


9 December 2024

The Honourable Dr. Jennifer Coate AO
Acting Chair
Victorian Law Reform Commission



Dear Justice Coate,

Review of artificial intelligence in Victoria's courts and tribunals

Thank you for the opportunity to participate in the Victorian Law Reform Commission's review of artificial intelligence in Victoria's courts and tribunals.

Please find below the Office's written response to the consultation questions posed to the Director of Public Prosecutions, Brendan Kissane KC. I note that we have limited our responses to the questions that were of relevance to the Office's legal practice.

3(b): What are the most significant benefits and risks for the use of AI by legal professionals and prosecutorial bodies?

The OPP considers that the use of AI technology has the potential to lead to enhanced productivity and efficiency across the legal practice. It is anticipated that the effective use of AI will help cut through the administrative burden on staff and enable solicitors to spend more time engaging in in-depth legal analysis and decision making.

For example, the OPP is currently exploring how AI can be used to assist in brief analysis at an early stage of criminal proceedings. This includes the use of a bespoke AI tool designed to process and analyse police briefs. The OPP has noticed that the briefs of evidence being prepared by police are increasingly complex and voluminous (often due to the use of phone and computer downloads), which has prompted us to consider how AI could be used to assist navigating this material.

By using AI to assist with time consuming tasks such as creating the first draft of charts of evidence and chronologies, it is anticipated that solicitors will have more time to identify issues and engage in detailed legal analysis at an early stage of criminal proceedings. It is hoped that this, in turn, will assist in the early resolution of criminal matters.

It is also anticipated that legal specific AI technologies will be able to play a role in helping OPP solicitors and administrative staff fulfill disclosure obligations by helping to locate relevant documents and compile disclosure material. Legal specific AI will also be beneficial to solicitors undertaking legal research, or to generate the first draft of content such as emails, policies or speeches.

The OPP is also cognisant of the risks of legal professionals and prosecutorial bodies using AI. Foremost of these from the OPP's perspective is the risk to privacy and sensitive information. The

OPP is of the view that confidential information should not be entered into a publicly generative AI tool given the lack of safeguards in these tools. For this reason, the OPP has limited its use of AI to legal-specific AI tools.

However, the OPP is of the view that these risks are capable of being managed and mitigated with greater awareness and investment in legal specific AI tools. For example, by ensuring that an AI tool is only drawing on verifiable and accurate sources of information, the potential for misinformation is significantly reduced.

3(c): What are the most significant benefits and risks for the use of AI by the public including court users, self-represented litigants and witnesses?

The OPP appreciates that AI tools have the potential to be very useful to court users, including victims and witnesses. AI tools could play a role in helping to explain complex legal concepts or processes to victims and witnesses, or to translate documents to non-English speaking victims and witnesses. This would play a significant role in enhancing access to justice in the community. The OPP notes that the use of AI in this context would not replace the obligations that OPP solicitors hold under the Victims Charter Act 2006.

On the other hand, victims and witnesses should be aware of the potential for AI tools to generate misinformation. For this reason, victims and witnesses should be cautioned against relying on publicly available AI to provide information about the law and legal processes.

Insofar as it relates to criminal matters, the OPP does not currently support the use of publicly available generative AI tools to assist in the preparation of affidavit materials, witness statements or other documents created to represent the evidence or opinion of a witness. The OPP is of the view that the risks that this presents to privacy of victims and witnesses is too great and has the potential to lead to misinformation. However, if legal specific AI tools were developed in such a way that these risks could be significantly mitigated, the OPP would be interested in exploring how AI could assist in preparing draft versions of these documents.

5(b): How is AI being used by legal professionals in the way they interact with Victorian courts and tribunals?

OPP solicitors are not currently permitted to use publicly available AI tools to draft legal or other documents or evidence related to a criminal case, or input case related documents or information into publicly available AI tools. The OPP Guidelines on the use AI currently permits the use of publicly available AI tools for limited uses, including summarising large bodies of text, non-legal research or converting text formats (for example, converting a policy to an article).

