

**Response to the Victorian Law Reform Commission's Consultation
Paper 'Artificial Intelligence in Victoria's Courts and Tribunals (October
2024)'**

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12 December 2024

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The Commissioners

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Dear Commissioners

This is a written submission in response to VLRC's Consultation Paper entitled 'Artificial Intelligence in Victoria's Courts and Tribunals' (October 2024) (the **Consultation Paper**).

About me

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I make this submission in my personal capacity.

Overview of this submission

Artificial Intelligence systems have the capacity to greatly improve access to justice, increase judicial efficiency, and generate higher quality outcomes in Victoria's courts and tribunals. Aside from narrow use cases centred around the exercise of judicial power, the risks of such systems to Victoria's courts and tribunals are small, reversible and constrained by existing frameworks.

Accordingly, I advocate for limited additional constraints on the use of the technology. Specifically, I recommend that:

1. The Commission focus on generative AI and those applications which directly influence the exercise of judicial discretion and decision-making power;

2. The only truly high-risk use case of AI in the courts is that which makes recommendations to a judge or tribunal member on how to exercise their judicial discretion. All other use cases are subject to existing safeguards and should be considered low risk;
3. The disclosure of the use of AI by court users, including lawyers, experts and parties, should *not* be required. Mandatory disclosure requirements could stifle exploration of genuine and beneficial use cases by all participants in the justice system. The use of these tools should definitely not be prohibited;
4. Education on the pitfalls and appropriate use of the technology should be encouraged for all participants in the court system, including court users, legal professionals, administrative staff and the judiciary.

The balance of this submission contains my detailed responses to select questions from the Consultation Paper.

Should you have any questions, please feel free to contact me at the email address below.

Kind regards

Damian Curran.

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

It depends on how the definition is to be applied.

The Commission has been tasked with making recommendations with respect to 'Artificial intelligence' in Victoria's courts and tribunals. The Commission's adoption of the OECD definition is justifiable, given there is no universally accepted definition of AI, and given the broad ambit of the Commission's terms of reference.

That approach does, however, capture a vast swathe of different technologies touching all corners of the legal industry. I suspect that, with respect to AI and the courts, the primary concerns of the Attorney-General, the Victorian Government and the Victorian public relate to a much narrower subset of modern AI capabilities – namely the text-based generative AI tools such as ChatGPT that have entered the public consciousness since late 2022.

Aside from the various applications of these generative AI tools (and a few instances of other machine learning applications¹), the other technologies identified in the consultation paper should not be a priority for the Commission or the subject of recommendations for legal reform.

Those other technologies are either:

1. low-risk administrative tools (such as e-filing and virtual hearing tools);
2. economy-wide technology which warrants regulatory attention but should be outside the ambit of a specific analysis of AI in the courts (such as facial recognition, fraud and cyber-security);
3. older generations of technology for which the legal system has already established frameworks (such as predictive coding in eDiscovery), or
4. fanciful or futuristic technology which does not exist (such as reliable judgment prediction, and reasoning engines which replace judicial discretion).

¹ Such as the COMPASS recidivism prediction tool. (See Julia Dressel and Hany Farid, "The Accuracy, Fairness, and Limits of Predicting Recidivism," *Science Advances* 4, no. 1 (January 5, 2018): eaao5580, <https://doi.org/10.1126/sciadv.aao5580>.)

2. Are there specific AI technologies that should be considered within or out of the scope of this review?

Yes.

I set out in the table below my views on which AI use cases ought to be a priority for the Commission. It is arranged by use case from section 4 of the Consultation Paper, rather than by AI technology, as use cases can differ significantly within each technological category.

The use cases which should be a high *priority* for the Commission are those using generative AI technologies (although most examples of the use of generative AI should be considered low *risk*) and any use cases which recommendations to a judge or tribunal member on how to exercise their judicial discretion (which should be considered both high *priority* and high *risk*).

