Victorian Law Reform Commission
3/333 Queen Street
MELBOURNE VIC 3000

Dear Sir/Madam

Re: Artificial Intelligence in Victoria's Court and Tribunals

The Law Institute of Victoria (**LIV**) is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 20,200 members. The LIV has a long history of contributing to, shaping, and developing effective state and federal legislation and policies.

The LIV welcomes the opportunity to provide feedback to Victorian Law Reform Commission (**VLRC**) regarding its Consultation Paper on Artificial Intelligence in Victoria's Courts and Tribunals (**Consultation Paper**). The LIV notes that the Consultation Paper sets out eight principles proposed by the VLRC to promote the safe use of artificial intelligence (**AI**) in courts and tribunals, being:

1. Impartiality and fairness – ensuring AI systems are fair, equitable and impartial;
2. Accountability and independence – ensuring accountability for the safe use of AI;
3. Transparency and open justice – ensuring transparency about AI usage;
4. Contestability and procedural fairness – the existence of a process to challenge the use or output of an AI system;
5. Privacy and data security – careful data collection, use and storage and appropriate governance and management;
6. Access to justice – promoting access to justice through the use of AI and ensuring AI usage does not create barriers to justice;
7. Efficiency – enhancing the efficiency of the justice system through AI usage, contributing to a fair justice system;
8. Human oversight and monitoring – to be retained as a check on AI systems to address risks relating to bias, reliability and accuracy;[1]

The LIV notes that these principles are designed to guide the integration of AI in judicial settings by bringing together common principles that have been adopted or considered in other jurisdictions for regulating AI and maintaining the fundamental principles of justice. The LIV broadly endorses these principles, although would be open to the addition of a further guiding principle, namely, maintaining trust and confidence in the legal system.

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[1] Victorian Law Reform Commission, Artificial Intelligence in Victoria's Courts and Tribunals Consultation Paper, October 2024 ('Consultation Paper) 75.

The letter that follows provides general comments on the subject matter of the Consultation Paper, and then responds to select Consultation Questions in the Consultation Paper. The views expressed below are informed by feedback from members of the LIV's Technology and Innovation Section, Administrative Law Section, Policy Roundtable Network, and internal Ethics Department.

General Comments

The LIV acknowledges the opportunities and benefits that Artificial Intelligence (**AI**) can provide across the economy, society, and the justice system. Having consulted with its members, the LIV understands that practitioners are already using AI tools for various purposes, including to transcribe meetings and to translate client instructions and documents (with this latter function observed to have significant access to justice benefits). Multiple law firms noted that they are using or are planning to use AI to organise information into specific formats – in particular, chronologies (including for use in court proceedings, as an aide to counsel, expert witnesses or a trial judge). Some members indicated that they use AI for legal research purposes, including to assist in identifying and summarising relevant legislative provisions and case law (with citations then checked for accuracy), for drafting initial versions of legal documents, and for monitoring compliance with legal standards and identifying potential risks. Further, practitioners also indicated that they are using AI-powered tools for document review – that is, to analyse large sets of case documents, identifying key pieces of evidence and other relevant information. Finally, the LIV heard that AI tools are being used for ancillary purposes, such as developing educational content.

As AI continues to advance rapidly, it is nonetheless crucial that the unique risks posed by AI are recognised, appreciated, and suitably addressed, especially in high-risk environments like courts and tribunals. The members consulted by the LIV were cognisant that AI poses some risks, and indicated that these are mitigated in various ways within practices – for example, practitioners are prohibited from entering personalised client information into AI systems, AI tools are integrated into the practice's document management system so that they operate within a closed system only, and the results of AI analysis are required to be checked by qualified lawyers.

The LIV notes that currently, there are voluntary guardrails regarding the use of AI in place, and that the federal government is considering legislating certain mandatory guardrails for the use of AI in high-risk settings. The LIV has previously engaged in consultations about the opportunities and risks associated with high-risk AI, emphasising the importance of cautious implementation. This feedback was provided to the Law Council of Australia (**LCA**) in October 2024 and is annexed to this letter.

