Human Services' Online Compliance Initiative* April 2017 file:///C:/Users/manoo/AppData/Local/Temp/sub121_O'Donovan.pdf

receiving the letters but also to the broader administrative law system and rule of law principles.⁵⁶

Given that around 50% of Australian households receive some type of a government payment then automated decisions will likely affect many people.⁵⁷ Government views systems like Robo-debt through a budgetary and efficiency lens, however given the significant consequences for individuals and our administrative justice system, a more pertinent perspective should be whether such an innovation enhances or diminishes principles of equality before the law and access to justice. Technological innovations like Robo-debt need to be rigorously scrutinised to ensure that all people but particularly, the disadvantaged and marginalised are not further prejudiced.⁵⁸

Clinical Legal Education and Innovation and disruption

I have given a brief overview of innovations occurring within the legal sector and have identified two aspects that indicate the need to critical analyse these innovations. I now turn to examine what this means for clinical legal education and

⁵⁶ O'Donovan, Darren. Social security appeals and access to justice: Learning from the robodebt controversy [online]. Precedent (Sydney, N.S.W.), No. 158, Jun 2020: 34-39.

⁵⁷ Peter Whiteford 'FactCheck: Is half to two-thirds of the Australian population receiving a government benefit?' *The Conversation* May 11, 2015 <https://theconversation.com/factcheck-is-half-to-two-thirds-of-the-australian-population-receiving-a-government-benefit-41027> ; note this figure has likely increased in 2020.

⁵⁸ Monika Zalnieriute, Lyria Bennett Moses & George Williams, 'The rule of law and automation of government decision-making', (2019) 82 *Modern Law Review*, pp. 425 - 455, <http://dx.doi.org/10.1111/1468-2230.12412>; Monika Sarder 'From robodebt to racism: what can go wrong when governments let algorithms make the decisions' June 2020 <https://theconversation.com/from-robodebt-to-racism-what-can-go-wrong-when-governments-let-algorithms-make-the-decisions-132594>

legal education more generally. What should be the form and content of legal education to adequately equip students to take on legal roles in this 21st century?

Australian legal education has altered little for decades: to be admitted to legal practice an individual needs to complete a law qualification, a period of practical legal training and be a 'fit and proper' person⁵⁹. The period of practical legal training was an area where Sue championed the change from articles to traineeships.⁶⁰

One aspect of the academic qualification that has altered is the proliferation of clinical legal education programs within the degrees. In the latest *Guide to Clinical Legal Education* in Australia, 26 out of 38 law schools offer some form of clinical legal education or experiential learning.⁶¹ Compare this to only three programs in existence in 1991 when Sue wrote her influential article *Blueprint for a clinical program*.⁶²

When undertaking clinical legal education programs, students experience disruption; not in relation to technological innovations but rather through dealing with real clients and real issues and interacting with their clinical supervisors who are their role models of lawyers.⁶³ Their views about law and justice are often 'disrupted'. Students learn about law and its impact on disadvantaged communities;

⁵⁹ S.17 *Legal Profession Uniform Law* 2014

⁶⁰ Susan Campbell [Review of legal education report : pre-admission and continuing legal education](#) 2006 | Victoria. Dept. of Justice.

⁶¹ Kingsford Legal Centre, *Clinical Legal Education Guide 2019-20* Uni of NSW <https://www.klc.unsw.edu.au/sites/default/files/documents/2924%20CLE%20guide-WEB.pdf>

⁶² Susan Campbell 'Blueprint for a Clinical Program' (1991) 9(2) *The Journal of Professional Legal Education* 121

⁶³ Mary Anne Noone & Judith Dickson (2002) 'Teaching towards a new professionalism: Challenging law students to become ethical lawyers' 4 (2) *Legal Ethics* 127

they critique the law and legal system, reflect on their role as future lawyers while developing legal skills⁶⁴.