Use-case	Suggested Priority	Comment
E-filing and allocation of court matters	Low	<p>E-filing is an administrative function. As noted in the consultation report, existing e-filing processes in Victorian courts do not use AI.</p> <p>The VICTOR project in Brazil is noted in the Consultation Paper.² That tool is not designed to replace judicial determination of a constitutional threshold. It is merely a classification tool designed to assist the efficiency of court administrative staff by classifying incoming documents into general categories (such as 'lower court decisions under review' or 'appeal petitions'), where that classification was previously done manually in the registry. It also operates in a court system with wildly different resource constraints than the Victorian court system – one in which, for example, 80 million lawsuits were awaiting judgment in 2017 and average processing time reached 7 years.³</p>

² at paragraph 4.4

³ Pedro Henrique Luz De Araujo et al., "VICTOR: A Dataset for Brazilian Legal Documents Classification," in *Proceedings of the Twelfth Language Resources and Evaluation Conference*, 2020, 1449–58.

Use-case	Suggested Priority	Comment
Case analysis and legal research (and other text-based Generative-AI use cases including triage, drafting, and document summarisation)	High	<p>Text-based generative AI tools, such as ChatGPT, entered the public consciousness in 2023. These tools offer the most exciting potential boon to the legal industry in generations. They are also the cause of many of the concerns of AI in the courts.</p> <p>The broad benefits and risks of generative AI tools are widely known and have been identified in the Consultation Paper. The key concerns are accuracy (i.e. hallucination) and privacy. Key potential benefits are wide and include sweeping improvements to access to justice, judicial efficiency and outcome quality.</p> <p>These tools should be the primary focus of the Commission.</p>
Rules as code	Low	<p>Machine readable rules are part of wider expert system infrastructure. Expert systems have been a part of legal discourse for decades.⁴ They are appropriate for certain use cases where rules are clear and decisions can be automated, but not otherwise. There is no need for the Commission to address them.</p>

⁴ See, e.g., Graham Greenleaf, Andrew Mowbray, and Alan Tyree, "The DataLex Legal Workstation: Integrating Tools for Lawyers," in *Proceedings of the 3rd International Conference on Artificial Intelligence and Law*, 1991, 215–24.

Use-case	Suggested Priority	Comment
Predicting outcomes of decisions	Low	<p>Case predictions should not be a priority of the Commission, if for no other reason than the task is incredibly difficult, and no tools have been developed which can predict case outcomes with high accuracy. The human element of judging and the vast array of variables in litigation mean that such prediction tools may never be particularly accurate. Recent developments in generative AI do not appear to have altered this paradigm.</p> <p>The example provided in the Consultation Paper of Lex Machina outperforming lawyers at US Supreme Court prediction refers to the use of a simple classification tree algorithm reaching a purported 75% accuracy. The study was from 2004 and says more about the difficulty of the task (and perhaps of the abilities of the human participants) than the risks of predictive decision technology.⁵</p> <p>Even if certain prediction techniques show slightly better prediction than mere chance, the downside of allowing people to explore the benefits of the tools is minimal. The potential upsides if the technology does work include increased judicial transparency and information upon which to encourage early case settlement. These are hardly a cause for concern.</p>
Technology assisted review and e-Discovery	Low	<p>The use of traditional machine-learning techniques in e-Discovery has a long history. Its use was well ventilated in the courts, legal literature and procedural rules across the world throughout the 2010s – such as the case and practice note of the Supreme Court of Victoria identified in the Consultation Paper.⁶ There is nothing in the recent generative AI boom which ought to disrupt the frameworks established during this period.</p>

⁵ Theodore W Ruger et al., “The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking,” *Colum. L. Rev.* 104 (2004): 1150.