The LIV recommends that a nuanced principle-based approach, rather than a restrictive approach, should be adopted when implementing AI in courts and tribunals. Furthermore:

- any guidelines should distinguish between Generative AI (**Gen AI**) and AI more broadly, and between open and closed source AI;

- guidelines should distinguish between different users of AI (i.e. judicial officers, practitioners, self-represented litigants, etc);

- guidelines should not be issued by a particular court or tribunal without first having regard to the activity being undertaken by other courts and tribunals in the same and other Australian jurisdictions. That is, guidelines should aim for uniformity;

- guidelines should be underpinned by broad consultation and understanding of AI gained prior to their development – that is, courts should consult with a cross-functional range of experts (from within and outside the legal profession) in the formulation of any guidelines concerning the use of AI in courts and tribunals;

- guidelines should be subject to periodic review to keep up with the evolving landscape of AI – and a range of experts should contribute to periodic review also;

- courts should be allocated dedicated resources to enable a comprehensive and ongoing understanding of AI; and

- AI technologies deployed within courts and tribunals should be required to meet a standard deemed safe for general use, regardless of the user's level of knowledge or expertise.

In the LIV's view, each of these is necessary to ensure that all participants in the legal process, including those with limited technical skills, can engage effectively and safely with AI tools. As noted in the LIV's response to Consultation Question 4, it will also be necessary for this purpose to ensure that the quality of the AI technologies available to and used by different participants in the legal process does not vary greatly – or, if it does so vary, to address resulting inequities. This is particularly important where the State may invest in technologies that assist the Crown for example in a prosecution but by contrast small defence practitioners or self-represented litigants may not have access to the same technologies to assist them.

The strategy for adopting AI technologies in Victoria's courts and tribunals should be developed with a view not only to ensuring consistency of regulation with other Australian jurisdictions, but also to avoiding duplication of investment and effort within Victoria. This will be even more important in the current fiscal environment in Victoria, as we often see across the courts and tribunals, each jurisdiction developing their own technology solution, for example case management systems, rather than looking at how best to leverage technologies across all jurisdictions.

The LIV notes that the Supreme Court of New South Wales (**NSW**) has issued a Practice Note (**PN**) on the use of Gen AI in legal proceedings, to take effect from 3 February 2025. The PN adopts a mostly unfavourable view of Gen AI, stating that practitioners (and unrepresented parties) are prohibited from using it to:

- consider documents produced under Harman undertakings and similar; or
- generate content for affidavits, witness statements or other evidence.

The PN also prohibits the use of Gen AI in the preparation of expert reports, without prior leave of the Court.

The PN states that while Gen AI may be used in the preparation of written submissions, skeletons of argument and summaries, any such document that has been prepared using AI must include a statement of verification, in which the author confirms, in effect, that they are responsible for the content.

The LIV notes the undesirable divergence in positions between the Supreme Court of New South Wales and the Supreme Court of Victoria, which has developed its own AI guidelines together with the County Court of Victoria.[2] The LIV emphasises the importance of standardisation for certainty and efficiency, noting that the same AI technologies are being and will continue to be deployed across all Australian jurisdictions.

In this respect, the LIV notes that the Victorian Legal Services Board and Commissioner (**VLSB+C**) has very recently released a statement on the use of artificial intelligence in Australian legal practice (**Statement**), in a joint initiative by the Law Society of New South Wales, the Legal Practice Board of Western Australia, and the VLSB+C.[3] The LIV commends the collaborative approach taken by the Victorian, NSW and Western Australian regulators, to ensure that there is a consistency of approach in Uniform Law jurisdictions. The LIV agrees, as noted in the Statement, that '[i]t is important for lawyers to understand AI, including the capabilities and limitations of the large language models (LLMs) and foundation models that underpin the latest AI tools', and that '[w]hen using AI and other legal technology, lawyers must continue to maintain high ethical standards and comply with their professional obligations'.[4] Nonetheless, in the LIV's view it is possible to envisage a broader role for the use of AI in legal practice than that envisaged by the Statement, whilst simultaneously ensuring that lawyers continue to meet high ethical standards and comply with their professional obligations.

