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Legal Regulation in a Changing World

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2021 Conference of Regulatory Officers (CORO)

Opening Keynote: Legal regulation in a changing world

8 November 2021

Professor Michael Legg*

Abstract

The Australian legal profession is facing change from several directions. Change can be both positive and negative. Steps can be taken to encourage or ameliorate change and the impacts of change. This paper briefly addresses four developments that are the source of change in the legal profession: (1) Remote Working or Working from Home (WFH), including its impact on diversity, wellbeing and professional development, (2) Technology, with a focus on video-conferencing software apps that enabled WFH and artificial intelligence, (3) Alternative Fee Arrangements and (4) Limited Scope Services or Unbundling.

Introduction

Change evokes different responses or feelings in different people.

Winston Churchill said, "*To improve is to change*". Barack Obama, who epitomised change encouraged his constituency to be "*the change that we seek*." In contrast Sheldon Cooper (Jim Parsons), *The Big Bang Theory* (Season 2, Episode 19, originally aired 30 March 2009) said: *No, it's not going to be fine. Change is never fine. They say it is, but it's not.*

A frequent synonym for change at present is disruption. To disrupt is 'to prevent something, especially a system, process, or event, from continuing as usual or as expected'.¹ Disruption can also refer to the displacement of an existing market, industry, organisation or technology with something new and more efficient.² It is both destructive and creative. A past approach is destroyed and replaced by a new and different approach. Disruptions can be broader than a single organisation and affect entire industries or entire professions, and even all of society. Depending on whether you or your legal practice are being destroyed or created you may view change as negative or positive.³

The approach taken here is that change can be both positive and negative, and we need to be aware of both.

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¹ Cambridge Online Dictionary: <https://dictionary.cambridge.org/dictionary/english/disrupt>

² Clayton M. Christensen, *The Innovator's Dilemma: When new Technologies Cause Great Firms to Fail* (Harvard Business School Press, 1997); Clayton M. Christensen, Michael Raynor and Rory McDonald, 'What is Disruptive Innovation?', *Harvard Business Review*, December 2015, 46.

³ For practical frameworks to understand and implement change in a legal organisation and with lawyers especially, see Justine Rogers and Felicity Bell, *Change Leadership for Lawyers* (Law Society of NSW Future of Law and Innovation in the Profession Research Stream, UNSW Law & Justice, 2019).

This paper addresses four trends or developments:

- Remote Working or Working from Home (WFH)
 - Diversity
 - Wellbeing
 - Professional Development
- Technology
- Alternative Fee Arrangements
- Limited Scope Services / Unbundling

Remote Working

In the past decade a multitude of approaches to offering legal services have developed, including 'New Law' or virtual law firms. A common theme in relation to many of those models was remote working.⁴ In a COVID-19 world this has been fully embraced, by necessity for the most part, through the move to working from home or WFH.

Remote working is prized for the flexibility it affords lawyers, its ability to cut or end travel time, to reduce office overheads and end the 'tyranny of distance'. Lawyers can choose when and where they work, subject of course to employer and client needs. More hours can be devoted to doing productive work rather than sitting in a car, bus or train. Alternatively, those time savings can allow for time with family or for recreation. Commercial office space can be replaced or downsized. It also means that the client can be anywhere. Depending on the type of law practiced and having the necessary bar admissions a lawyer could offer their services in multiple jurisdictions without needing to be physically there.

These advantages were experienced by the many, rather than the previous few, engendering greater discussion about how a lawyer could practice. WFH did not just change the physical view, it prompted a change of point of view.

However, it also important to be cognisant of the negative aspects of flexible or remote working. It may also bring about surveillance, the evaporation of the private/work sphere distinction, and the temptation to overwork.⁵ This was already occurring with the 'always-on' worker that was tied to their mobile devices, but now employers and clients know work can be completed from home.

Concerns about overwork have been voiced in the traditional office environment.⁶ Flexible work arrangements create the risk that such over-work is not brought to the attention of employers or managers and therefore escapes detection.

⁴ Law Society of NSW, *Future of Law and Innovation in the Profession Report* (2017).

