

Artificial Intelligence (AI) and the Future of Law

AI can perform complex tasks that once required human input. One part of this article was written by a lawyer and the other part generated by ChatGPT. Can you tell the difference?

Will artificial intelligence (AI) engines eventually supplant the hard-working solicitor?
Will AI draft submissions for court, prepare merger and acquisition contracts better than a commercial partner in a national law firm? Can a chatbot replace a human judge? Are these questions already too late?

AI technology has been with us for a while, but easily accessible public-facing platforms like ChatGPT are a potential game-changer for the legal profession and other industries.

We hear news stories about universities expressing concerns regarding the capabilities of AI and the impact on education, as lecturers struggle to differentiate an essay written by a

student and an essay generated by an AI like ChatGPT.

To investigate further, and as an interesting exercise on AI, Brief asked a prominent lawyer to write an article on the topic, "A Short Explanation of Law", and then utilised ChatGPT to generate a second article on the same topic.

Brief now invites you to step into this brave new world. Read both versions and see if you can tell which one was written by a human being.

The answer can be found at the end of this article, with further insights on the writing process and the future of AI in the legal profession in "Behind the Articles".

A Short Explanation of Law – Version 1

There is an air of mystery about law that many lawyers do little to dispel. Perhaps they still

think of themselves as monks guarding the sacred spirit of the common law. In fact, law is nothing more than a tool.

Unfortunately, as will become clear, knowledge of all aspects of law is beyond any one human being. In days when Latin was widely used in law, there was a maxim Ignorantia juris non excusat – ignorance of the law is no excuse. This rule applies today in criminal law. A driver caught doing 70 km/h in a school zone will get short shrift if they attempt to argue lack of knowledge that such behaviour was an offence. An ordinary citizen is presumed to know every aspect of law, breach of which might lead to punishment.

Law has always been complex. The application and interpretation rests on members of society who have devoted themselves to study and achieved recognition of knowledge through exams. They become part of one of the three "Learned" professions: Law, Theology and Medicine. They have been given various names at different times depending on the area of law

chosen by them: Barrister, solicitor, proctor, attorney, notary, advocate, counsellor, Sergeant at law, King's (or Queen's Counsel), Senior counsel, legal practitioner. The generic name is 'lawyer'.

Every society has a set of laws, values, or conventions to govern interaction between human beings. If you live alone on a desert island, you have no need of laws. The moment another person arrives on your island, you must modify your behaviour to take account of their needs and desires so that the two of you may live amicably.

Law is pervasive, like the air we breathe. It governs our everyday life, our relationships, grants permission to undertake certain tasks without penalty. Parliaments of the Commonwealth and States are empowered to make laws for "peace, order (welfare) and good government".

What are the sources of law in Australia?

This is intended to be a brief guide, not a thesis so the sources are limited to two – the common law, sometimes called case law, and statutory law.

Common law

When Australia was colonised by the British, common law was imported and remains an important source of law in Australia and other former colonies such as the USA and Canada.

Common law is judge made law. Two parties are in dispute. A judge applies the law to the particular facts and announces a result. The law the judge applies might stretch from past centuries. The development of common law is like playing with Lego. Piece by piece a structure emerges. After perhaps ten similar cases all decided the same way, a principle may emerge.

A famous example is the snail in the bottle case in the UK where the highest court of the time, The House of Lords laid down a principle of duty of care in negligence that still is followed today in Australia. The law of negligence which we take for granted was still then in development. The principles of duty of care and standards of care were not completely settled. This is illustrated by the judgments. Although 3 law lords found in favour of the Plaintiff Ms Stevenson, 2 eminent Law Lords dissented and would have dismissed her claim. Were they wrong, or was it simply that they applied a different principle? The case-by-case approach of the common law allows development in many directions. By contrast, statutory law, if clear, permits no divergence.

Statutory law

The second source of law is parliamentary

made law, known as statutes or acts – the terms are interchangeable. When a document known as a bill is agreed to by a majority of members of both houses of parliament, and subsequently assented to by the King's representative, the Governor, the bill becomes law and is known as an Act of Parliament.

This is now the main source of law. Whereas a judge's task in a common law case is to find facts and apply a principle developed over the ages by other judges, in a statutory law case, the judge will find facts, if necessary, interpret the statute to see what it means, and then apply the words of the statute to the facts to resolve the dispute.

With the rise of representative democracy, parliaments pass laws on any subject. These may be to regulate a developing issue, to amend the criminal law to deal with a specific threat, to enact promises made at elections.

There is sometimes a tendency to think of legislation – another word meaning statute law – as the solution to any problem. Of course, it is not. Parliaments who attempt to legislate for every situation tend to get into strife. It is courts that must resolve disputes in particular factual situations. As a judge said many years ago, parliament enacts the outlines of the picture leaving courts to colour in the detail.

Civil law and criminal law.

Finally, a word about the difference between civil law and criminal law.

Civil law is the vindication of rights and may be based on the common law, statute law or both.