Chapter 2: What is artificial intelligence?

Question 1. Should courts and tribunals adopt a definition of AI? If so, what definition?

The LIV recommends that courts and tribunals adopt a definition of AI. It is recommended that the internationally recognised definition of AI developed by the Organisation for Economic Co-Operation and Development (**OECD**), being:

> *"a machine-based system that, for explicit or implicit objectives, infers from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments"*,[5]

should be narrowed and refined to suit the legal context and should comprise specific reference to machine learning and Gen AI, including deepfakes.

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[2] Supreme Court of Victora, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation*, 6 May 2024; County Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation*, 3 July 2024.

[3] Victorian Legal Services Board and Commissioner, *Statement on the use of artificial intelligence in Australian legal practice*, 6 December 2024.

[4] ibid.

[5] OECD, Recommendation of the Council on Artificial Intelligence (Report No OECD/LEGAL/0449, 2024) 7; Victorian Law Reform Commission, Artificial Intelligence in Victoria's Courts and Tribunals: Consultation Paper (Consultation Paper, October 2024) 8-9 (VLRC Paper)

In this respect, the LIV notes the emergence of 'deepfakes', or 'images or recordings that have been convincingly altered and manipulated to misrepresent someone as doing or saying something that was not actually done or said'.[6] Deepfakes are created by Gen AI, which is 'a form of AI that enables users to quickly generate new content – [that] can include text, images, sounds and other data'.[7] Deepfakes can be misused for purposes such as fraud, defamation and false advertising, and courts have had to, and will presumably continue to have to, deal with the challenges of determining authenticity of materials presented to it in light of this phenomenon.

Adopting a clear definition of AI would greatly assist courts and tribunals to regulate permissible and impermissible uses of AI, to ensure the integrity of evidence and of the judicial process. Any definition of AI should particularise the unique roles and capabilities of Gen AI in contrast to the operational characteristics of digital agents (such as Google and LexisNexis), which are commonly used tools to conduct legal research.

Chapter 3: Benefits and risks of AI

Question 3: What are the most significant benefits and risks for the use of AI by

a. Victorian courts and tribunals?

b. legal professionals and prosecutorial bodies?

c. the public including court users, self-represented litigants and witnesses?

The use of AI brings several potential advantages to the Victorian legal system.

AI has the potential to enhance efficiency by speeding up the processing of court documents. Legal practitioners could benefit from higher quality and more efficient delivery of documents required during case management, litigation or prosecution. This, in turn, could improve overall efficiency and save time, thereby reducing legal costs for clients.

For court users, including self-represented litigants (**SRLs**) and witnesses, AI could assist in the preparation of documents in the form required by courts, and could improve litigants' access to justice by providing better understanding of State and Federal legislation and how Victoria's legal system operates.

By integrating AI, courts and tribunals could better manage their caseloads, improve the accuracy of legal document handling, and foster a more effective and inclusive judicial environment.

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[6] Raymond Sun et al, 'Facing the Facade – Legal challenges in the age of deepfakes (Australia): Navigating the creative yet complex world of deepfakes' Herbert Smith Freehills (Web Page, 6 June 2024) < https://www.herbertsmithfreehills.com/insights/2024-06/facing-the-facade-legal-challenges-in-the-age-ofdeepfakes>.

[7] Courts of New Zealand, Guidelines for use of Generative Artificial Intelligence in Courts and Tribunals: Judges, Judicial Officers, Tribunal Members and Judicial Support Staff, 7 December 2023, 1 ('*Courts of New Zealand Guidelines*').

