Transcript: Striking the balance: how legal services regulation can foster responsible technological innovation

A discussion between LSB colleagues; Aisling O'Connell, Technology and Innovation policy lead, and Paul Nezandonyi, Head of Communications and Engagement.

Paul Nezandonyi: Hello and welcome to Talking Tech, the legal services board's podcast series on how legal services regulators can develop approaches to regulating how technology is used to deliver legal services. I'm joined by Aisling O'Connell, a regulatory policy manager at the LSB. Hi Aisling.

Aisling O'Connell: Hello.

Paul Nezandonyi: Why don't you begin by telling us a little bit about the LSB's work on technology.

Aisling O'Connell: Yeah, perfect. So, thanks Paul and good to be here to talk about it. Um, so I guess to start off with a bit of context as to why the LSB started doing work on technology and innovation, our work began back in 2019, and really it focused, at the beginning, on establishing an evidence base for regulatory bodies to use in developing their own approaches to the regulation of technology in legal services. So, to do this, we started off by commissioning papers from a range of experts in technology, regulation and legal services, and we also began this podcast, to discuss the challenges and the issues brought up in the papers in a bit more depth. We've also released, um, a range of articles that also, kind of, probe the issues in a bit more detail and look at legal technology and regulation. So, the kinds of things that the-, our work has covered to date has been um, how legal services technology is being used and regulated in other jurisdictions, what lessons we can actually learn in the legal services sector from other sectors, so for example, health and financial services, and whether the current regulatory framework that's in the legal services, Act 2007, um, can actually respond to the challenges posed by technology and innovation. And then we've also looked, I guess, a bit at specific technologies. So, distributed ledger technologies, for example. So, that's things like Blockchain, the challenges they can present for consumers, and also for legal service providers, and then, more generally, the ethical and regulatory challenges that technology poses legal service regulators and providers. So, that's just a bit of, kind of, wider context on the work and on the project to date.

Paul Nezandonyi: So, reflecting on that work, um, why would you say then, um, technology and innovation is important for legal services regulators? And what are some of the benefits that you've learnt about?

Aisling O'Connell: So, in terms of why legal service regulators, um, should care about technology and why it's important, I think technology has the potential to enhance or conversely even be detrimental to the realisation of the regulatory objectives that are in the Legal Services Act 2007. So, for example, technology has the potential to improve access to justice, so can help people access solutions to legal problems in new ways. So, for example, by doing it online, um, you know, consulting with, kind of, providers, that way. On the other hand, there's also the potential for technology, um, to be detrimental to access to justice. So, for example, if technology becomes, um, the only way that a particular service is provided, that could actually cut people out from being able to access that kind of service. So, those are, kind of, some specific examples of how, um, the risks and opportunities, kind of, come to the fore really, in technology in the legal services sector. I think, also, it's probably relevant to point out, um, that we are in the new era of, kind of, COVID-19, and really that's, kind of, been the biggest case study, I suppose, of how technology can be used in delivering legal services, and really probably has pointed to, kind of, some of the benefits, and also some of the risks. So, it really has, kind of, pointed to-, well, you know, if you actually have services available online more people can access them, and they can access them at a time that suits them, they can access them in a way, perhaps, that's more convenient to them and their, kind of, life circumstances.

But, conversely, that also relies on actually having, err, the means to access, kind of, online services. Um, so if you don't have, you know, kind of, digital infrastructure, you don't have broadband to, um, you know, to actually access the service, that can-, that can be a real risk in accessing things. So, those are, kind of, some specific examples, kind of, thinking of the COVID, um, COVID-19 situation. And then I think, more broadly, in terms of the opportunities, um, and risks that technology offers, there's a whole load of opportunities for helping legal service providers do their job, um, more efficiently and better. So, for example, kind of, you know, automated decision making type tools or, kind of, AI type tools, that can help with due diligence and help with, kind of, drawing up contracts and those kinds of things that can actually help lawyers do their job. Um, I guess, kind of, some of the risks and, really, we, kind of, probe that in, um, in some of the papers and in our work, err, around artificial intelligence, for example, there are risks there about, well, actually, if your artificial intelligence tool is trained on a dataset that has biases in it, is that just going to perpetuate biases that then pose more risks to consumers? And actually being able to understand, well, how does that tool work? How did it, kind of, come to decisions? So, there's a lot of, I guess, kind of, theoretical risks and benefits, but also some practical ones that I think people have really lived through in the COVID-19 era.

