



THE VICTORIAN BAR
INCORPORATED

**SUBMISSION TO
THE VICTORIAN
LAW REFORM
COMMISSION**

CONSULTATION PAPER:
ARTIFICIAL INTELLIGENCE IN
VICTORIA'S COURTS AND
TRIBUNALS

INTRODUCTION

1. The Victorian Bar (the Bar) welcomes the opportunity to provide written input to the Victorian Law Reform Commission (VLRC) in response to the VLRC's Consultation Paper, *Artificial Intelligence in Victoria's Courts and Tribunals*.

ACKNOWLEDGEMENT

2. The Bar acknowledges the contribution of the Commercial Bar Association of Victoria, the Criminal Bar Association of Victoria, the Bar's Innovation and Technology Committee, and members of the Bar's Ethics Committee in respect of this submission.¹
3. The Bar also acknowledges the previous contribution of Emma Poole, on behalf of the Innovation and Technology Committee, Shaun Ginsbourg, on behalf of the Criminal Bar Association, and Laurence White, who met with the VLRC on 21 November 2024 to discuss the Consultation Paper.

COMMENTS IN RESPONSE

DEFINING AI

4. The Bar suggests that human-centred definitions of artificial intelligence (AI) and generative artificial intelligence (Generative AI) should be adopted, rather than technical descriptions as exemplified by the Organisation for Economic Co-operation and Development (OECD) definition for AI set out at paragraph 2.4 of the Consultation Paper. The definitions should also be expressed in the simplest possible language.
5. Examples of human-centred definitions include those contained in the United Kingdom Courts and Tribunals' *Artificial Intelligence (AI) Judicial Guidance* of 'AI': 'Computer systems able to perform tasks normally requiring human intelligence' and Generative AI: '[a] form of AI which generates new content, which can include text, images sounds and computer code. Some generative AI tools are designed to take actions.'²

¹ The Bar's Ethics Committee did not provide a formal response – rather, three individual members of the Committee agreed on a response to be provided to the Bar, with no members expressing disagreement. As the Committee considered the request over January 2025, not all members of the Committee had the opportunity to consider the response.

² See also the definition in the Victorian AI Guidelines p 5: 'A term describing a range of technologies and techniques used to computationally generate outputs that typically require human intelligence to produce' and the Commonwealth Scientific and Industrial Research Organisation's (CSIRO) Data61 definition: 'the name given to a range of technologies that exhibit some characteristics of human intelligence.' - <https://www.csiro.au/en/news/AI/Articles/2019/November/artificial-intelligence-a-discussion>.

6. A human-centred definition of AI has a number of benefits: it is simpler for non-experts to understand and apply, it is less focussed on the current capacity and functions of AI tools and systems, and it is clearer how the defined term would interrelate with existing obligations on the people involved in court or tribunal processes.

COMPARING THE CURRENT APPROACHES IN VICTORIA AND NEW SOUTH WALES

7. This submission is drafted in the context of a rapidly evolving legislative and regulatory environment for AI in Australia. In particular, the Bar notes the following relevant recent developments:
 - a. the Supreme Court and County Court's *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* published in May and July 2024 respectively (**Victorian AI Guidelines**);
 - b. the Senate Select Committee on Adopting Artificial Intelligence published its report on 26 November 2024 which made 13 recommendations;³
 - c. the New South Wales Supreme Court published *Practice Note SC Gen 23 – Use of Generative Artificial Intelligence (Gen AI)* which will commence on 3 February 2025 and guidelines for judges on AI.⁴ (**NSW Supreme Court AI Guidelines**); and
 - d. the Victorian Legal Services Board and Commissioner published the *Statement on the Use of Artificial Intelligence in Australian Legal Practice* jointly with the legal industry regulators for NSW and Western Australia.⁵

VICTORIA

8. The Victorian AI Guidelines recognise the shortcomings of Generative AI, the current use of closed categories, such as Technology Assisted Review, and the usefulness of specialised legally focused AI tools. Underpinning the principles is the 'direction' that Generative AI does not relieve the responsible legal practitioner of the need to exercise judgment and professional skill in reviewing the final product to be provided to the Court.
9. At this juncture, the Victorian AI Guidelines recognise the importance of human work in the legal system, as regulated by the courts, both for the presentation of evidence and the application of relevant legal principle to the facts as found.

³ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Adopting_Artificial_Intelligence_AI

⁴ <https://supremecourt.nsw.gov.au/practice-procedure/generative-artificial-intelligence.html>. The Chief Justice announced amendments to the note on 28 January 2025.