However, it is crucial that AI is implemented with caution, ensuring fairness, transparency, and human oversight to maintain the integrity of court processes. This will assist to guard against the risks of AI, including inaccuracy and bias. The VLRC is no doubt aware of cases in the United States,[8] and also in Australia,[9] in which practitioners who relied on AI tools in the preparation of documents cited to court legal authorities that were, in fact, non-existent. These cases demonstrate that the inaccuracy of outputs generated by AI remains a concern. Concerns also remain about the impartiality and comprehensiveness of AI-driven evaluations. As such, it is crucial that the integration of AI into Victoria's courts and tribunals allows for human oversight, supporting, rather than hindering or overriding, the essential elements of human judgement and expertise. For the potential benefits of AI may be realised only if the systems are used in a way that ensures reliability, accuracy, quality, and integrity.

Question 4: Are there additional risks and benefits that have not been raised in this issues paper? What are they and why are they important?

Members of the LIV note that a potential risk not identified in the Consultation Paper flows from the assumption that all users possess equal knowledge, skills, and understanding of AI technology, and thus the expectation that generative AI outputs will be consistent for all users, irrespective of their level of sophistication. This assumption is unrealistic and may result in unintended consequences.

Similarly, there is a risk that the adoption of AI may perpetuate inequities in the justice system, given that the capabilities and reliability of AI tools available to prosecuting practitioners may differ with respect to those available to defence practitioners, and likewise that the AI tools available to SRLs may be less powerful and less reliable than those available to some practitioners. The LIV cautions against allowing the adoption of new technologies to become another factor creating inequities between parties.

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[8] For further information see Nate Reuters, 'Ex-Trump fixer Michael Cohen says AI created fake cases in court filing' (Web Page, 30 December 2023)<https://www.reuters.com/legal/ex-trump-fixer-michael-cohen-says-ai-created-fake-cases-court-filing-2023-12-29/>.

[9] See Dayal [2024] FedCFamC2F 1166. For commentary on this case, see The Guardian, 'Melbourne lawyer referred to complaints body after AI generated made-up case citations in family court' (Web Page, 10 October 2024) <https://www.theguardian.com/law/2024/oct/10/melbourne-lawyer-referred-to-complaints-body-after-ai-generated-made-up-case-citations-in-family-court-ntwnfb>.

Chapter 4: Regulating AI: the big picture

Question 9: What would the best regulatory response to AI use in Victorian courts and tribunals look like? Consider:

(a) which regulatory tools would be most effective, including rules, regulations, principles, guidelines and risk management frameworks, in the context of rapidly changing technology.

(b) whether regulatory responses should be technologically neutral, or do some aspects of AI require specific regulation?

Members submit that the best approach to regulating AI in Victorian courts and tribunals is the development of clear and consistent AI guidelines. These should be outlined in each jurisdiction's main practice note, which practitioners heavily rely on, and also displayed on the websites of each court and tribunal, as these are key resources for parties, witnesses, and SRLs. The guidelines should not prohibit or restrict the use of specific products or features but should include standards designed to ensure that the use of AI in Victorian courts and tribunals satisfies the eight principles proposed by the VLRC in its Consultation Paper (and listed above). Further, the AI guidelines should make a clear distinction between Gen AI technologies, which (amongst other things) can create text that looks human-written, and tools that provide resources for people to conduct their own analyses.

Chapter 8: Developing guidelines for the use of AI in Victoria's courts and tribunals

Question 22. Should guidelines be developed for Victorian court and tribunal users relating to the use of AI? Should guidelines be developed for the use of AI by Victorian courts and tribunals including for administrative staff, the judiciary and tribunal members?

Yes, the LIV considers that guidelines should be developed for i) Victorian court and tribunal users; and ii) Victorian courts and tribunals, including administrative staff, the judiciary and tribunal members, relating to the use of AI.