⁶ at paragraph 4.40

Use-case	Suggested Priority	Comment
Transcription and translation	Low	These are practical tools for use within a courtroom. Their procurement, performance evaluation and use should be exclusively within the ambit of the court, tribunal and parties deploying them, akin to decisions on any other digital infrastructure to aide the smooth operation of a hearing.
Evidence	Medium	<p>As with any new technology, as AI proliferates through our society, it will find its way into the courtroom. As identified in the report, this will include evidence <i>generated by AI</i>, as well as evidence <i>about AI</i>. Adversarial hearings are well suited to probe the veracity of AI evidence. Over time, experts and court personnel will develop appropriate expertise to both support and critique different forms of AI evidence.</p> <p>Some of the other concerns identified in this section of the Consultation Paper relate to broader societal issues, such as the regulation of the use of facial recognition tools by law enforcement, and policies relating to copyright infringement and privacy arising from AI.⁷ These are important issues but appear to be beyond the ambit of a consultation specifically on AI use within courts and tribunals.</p>
Online dispute resolution and Online alternative dispute resolution	Low	All automated systems, using AI or otherwise, which facilitate <i>voluntary</i> settlement of legal disputes should be encouraged.
Virtual courts and tribunals	Low	The risks of cyber-vulnerability are present when using online conferencing tools in any professional environment. The risks are not negligible, but are economy-wide concerns typically resolved through IT procurement policies and education. These are important issues but appear to be beyond the ambit of a consultation specifically on AI use within courts and tribunals.

⁷ at paragraphs 4.49 to 4.74.

Use-case	Suggested Priority	Comment
<p>Risk assessment, bail and criminal sentencing</p> <p>(and other judicial decision-making functions such as judicial review of decisions)</p>	<p>High</p>	<p>Any tools which assist the judiciary in their discretionary exercise of power should be carefully scrutinised. These include tools which provide 'recommendations' on sentencing or recidivism to the judiciary.⁸</p> <p>However, care should be taken to distinguish between tools which may encroach on judicial decision making, and generative AI tools which may be responsibly used by judges and tribunal members to aide drafting, evidence summarisation, ideation and other tasks necessary as part of the process of drafting written reasons.</p>

⁸ Such as COMPASS (n. 1)

Use-case	Suggested Priority	Comment
Automated decision-making	Low	<p>Current AI techniques cannot replace judicial discretion. Technologies such as generative AI do not conduct reasoning. There are no technologies on the near horizon which will be able to reason in a human-like manner. Claims that AI processes can or will at some point in the near future replace or supplant judges are fanciful and ungrounded.</p> <p>Modern AI systems can only:</p> <ul style="list-style-type: none"> i. provide guidance to human judges on the exercise of their discretion. (This is a high-risk application, as discussed below, but one in which there are limited examples); or ii. make assessments in an 'automated' fashion where there is a fixed ruleset which can be programmed into a decision tree or expert system. This is not the exercise of judicial discretion. <p>There are several instances where automated decision making has been poorly designed and caused significant harm. Historic examples are found in evaluations of entitlements in bureaucratic environments where eligibility is determined according to strict rules.⁹ These applications are indeed high-risk and can cause significant harm to large groups. They are recognised as high-risk applications by the EU AI Act.¹⁰ These are important issues but appear to be beyond the ambit of a consultation specifically on AI use within courts and tribunals.</p>

⁹ Such as the Robodebt system, which "involved a system of business rules with no ability to move outside of specific and defined action on the basis of the data received. It was extremely rigid; once the rules had been coded and set in place, the system itself would stay in place" (See Catherine Holmes, "The Final Report of the Royal Commission into the Robodebt Scheme," July 7, 2023, <https://robodebt.royalcommission.gov.au/system/files/2023-09/rrc-accessible-full-report.pdf.>)

¹⁰ Annex III 5(a) of the EU Artificial Intelligence Act, Regulation 2024/1689

3. What are the most significant benefits and risks for the use of AI?

Benefits

The headline benefits are as identified in the Consultation Paper, namely – increased access to justice, increased efficiency, and improved outcomes. There are unlikely to be headline-grabbing advances or single tools which cause substantial improvements in these outcomes. It is more likely that increasing AI capabilities will lead to a range of small improvements in legal workflows and tools which create incremental change that compounds over time. Those incremental improvements may make it tempting to focus on the occasional news story of "AI-gone-wrong". However, it is important not to lose track of the broad positive impact this technology could have across the justice system.