Paul Nezandonyi: So, um, it was interesting, what you were saying there about bias and, um, the potential risks. So, um, it sounds like there's a lot of diversity considerations that we need to think about when we, um, you know, roll out these new technologies, would you say?

Aisling O'Connell: Yeah. I think that's definitely an element. I suppose with technology in general, you have the specific, kind of, risks and challenges that that technology and it's, kind of, um, purported use can offer then and there. And then there's also the potential ones that we just haven't thought about. Because I think if there's one thing, um, that we can all probably agree on with technology is that we probably won't be using, um, technology in the way that we use it right now in a few years time, or in ten years time, or just in the future. So, actually, kind of, the risks and challenges, there's an awful lot that we probably-, we just don't know yet, they, kind of, haven't come, come to bear. But certainly, kind of, specifically in relation to diversity and inclusion, um, and, kind of, the risks and challenges technology can offer in that space, technology at it's most basic level, um, can potentially help diversity and inclusion, both within the sector, um, kind of, for providers and for consumers. But it can absolutely pose risks. So there is risk of, if you use, kind of, certain technologies, um, in certain ways. So, for example, kind of, using some AI tools and, if they are trained, um, on, kind of, particular datasets. Or if we just don't know, kind of, how they were trained, um, that there's risk or biases around that.

But equally there's opportunities for using technology in ways that mean there's new ways of working, new ways of providing services, and that could actually mean that people look at the legal services sector and, kind of, I guess, the legal profession as a career option, they might look at it and go, 'Oh, I can actually work from home for a portion of the week. That's not something I thought I'd be able to do before. Maybe this is a career that I could consider.' So, I think it, kind of, cuts in lots of different ways, um, and certainly, kind of, one of the-, one of the things that we've learnt in our work is that there's an awful lot more questions, err, remaining, than answers, when it comes to technology. And we just, kind of, need to be cognisant of that fact, and just keep exploring it and, kind of, keep learning more.

Paul Nezandonyi: Very interesting. I think, um, yeah, that point about, we need to keep exploring and learning more, um, I think it's really important. And, so I wanted to ask you, why do you think the legal sector's been slow to embrace technology? If you look at other sectors, like finance, you know, they-, you know, we're all banking online, finances embrace things like Blockchain, but the legal services sector seems to be behind the curve. Any thought on that?

Aisling O'Connell: Yeah. So, I think, um, it's important to say that change has been happening in the sector for some time, that there are examples of, you know, really innovative practices, and legal service providers and others embracing technology to deliver legal services or improve, kind of, um, how they themselves do the business of law. So, that change has been happening. So, I don't think it's probably entirely fair to say that the sector hasn't been embracing it, it has. Um, at a slower pace than other sectors is certainly true, and I think, kind of, you know, one of our papers really probes the, what is it, kind of, in the health sector, and what is it in, kind of, the financial services sector. Um, you know, what's happening there and, kind of, why has it been a bit faster in those sectors. I think there's a few, um, kind of a few issues at play when it comes to why the sector's been slower at adopting technology. I think there's, kind of, a culture piece, um, you know, I think it's pretty, kind of, widely, err, accepted that change is incremental in the legal services sector. Um, that, kind of, you know, the protection of consumers and, kind of, delivering, um, services to a high standard is long-standing within the sector. Which is excellent and really does protect consumers, but that can also can be-, can mean then that new ways of doing things, um, that are untested and that are, um, yeah, new, that they-, that the sector can be slower in adopting, um, those kind of practices and those initiatives.

So, there's, kind of, that piece, which has benefits and also has it's risks. And then, also, I think there's, um-, there's, err, you know, kind of, other, like, practical barriers. So, to adopt, kind of, new technologies, really to, kind of, embrace technology and innovation, first of all you have to have access to those technologies. So, you need, kind of, the digital infrastructure in place, you need, kind of, the investment within legal service, kind of, firms and, um, providers investing in the adoption of technology. And I think COVID-19 is a real example of how making sure you get those basics right, so making sure that you can actually-, you equip, equip people to work from home and to, kind of, do things that way, that's really the first stepping stone. And then, kind of, on the other end of the spectrum, so for, kind of, perhaps more advanced technologies, so for things like AI, (TC 00:10:00) um, and, kind of, automated decision making, I think there's a whole piece around, um, data, kind of, within the sector. And, actually, what is available, what isn't, how open is it, is it a good quality, because we know that AI needs those, kind of, and you know, new emerging technologies, they need good quantities of open quality data, and we don't necessarily have that within the sector. We also don't necessarily have a good understanding of where the actual data assets are within the sector. So, who owns the data? Um, how do they use it? And that's, kind of, one, one strand that we pick up in our-, in our work for-, as part of the next phase of tech innovation.