Clinical legal education programs range from the significant program at Monash Law School where every student who wants to, can undertake a clinical subject and be engaged in providing legal services under supervision to clients⁶⁵, to law schools that have a single elective externship subjects or perhaps a clinical component of a subject in which students undertake a simulated piece of legal work.⁶⁶

The benefits of clinical legal education, a form of experiential education, which is the process of learning through experience and reflection on that experience, are now widely recognised but still clinical legal education remains optional in Australia's law degrees.⁶⁷ Clinical legal education sits on the margins of Australian legal education. I argue it is time to challenge that state of affairs.

There is an opportunity for those involved in clinical legal education to build on the renewed energy and impetus amongst the legal profession, academics and regulators about the future of Australian legal education. ⁶⁸As I am about to outline, Australian clinical legal education is well placed to take a more central role in the

⁶⁴ Adrian Evans, Anna Cody, Anna Copeland, Jeff Giddings, Mary Anne Noone & Simon Rice, (2017), *Australian Clinical Legal Education*, ANU Press

⁶⁵ Monash Clinical Guarantee <https://www.monash.edu/law/home/cle> ; Jeff Giddings & Jacqueline Weinberg, Experiential legal education: stepping back to see the future 2020, in Denvir, C. (ed.). *Modernising Legal Education*. Cambridge UK: Cambridge University Press, p. 38-56

⁶⁶ Evans et al above n 64, p39-66

⁶⁷ Council of Australian Law Deans adopted *Best Practices Australian Clinical Legal Education* in Sept 2012.

⁶⁸ For example Kevin Lindgren, Francois Kunc & Michael Coper (ed.), *The Future of Australian Legal Education*, Lawbook Company 2018

legal education of 21st century legal workers as it already addresses the required attributes of the future legal worker. If law schools are serious about preparing graduates for the unknown future, they need to embed clinical legal education into law schools' curricula.

There are many people questioning whether the current content and form of legal education is sufficient to provide law graduates with the skills and knowledge they will need to work in this rapidly changing legal practice environment.⁶⁹ For example, in 2017, the New South Wales Law Society's report on "The Future of Law and Innovation in the Profession" notes:

In a changing environment, the skills and area of knowledge likely to be of increasing importance for the graduate of the future include:

- *technology;*
- *practice related skills;*
- *business skills and basic accounting;*
- *project management;*
- *international and cross border law;*
- *interdisciplinary experience;*
- *resilience;*
- *flexibility and ability to adapt to change.*⁷⁰

⁶⁹ Pauline Collins 'Australian legal education at a crossroads' (2016) 58 (1) *Australian Universities Review* 30

⁷⁰ New South Wales Law Society, *The Future of Law and Innovation in the Profession* (2017)

Other commentators argue that the “growing impact of IT and the proliferation of legal tech jobs will, counterintuitively, place a heightened premium on “people skills.”⁷¹ The lawyer’s human characteristics will differentiate them from technology. It is posited that there are three kinds of intelligence at work in the legal industry today: intellectual (IQ), emotional (EQ) and artificial (AI).⁷² Each kind of intelligence can be aspects of a student’s learning in a clinical legal education environment.

We know that increasingly law schools are offering a variety of subject offerings focussed on technology.⁷³ For example, at Monash there is a subject called Legal Tech Studio where students work collaboratively to develop a web based application that solves a contemporary legal issue⁷⁴; similar courses are run at Melbourne University ‘Law Apps’ program⁷⁵, UTS’s New Legal Futures and Technology major in its law degree⁷⁶ and La Trobe has a Masters of Law and Entrepreneurship⁷⁷. Although not labelled as clinical legal education, these courses are often based on experiential learning, where students collaborate and work with end user groups otherwise known as clients.