As discussed above, the OPP is currently exploring how a bespoke, legal specific AI tool can be used to assist with brief analysis. The OPP is also trialing how other legal specific AI tools can be used to assist in legal research and the preparation of documents such as chronologies and charts of evidence. At this stage, the OPP does not envisage that these tools will be used by OPP solicitors in the preparation of documents being tendered in court, although they may be used in the preparation of a matter. The OPP would be interested in exploring how legal specific AI tools could be used to assist in preparing draft versions of court documents, which could then be reviewed by OPP solicitors and counsel.

6(a) and (b): Are there uses of AI that should be considered high-risk, including in court administration and pre-hearing processes, and criminal matters? How can courts and tribunals manage those risks?

The OPP is of the view that the use of AI in any kind of decision-making process carries high risk. This is particularly so in criminal matters where the accused person's liberty is at stake. The use of AI to manage administrative functions is, on the other hand, relatively low risk.

The use of legal specific AI tools will manage these risks to some extent. However, the OPP would hold concerns for the use of AI tools in judicial decision making, regardless of whether these tools are legally focused or not. Using AI tools in this process, even if they were legally focused, would present a risk to the transparency of the decision-making process. Providing explanations for how an AI informed decision was reached would assist in mitigating these risks to an extent. However, given that these explanations are often technically complex, work would need to be done to ensure

that the explanations could be easily understood (without being over simplistic) so as to ensure that an AI system made a decision in a manner which is correct at law.

11: Are the principles listed in this chapter appropriate to guide the use of AI in Victorian courts and tribunals?

The OPP agrees that the regulatory principles listed in Chapter 6 are appropriate to guide the use of AI in Victorian courts.

12: Are principles sufficient, or are guidelines or other regulatory responses sufficient?

The OPP considers that guidelines are required to give users of AI clarity about how these principles should be applied in the court context. However, given the speed at which AI technology is evolving, we consider that any such guidelines will need to be frequently reviewed and updated.

The OPP has also recently developed guidelines on the use of publicly available generative artificial intelligence for OPP work. These guidelines include examples of appropriate and inappropriate uses of publicly available AI tools. While these examples are not intended to be exclusive and have been kept at a relatively high level, they offer useful guidance about the parameters of AI use.

15: Is it appropriate to have varying levels of transparency and disclosure depending on the use of AI by courts and tribunals? (For example, use by administrative staff compared with judicial officers).

The OPP understands that AI is not currently being used in judicial decision making or to prepare reasons for decisions. If AI is solely being used in an administrative context, the OPP does not consider that it is necessary for this to be formally disclosed.

If AI tools were to be used in judicial decision making in any way, the OPP is of the view that the courts should be disclose the use of AI.

16: Who should be able to contest an AI decision and when? Is the capacity to contest necessary for decisions made by court administration staff, or only judicial decisions?

Given that AI is not currently being used in judicial decision making, we do not consider that it is necessary for there to be a mechanism to contest AI decisions if they are solely being used in an administrative context.

If AI tools were to be used in judicial decision making in relation to criminal matters, the OPP is of the view that additional guidelines would need to be put in place regarding the contestability and review of those decisions.

23: Should guidelines require disclosure of AI use? If so, should it apply to legal professionals, expert witnesses and/or the public?

In the OPP's view, whether it is appropriate for AI use to be disclosed will depend on the context in which it has been used. As per our response to question 15, the OPP does not consider that it is necessary to disclose AI use if it is being used for purely administrative purposes.

If AI was being used to express opinions or write judgements, the OPP is of the view that it likely would be appropriate for the use of AI to be disclosed. However, this may not always be the case. For example, disclosure may not be necessary if a document has been thoroughly reviewed and checked by a human after AI was used to help produce a first draft.

24: What are the benefits and risks of disclosure?

The OPP does not consider there to be any risks associated with disclosing the use of AI and that disclosure should be encouraged where appropriate. This will likely lead to increasing awareness of the potential for AI to be used in a responsible and transparent way.

Thank you again for the opportunity to provide comments on this consultation paper.

Yours faithfully,

Georgia Blackie
Director, Policy & Specialised Legal Division
Office of Public Prosecutions