⁵ https://www.lsbc.vic.gov.au/sites/default/files/2024-12/Statement%20on%20the%20use%20of%20AI%20in%20Australian%20legal%20practice_2.pdf

10. The Bar considers that informed Court guidelines are critical. Principles should be developed for the use of AI and, in certain circumstances, its use ought to be prohibited.
11. The Victorian Courts and Tribunals should issue practice notes (ideally uniform practice notes) on the use of Generative AI in litigation. This is necessary because some aspects of the use of Generative AI in litigation require more than just guidelines or statements of expectations as to the conduct of legal practitioners, but instead firm rules.
12. The Bar considers that the principle-based approach outlined in Chapter 6 of the Consultation Paper is a suitable basis for the development of technology neutral guidelines, practice notes, rules and other related materials. This principle-based approach should be structured around the existing legislative provisions, rules, duties and obligations that apply to the various individuals involved in the court or tribunal process.
13. Any further guidelines, practice notes, rules or other related materials provided by the Victorian courts and tribunals (or any other legal regulators or law societies) should aim to be technology neutral and be regularly reviewed by reference to the principles. In particular, the Bar considers that reminding barristers of their obligations represents no more than an application of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* which are technology neutral, with no update to those rules further required.

NEW SOUTH WALES

14. The NSW Supreme Court AI Guidelines prohibit the use of Generative AI in respect of information subject to, among other things, the *Harman* undertaking, and in the provision of evidence, as well as guidelines for its use in the preparation of legal submissions.
15. The Supreme Court of NSW prohibits the use of Generative AI in the evidential process in two ways:
 - a. information produced under compulsion is not to be entered into Generative AI. This is the general prohibition; and
 - b. Generative AI is prohibited in the production of materials created for the proceeding. The legal practitioner safeguards the prohibition.
16. Also, where submissions are provided to the Court the various 'authorities' relied upon must be verified and relevant.
17. The Bar submits that developed principles for the responsible use of Generative AI in Victoria should, consistent with the NSW approach, include the foundation principles of full disclosure and consent for its use, and that the practitioner take full responsibility for the outcome of its use, which are matters integral to the discharge of the duty of practitioners to the court.

SAFEGUARDING THE USE OF AI IN COURTS AND TRIBUNALS

THE ROLE OF COURTS AND TRIBUNALS

18. To understand the Court's purposes and the Bar's submission, an important distinction should be made between artificial and human intelligence. Generally, computers work from a determinative pathway to an outcome, based on a probabilistic analysis. Human intelligence is intuitive, imaginative and insightful, and human work is to reason to an outcome. Generative AI may learn new pathways, but it does not reason, it does not admit to ethical responsibilities, and therefore it is unlikely that artificial intelligence will converge with human intelligence.
19. Laws use normative standards – 'reasonable businessperson', 'objective' interpretation or 'reasonably foreseeable', as examples. Without structural change to the legal system, it is unlikely that AI can determine the outcome of a complex controversy applying the relevant standard.
20. Nevertheless (with emphasis added):

an important aspect of the current legal system is that the result is determined didactically — that is, through the endeavour of competing counsel and instructing solicitors regulated by the court as to the weight of evidence, the relevant legal principles and their application. In effect, there are multiple brains working on the one problem, in an environment specifically designed to "test" hypotheses, facts, analysis/reasoning and conclusions in real time. These super-computers (brains) are the most sophisticated and dynamic organs known in the universe. AI may, however, be able to help participants in litigation formulate and test relevant hypotheses.⁶
21. To that end, the Bar considers that the use of AI tools, platforms and systems may have an important role to play in improving access to justice and efficiency in pre-trial and trial preparation, and solution exploration. The Bar suggests that the Victorian courts and tribunals may wish to explore the use of AI tools and platforms as aids. Some illustrative possible uses are presented in Annexure A.
22. However, critically, the Courts recognise human intelligence as irreplaceable and vitally important to the legal system as an institution, and as a safeguard for its decisions. Legal practitioners play the vital role. Generative AI in its various forms will provide valuable support and save costs, but it cannot replace the unique role of practitioner, which must extend to regulating its use in decision making.
23. The Bar considers that:
 - a. safeguarding for the use of Generative AI is the responsibility of legal practitioners, who owe a personal duty to the courts and tribunals;

⁶ D Farrands, "Artificial Intelligence and Litigation — Future Possibilities" (2020) 9(1) *Journal of Civil Litigation and Practice*.

- b. it is critical that legal practitioners first obtain an accurate understanding of the manner in which confidential and privileged information is used and stored in the Generative AI processes; and
- c. appropriate disclosure and consent to the use of data in the AI processes is necessary.