Risks

The realistic risks are as identified in paragraph 3.15 of the Consultation Paper. Inaccuracy is the most obvious and technically challenging risk of the application of generative AI tools in courts and tribunals. Bias is becoming less of a concern with each newer generative AI release,¹¹ and generative AI offers a paradigm shift improvement over the problems of bias in more traditional machine learning methods.¹² Data security and privacy concerns, whilst critically important considerations when using public-facing chatbots, have known solutions.¹³ The further 'risks' identified at paragraph 3.16 of the Consultation Paper, such as the deskilling of justice professionals and impacts on judicial independence, are, with respect, ungrounded and alarmist.

¹¹ See, e.g., Anthropic's recent LLM, Claude 3 Opus, which outperforms earlier versions of the Claude models on all bias factors that they measures, including age, nationality, religion, gender and race: Anthropic, "The Claude 3 Model Family: Opus, Sonnet, Haiku," 2024, https://www-cdn.anthropic.com/de8ba9b01c9ab7cbabf5c33b80b7bbc618857627/Model_Card_Claude_3.pdf.

¹² Bias such as that evident in older machine learning products like COMPASS (n. 1)

¹³ Such as data security agreements with AI service providers, encryption, and private model hosting.

6. Are there uses of AI that should be considered high-risk in court processes? How can courts and tribunals manage those risks?

Yes.

The primary high-risk use case of AI in courts and tribunals are systems which assist the decision maker in exercising judicial discretion. This includes tools which provide guidance or recommendations on a judicial determination.¹⁴

However, it is not clear that such tools are widespread in Australian courts and tribunals (or, indeed, deployed *at all*).

Tools which are used by judges or tribunal members which merely assist in workflow, but do not go directly to the decision-making function, should be *not* be considered high-risk. These may include generative AI tools which summarise text, facilitate research or permit ideation and critique of text.

Members of the judiciary and the tribunal will have varying levels of enthusiasm, technical competency, interest and workflows which will be more and less suited to these tools. They ought to be given the autonomy to investigate the use of these tools for ways which best help them increase quality and efficiency of their output.

All other use cases of AI in courts and tribunals (including by court administrators, lawyers, experts, witnesses and parties) should be considered low risk.

7. Should some AI uses be prohibited at this stage?

No.

There are certain economy-wide AI applications, such as facial recognition technology in some settings, which ought to be prohibited. However, those concerns are beyond the ambit of this consultation.

¹⁴ such as the length of a sentence, quantum of damages, or risks of recidivism. The most well-known misuse of such technology is COMPASS (n. 1).

16. Who should be able to contest an AI decision, and when?

This question is ill-conceived

There are no systems where an AI makes a ‘decision’ in a court or tribunal setting.

Automated decision-making expert systems have been deployed in *bureaucratic settings* to make rigid, rules-based determinations. Some of these systems do not have humans-in-the-loop. Some have had disastrous consequences.¹⁵

However, those are not *judicial* determinations and are not the subject of this consultation. Judicial determinations require the application of discretion by a (human) judicial officer, such as a judge or a tribunal member. Such decisions are not rules-based. They are not amenable to expert ‘automated decision making’ systems. They are usually authored and signed off, by name, by the responsible judicial officer.

Some court administrative functions could conceptually be automated (such as some version of automated classification system, akin Brazil’s VICTOR project¹⁶). But these systems would merely be automating existing administrative processes. They would not be replacing decisions which have any element of judicial reasoning or discretion.

Mistakes or errors made by a registry or court administration can typically be corrected by notifying the registry or administrators. These corrections are not ‘contests’.

Given the above, it is unclear how in any court or tribunal setting an AI would be making a ‘decision’ which would necessitate a ‘contest’.

¹⁵ Such as Robodebt (see n. 9).

