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Victorian Law Reform Commission

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12 December 2024

Dear Commission Members,

Victorian Law Reform Commission Submission: Artificial Intelligence and Unrepresented Accused

I am pleased to provide this Submission to the Victorian Law Reform Commission on 'Artificial Intelligence in Victoria's Courts and Tribunals'. This submission addresses the following question:

> *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?*
> *What are they and why are they important?*

My specific focus is on unrepresented and self-represented accused in the criminal jurisdiction, and my submission is informed by my Churchill Fellowship Report, 'To find innovative solutions to assist unrepresented accused in criminal matters'.

Introduction

'use technology as a tool to further…justice; not as a solution'[1]

Technological advancements including the introduction of Artificial Intelligence[2] ('AI') have become important in promoting equitable access to justice. Online platforms, mobile applications, and AI-powered tools democratise legal information and guidance, equipping unrepresented and self-represented accused with the means to navigate legal systems more effectively. This can alleviate the pressure on traditional legal service providers by enabling

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[1] JustFix, *Technology for Housing Justice: What We Do*, https://www.justfix.org/en/our-mission, 2024.
[2] As defined in the Artificial Intelligence in Victoria's Courts and Tribunals, Consultation Paper (Victorian Law Reform Commission, October 2024) x

them to concentrate their resources on matters that require legal advice and/or representation. However, the deployment of technology and AI in the legal system carries the risk of inadvertently magnifying existing inequalities. This underscores the necessity of integrating any technological and AI tools with significant caution, and with initiatives that enhance digital literacy ensuring inclusive digital participation. This submission focusses on the benefits and risks for the use of AI by unrepresented and self-represented accused, however the principles can be extrapolated to the civil jurisdiction and other groups of users such as witnesses. This submission draws on people-centred justice,[3] a concept that prioritises the needs, experiences, and perspectives of individuals fostering a more equitable and inclusive justice system. Finally, the use of AI is inherently connected with the role of technology. Therefore, when making recommendations, this submission at times conflates the two in recognition of their interconnectedness.

The Role of Technology and AI

The development of new legal technologies including AI has created significant opportunities to provide assistance to unrepresented and self-represented accused in legal matters.[4] These advancements also offer a diverse array of tools for legal practitioners, including lawyers, law firms, corporations, in-house legal departments, court systems, and community organisations.[5] While some technologies and AI are designed to perform specific legal tasks, others focus on the organisation and management of legal workflows. Additionally, certain tools operate in the background, facilitating more efficient development of legal technologies by developers.

By leveraging automation and streamlining processes within the legal system, legal technology companies can reduce the cost of legal services, thereby increasing their accessibility. By minimising or eliminating the need for lawyer's fees, these tools can also enable a wider range of individuals to access legal information and advice, often at little or

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[3] See for example, OECD, *OECD Framework and Good Practice Principles for People-Centred Justice* (2021) OECD Publishing, Paris.
[4] Natalia Antolak-Saper, Finding Innovative Solutions to Assist Unrepresented Accused in Criminal Matters, (2024, The Winston Churchill Memorial Trust) 38.
[5] Rebecca Sandefur with the assistance of Alice Chang, Taemesha Hyder, Sajid Khurram, Elizabeth Prete, Matthew Schneider and Noah Tate, *Legal Tech for Non-Lawyers: Report of the Survey of US Legal Technologies,* (2019) https://www.americanbarfoundation.org/wp-content/uploads/2023/04/report_us_digital_legal_tech_for_nonlawyers.pdf, 5.

no financial cost. Many digital tools provide basic services free of charge, with some offering premium features or comprehensive services for a fee. In the United States, it is estimated that approximately 75% of available digital legal tools are free, illustrating their potential to bridge gaps in access to justice.[6]

Digital tools also have the capability to reach individuals who are otherwise excluded from the legal system due to geographic, economic, or logistical barriers. This inclusivity can foster a more equitable and just legal landscape. The variety of digital tools available addresses a wide spectrum of legal needs, empowering users to navigate the complexities of the legal system.

Other tools are tailored to specific populations, such as low-income residents, and go beyond merely providing information. These tools frequently include official legal forms that users can download and complete manually or interactively online. In some cases, platforms even offer the capability to automatically submit completed documents to the relevant court or service provider. This combination of accessibility, user-friendliness, and functionality underscores the transformative potential of legal technologies in democratising access to justice.