JUDICIAL AND ADMINISTRATIVE DECISION-MAKING

- 24. The Bar considers that AI tools, platforms and systems should not currently, or for the foreseeable future, be used to take a judicial or administrative decision in any Victorian court or tribunal.
- 25. Critically, the Bar contends that Judges should not use Generative AI in the analysis of evidence or in writing, editing or proofing judgments. This is because the function of a Judge is not (at least for the time being) able to be delegated to AI, because of the limitations of AI and the need for public confidence - and corresponding openness - in the judicial process. It is also because litigants and any appellate Court must be able to understand the process by which the Judge arrived at the decision in question. Further, Judges should not submit draft judgments to any public Generative AI facility, because of the risk that the information so uploaded will be used by the Generative AI program in response to prompts by other users.
- 26. Consistent with this submission, the Bar opposes the use of AI to guide or support judicial decision-making on matters concerning risk assessment, bail and criminal sentencing as envisaged in [4.94]–[4.101]. These decisions, like many which are required in criminal cases, are highly evaluative and require human judgment and synthesis. In the area of risk assessment, for example, there are few (if any) tools that have been statistically validated and which do not require human evaluation, such as clinical judgment. There is no basis for concluding that AI powered tools will overcome that limitation. Further, in order for the use of AI tools in criminal cases to be appropriate, it would be necessary for the parties to have access to the algorithms which drive them and a proper opportunity to test and challenge their reliability. It is presently unclear how this opportunity could be provided.

USE OF DOCUMENTS PREPARED BY AI IN COURTS AND TRIBUNALS

- 27. Every aspect of the court or tribunal process is structured around the production, filing or publication of documents by individuals who have responsibility to attest to the accuracy, relevance or authenticity of the contents of those documents.
- 28. The Bar considers that these existing obligations, duties and responsibilities apply regardless of the tools used to produce the document and whether the document has been produced with the assistance of another person or with the assistance of a technological tool, platform or system (AI or otherwise).
- 29. In this way, the person reviewing and authorising the AI generated text is capable of mitigating against the 'blackbox' nature of AI.

30. If the person filing or certifying to a document is not competent to assess the AI generated content included in the document, the AI generated content should be clearly marked in the document with a note indicating that it has not been subject to human review. The judicial officer in charge of the matter would then be responsible for deciding whether or not to accept that content in the usual way (whether evidence or submissions).

31. Further, the Bar considers that disclosure of the use of AI tools, systems or platforms as between a party and their legal representatives should be governed by the existing regulation of legal professional duties and obligations and never by material prepared by the Victorian courts and tribunals. For the avoidance of doubt, the Bar suggests that no court or tribunal should direct any aspect of the communication between a party and their legal representative.

32. To protect the administration of justice, safeguards are required to:

- a. prohibit the use of Generative AI in the preparation of affidavits, witness statements, witness outlines, answers to interrogatories and character references. Such documents must reflect only the evidence of the witness or author and should be expressed in the witness' or author's own words, not the words of a large language model or system. The Bar urges for particular caution to be shown in respect of criminal proceedings. For example, the use of AI in the preparation of evidential material such as witness statements, as envisaged in [4.72] of the Consultation Paper, would pose a serious risk to the integrity and reliability of evidence in criminal proceedings and is opposed by the Bar. Further, such documents should contain a statement certifying that Generative AI has not been used in the preparation of its content;
- b. prohibit the use of Generative AI in the preparation of expert reports without leave of the Court or Tribunal. Expert reports must reflect the enquiries, reasoning and opinions of the expert, expressed in the expert's own words. Where the use of Generative AI may be justified in the work of an expert, leave of the Court or Tribunal should be able to be sought. Expert witness codes of conduct should be amended to reflect a prohibition on the use of Generative AI by experts; and
- c. mandate disclosure where Generative AI has been used in the preparation of written submissions, along with certification that the content of such submissions has been directly verified by the author.

USING SUMMARIES PREPARED BY AI

33. Although there may be a degree of attractiveness to practitioners utilising Generative AI to summarise discovered materials or evidence (affidavits, witness statements, expert reports etc), there remain concerns in respect of such use.

34. *First*, the use of Generative AI in this way may breach obligations of confidentiality, privilege and privacy, not just to a practitioner's client but to other litigants who have disclosed documents. The Bar understands there to be a belief among some practitioners that it is acceptable to have Generative AI review and summarise documents and evidence on the basis that:

- a. the documents and evidence are securely stored; and
- b. Generative AI will not use the data from those documents and evidence to train its public large language models.

This, however, says nothing as to *where* the data extracted from the documents and evidence is first processed, *how* that data is stored and for what period it is retained. Obtaining an understanding of the *complete* chain of how the data is treated and used by Generative AI is a critical step in a practitioner complying with his or her professional obligations.