¹⁶ (n. 3)

21. Is there a need to strengthen professional obligations to manage risks relating to AI?

No.

Existing professional obligations, as well as natural incentives, are sufficient to encourage the appropriate use of AI by lawyers in Victoria.

(See my response to question 23, below.)

22. Should guidelines be developed for Victorian court and tribunal users relating to the use of AI?

Yes - but voluntary guidance only

Guidelines are helpful as part of broader suite of professional and public education tools about the risks and proper use of AI in a legal environment.

However, guidelines (or practice notes, or rules) which contain blanket prohibitions on the use of the technology, or unnecessary disclosure obligations, should be avoided.

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

No

Disclosure of the use of AI should not be required by either legal professionals, expert witnesses, or the public, because:

1. **Existing legal restraints and incentives are sufficient to curtail misuse:** There are existing systems in place to address concerns arising from the use of AI in the production of legal documents;
2. **'AI use' will be difficult to define:** The line between disclosable and non-disclosable use cases of AI is blurry, and will continue to blur as the technology proliferates;

3. **No historic analogues:** There are no historic analogues for disclosure of the methods or process used to produce a document put before the court. Requiring such disclosure is odd, unnecessary and I suspect will be viewed with curiosity in the future as we become more comfortable with the technology.

I elaborate on each of these reasons below.

Existing legal restraints and incentives are sufficient to curtail misuse

The primary concerns of courts that have proposed prohibitions on the use of AI appear to be:

1. misrepresentations being made to the court;¹⁷ and
2. the loss of signals about an author which could otherwise be gleaned from their original written word.¹⁸

These concerns are already addressed by existing professional and legal obligations, and by the natural incentives of the individuals using AI tools.

Legal professionals, parties and experts are already subject to long-standing professional and ethical obligations not to mislead the court. As the current Victorian guidelines on AI state:

"A party or practitioner signing or certifying a document, filing a document with the Court, or otherwise relying on a document's contents in a proceeding, remains responsible for accuracy of the content. Whether a court document is signed by an individual or on behalf of a firm, the act of signing a document that is filed with the Court is a representation that the document is considered by those preparing it to be accurate and complete."¹⁹

Breach of these obligations by the production to the court of hallucinated content can have serious professional consequences. These consequences apply in the absence of any additional AI disclosure obligations.

There are also strong natural incentives for lawyers, experts and parties to minimise the risks of hallucinated content. No one preparing a document to be put before the court wants it to contain a mistake. Submissions, pleadings, expert reports, affidavits and the like are put before the court as part of an effort to persuade the court of a point of view. Should the court discover an error or misrepresentation in a document, credibility of the

¹⁷ Such as non-existent cases law contained in written submissions produced by ChatGPT.

¹⁸ Signals may include information such as cultural background, legal knowledge and personality of the author.

¹⁹ The Supreme Court of Victoria, "Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation," May 2024, <https://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/guideline-responsible-use-of-ai-in-litigation>.

author can be irreparably harmed.²⁰ In an adversarial setting (as many settings will be within Victoria's court and tribunal system), the chance of discovery of any errors or misrepresentations in a written document under scrutiny of an opposing party, are high.

These consequences of misuse of AI by a solicitor are evident in all of the oft-cited recent cases of ChatGPT's misuse in court systems across the globe. The consequences are notable because they occur in the absence of any AI specific regulations or disclosure requirements. The cases include:

- the much cited case of the 'ChatGPT Lawyer' in which a New York court imposed sanctions on the lawyer for producing submissions containing non-existent cases. The lawyer involved gained global notoriety for all the wrong reasons;²¹
- a Colorado Supreme Court case in which an attorney was suspended after using sham case law citations in a motion;²²
- the US Court of Appeals case in which a North Carolina attorney was referred to the bar grievance committee after filing a brief containing a citation to a non-existent case, was chastised by the Court for conduct which fell 'below the basic obligations of the counsel' and obliged to furnish a copy of that decision to their client;²³
- the Supreme Court of British Columbia case in which a Canadian attorney was ordered to pay personal costs to the opposing counsel, despite having no intention to deceive or misdirect. The lawyer said that finding out that the cases were fabricated was 'mortifying'.²⁴