⁵ Marina Nehme and Felicity Bell, *The Future of Legal Service Delivery – Sources of Innovation in the Legal Profession* (Law Society of NSW Future of Law and Innovation in the Profession Research Stream, UNSW Law & Justice, 2021) 48.

⁶ Natasha Gillezeau and Elouise Fowler, 'What it's like working as a young corporate lawyer at a top tier firm', *The Australian Financial Review*, 24 January 2019; Sarah Thompson, Jemima Whyte and David Marin-Guzman, 'King & Wood Mallesons investigated for overworking employees', *The Australian Financial Review*, 11 October 2018; Jerome Doraisamy, 'How G+T is responding to the SafeWork NSW notice', *Lawyers Weekly*, 9 December 2018.

Diversity

The pandemic has highlighted the need for a continued focus on diversity. The pandemic has impacted members of the profession unequally, just as it has impacted particular people and businesses differently.

McKinsey & Co has reported that “the virus is significantly increasing the burden of unpaid care, which is disproportionately carried by women” and impacts their ability to undertake pre-existing commitments.⁷ The Productivity Commission similarly reported “Working from home was not associated with a more even distribution of unpaid work in the home”.⁸ Home schooling is a particularly salient issue as parents who were required to home school their children during the pandemic needed to juggle the new role of teacher in addition to work demands. Empirical research has found that home schooling particularly impacted mothers.⁹

Being able to work from home can assist with care-giving as it allows a person to be present for the people they are caring for while still being connected to their paid employment. WFH can assist in preventing the loss of a diverse workforce. Indeed “the pandemic has reduced any negative stigma around flexible working”.¹⁰

Equally, the negative aspects of flexible working can also impact diversity. WFH can fray the boundary between work and home life so that flexibility actually becomes greater work commitments.

Wellbeing

The wellbeing of the legal profession has been a hot button issue for some time, given studies showing high levels of stress and depression among both members of the practising profession and among law students.¹¹

WFH is not all rose gardens and walks on the beach – in between zoom meetings. The measures taken to avoid the spread of COVID-19, including isolation, have been said to have impacted the mental health of citizens around the world. People, including lawyers, need personal connections. This is especially the case for the new lawyer who is just starting to build their professional network. Not just for business contacts, but to be able to share the ups and downs of life in the law.

⁷ See Anu Madgavkar, Olivia White, Mekala Krishnan, Deepa Mahajan, and Xavier Azcue, *COVID-19 and gender equality: Countering the regressive effects*, McKinsey & Co, 15 July 2020.

⁸ Productivity Commission, *Working from home: Research paper* (Commonwealth of Australia, 2021) 80. See also Jennifer Venis, ‘The COVID Conundrum – Has the Pandemic Tipped the Scales of Gender Equity Backwards?’ (2021) 83 *Law Society Journal* 42, 44.

⁹ Nino Bariola and Caitlyn Collins, ‘The Gendered Politics of Pandemic Relief: Labor and Family Policies in Denmark, Germany, and the United States During COVID-19’ (2021) 65 *American Behavioral Scientist* 1.

¹⁰ Venis, above n 8, 46.

¹¹ See the literature collected in Michael Legg, Prue Vines and Janet Chan, *The Impact of Technology and Innovation on the Well-Being of the Legal Profession* (Intersentia, 2020).

According to the American legal profession's National Task Force for Lawyer Wellbeing, troubled lawyers can struggle with achieving even minimum competence, and disciplinary proceedings and malpractice claims against lawyers can arise from substance use or depression.¹²

Equally, there are cautions against seeing wellbeing issues only as individualised or medicalised problems, and a general acceptance that legal workplace cultures or environmental factors have a key mediating role to play.¹³ Wellness is, or needs to be, a focus for lawyers, law practices and professional associations.¹⁴

What regulatory steps can be taken? The ABA puts forward a number of recommendations.¹⁵ One is to modify the Rules of Professional Responsibility to endorse wellbeing as part of a lawyer's duty of competence. For example, California's Rule of Professional Conduct 3-110, defines "competence" to include the "mental, emotional, and physical ability reasonably necessary" for the representation. While this directs attention to the link between wellbeing and a lawyer discharging their professional obligations, it does not address the underlying problem. Consequently, further steps such as education and the availability of assistance are crucial. The ABA also states "Discipline does not make an ill lawyer well. We recommend that regulators adopt alternatives to formal disciplinary proceedings that rehabilitate lawyers with impairments".¹⁶

The aim here is not to recommend any particular step or to evaluate steps that have been taken, but instead to highlight the impact of the pandemic on lawyer wellbeing as an issue that adds to past concerns.