⁷¹ Mark A. Cohen ‘Getting Beyond The Tech in Legal Tech’
<https://www.forbes.com/sites/markcohen1/2019/05/03/getting-beyond-the-tech-in-legal-tech/#29db384216fc>

⁷² Cohen ‘above n. 71

⁷³ Rachel Kessel, ‘Pracademic collaboration: Hacking into the future of legal education’ 2019 44(1) *Alternative Law Journal* 73

⁷⁴ <https://www.monash.edu/study/courses/find-a-course/2021/legal-tech-studio-pdl1031>

⁷⁵ <https://law.unimelb.edu.au/students/jd/enrichment/pili/subjects/law-apps>

⁷⁶ <https://www.uts.edu.au/future-students/law/courses/undergraduate-law/why-study-uts-law/legal-futures-and-technology-major>

⁷⁷ <https://www.latrobe.edu.au/courses/master-of-law-and-entrepreneurship>

However it is argued by several contributors in a recent book on the future of Australian legal education, that it is not enough for students to learn about the scope of technological innovation and that artificial intelligence is changing how decisions are made, it remains critical that human legal analysis is applied to these systems.

Bennett Moses states “all law students need a basic understanding of the technologies that are becoming part of the practice of law and the administration of justice. [but] students need to know how to use them appropriately and in ways consistent with the rule of law and associated values including fairness, natural justice and legal equality.”⁷⁸ She also makes the critical point that legal educators need to make sure that future judges and practitioners remain appropriately sceptical about what precisely new technologies offer them and where their limitations lie, that they do not embrace tools such as risk assessment, predictive analytics and blockchain without understanding the limitations as well as the benefits.⁷⁹ For instance, legal expertise needs to be applied to examine when and how transactions, sentencing decisions, administrative decisions and the provision of target information should be automated, what is the logic and inherent biases in the systems, what regulation is required and particularly, to advocate for remedies when the technology fails. Lawyers need to be able to appeal against inappropriate

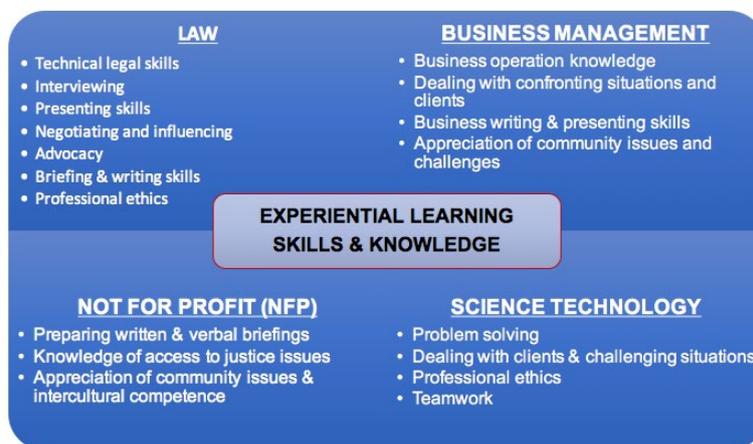
⁷⁸ Lyria Bennett Moses ‘The Need for Lawyers’ in Kevin Lindgren, Francois Kunc and Michael Coper (eds) *The Future of Legal Education: a Collection* (Lawbook Co. 2018) 370

⁷⁹ Above n 78 p 370; See also Allsop above n 23, 18-19 and Nicholas Diakopoulos “We need to know the algorithms the government uses to make important decisions about us” — <https://theconversation.com/we-need-to-know-the-algorithms-the-government-uses-to-make-important-decisions-about-us-57869>

uses of data analytics and expert systems in government decision making. Most importantly lawyers need to be prepared to defend core rule of law values in the face of pressures to embrace innovations and disruption.

So how does clinical legal education fit in? Australian clinical legal education can, and already does, provides many of the skills and knowledge required of 21st century legal workers.⁸⁰ Those involved in clinical legal education will recognise that the desired attributes like emotional intelligence, project management, capacity to collaborate across disciplines and people skills are learning outcomes for many clinical legal education programs.

As an example, the Monash clinical website⁸¹, indicates that this range of skills and knowledge are already to be obtained through undertaking a clinical subject.