There are also consequences for the inappropriate use of AI in the preparation of witness statements. In a case in the ACT, AI appeared to be used by a witness to draft a statement of support.²⁵ Because it was evident to the judge that AI had been used to draft the statement, little weight was placed on its content. No party calling a witness wants their evidence to be dismissed in such a manner. The result is a natural incentive to ensure that written evidence is truly prepared in the witness's own voice. Such evidence is often more real and ultimately more persuasive. Those incentives apply regardless of any AI specific rules.

²⁰ Kirby J said of credibility that it is an advocate's 'most priceless possession.' (See Michael Kirby, "Rules of Appellate Advocacy: An Australian Perspective," *J. App. Prac. & Process* 1 (1999): 227.)

²¹ Mata v. Avianca, Inc. (United States District Court June 22, 2023). The lawyer was named and shamed in the New York Times (See Benjamin Weiser, "Here's What Happens When Your Lawyer Uses ChatGPT," *The New York Times*, May 27, 2023.)

²² Thy Vo, "Colo. Atty Suspended For Using 'Sham' ChatGPT Case Law," November 27, 2023, <https://www.law360.com/pulse/articles/1770085/colo-atty-suspended-for-using-sham-chatgpt-case-law>.

²³ Park v. Kim [2024] F.4 610

²⁴ Zhang v Chen [2004] BCSC 285

²⁵ DPP v Khan [2004] ACTSC 19

A similar set of incentives exist for expert witnesses. Experts, and the parties that engage them, want to be believed and want to effectively communicate their authority. No expert wants to gain a reputation for producing false or inaccurate work product and losing the trust of the judiciary and their clients. Expert witnesses are also under existing professional obligations similar to those of legal professionals not to mislead or deceive the court, to act honestly and to further the administration of justice.²⁶

'AI use' will be difficult to define

Some recent court guidelines have attempted to draw a distinction between acceptable and unacceptable uses of AI.²⁷ This boundary can be difficult to draw, and will become more blurry as the technology is integrated deeper into the workflows and technology of legal professionals.

There are countless ways in which the technology can be used. It may be unclear to users what use cases are acceptable (or at least, disclosable) or not. For example, it could be used to improve strategy, efficiency and quality of written product, ideation, counter-arguing, condensing / shortening lengthy argumentation, making prose clearer and easier to read, generating chronologies and evidence compilation, or producing first drafts. There are likely to be many other interesting use cases throughout a legal workflow that are yet to be properly explored.

It is also often not evident to even a tech-savvy end user whether a tool they are using incorporates 'AI' or not. Most modern spell checking and grammar tools incorporate some form of AI language model. The Microsoft Office suite now incorporates 'Co-Pilot' – an AI assistant – throughout their products, including to make suggested rewrites and sentence completions. Co-Pilot incorporates AI language models (similar to those which power the ChatGPT app).²⁸

The consequence of these unclear boundaries may be a chilling effect in which people will be unwilling to explore these many potentially beneficial use cases of AI because they are unclear of the associated disclosure requirements.

No historic analogues

There are no historical analogues which require the disclosure of *how* a document was produced.

²⁶ ss.10(3), 16, 17 and 21 of the Civil Procedure Act 2010 (Vic)

²⁷ Such as the attempt in the recent NSW Court guidelines to distinguish between technology that 'merely corrects spelling or grammar, provides transcription, assists with formatting' and that which 'generates substantive content'. (See The Chief Justice, NSW, "Generative AI Practice Note and Judicial Guidelines," November 21, 2024, https://supremecourt.nsw.gov.au/documents/Practice-and-Procedure/Practice-Notes/general/current/PN_Generative_AI_21112024.pdf. p6(a))

²⁸ Microsoft 365 "coordinates large language models (LLMs). LLMs are a type of artificial intelligence (AI)..." (See "Microsoft 365 Copilot Overview," May 12, 2024, <https://learn.microsoft.com/en-us/copilot/microsoft-365/microsoft-365-copilot-overview>.)