Despite these advancements, 'no existing tool is a "one stop shop" for justice problems generally… there is no tool that consists of a natural language interface that diagnoses the legal aspects of a user's life situation, offers possible routes to solution, and then facilitates taking action toward a solution by compiling evidence of a complaint and creating or filing a legal document with a court or other agency.'[7] Further, there is a disconnect between the capabilities of existing legal tools and the realities of how individuals engage with the legal system, as well as the broader community's needs when addressing legal challenges.

AI Tools: Legal Information vs Legal Advice

'I am not a licensed legal professional and cannot provide legal advice. However, I can offer general information about legal principles, processes, and potential options

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[6] Ibid 14.

[7] Ibid, 7.

for addressing legal concerns. If you have a specific legal issue, it is important to consult a qualified lawyer who can provide advice tailored to your situation.'[8]

AI tools are predominantly designed to facilitate information generation, for example, assisting users in generating a legal document, information on legal principles or summarising content. While these services can be helpful, they ideally ought to be utilised after individuals have already identified and understood their legal issue. In many cases however, self-represented and unrepresented accused fail to recognise the legal dimensions of their problems, which significantly diminishes the effectiveness of these tools in addressing their needs.

Despite this, self-represented and unrepresented accused increasingly utilise AI tools as a substitute for traditional legal advice. Reliance on AI as a replacement for legal advice however, presents several critical concerns. While AI systems can efficiently process and analyse legal information, they are inherently limited in their ability to provide nuanced, context-specific advice tailored to an individual's unique circumstances. Legal advice requires an understanding of subjective factors, such as intent, mitigating circumstances, the context of the accused, and jurisdictional differences which AI may not fully capture. Consequently, there is a risk that self-represented and unrepresented accused relying on AI for legal advice may misinterpret the outputs, fail to recognise critical legal nuances, or inadvertently present incomplete arguments in court. Further, the effectiveness of AI tools is contingent upon the user's familiarity with legal terminology, which can vary widely among self-represented and unrepresented accused. AI tools therefore can play a valuable role in supplementing legal knowledge and assisting self-represented and unrepresented accused, but they cannot replace the comprehensive and strategic advice provided by a qualified legal professional.

Regulation of Legal Advice

Of course, if AI tools were to provide legal advice, this raises important and fundamental questions about the applicability of the existing legal professional regulatory framework. A foundational question is what constitutes the provision of legal advice and how this

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[8] ChatGPT Response when asked if it can provide legal advice.

definition extends to AI systems.[9] Traditional legal advice is predicated on the expertise of qualified professionals who possess the training, ethical obligations, and accountability mechanisms to ensure their advice is contextually appropriate and legally sound. In contrast, AI tools operate within parameters defined by algorithms and datasets, often developed by individuals without legal qualifications. Determining appropriate regulatory responses is complicated by the lack of data on legal technology companies.

A 2019 study in Australia revealed that 83% of legal technology companies had founders with legal qualifications, and in some cases, practice experience. This suggests that digital tools benefit from legal expertise during their development. However, the end-user interfaces—what unrepresented and self-represented accused interact with—are typically designed by programmers, coders, and engineers, most of whom lack formal legal training. This disconnect between legal expertise in development and the operational aspects of digital and AI tools complicates the question of who, or what, is ultimately responsible for the accuracy and appropriateness of the legal outputs provided.

This complexity raises concerns about the sufficiency of current regulatory boundaries. If the primary concern is ensuring quality control and maintaining the integrity of legal systems, the scope of legal professional regulation may need to expand. Non-lawyers, particularly those involved in the design and deployment of AI tools, could be brought within a regulatory framework that establishes standards for accuracy, accountability, and ethical compliance. Alternatively, new oversight bodies with specific expertise in technology and law could be empowered to regulate AI systems providing legal assistance.

In the absence of appropriate regulation, users of AI legal tools face significant risks. Misclassification of legal information as advice could lead to detrimental outcomes for self-represented and unrepresented accused who lack the knowledge to discern inaccuracies or contextual limitations in AI-generated outputs. Moreover, without regulatory oversight, the quality and reliability of AI tools remain inconsistent, threatening the credibility of the legal system and public trust in emerging technologies.