Professional Development

Lawyers are typically required to undertake continuing professional development as a condition of practicing.¹⁷ Professional development is also highly desirable from the perspective of law firms wanting to ensure their lawyers are adequately equipped to provide legal services. Law firms need to be able to build and maintain their culture, particularly among new lawyers and lateral recruits, as well as disseminate know-how in relation to practical skills. Individual lawyers also want access to professional development opportunities to be able to learn and progress.

¹² American Bar Association National Task Force on Lawyer Well-Being, 'Creating a Movement to Improve Well-Being in the Legal Profession' (Report, 14 August 2017) 8.

¹³ Janet Chan, Suzanne Poynton and Jasmine Bruce, 'Lawyering Stress and Work Culture: An Australian Study' (2014) 37(3) *University of New South Wales Law Journal* 1062.

¹⁴ Deborah Hartstein and Justine Rogers, 'Professional associations as regulators: an interview study of the Law Society of New South Wales' (2019) 22(1-2) *Legal Ethics* 49, 81-2 (for a discussion on the Law Society's wellbeing programmes).

¹⁵ American Bar Association National Task Force on Lawyer Well-Being, above n 12, 25. See also the resources at https://www.americanbar.org/groups/lawyer_assistance/task_force_report/

¹⁶ *Ibid* 29.

¹⁷ See eg Legal Profession Uniform Law (NSW) s52 ("It is a statutory condition of an Australian practising certificate granted in this jurisdiction that the holder must comply with the applicable requirements of the Continuing Professional Development Rules."); For a discussion of continuing professional development, including the professional association's role in it, and lawyers' perceptions of it, see Hartstein and Rogers, above n 14, 75-76.

Remote working, and in particular the technology that facilitates it (which is discussed below), can make a wide range of recorded and live online materials available. Indeed, entire conferences have been delivered online.

However, remote working creates a challenge for some forms of professional development. Young lawyers undertaking tasks for the first time may worry about how they will get guidance and feedback as they go. Equally the learning that comes from being in the room with the experienced supervisor for the sotto voce comments and picking up on how they do things are important developmental steps that WFH restricts. Research on WFH has found concerns that employees miss out on unplanned face-to-face interactions with decision makers and are 'out of sight, out of mind' so that when opportunities arise, they are unevenly distributed, with in-office workers having an advantage.¹⁸

The office may need to be compulsory for some in person training or team building events. Even then informal learning can be lost.

More generally, support for the value of human interactions from an economic perspective comes from the continued concentration of economic activity in particular cities like San Francisco, New York, London, Tokyo and Sydney. By allowing knowledge workers to interact there are synergies and serendipity that can arise outside the formal online meeting. As *The Economist* explained 'Productive contacts between people grow exponentially with the numbers gathered in one place'.¹⁹ The advent of WFH raises whether online communities can provide these interactions. But it seems more prudent to create space for lawyers (and clients and other professionals) to interact informally because this is where unexpected collaborations can arise.

Supervision

One approach to addressing the negative concerns associated with remote working that are discussed above is through supervision.

Supervised legal practice is mandatory for new members of the legal profession.²⁰ Rule 37 of the Australian Solicitors' Conduct Rules 2015 provides

'[a] solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter.'

Reasonable supervision is not defined and will vary according to the employee's experience, qualifications and role and with the type and complexity of the work delegated.²¹

Supervision includes ensuring that the lawyer understands their role, including the limits of their role and authority, can seek advice on matters (legal and ethical) they were unsure about and understood the internal operation and controls in the law firm. It is about monitoring to avoid

¹⁸ Productivity Commission, above n 8, 85.