In civil law, a person comes to court to seek vindication of a right. It might be a right under contract, a claim of a breach of duty of care, a complaint that a government department has acted unlawfully.

Most civil cases are settled either by the parties directly or through mediation. With disputes that proceed to trial, the judge will decide on the balance of probabilities which side's facts resolve the legal issue.

A side note. Many parties will choose to resolve their dispute privately without a judge. Instead they will submit their dispute to an arbitrator appointed by them. This may be useful if the dispute involves complex technical evidence such as a breach of patent or an engineering dispute. An arbitrator does not have to be a lawyer though many are.

Criminal law is different to civil law. The purpose of criminal law is not primarily to resolve disputes but to determine if it is proved beyond reasonable doubt that the conduct of a person has breached a statutory law such as a section of the Criminal Code. If so, the person is to be punished in a manner the

statute permits. The State takes over what might otherwise be a private dispute between offender and victim to keep the peace, prevent retribution and revenge and impose a common range of penalties to inform and deter others.

Criminal law in Western Australia, Queensland, Tasmania, Northern Territory, and the ACT is entirely statutory in the form of a criminal code. In New South Wales, Victoria, and South Australia, while most criminal law is now the subject of statutes, there remains some operation of the common law.

Criminal or regulatory states such as the Work Health and Safety Act prescribe maximum penalties – length of imprisonment or amount of fine, leaving a judge to fix a just penalty within the range the statute allows. The most severe punishment legislated in Australia is loss of liberty or imprisonment.

In an imaginary perfect community citizens would know all the law, rather than the State imposing an artificial and unrealistic presumption of knowledge.

Until we reach that enlightened Shangri La, we will continue to need pilots to navigate us through the complexities of law in the modern age.

Lawyers will always be with us.

Or will they?

Perhaps machine learning will send lawyers the way of the dodo. ■

A Short Explanation of Law – Version 2

Law is an integral part of any human society, no matter where it is in the world. In Australia, law is what keeps order in the world, protecting our rights and freedoms, resolving disputes, and solving problems. But what exactly is law, and how does it work in Australia?

At its core, law is simply a set of rules that govern how individuals and organisations interact with each other, as well as with governments and authorities. Every country has its own system of laws, and in Australia our legal system is based on the English common law system, meaning it is comprised of common law, statutes, regulations and other various sources.

In other words, laws are made with three branches of government – legislature, judiciary and executive – operating together.

The legislature – made up of elected representatives and the Senate – is responsible for creating laws. This includes

enacting acts, setting up a trial process, and creating an appellate system.

The judiciary – made up of the High Court of Australia, state and territory courts – enforces those laws using due legal process.

The executive – represented by the Queen and other ministers – is responsible for carrying out the laws through federal and state governments.

When it comes to day-to-day living, Australian citizens and residents are subject to criminal laws and civil laws.

Criminal law is the branch of law that applies to offences committed against society as a whole. This can include anything from speeding to murder and is usually (though not always) severely punished. Civil law is the branch of law that applies to disputes between private persons or organisations. This can range from family disputes to contract disputes or debt recovery.

In the event of a dispute, both parties can bring the issue before an independent court or tribunal. There, an independent judge or arbitrator can listen to both sides' arguments and ruling based on the facts and evidence before them, as well as Australian law.

The laws and legal system in Australia exist to protect its citizens and residents, promote justice and ensure freedom. Our laws can be complex but, at its core, it's really all about keeping the peace and treating each other fairly. ■



Which version was written by a human?

The correct answer is Version 1.

The first version was written anonymously by a former lawyer.

The second version was provided by Jessica Henderson, a barrister and university lecturer, who utilised ChatGPT to generate the content.

"Behind the Articles" below explores the writing process using ChatGPT, and offers further insights and understanding about the future of AI in the legal profession.

Behind the Articles

By Jessica Henderson

ChatGPT was entirely off my radar until Christmas Day 2022, when my brother drew it to the attention of my family during Christmas lunch. I presumed it was an attempt to tease me. I have prided myself on my command of language from a very early age (not without cause, as my teachers annually assured me). My brother's suggestion that an artificial intelligence could reproduce what I do, only indicated how little he understood about my expertise and what I do for a living.

He was insistent that it was the future of drafting, however, and that it would save me hours of time. He was so touchingly earnest that I gave in and tried it. Not without my tongue in my cheek, at least at first.

"Will AI replace human draftsmen", I asked.

The answer was short, sharp and right to the point.

"AI does have the potential to replace human draftsmen in certain aspects of the job. AI-driven software is capable of creating diagrams and blueprints..."

Diagrams and blueprints. Because if you look at the internet, that's what "draftsmen" means. "Drafting" is not recognised as a literary art by your average internet blogger.

I was reassured that I was still superior to a machine. As if there was any doubt.

After some reflection, however, I reconsidered whether what I do is, in fact, best described as 'drafting'. Unable to immediately think of another description, and conscious of the ticking clock of my lunch break, I asked ChatGPT instead "should I use a lawyer or AI to write to the Court?" After all, what I do is in two parts. I advise, and I persuade. My drafting is made up of both legal knowledge and the under-sung art of rhetoric.