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[9] Natalia Antolak-Saper, Finding Innovative Solutions to Assist Unrepresented Accused in Criminal Matters, (2024, The Winston Churchill Memorial Trust) 39.

Digital Divide

A people-centred justice approach necessitates the integration of AI tools and services with in-person support to mitigate the risk of a persistent 'digital divide'. While data from 2020 indicates that 99% of Australians accessed the internet, by 2024, approximately one in four individuals in Australia remain digitally excluded.[10] This digital exclusion disproportionately affects populations with limited income, education, and employment opportunities, as well as those living in remote areas, seniors, and individuals with disabilities. These groups face significant barriers to accessing the internet and utilising technological tools effectively.

Further, the high data requirements of AI tools can exacerbate costs, further limiting their accessibility.[11] Additionally, the predominantly text-based and English-only design of many digital platforms excludes individuals with limited English proficiency, compounding accessibility challenges for culturally and linguistically diverse communities.

In-person services are therefore critical in complementing any provision of AI tools. These services should be physically accessible and embedded within key locations, such as courts.[12] Self-represented and unrepresented accused rely on physical courts as resource hubs where they can access information, understand their rights, and receive guidance on representing themselves.[13] This underscores the importance of maintaining physical points of contact within the justice system to ensure inclusivity and equitable access to justice resources.

Guidelines for Responsible Use of AI by Self-represented and Unrepresented Accused

A number of Australian courts have introduced guidelines governing the use of generative artificial intelligence (AI) in court and tribunal proceedings. For example, in May 2024 the Supreme Court of Victoria issued the Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation, which are aimed at both legal practitioners and self-represented litigants. These guidelines acknowledge the growing presence of generative AI in legal

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[10] Good Things Foundation Australia, *The Digital Divide*, https://www.goodthingsfoundation.org.au/the-digital-divide/, 2024.

[11] Ibid.

[12] Natalia Antolak-Saper, Finding Innovative Solutions to Assist Unrepresented Accused in Criminal Matters, (2024, The Winston Churchill Memorial Trust) 40.

[13] Ibid.

contexts and the rapid expansion of its capabilities. The Victorian Supreme Court provides a set of principles to guide the use of AI, emphasising that parties must understand how these tools function, including their limitations. Further, parties are cautioned against using AI in a manner that might indirectly mislead other parties or the court regarding the nature of the work performed or the content produced by the tool.

Specific guidance is offered for self-represented litigants who utilise AI to prepare documents. The Court encourages these litigants to disclose the use of AI tools in the preparation of any documents or reports filed in court. Such disclosures are intended to provide context for judicial officers, aiding them in forming a more accurate assessment of the litigant's level of legal knowledge and experience. The guidelines clarify that such disclosures will not influence the substantive evaluation of the document's content. However, the scope of the Victorian guidelines is currently limited to civil litigation.

In contrast, Queensland courts have adopted a broader approach through the Guidelines for the Responsible Use of Generative Artificial Intelligence (AI) by Non-Lawyers, which apply to both civil and criminal proceedings. These guidelines are specifically designed to assist non-lawyers, including self-represented litigants, McKenzie friends, lay advocates, and employment advocates, in responsibly utilising AI tools. The Queensland guidelines stress the importance of users having a comprehensive understanding of the AI tools they employ, including an awareness of their limitations. They explicitly caution that AI tools are not substitutes for qualified legal professionals and cannot provide tailored legal advice.

The Queensland guidelines also provide foundational knowledge about how generative AI operates, along with an overview of its capabilities and limitations. This educational component aims to equip users with the skills necessary to navigate AI technologies responsibly, while reinforcing that such tools should complement, rather than replace, traditional legal advice.

These jurisdiction-specific guidelines reflect an emerging recognition of the transformative potential of AI in the legal system, while also underscoring the importance of maintaining transparency, accountability, and ethical use in its application.

Most recently, in November 2024, the NSW Supreme Court issued Supreme Court Practice Note SC Gen 23, Use of Generative Artificial Intelligence. The Practice Note aims to promote fair and transparent use of AI in legal proceedings while ensuring that litigants remain responsible for the content they present in court. The Practice Note provides specific principles and considerations for the responsible use of generative artificial intelligence by self-represented litigants in legal proceedings. These include requirements imposed on self-represented litigants to disclose any use of Gen AI in preparing court documents or filings. Documents must include a statement identifying the AI tool used, but this disclosure will not affect how the content of the document is evaluated by the court.