35. *Second*, once a practitioner understands relatively clearly where and how the data from documents and evidence is to be used by Generative AI, appropriate consent can then be obtained. This extends to obtaining consent from litigants and third parties in respect of their documents and evidence. Put simply, while a client may be comfortable with data from its own disclosure being processed by Generative AI and retained, opposing parties and non-parties may not be.

36. *Third*, the use of Generative AI in the absence of a clear understanding of how data is stored and managed increases litigants' exposure to the risk of data breaches. This is of particular concern, given recent well publicised significant data breaches.

37. *Fourth*, the careful review and distillation of data from documents and evidence is often a task that falls to junior practitioners. Such tasks promote the necessary development of their forensic judgment and analytical skills. The removal of such tasks may impede the next generation of practitioners which will have a negative impact on the administration of justice.

38. *Fifth*, there are known accuracy issues with the use of Generative AI. Traditionally, practitioners rely on more junior practitioners to critically review and summarise documents. Senior practitioners do so on the basis of: (i) the established training and expertise of those junior practitioners; (ii) the professional obligations of the junior practitioners; and (iii) the level of trust and confidence that the junior practitioners build with senior practitioners over time. Generative AI lacks these three factors. Further, having regard to known accuracy issues, it is questionable the degree of trust that may be accorded to a Generative AI generated product in the absence of a practitioner having independently conducting a complete and thorough review each time Generative AI is used.

39. Any further guidelines, practice notes, rules or other related materials provided by Victorian courts and tribunals in respect of AI-summarised material should, in addition to emphasising the need to exercise judgment and professional skill in reviewing the AI-summarised material, remind the profession of the obligation of confidentiality that attends privileged material and documents

produced under compulsion. Practitioners should also be reminded that it would breach that obligation to disclose, without proper authorisation, any information from such sources to a public large language model or system, or indeed to a private one, if it could then be utilised in respect of other parties or proceedings.

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ANNEXURE A – POTENTIAL USES OF AI TOOLS IN VICTORIAN COURTS AND TRIBUNALS

Judgment summaries: AI tools could be used by court or tribunal staff to generate summaries of judgments (i.e. case notes) which could be authorised either by the judicial officers responsible for the judgments, their associates or specialised court or tribunal staff.

Statement of key issues, dramatis personae and chronologies: Judicial officers could encourage the use of AI tools to aid in the preparation of summary documents in proceedings such as statements of key issues, dramatis personae and chronologies.

Voluminous documents: a judicial officer might direct that a summary under section 50 of the Evidence Act 2008 (Proof of voluminous or complex documents) might be prepared using an AI tool. Such a direction could be subject to the usual liberty for the parties to apply to challenge or exclude any such evidence.

Transcription: AI tools could be used to prepare cheaper forms of real-time or near-real time transcription which could supplement existing transcription services. They may also be deployed within transcription services to add additional value such as chronology extraction, exhibit tables, dramatis personae tables, etc.

Translations: AI tools could be used to prepare translations of judgments or judgment summaries into any language on demand or as ordered by a judicial officer. Additionally, the court or tribunal could prepare short summaries using the 'Easy English' style developed by Scope Australia.

List and matter management: Judicial officers who have management of particular lists or matters could use AI tools to prepare summaries of court files for internal use. Additionally, AI tools could be used to summarise upcoming dates from orders in particular matters to enable court and tribunal staff to monitor compliance with those orders.

Matter and resource allocation: Judicial officers or court or tribunal staff who are responsible for the allocation of judicial resources or courtrooms could use AI tools as an aid to ensure that those resources are used as efficiently and effectively as possible.

Solution exploration: There may be a role for AI to play a role in online solution exploration (for example in VCAT disputes).⁷

⁷ For example, the British Columbia Civil Resolution Tribunal uses Solution Explorer, a questionnaire-based expert system, to provide potential claimants with advice at the early stage of dispute onboarding. See <https://civilresolutionbc.ca/solution-explorer/>. See also AI Decision-Making and the Courts (Australasian Institute of Judicial Administration (AJJA) 2022), pp. 17 ff at https://aija.org.au/wp-content/uploads/woocommerce_uploads/2022/06/AI-DECISION-MAKING-AND-THE-COURTS_Report_V5-2022-06-20-1lzkls.pdf.

Decision support: AI tools may be developed that are appropriate for use by judicial officers in providing decision support, such as support in making bail decisions, sentencing, etc.⁸

⁸ See AIJA, AI Decision-Making and the Courts, pp. 24-25.