So, I think there's just a few different issues at play, um, and that, kind of, you can't necessarily tackle just one of them and expect the sector to, overnight, um, become the lead in tech. And then I think the, the final point, probably, to add in as well, um, is around, kind of, the, the regulatory framework and, kind of, the way regulation works, really, within the sector. So, other sectors, like health and financial services, um, you know, they can regulate medical products, that's the kind of framework within, within which they operate. We're a different sector, we have multiple regulatory bodies who work on the front lines. Um, you know, it's a, kind of, title based nature framework, um, not necessarily entirely risk-based. So, those kind of differences can impact, um, even just, kind of, tech innovators being able to navigate the system. I think it's probably fair to say that they can find it confusing on who they should talk to about what, what is the reserve to legal activity, what isn't, um, and who they, kind of, need to talk to and when. So, I think, you know, the legal services regulatory framework, and being able to, kind of, give better information on what it is and, err, all that kind of stuff is an area that, um, has potentially been a barrier for innovators to break in previously.

Paul Nezandonyi: It sounds like, um, there's a lot happening in the sector, and a lot happening, in terms of tech, um, and a lot of it's untested, which, um, might be seen as a-, as a risk to regulators. Um, so how important is it that people start working together and getting around a table to identify

the challenges, and opportunities, and how they'll work together? And, um, who are the people that need to be around that table?

Aisling O'Connell: Yeah. So, I think that's a really good question and I think collaboration and cooperation, um, is really important always, but especially important when it comes to technology and innovation. And one of the things that we, err, found in our work to date is that there are practical steps that regulators can take. And our work, kind of, paints this picture of an ideal regulator and what-, you know, one of the elements in that is really about, kind of, being proactive in engaging with technology. So, what legal services technology there is out there, um, how people are using it right now, and perhaps how and why they're not using it. But also an important part of that is about being cooperative and collaborative, both with other regulators but also, kind of, being cooperative and collaborative with tech developers. So, understanding, um, what it is that they need from regulators. And very often what we have heard, I suppose, is that just an understanding of what regulators do, kind of, what they can help with, what, what they can't, is really, really helpful. So, I think that idea of being, kind of, cooperative and collaborative with other bodies-, I mean, cooperative and collaborative with organisations even outside of, kind of, the legal services sector. So, for example, there are other regulators, um, who aren't legal services regulators, that are really important to talk to. So, the Information Commissioner's Office, for example. We can all learn things from regulators like the Financial Conduct Authority and the approaches they've taken.

And then there are, kind of, specific initiatives that regulators can take. So, for example, things like sandboxes or setting challenges to the sector, to innovators, to, kind of, address this systemic sector issue are really helpful as well. But I think, in the first instance, talking to other legal services regulators, um, and also, kind of, bringing in tech developers, and also academics, um, and other (audio distorts 14.07) expertise, and what the issues are, and how we can, kind of, overcome them. Because I think we-, you know, all of the regulators are facing similar issues, um, and that there's a lot of, kind of, commonality of approach that can be adopted and, you know, resources that can be pooled and expertise that can be pooled in overcoming them.

Paul Nezandonyi: And what-, and what's next for the LSB and, um, technology and innovation?