Additionally in Australia there is a strong legacy in clinical legal education of critical analysis and formulation of appropriate legislative change and test cases. The location of most clinical legal education programs within community legal centres

⁸⁰ Evans et al above n 64

⁸¹ <https://www.monash.edu/law/home/cle>

has meant that students are exposed to discussions about injustice, analysis of both processes and legislation and potential law reform.⁸² The critical thinking skills that students utilise currently in clinical practices can be equally applied to assessing the advantages, limitations, assumptions and impacts associated with technology in general and artificial intelligences in particular.

Engaged in clinical legal education, students can work with others to identify problems in access to justice and injustice in the legal system and to develop appropriate responses to clients' problems and forms of injustice. Since the 1980s, clinical legal educators like Sue Campbell, have been concerned about ensuring students were aware of the wider obligations of lawyers – emphasising legal ethics and the impact of the legal system on disadvantaged clients and communities.

Australian clinical legal education has a strong history of innovation, often leading the way with new approaches and models of legal practice. As documented by Naylor and Hyams, “clinical legal educators have not been content to rely on tried and tested programs alone. New ideas about different ways to get the most out of clinical legal experience abound” and the examples detailed in that publication include integration of clinic and academic legal teaching; co-location with a welfare agency eg Homeless Persons Legal Advice Service; examining domestic, commonplace legal issues within a human rights framework; development of

⁸² Evans et al above n 64, ch 5 pp 97-122

specialist clinics eg Centre for Sexual Assault, Tax Help Offices; prisoners, law students and theatrical method being used in clinical community development.⁸³

More recent examples include:

- clinics at Monash, Uni NSW and La Trobe have run multi-disciplinary clinics where law students collaborate with students and professionals from other disciplines eg business, social work, financial counsellors, health sciences to provide a holistic service to clients.⁸⁴
- clinical programs at ANU and here at Monash run virtual clinics where technology enables students to provide legal assistance to clients and groups both national and internationally⁸⁵.

As has been the case historically, Australian clinical legal education currently remains interwoven with a concern to improve access to justice and is well placed to encourage students to engage with the types of issues I have outlined above. Over the last three decades, people like Sue Campbell and others, adapted to new forms of technology but they also continued to be innovative in their approaches to learning and modes of service delivery whilst focusing on seeking justice for the disadvantaged; they engaged in critical analysis and modelled what a good and ethical lawyer should be.

⁸³ Bronwyn Naylor & Ross Hyams., (ed) *Innovation in Clinical Legal Education: educating lawyers for the future* (2007) *Alterative Law Journal Monograph* No 1

⁸⁴ Ross Hyams & Faye Gertner., 'Multidisciplinary clinics - broadening the outlook of clinical learning' (2012) *International Journal of Clinical Legal Education*. 17, p. 23

⁸⁵ Les McCrimmon, Ros Vickers & Ken Parish 'Online Clinical Legal Education: Challenging the Traditional Model' (2016) 23(5) *International Journal of Clinical Legal Education* 565.

Conclusion

There can be no doubt that legal practice and how lawyers work will continue to change dramatically over in the coming years. Similarly, how courts and dispute resolution processes function and are accessed will change. Equally we can predict that limited access to justice, attacks on the rule of law like Robo-debt, growing inequality and social injustice will persist. There is enormous potential for those involved in clinical legal education to challenge this state of affairs whilst, concurrently, providing a legal education that prepares agile and resilient graduates for the unpredictable nature of legal work in the future.⁸⁶

Australian clinical legal education is well positioned to take a more central role in the legal education of 21st century legal workers. Those concerned about the future of legal education, should seriously consider how law schools can embed clinical legal education into the legal curriculum.

Irrespective of the changes to the work that lawyers do, how they do it or where they do it, clinical legal educators can continue to cause disruption, not in the contemporary market sense, but rather in the Susan Campbell style, agitating for change within the law school and legal profession, whilst modelling for students how to be access to justice champions, protectors of the rule of law and good and ethical lawyers.

⁸⁶ Jeff Giddings & Jacqueline Weinberg, 'Experiential legal education: stepping back to see the future' in Denvir, C. (ed.) (2020), *Modernising Legal Education*. Cambridge UK: Cambridge University Press, p. 38-56