For example, we do not currently require lawyers to disclose details of all brainstorming sessions, paralegal first drafts, partner corrections, research memos and google searches which contributed to a finalised submission. Most lawyers would be cautious of disclosing exactly how their work product is compiled.

The final document, signed off by counsel or a firm, filed and served, stands on its own and is judged purely by the text on its face. If certain parts of that creation process can now be streamlined and the final output improved with the use of newer technology, it seems unnecessarily stifling to require disclosure of that process.

24. What are the benefits and risks of disclosure?

Benefits

The benefits of disclosure are few in circumstances where existing professional obligations and incentive structures already curtail misuse, as discussed above.

Risks

Mandatory disclosure risks having a chilling effect on the exploration of genuinely beneficial use cases of the technology, unnecessarily curtailing potential improvements to access to justice, judicial efficiency, cost of legal services and quality of service.

26. Are there other guidelines or practice notes relevant to court users and AI use that should be considered by the Commission?

Yes.

Many jurisdictions around the world are grappling with the impacts of AI and have prepared useful guidance from which Victoria can learn.

Non-binding guidance for the judiciary and legal professionals is welcome.

The UK AI Guidance for Judicial Office Holders is an admirable example.²⁹ It describes the technology, identifies the nature of issues the judiciary ought to be aware (including risks of privacy, confidentiality, accuracy) and gives practical positive and negative use cases.

The recent Practice Note from the NSW Court system, is, with respect, overly prescriptive and unnecessarily restricts the use of the technology.³⁰

27. Should guidelines be developed for the use of AI by Victorian courts and tribunals including for administrative staff, the judiciary and tribunal members? If so, what should they include and who should issue them?

Yes.

As with other participants in the court systems, guidance on the nature of the technologies, its capabilities and its limits for administrative staff, the judiciary and tribunal members, is welcome.

But the prescriptions on 'acceptable' use cases of AI within the judiciary sits on a spectrum.

At one end of the spectrum are high-risk AI tools which assist the decision maker in exercising judicial discretion. This is discussed in more detail in response to question 6, above.

²⁹ Courts and Tribunals Judiciary, "Artificial Intelligence (AI) Guidance for Judicial Office Holders," December 12, 2023, <https://www.judiciary.uk/wp-content/uploads/2023/12/AI-Judicial-Guidance.pdf>.

³⁰ See n. 27

On the other end are benign use cases in which the technology could be used to assist the judiciary and its administrative staff to improve court and tribunal functioning, efficiency and service quality.³¹ These ought not to be restricted.³²

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?

Not necessarily

Over the last few years, many courts have been transparent about their implementation (or, in many cases, their non-implementation) of AI tools. They did so without any regulatory requirement to do so – presumably in response to natural desire to maintain confidence in the judiciary and to be transparent about their processes. If courts do begin to integrate AI into certain workflows, perhaps it will be desirable for them to disclose that use.

But there is no obvious parallel *requiring* consultation or disclosure of their internal processes. We currently do not ask judges to disclose the internal processes they undertake when making their decisions. They do not disclose first drafts, internal research work by their associates, or details of conversations they have had with judicial colleagues.

39. How can education support the safe use of AI in courts and tribunals?

Education is critical.

Education is the best tool available to minimise the risks of AI.

Many of the limits, capabilities and appropriate use cases of AI are fairly well understood and publicised. Education is key to ensuring that information is promulgated to the judiciary and to the users of the legal system.

³¹ Including business functions such as emailing and document filing, to summarisation or research.

³² The EU AI Act also acknowledges that the high-risk classification should not apply to 'AI systems intended for purely ancillary administrative activities that do not affect the actual administration of justice in individual cases' (Recital 61).