Litigants must understand how the AI tools they use function, including their limitations, to avoid misleading outputs. Users must verify the accuracy, completeness, and relevance of AI-generated content, especially for legal citations, case law, or arguments included in submissions.

Generative AI must not be used to generate affidavits, witness statements, or other evidence-related materials. Such documents must reflect the litigant's own knowledge and cannot rely on AI assistance unless prior court approval is obtained. This is particularly crucial as evidence law requires that witness statements reflect the direct knowledge, observations, or experiences of witnesses. Generative AI, which creates outputs based on probabilistic models, cannot replicate an individual's subjective understanding or perception of events. AI-generated content risks introducing inaccuracies, biases, or fabrications that distort the factual basis of the testimony.

Sensitive, confidential, or privileged material must not be entered into public Generative AI tools. Users are cautioned about risks to confidentiality and the potential misuse of entred data. The Practice Notes warns that AI-generated content may inadvertently create 'hallucinations' (plausible but fictitious or incorrect outputs). Litigants are required to cross-check all references, citations, and summaries for factual and legal accuracy.

Importantly, the NSW Practice Note states that AI tools are not suitable for substantive legal arguments, evidence preparation, or tasks requiring precise legal judgment. The guidelines

caution against reliance on tools that lack safeguards for bias, accuracy, or applicability to the specific jurisdiction.

The following is a table summarising the key principles of each of the guidelines for self-represented litigants using generative AI:

Jurisdiction	Key Principles: Guidelines for Self-Represented Litigants Using Generative AI
Victoria	Self-represented litigants are encouraged to disclose the use of AI tools in preparing documents filed with the court or presented as evidence. This disclosure provides context to judicial officers and aids in assessing the litigant's level of legal knowledge or expertise. Documents created using Gen AI must not mislead the court or other parties as to the nature of the work done. Users must understand the limitations of AI tools, such as accuracy, completeness, and potential biases, ensuring all AI-generated content is verified for correctness.
Queensland	Generative AI tools are not a substitute for qualified legal advice and cannot provide tailored legal counsel. Users are advised to have a clear understanding of the AI tool's functionality and limitations to avoid inaccuracies or biases. Guidelines include explanations of how Gen AI operates, providing self-represented litigants with a foundational understanding of its capabilities and restrictions.
New South Wales (NSW)	Guidelines include explanations of how Gen AI operates, providing self-represented litigants with a foundational understanding of its capabilities and restrictions. Self-represented litigants must disclose the use of Gen AI in written submissions, including verification of all citations, legal authorities, and case law referenced. Affidavits, witness statements, or evidence-related documents must reflect the litigant's own knowledge and cannot rely on AI-generated content unless prior leave of the court is obtained. Users are cautioned about the risks of inaccurate or fictitious outputs, the misuse of confidential data, and the limitations of AI models, which may be based on incomplete or outdated information.

<center>**Conclusion**</center>

Artificial intelligence (AI) and other legal technologies have the potential to improve access to justice for unrepresented and self-represented accused. However, as this submission makes clear any integration of such tools into the legal system needs to be limited, regulated and courts can use practice notes to help narrow the scope of its use in the legal process, and expand their application to the criminal jurisdiction:

Recommendation: Limiting Formal Use of AI in Legal Proceedings Until Reviewed by Legal Professionals or Court-Approved Personnel

To safeguard the integrity of the legal system and ensure equitable access to justice, it is recommended that the formal use of AI-generated outputs in court proceedings be restricted to circumstances where they have been reviewed and validated by a qualified legal professional or a court-appointed advisor. This recommendation addresses the risks associated with reliance on AI tools, particularly for self-represented and unrepresented accused, who may lack the legal expertise necessary to identify inaccuracies, contextual errors, or biases in AI-generated content. This recommendation also draws on a people-centred justice approach which recognises the importance of complementing AI solutions with in-person support.

Mandatory Review Post-Legal Advice:
Individuals should only be permitted to formally use AI-generated documents or arguments in court after obtaining legal advice or representation from a qualified legal professional. This ensures that AI outputs are appropriately contextualised, accurate, and aligned with legal standards.