As noted above, guidelines should cover both AI generally and Gen AI specifically (and distinguish between the two, given their distinct functions). In the LIV's view, it is essential to address the unique aspects and ethical considerations of each.

For example, Gen AI tools may produce content that is inaccurate, biased, or contextually irrelevant, posing considerable challenges that may not be mitigated by broad principles alone.

The existing Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation, developed by the Supreme Court and County Court of Victoria,[10] promote ideals such as transparency, accountability, and accuracy. Practitioners are advised to disclose their use of AI, avoid misleading representations, and maintain responsibility for AI-assisted outputs. However, these guidelines, while well-intentioned, may have limited impact in practice.

Similarly, in its guide for judges, tribunal members and court administrators,[11] the Australian Institute of Judicial Administration's focus on 'open justice' and 'procedural fairness' reflects an aspirational approach to AI regulation. It also presumes a level of technological literacy among judicial officers, litigants, practitioners and even administrative staff at the courts that may not align with current realities.[12]

The LIV submits that AI guidelines should take the diversity, complexity and ubiquity of AI applications into account. In particular, it will be necessary in guidelines to acknowledge that many existing tools, commonly used by legal practitioners, already incorporate or are moving to incorporate AI technologies.

Further, the LIV submits that without evolving these guidelines into specific, enforceable standards that directly engage with the inherent limitations and risks of AI, there is a substantial risk that they will remain as nominal measures and may fail to meaningfully safeguard court users against AI's potential challenges within the judicial system.

Question 24: What are the benefits and risks of disclosure? If mandatory, what form should disclosure take?

The LIV submits that the benefits of disclosing AI usage include promoting transparency and accountability among court participants. However, disclosure – particularly a blanket requirement for disclosure that is not tailored to specific groups of court users – might also lengthen court processes and increase costs, potentially counteracting efficiency advantages. Consideration should perhaps be given to mandating disclosure by court users only when AI use becomes more prevalent amongst the legal profession and other court users, and after further consultation with stakeholders and experts on the purpose of disclosure, on the specific type of court process or documentation that should be used to disclose AI use, and on the groups of court users that should be required to disclose.

LIV members are of the view that, if disclosure is mandated (or simply encouraged), it will be crucial to make clear in applicable guidelines the actions or interpretations that will flow from disclosure.

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[10] County Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation*, 3 July 2024; *Supreme Court of Victora, Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation*, 6 May 2024.

[11] Felicity Bell et al, AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators (Report, Australasian Institute of Judicial Administration Incorporated, December 2023), ('*AI Decision Making and the Courts*').

[12] ibid.

Where AI is used, and use is disclosed, by an SRL, disclosure might offer insights into the individual's level of expertise with AI. However, the LIV would be concerned if disclosing the use of AI in the preparation of a document always undermined the perceived value of the document.

As the guidelines to be developed should apply to courts, tribunals, legal professionals, witnesses, expert witnesses, parties, and the public, there are important questions about how courts should address SRLs who disclose use of AI compared to judicial officers who do the same, ensuring fairness whilst simultaneously maintaining the integrity of legal proceedings.

An AI declaration document, as a template set out in each court's rules, might be an appropriate form for disclosure if this is mandated (or encouraged).

Guidelines for courts and tribunals

Question 29: Are there tools from other jurisdictions you think should be incorporated into guidelines to support Victorian courts and tribunals in their use of AI? If so, what are they?

With the rapid growth of AI across the world, Victorian courts and tribunals could benefit from adopting mechanisms already used in other jurisdictions, such as in the European Union's Artificial Intelligence Act (**EU AI Act**) and Canada's Directive on Automated Decision-Making.

European Union

The EU AI Act's risk classification system is an effective framework for managing AI applications in high-stakes areas. This Act categorises AI systems by risk level, applying stringent standards, such as mandatory testing, transparency, and oversight, for high-risk AI tools used in areas like criminal sentencing or predictive analytics.[13] Incorporating this risk-based approach in Victoria would allow courts to impose stricter safeguards on high-risk uses while giving more latitude to lower-risk AI applications, such as administrative processing. If such an approach was adopted, consideration would need to be given to its integration with any mandatory guardrails for AI use in high-risk settings that may ultimately be introduced at federal level.