¹⁹ 'Zoom and Gloom', *The Economist*, 8 October 2020.

²⁰ See eg Legal Profession Uniform Law (NSW) s 49.

²¹ *Legal Services Commissioner v Michael Vincent Baker* [2005] LPT 002 at [42]; GE Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 6th ed 2017) [20.205].

errors and feedback to aid in learning and improvement. Even if supervision was not mandated it would be good practice, both in terms of law firm management and staff retention, to undertake it.

The remote working environment creates challenges to supervision.²² However, an approach that involves regular, planned interactions as well as ensuring that the supervisor is readily contactable by the supervisee when needed, allows for supervision to continue. The above concerns about overwork, isolation, wellbeing and professional development need to be part of the conversation. Both supervisor and supervisee should be raising these issues. Equally, if WFH is part of flexible working rather than mandated by government stay-at-home orders then some in office contact should be included to enable the concerns to be responded to and ameliorated.

Technology

Technology is a recognised driver of change in society and business.²³ Consequently, it is not surprising that technology should impact the legal profession.

Before the pandemic there was great interest in a range of new technologies, or technologies being used for new purposes, in the legal field, including mobile technology, big data, the internet of things and artificial intelligence (AI). But actual technology use remained uneven across the legal profession.

The pandemic made mobile technology and video-conferencing software apps such as Zoom, Cisco Webex and Microsoft Teams essential business tools. The International Legal Technology Association's 2020 annual technology survey reported that in 2017, 5% of respondents said they used Zoom for video conferencing while in 2020 that figure was 71%. Microsoft Teams saw a jump from 12% to 48% and Cisco Webex from 24% to 30%.

These apps have been used for internal team meetings, client meetings, negotiations, witness interviews, mediations and even court hearings and trials. The mass adoption of these apps by almost everyone in the profession so as to be able to keep practicing has resulted in broad-based upskilling. Lawyer's success in mastering this new technology should give them confidence to try other technologies that can assist their practice.

However, using technology is not just about having the confidence to try something new. It is arguably a requirement for legal practice.²⁴

For example, rule 4 in the Australian Solicitors' Conduct Rules 2015 provides:

4.1 A solicitor must also:

²² See eg Law Society of NSW, Remote Supervision - Guidelines for completing supervised legal practice available at <https://www.lawsociety.com.au/news-and-publications/news-media-releases/impact-covid-19-legal-profession/remote-supervision>

²³ R A Buchanan, *The Power of the Machine – The Impact of Technology from 1700 to the Present* (Penguin Group, 1992); M Fichman, *Science, Technology and Society – A Historical Perspective* (Kendall-Hunt Publishing Company 1993); R Voti, *Society and Technological Change* (Worth Publishers, 5th ed 2006).

²⁴ See Justine Rogers and Felicity Bell, 'The Ethical AI Lawyer: what is required of lawyers when they use automated systems?' (2019) 1(1) *Law, Technology, Humans* 80; Michael Legg and Felicity Bell, *Artificial Intelligence and the Legal Profession* (Hart, 2020).

4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client,

...

4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible,

...

Competence - Competence may be defined as having knowledge of the law and being able to use the law (both substance and procedure) with skill to solve problems. It refers to technical proficiency.

It involves effectiveness and efficiency – the rule refers to diligently and promptly – achieving an outcome in a timely and cost effective manner.

The impact of technology on the functioning of law and the legal profession was highlighted by the American Bar Association when it approved changes to the Model Rules of Professional Conduct. Rule 1.1, Comment 8 was added to make clear that lawyers have a duty to be competent not only in the law and its practice, but also in technology. Comment 8 provides:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

In jurisdictions outside the US where there is no specific rule or commentary addressing technology the general requirement of competence may nonetheless be viewed as including competence with technology.²⁵

This argument can be made on the basis that it is not possible to carry out legal representation without being able to use technology.

A straightforward example is legal research before and after the rise of electronic databases, the internet and various forms of search – keywords, connectors (ie AND, OR) and natural language. The way a lawyer finds the law has changed and with it the way a lawyer must think about finding the law. The lawyer that only relies on the textbooks, legislation and case law (including citators) physically in their office cannot be as comprehensive as the lawyer with access to online databases. However, the effectiveness of using those online databases requires knowledge of how to search.