I was advised that "[i]t really depends on your specific situation. If you are dealing with a complex legal issue, it would be best to use a lawyer. AI technology is not yet capable of providing the same level of service as a legal professional. If you are dealing with a relatively minor issue and you are comfortable researching and writing your own legal documents, then you can use an AI service."

A reassuring and indeed an intelligent answer. I was particularly struck by the power of that little "yet". I am a proponent myself of the micro-insertion that can operate so powerfully on the unconscious mind of the reader. ChatGPT was clearly a more formidable opponent than I had given it credit for.

Thus was born my suggestion to Brief

Magazine that we run a little competition. We would set topics for two expert human authors and then ask ChatGPT to write us a corresponding article. See what happened.

The truth is, I am intimidated by the possibilities of AI. Consistent with my life-long determination against unnecessary intimidation (arachnophobia is not unnecessary), I volunteered to learn how to use the AI software myself and set myself the task of producing the best possible articles that I could with it. My brother gave me a quick lesson, and I set about my task.

On the assumption that most people would try the free options first, I started with TinyWow's 'essay writer'. Tiny Wow was the first option that came up on a search of 'free AI essay generators'. I started with its Essay Generator and was asked what I wanted to write.

"A short explanation of law" resulted in a paper that was too generic.

"A short explanation of law in Australia" did not offer any introduction from a global or civilisation perspective. It dove right into the details of the Australian legal system.

"A short explanation of law in Australia with an introduction about the importance of law to civilisations" was too long for Tiny Wow to work with.

I tried "what is law, and how does it work in Australia". It produced a textbook answer, utterly devoid of any personality. Whilst reasonably accurate, it was in the old Encyclopaedia Britannica style and there wasn't going to be any doubt in the reader's mind that it was the AI generated article.

So I tried Tiny Wow's Article Writer (arguably this would have been the better starting point, in retrospect). Instead of asking me for a topic, it asked me for a title. I used "A short explanation of law". It generated heading ideas, which gave me detailed options for the content of the article.

Still no options for style, and the article ended up pretty sanitised.

I gave in and paid for the 14 day trial of AI-Pro ChatGPT.

A little exploration took me to the AI-PRO generator page, which gave me the broader range of options that I had been promised AI chat generators would have.

I asked for "an article for the general public about what law is, with specific reference to the Australian context". On a scale where 0 is logical and 1 is creative I asked for a 0.6. I selected the davinci 003 generator, without any idea what it did. The result was better, but still lacked the tone of a human author.

I tried the 0.8 setting using "Davinci".

"The output for your prompt is too long for us to process. Please reduce your prompt and try again."

I went back to the "davinci 003" and tried "witty article about law in Australia".

At this point ChatGPT advised me that "[w]riting articles requires research and a certain depth of knowledge, which is why it is best left to experts." I was mildly impressed at the display of humility.

It did, however, offer me "a basic overview of law in Australia". It was not sufficient for my needs.

I went back to my original question:

"What is law?"

It went back to its original answer:

"Law is a system of rules created and enforced through social or governmental institutions to regulate behaviour."

I tried asking for "a witty explanation of law" and got:

"Law is like that wild, party-hard friend who always seems to get away with having too

much fun..."

I had that friend. If she's reading this article, she'll know who she is. Again, I was mildly impressed. It wasn't what I was looking for, however.

I tried asking for "a witty essay on what is law". This time I got a roller coaster analogy.

After several more false starts, I hit upon searching "a witty article on what is law in Australia?" The result was better, but just a paragraph.

Finally I set the generator to 0.8 and asked it to "write an article on what is law and how does it work in Australia?"

Success. The result is that which is published.

Perhaps others may find this software more intuitive than I did. I clearly struggled to find the right questions, and I sense that I am only just tapping into the surface of what the software can do. I am also very pressed for time, so I asked ChatGPT to write me an intellectual concluding paragraph to an essay about the future of AI in the legal profession.

"The future of AI in the legal profession

promises to be an exciting one; its potential to improve efficiency and productivity is immense. However, it is important to maintain an ethical and responsible attitude towards its use – AI should be used as a supplement to, not a replacement of, the reasoning that is unique to human lawyers. As technology advances, it is essential that AI is regulated appropriately to maintain respect for the law and the rights of those affected by it. With careful consideration, AI can be an invaluable tool in the legal industry, opening up a world of improved access to justice."

I agree with that assessment. The future of our profession is interwoven with the development of AI in many important ways. Fearing and hating it will accomplish nothing. Working diligently to ensure that we are equipped with the knowledge needed to navigate the AI legal issues will be far more productive. The AI legal landscape will be intricate, and unprecedented in important respects. Lawyers with mastery of the legal issues will be necessary in the litigation that will inevitably arise.

For lawyers, this is not the beginning of the end. It is the beginning of an exciting opportunity. ■