

Victorian Law Reform Commission
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Submission in Response to the Consultation Paper – Artificial Intelligence in Victoria’s Courts and Tribunals

I am pleased to provide this submission to the above Consultation Paper and contribute to reform of this important issues in the Australia legal system. Artificial Intelligence (AI) is changing the way legal documents are analysed and drafted, and already affecting decisions made at trial by litigants and by judges. This will only increase in the years ahead, raising fundamental questions for courts related to accuracy, accountability, transparency and fairness.

Legal and other professional service firms will increasingly adapt their practice to integrate new analytical and communications systems into their work, with flow-on implications for courts. Firms are increasingly moving towards online portals and smart documents to communicate with clients and colleagues and complete work. Professional practice will become more efficient, blurring traditional work environments and geographically extending the legal workplace. New technologies may reduce the range of human skill sets, as artificial intelligence becomes more advanced. Analytics platforms such as Lex Machina are already part of trial preparation for civil litigation.¹ Previous court decisions are integrated into these platforms, allowing them to provide an indication of the likelihood that a particular judge will allow specific evidence to be adduced, or grant an order in a civil trial, assess how long the hearing is likely to take, and assess factors such as an opposing counsel’s level of experience and likely approach.²

This jurisdiction is already proactive in this area and it is notable that the Supreme Court of Victoria was the first Australian court to issue guidelines on AI, acknowledging the reality that it is increasingly being used: ‘the assistance of computers in information management is an important tool for the efficient conduct of litigation ... generative AI tools are already in use in legal settings. The capacity and use of such tools is rapidly increasing’.³

Recent judicial decisions in other Australian jurisdictions have included comment in relation to the use of generative AI. In *Yousef v Eckersley & Anor*, a 2024 case in the Queensland Supreme Court, a litigant used ChatGPT to prepare submissions, which the Court considered to be acceptable practice. Key factors that influenced its view in reaching the finding included that the litigant was upfront with the court, disclosing that they had used

¹ Lex Machina, *Legal Analytics Platform* (2019): <https://lexmachina.com/legal-analytics/>

² Ibid.

³ Supreme Court of Victoria, *Guidelines for Litigants Responsible Use of Artificial Intelligence in Litigation* (2024) <https://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/guideline-responsible-use-of-ai-in-litigation>

generative AI, and that they had checked the document prior to submission and ‘vouched for its accuracy’.⁴ The judge in the case stated:

I note the plaintiff’s submissions have been prepared with the assistance of the artificial intelligence platform Chat GPT. The plaintiff vouched for the accuracy of his submissions, however, stated that this platform assisted in their organisational structure and added a flourish to his submissions.⁵

The appropriateness of using a generative AI application to prepare a submission will likely depend on the circumstances, particularly, whether the document in question is a statement by a witness. For instance, in a 2024 case, *DPP v Khan*, in the Australian Capital Territory Supreme Court, the use of ChatGPT was described as ‘clearly inappropriate’ for a character reference, because ‘it becomes difficult for the court to work out what, if any, weight can be placed upon the facts and opinions set out in them.’⁶

Supreme Court of New South Wales recently issued a new practice note relating to the use of Generative AI in legal proceedings, commencing in February 2025. All affidavits must now contain a disclosure that generative AI was not used:

13. An affidavit, witness statement or character reference must contain a disclosure that Gen AI was not used in generating:

- (a) its content (including by way of altering, embellishing, strengthening or diluting or rephrasing a witness’s evidence); or
- (b) subject to leave having been obtained in accordance with paragraph 15 below, the content of any annexure or exhibit *prepared by the deponent* of the affidavit or witness statement or character reference for the purposes of his or her evidence.⁷

New models of regulation and legal responsibility will need to be developed for courts throughout Australia as these technologies become more widespread. Who should take responsibility when errors are made – and what the response should be – is a difficult question concerning AI applications. For courts, this question is particularly complex, and the legal system will need to evolve to accommodate it. There are a range of different principles and guidelines emerging at present that share similar themes.

It is sensible for these principles and guidelines to be consistent and harmonised across legal jurisdictions. The need to address issues such as disclosure of personal information, concerns around accuracy, and the need for training and education. Another key question is

⁴ [2024] QSC 35, [17].

⁵ Ibid.

⁶ *DPP v Khan* [2024] ACTSC 19, [43].

⁷ Supreme Court of NSW, *Practice Note SC Gen 23* (2024)

<https://supremecourt.nsw.gov.au/news/news-archive/practice-note-sc-gen-23-.html>

whether guidelines and principles-based approaches are sufficient, or whether there is a need for more binding and enforceable rules around the use of AI in courts. In some cases, it may also be more appropriate to prohibit the use of generative AI entirely, for example in cases that are high stakes or involve vulnerable members of society.

There is a need to for further education and training, the crystallisation of emerging guidelines concerning the use of AI in courts, and consistency and harmonisation across jurisdictions. AI has many useful applications, but it should be carefully regulated, and restricted in high stakes cases. In relation to the development of policy and guidelines on AI, it is pleasing that guidelines are being developed, and that there is increasing recognition of the issue. However, it must be an area of significant policy development over the next decade, alongside the inevitable development of AI itself.

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