What does competence mean in relation to technology? It is the lawyer being able to:

- choose technology that is fit for purpose.
- use the technology correctly.
- understand the risks associated with technology
- challenge or interrogate technology eg AI tools such as Robodebt or AI used for sentencing criminal offenders.²⁶

²⁵ Legg and Bell, above n 24, 292.

²⁶ Ibid, 296-297.

Importantly, lawyers can get help. Lawyers can retain experts, such as third party provider of technology assisted review for discovery to assist them. Lawyers can also undertake training, including as part of continuing professional development, to acquire the skills to be competent with technology.

Duty to Client - The duty to the client is typically characterised by requirements of loyalty, partisanship and acting in the client's best interests.²⁷ The lawyer is required to put the client's interests before their own, although the lawyer is permitted to charge a fee for the services they provide.

Technology may improve the quality and/or efficiency of the lawyer's work. This can mean a better result for the client.

Technology can assist the lawyer in promoting the client's interests by bringing about the outcome the client seeks – resolving a dispute or bringing a transaction to successful completion. For example if machine learning aids in finding the key documents in litigation or as part of a due diligence then acting in the client's best interests requires the use of the AI tool.

Further, AI can save so much time that lawyers would be unethical to bill for doing these tasks manually or using (for example) inferior technology. Failure to use technology may result in overcharging.

Put in the converse – it is not in the client's interest to conduct representation in a way that is incomplete or takes more time and cost because the lawyer cannot use readily available technologies.

Technology also gives rise to certain risks.

A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement, subject to specified exceptions.

The issue of technology and confidentiality has been considered in a number of contexts, namely the use of mobile phones, email, wireless technologies (such as public wifi) and data storage in the 'cloud'. It also arises in relation to AI.

The issue in relation to AI is that client (or law firm) communications, including electronic versions of documents, may need to be analysed by the AI as part of its use. Machine learning applications generally require a volume of data in order to be trained, so the status of this data must be clarified in order to maintain its confidentiality.²⁸

Related to confidentiality is security.

For example, the use of video-conferencing software apps saw the advent of "Zoombombing" – uninvited persons attending a meeting on Zoom to either surreptitiously listen in or to disrupt the meeting. For lawyers the concern is that confidential and privileged communications may be

²⁷ Andrew Boon, *The Ethics and Conduct of Lawyers in England and Wales* (Hart, 3rd ed 2015) 333; Dal Pont, above n 21, 113-114.

²⁸ Roy Simon, 'Artificial Intelligence, Real Ethics' *New York State Bar Association Journal*, April 2018.

accessed, including being recorded. Zoom has taken steps to improve security but lawyers must be aware of the risks in all such software and address them.²⁹

On 30 August 2021 the Australian Cyber Security Centre issued an alert that "Cybercriminals are targeting the property and real estate sector to conduct business email compromise scams".³⁰ Lawyers are key intermediaries in property transactions and need to be taking steps to avoid harm to their clients and themselves from such scams.

Putting in place technological tools but also training and risk management practices to guard against such harm is in keeping with competence and the duty to the client.³¹

Alternative Fee Arrangements

Changes in client demand, increased competitive pressures on law firms and advances in technology has seen law firms put forward innovative methods of charging. These innovative methods of charging have been termed Alternative Fee Arrangements or AFAs.

An AFA is a fee arrangement that is not based on hours multiplied by rates ie not the billable hour or time-based billing. AFA's include fixed fees which have been embraced in areas such as conveyancing and wills, subscription fees (modern versions of a retainer) which are being utilised by New Law, and contingency fees.³²

Innovation in charging and costing, like innovation in legal practice generally, is needed to allow lawyers to deliver efficient and effective legal services. This should be advantageous to both lawyers and clients. However, where does the line get drawn in relation to fostering innovation in charging?