Support for Financially Disadvantaged Individuals:
For those unable to afford legal advice, courts should provide access to a designated support officer or legal aid representative who can review AI-generated content. This service would ensure that economically disadvantaged individuals are not excluded from accessing the benefits of AI while preserving fairness and accountability in legal proceedings.

Court-Embedded Review Mechanism:
Courts should establish a resource desk or AI guidance unit staffed by trained personnel familiar with the use of AI in legal contexts. This unit would:

- Assist individuals in verifying the accuracy and relevance of AI-generated outputs.
- Provide basic guidance on whether the AI-generated content meets the court's evidentiary and procedural requirements.
- Flag potential risks, such as reliance on fictitious citations or inappropriate legal arguments.

Public Education and Training:
Courts and legal institutions should implement educational initiatives to increase public understanding of AI tools and their limitations. This would empower users to use AI responsibly and reduce reliance on flawed outputs.

Recommendation: Expanding the Regulatory Framework to Address AI Tools Used by Unrepresented Accused

In recognition of the growing reliance on AI tools by unrepresented and self-represented accused, it is recommended that the existing regulatory framework governing legal practice be expanded to encompass the use of AI in legal contexts. This would ensure that AI tools are deployed in a manner that upholds the principles of fairness, accountability, and the integrity of the legal system, while addressing the unique challenges faced by unrepresented and self-represented accused.

Defining the Scope of Regulation:
The regulatory framework should clearly define what constitutes the use of AI for legal purposes, distinguishing between tools that provide general legal information, tools that assist in document preparation, and tools that generate substantive legal advice or arguments.
The framework should explicitly address the responsibilities of AI developers, service providers, and end users to ensure the quality, accuracy, and ethical use of AI-generated outputs.

Accountability for Developers and Providers:
Legal tech companies and developers of AI tools should be brought within the regulatory framework, requiring them to:

- Ensure that AI systems meet established standards of accuracy, data security, and jurisdictional relevance.
- Provide disclaimers clarifying the limitations of their tools, particularly in relation to the provision of legal advice.

Licensing or certification programs could be introduced to ensure compliance with these standards.

Recommendation: Narrowing the Scope of AI Use by Parties in Court Proceedings

To ensure the integrity, fairness, and accuracy of judicial proceedings, it is recommended that the scope of permissible use of artificial intelligence (AI) by parties in court be explicitly defined and limited through the adoption of court guidelines and practice notes. This approach reflects existing judicial guidelines and aims to mitigate risks while enabling responsible use of AI in the legal system:

Restrict AI Use for Evidence and Testimony:
AI tools should be prohibited from generating affidavits, witness statements, or other evidence-related documents. These materials must reflect the direct knowledge,

observations, or opinions of the deponent or witness, as required by evidentiary principles. In exceptional cases, where AI is used for ancillary purposes (e.g., summarising or organising data for annexures), prior court approval must be obtained, with detailed disclosure of the tool's use and its limitations.

Mandate Disclosure of AI Use in Submissions:
Parties using AI for drafting written submissions, skeleton arguments, or other court documents must disclose its use. The disclosure should identify:

- The AI tool used.
- The specific role of AI in the preparation of the document.

Such documents must also include a verification statement affirming the accuracy, relevance, and completeness of all legal references, citations, and arguments, verified independently from the AI tool.

Prohibit AI Use for Substantive Legal Arguments:
AI tools must not be used to generate substantive legal arguments or interpret legal authorities. Parties should rely on human expertise for tasks requiring nuanced legal analysis and reasoning.
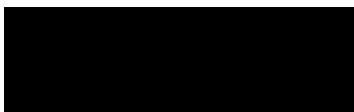
Limit Use of Public AI Tools:
Sensitive or confidential information must not be uploaded into public AI tools that lack safeguards for data security and privacy. Courts should require parties to confirm that no protected material has been entered into such tools.

AI as a Supplementary Tool Only:
AI should be restricted to supplementary roles, such as assisting with procedural tasks (e.g., formatting or summarising non-sensitive information), rather than replacing professional judgement or legal expertise.

Thank you for considering my submission. I am happy to provide further information on any of these, or associated issues.

Yours Faithfully,

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