Aisling O'Connell: Yeah. So, I guess, um, it's important to, kind of, point out that, in tandem to the work that we've been doing on technology and innovation, we've also been doing a lot of work, um, to develop a strategy for the sector. So, in November, err, for example, we published our state of the legal services report, and this really reflected on ten years if independent regulation. And our overall conclusion was that, although there's been many achievements over the last decade, there is a need to reshape legal services to better meet society's needs. So, we spent a lot of this year, um, well, last year rather, 2020, developing a draft strategy for the sector and we encapsulated the challenges facing the sector into three themes, um, and the ideas that these, kind of, three themes will help us reshape legal services to better meet society's needs. So, they are fair outcomes, stronger confidence and better services. And we see technology and innovation as having a really important role to play in overcoming those challenges and, in particular, in helping deliver those better services that society wants and needs. So, our immediate, kind of, next steps in technology is going to focus on, kind of, four areas. So, the first, we kind of touched on already, which is about this enabling cross-sector collaboration. There's some really great initiatives out there right now. So, for example, the Tech Nation Sound Box pilot and the regulatory response unit that's part of that is a really excellent example of how regulators can come together to support and foster innovation.

So, we see real value in continuing to enable that type of cross-sector collaboration, to help address those ethical and regulatory challenges that everyone's, um, grappling with. The second is this piece, kind of, around data. So, exploring how more and better open data can actually be made available in the legal services sector. If we accept, and as we found in our work, that data really is the building block for innovation, how do we make sure that's available for innovators? So that's, kind of, the second area. And then the third is around, um, generating insights into whether emerging uses of technology are ethical and, what we call, socially acceptable. So, this is this idea of technologies being used in a way that's acceptable to citizens and to society at large. And perhaps an example that I think most people might be, um, familiar with would, like, genetically modified, kind of, crops and the potential that that technology was seen to have versus social acceptability and the actual acceptance and trust, really, the people would have had, um, in how that technology was used. So, being able to understand whether the proposed uses of things like AI and, you know, would, err, citizens in, kind of, society be comfortable with going to an AI, um, you know, type software for legal advice rather than a person? And, kind of, exploring that, we see that as really important. And then the fourth one, which, err, is, is going to be really, really interesting, is considering whether the current regulatory framework actually adequately protects consumers from the risks posed by technology.

So, whether, actually, you know, it is aligned to the risks that technology poses or whether there is a consumer protection gap there. So, for example, um, that we know, kind of, from a survey that we did back in 2018, that a lot of unregulated legal services providers are really innovative, but we also know that consumers are not as happy with, um, the service that they receive from those providers. And as we've seen, I guess, through COVID-19, more people and more services are using technology to deliver their services so, you know, the question rises then, is there a growing consumer protection gap between those users of unregulated providers and regulated providers, um, and are-, are those, kind of, consumers adequately covered by the risks that technology poses? So, those are, kind of, the four areas, um, that we're going to focus on. It's the next part of our work.

Paul Nezandonyi: And, so looking forward, what, what are the key changes you would like to see in the sector, with respect to technology and innovation, in, in, say, five years time? What do you think-, well, how would you like to see things looking?

Aisling O'Connell: Yeah. So, I think that's a really good question. Um, and we, kind of-, we try to, I guess, paint that picture of the destination and where we see the sector going to, in our draft strategy. I think it's important to say that, look, the sector will likely look different in years to come, um, and it will also probably, err, look the same in many ways. I think it's important that the sector delivers services that better meets society's needs. That's been very clear. Um, and then, I guess, kind of, in terms of how-, what that would look like and how it could be different, we'd really hope to see a sector where technology is routinely used, um, and where it's, kind of, trusted technologies being routinely used to enable consumers to have more choice in how they access legal services. I also think digital infrastructure and technological skills, um, would likely be, kind of, the core part of the skills that professionals develop and maintain through the course of their career. I think the scope of regulation would mirror the key risks that are actually posed to consumers and to the public interest. And I think there should be a really healthy and, um, active, kind of, culture of innovation and competition within the sector, so that you would see, you know, firms and, kind of, legal service providers engaging with the technologies and, kind of, (TC 00:20:00) using them, and trialling them, and, um, and that kind of thing.

Paul Nezandonyi: Thank you. Um, that's been really, really interesting and lots of food for thought there. Um, if people want to hear anymore, um, what should they do?

Aisling O'Connell: So, I would say first go onto our website, um, and certainly have a peruse of all of the work that we've done to date. So, read through the papers, listen to the-, to the other podcast episodes, were we, kind of, get more into, into the detail of those papers. Um, and then the other thing I would say is, that if anyone's interested in, kind of, reaching out and having a conversation, my contact details are on there. Um, and, kind of, keep an eye on our, our next steps and what's coming up next.

Paul Nezandonyi: Thank you very much.

Aisling O'Connell: Perfect. Thank you.