Re-regulation can be very contentious. For example legalising contingency fees (which has occurred in relation to class actions in Victoria)³³ can assist with access to justice by allowing lawyers to take on the risk of an unsuccessful action, but if they were to be used to allow lawyers to simply charge higher fees for doing the same legal work such change is disadvantageous for society. However, there are also more moderate changes such as facilitating the use of legal methods of charging such as fixed fees and subscription fees but in a broader array of legal services.

However, not responding to change can stall that change. There is currently an issue in trying to use more creative costs arrangements when legal system structures are not designed to accommodate them or how they will accommodate them is uncertain.

For example, in litigation where some form of AFA is used it may be difficult for a court or costs assessor to understand or determine what is fair and reasonable. The billable hour is so pervasive

²⁹ Michael Legg, 'OK Zoomer: The impacts and future of working from home' (2020) 73 *Law Society Journal* 77.

³⁰ <https://www.cyber.gov.au/acsc/view-all-content/alerts/property-related-business-email-compromise-scams-rising-australia>

³¹ Simone Herbert-Lowe, 'Solicitors' duties in the digital era – is there a duty of technological competence' (2021) 82 *Law Society Journal* 84, 85.

³² Michael Legg, *The Sustainability of Law and Lawyers – Costs and Fees: A Primer* (Law Society of NSW Future of Law and Innovation in the Profession Research Stream, UNSW Law & Justice, 2020).

³³ *Justice Legislation Miscellaneous Amendments Act 2020* (Vic); Michael Legg, 'Class Actions Fee Shakeup' Jan/Feb 2020 *Law Institute Journal* 68.

that there are no reference points in relation to an AFA. For example a firm might agree a flat fee for a portfolio of cases – some resolve quickly and some go to trial – but the firm charges the same amount for every case. The client has certainty and the firm takes on the risk/upside of cases taking less or more time/resources. However, if a costs order is made in the client's favour what is the amount of costs that the losing party must pay? Similarly, if there is a dispute between the client and their own lawyer about costs how does a costs assessor determine the amount to be paid in this circumstance.³⁴

These uncertainties push a lawyer towards the status quo of the billable hour. However, it might be asked how it is that an hourly fee or the hours charged can be justified as fair, reasonable and proportional if with the use of technology, the cost of the service could be reduced. Relying on the status quo may not be as safe as assumed.

Limited Scope Services / Unbundling

A related reform that could facilitate the use of AFAs for both clients with limited economic resources, thus facilitating access to justice, but also for commercial clients, is limited scope services.³⁵

Limited scope services, also called unbundling, à la carte legal services, discrete task representation, or disaggregated legal services, is a form of delivering legal services that involves breaking down a legal matter into various tasks with a lawyer only providing representation for some or one of those tasks. Examples of limited scope services are: making limited court appearances; drafting some court documents but not being the solicitor on the record; drafting a contract but not negotiating its terms; reviewing a contract but not drafting the contract; and providing an opinion on strategy.

Unbundling facilitates the provision of legal services to clients with limited economic resources. The client simply cannot afford to retain a lawyer for all steps in addressing their legal issue and therefore seeks assistance with only some of those steps. In that context the client acts for themselves on those parts of the legal matter for which the lawyer does not act.

Unbundling may also be employed in relation to commercial applications in response to changes in how corporations and government source legal representation/advice. The drivers of unbundling include businesses utilising their own in-house legal teams for more types of work due to internal expertise and lower costs. Corporate counsel are also prepared to utilise non-traditional legal services providers to undertake specific functions so as to drive down cost or acquire specific expertise, or both.

The link between unbundling and AFAs is that the lawyer in providing specified aspects of a legal service can better identify the cost of that limited service which facilitates charging an AFA such as a fixed fee. Unbundling aims to reduce uncertainty which hampers AFAs. Unbundling and the AFA go hand in hand in meeting the demand for the legal services described above.

However, the regulation, or lack thereof, of limited scope services creates risk for solicitors.

Central to both the effectiveness of providing unbundled legal services and avoiding allegations of professional negligence is to clearly specify the tasks for which the lawyer is taking responsibility.

³⁴ Legg, *The Sustainability of Law and Lawyers – Costs and Fees*, above n 32.

³⁵ Michael Legg, 'Recognising a New Form of Legal Practice – Limited Scope Services' (2018) 50 *Law Society Journal* 74.