Canada

Canada's Directive on Automated Decision-Making also offers valuable insights, particularly through its requirement for an Algorithmic Impact Assessment, which must be conducted prior to the application of '[a]ny technology that either assists or replaces the judgment of human decision-makers' to an administrative decision.[14] This requirement mandates that public sector institutions

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13 *Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act)* [2024] OJ L 2024/1689.

14 Government of Canada, *Treasury Board of Canada Secretariat: Directive on Automated Decision-Making* (Directive, 25 April 2023) 6.1.1, Appendix A.

evaluate systems for fairness, accuracy, and potential human rights implications before deployment. If Victorian courts adopted a similar impact assessment process, it would promote accuracy, by identifying and addressing biases or inaccuracies in AI models, and also transparency. This would enhance trust in institutions and accountability by ensuring that AI tools used in courts and tribunals are fair and reliable.

Together, the EU's risk-based classification and Canada's impact assessment requirement could provide the model for a structured, ethical, and transparent framework that would support responsible AI integration in Victorian courts and tribunals.

Question 30: Should courts and tribunals undertake consultation with the public or affected groups before using AI and/or disclose to court users when and how they use AI? What other mechanisms could courts and tribunals use to promote the accountable and transparent use of AI?

Yes, the LIV considers that courts and tribunals should engage in public consultations before implementing AI tools. Courts and tribunals should also disclose AI use to all court users.

Public consultation would allow affected groups to express concerns and would ensure that AI implementation aligns with community expectations for fairness and transparency. Notably, public engagement can increase trust in the use of AI applications within courts and tribunals, which is crucial given the high-risk nature of these environments.

Transparency would be further supported through clear disclosure of when and how AI is used, detailing its role, limitations, and the oversight mechanisms applied. Recent findings of the Australasian Institute of Judicial Administration highlight the need for AI-specific procedural safeguards, including disclosure, to prevent potential misinterpretations or over-reliance on AI-generated outputs.[15] Accountability could be further ensured by establishing independent oversight bodies tasked with regularly reviewing AI applications in court settings, thus ensuring that AI use aligns with principles of open justice and procedural fairness.

Chapter 9: Support for effective use of principles and guidelines about AI

Question 40: Are there opportunities to improve the current continuing professional development system for legal professionals about AI?

Members submit that courts and tribunals should assume a leadership role in ensuring the responsible use of AI tools, setting standards and minimum requirements to guide their application within the legal system. However, the LIV cautions against individual courts or tribunals establishing their own guidelines, which would likely lead to varying standards within and across jurisdictions. Instead, a uniform approach is preferable to ensure consistency and fairness.
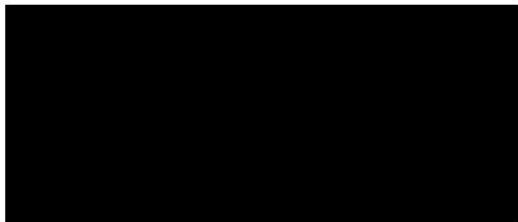
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[15] *AI Decision-Making and the Courts* (n 11).

A core function of the LIV is providing guidance and education to the Victorian legal profession on all things affecting the profession. The LIV has already embedded AI education throughout its entire professional development program, including conferences, targeted webinars, and ethics sessions. It is also creating an online hub for practitioners containing resources regarding AI. The LIV will continue to inform the profession on the key risks and opportunities associated with new ways of working, including the adoption of AI tools.

If standardised guidelines concerning the use of AI in Victorian courts and tribunals are developed, the LIV would be ready to support practitioners to understand and comply with these guidelines.

Yours sincerely,

Adam Awty
Chief Executive