The lawyer and client should be clear on what work the lawyer is being retained to undertake and what is excluded. In addition to specifying what is included and what is excluded it has been suggested that the risks to the client that arise from the limited scope should be set out. This may include expressly informing the client that the representation differs from the traditional way in which legal work is done and to describe for the client the steps they may be responsible for.

However concern has been expressed, relying on *Trust Co of Australia v Perpetual Trustees WA Ltd* (1997) 42 NSWLR 237, 247, that while the agreed scope of the retainer is an important factor in determining this duty of care, there remains the risk that a broader scope may be found to exist for the purposes of determining professional negligence, once considerations such as the nature of the task and circumstances of the case are taken into account. For example in *Robert Bax & Associates v Cavenham Pty Ltd* [2013] 1 Qd R 476 the Queensland Court of Appeal found that in circumstances where a solicitor was retained for the purposes of "the preparation, stamping and registration of documents" the scope of the duty "does not depend on advice or information being specifically sought by the client". Rather the lawyer was found to owe a duty broader than the retainer to "ascertain [the client's] understanding of the transactions it was proposing to enter, its commercial aims and the degree of risk it was prepared to take".

The way in which to effectively carry out limited scope services and the risks to be addressed have been the subject of discussion by various Law Societies. For example Queensland and Western Australia have issued guidelines, namely:

- Queensland Law Society, Guidance Statement No. 7 - Limited scope representation in dispute resolution, 8 June 2017.
- The Law Society of Western Australia, Unbundling Guidelines, 9 August 2017.

However, limited scope services are not recognised by legal profession legislation or ethics rules, nor court rules in Australia. The Law Council of Australia has recently invited comments and submissions on a proposal for a new Australian Solicitors' Conduct Rule (Rule 11A – Short-term legal assistance services) that address unbundling in very narrow circumstances. The proposal addresses conflicts of interest where the delivery of legal services is on a limited scope basis where those services are provided as a legal assistance service by or through legal aid commissions, community legal centres and similar organisations or on a pro bono basis.³⁶ The proposal does not address broader concerns such as facilitating limited retainers through addressing the case law above, especially in commercial settings.

An earlier Law Council of Australia review of the Australian Solicitors' Conduct Rules observed:

The Ethics Committee considers that the most significant impediment to the wider use of limited scope retainers/unbundled legal services appears to be court rules which require practitioners to remain on the record during a matter, despite only providing limited and discrete services throughout the matter. The Legal Profession Uniform Law applying in New South Wales and Victoria, legal profession laws in other jurisdictions and the Australian Solicitors' Conduct Rules 2015 do not restrict a lawyer from entering into a limited scope retainer with a client. However, Court Rules in various Australian courts, including the Family Court of Australia, state Supreme Courts and intermediate courts, can act as a

³⁶ The Law Council of Australia, Australian Solicitors' Conduct Rules-Short-term legal assistance services – Public consultation, 6 November 2020 <https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules>

barrier. For example, current general civil procedure rules that require a solicitor to seek leave to cease to act for a party should be reviewed. Changes to such court rules would be likely to:

- open up legal services to those who are not be able to afford all costs relating to retaining legal assistance; and
- encourage lawyers to be involved in pro bono legal services that rely on discrete task assistance.³⁷

If this valuable mechanism for facilitating innovation in the provision of legal services, including supporting access to justice, is going to reach its full potential then the regulators of the legal profession need to provide the infrastructure to promote it. This may include not just expressly recognising limited scope services in legal profession legislation and ethics rules, but also engaging with the courts in relation to court rules. Equally training and guidance are needed.

Conclusion

Change is a normal part of life and in the current context, the legal environment. However, change is rarely neutral. It can be negative or positive.

As regulators who have the ability to promote or stifle change it is necessary to be aware and sensitive to the positive and negative ramifications that change may bring.

But it is also important not to become paralysed or inactive out of concern at making the wrong choice.

³⁷ The Law Council of Australia, Review of the Australian Solicitors' Conduct Rules, 1 February 2018, 60 <https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/review-of-the-australian-solicitors-conduct-rules>