UNSW
Centre for the
Future of the
Legal Profession

Submission to the Victorian Law Reform Commission inquiry 'Artificial Intelligence in Victoria's Courts and Tribunals'

UNSW Law & Justice

and

Centre for the Future of the Legal Profession

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About us

We are researchers from the Centre for the Future of the Legal Profession and UNSW Law & Justice at the University of New South Wales. In this submission we discuss in brief our views on some of the issues arising from the Victorian Law Reform Commission (**VLRC**) Consultation Paper on Artificial Intelligence in Victoria's Courts and Tribunals, adopting the same chapter structure. Not all questions have been addressed. Our submission reflects our views as researchers and is not an institutional position.

Chapter 2: What is artificial intelligence?

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

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

The challenge of adopting a definition of AI is that any definition will inevitably change. AI is an umbrella term which captures a set of technologies that have common features but also much diversity. There is no universally agreed upon definition, and those definitions which have achieved degrees of consensus (such as that of the OECD) have changed over time. Further, definitions that exist (such as in the European Union's AI Act) are not necessarily well-aligned to the kinds of issues with which they are associated. A pragmatic approach for courts and tribunals might be to adopt a largely agreed upon definition from elsewhere (e.g., the OECD or CSIRO) noting it may change from time to time and may vary depending on the context in which the term is used.

Likewise, our suggestion would be to attempt to narrow the scope, because to examine aspects of everything falling within the definition of AI will be onerous. Further, in many instances, AI is built into technological tools that are in everyday use and where the AI component does not necessarily present risks that courts or tribunals should be concerned with (such as grammar checking). Often, it is not the technology or AI itself which is the issue, but rather ill-informed use.

Chapter 3: Benefits and risks of AI

3. 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?**

4. Are there additional risks and benefits that have not been raised in this issues paper? What are they and why are they important?

In our view, specific benefits and risks of AI are well-covered in the report 'AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators' (Australasian Institute of Judicial Administration) (**AIJA Guide**), authored by three of the present authors.

A key risk is that some users may place too much faith in the operation of AI systems, whether in pursuit of efficiency or due to a belief that AI is infallible. For example, there are legal tasks at which AI can perform very well, but perfection cannot be guaranteed. In such cases, users may be tempted not to check an AI system's outputs, or not to check thoroughly enough. If AI-completed tasks need to be checked extensively then efficiency gains may be reduced or lost.

Chapter 4: AI in courts and tribunals

5. How is AI being used by:

- **a. Victorian courts and tribunals**
- **b. legal professionals in the way they interact with Victorian courts and tribunals**
- **c. the public including court users, self-represented litigants and witnesses?**

In response to question 5(b) and in addition to the examples mentioned by the VLRC in Chapter 4, we note that AI features are deeply embedded in many modern software and technology integrations currently used by legal professionals in matters before Victorian courts and tribunals. Consequently, AI usage may not be fully apparent to users, or to courts and tribunals, potentially complicating the implementation of any proposed mandatory 'AI disclosure' requirements.

For example, modern practice management systems and document/template automation software, commonly used by law firms to automate and generate many court and tribunal forms and other templated documents used in litigation, increasingly incorporate AI-driven features, including generative AI (**GenAI**). Many eDiscovery providers are also evaluating or implementing GenAI as part of their products to enhance existing technology assisted review and predictive coding processes.[1]

We recommend that the VLRC engage with a representative cross-section of providers of these types of technologies,[2] to better understand the current status of the software commonly used in the preparation and conduct of litigation, their product development plans, and examples of recent client implementations adopting features incorporating AI that may inadvertently fall within the scope of this review.

In response to Question 5(c), the Centre for the Future of the Legal Profession is monitoring the rising use of GenAI by legal professionals and other parties involved in proceedings before courts and tribunals since November 2022. In addition to the recurring issues of hallucinations and fake or inaccurate citations noted by the VLRC at paragraphs 8.29 and 8.30 of the Consultation Paper, other potential issues with GenAI use by legal professionals, self-represented parties, and other third parties such as expert witnesses include:

- inaccurate summaries and fallacious arguments presented to courts and tribunals;
- incorrect research of legal and other 'facts';
- drafting prolix or legally incorrect documents; and
- 'flooding' courts or tribunals with large quantities of submissions created using GenAI.

Beyond the case of *Dayal* mentioned in paragraph 8.30, and the Children's Court matter in paragraph 7.14, recent cases heard in Victoria involving the use of GenAI that the VLRC may wish to examine include:

[1] See, eg, Relativity, 'White Paper: Generative AI in Legal: How Relativity aiR Reshapes Review', <https://resources.relativity.com/generative-ai-in-legal-how-relativity-air-reshapes-review-lp.html>.
[2] Such as LEAP, Smokeball, Thomson Reuters for Contract Express, and Avokka.

- *DPP v Khim* [2024] VCC 1428: In the County Court of Victoria, where the defendant used AI to prepare a false employment reference for a bail application in the Magistrates' Court.
- *Finch v Heat Group Pty Ltd* [2024] FedCFamC2G 161: In the Federal Circuit and Family Court of Australia (Division 2), where the self-represented plaintiff apparently used AI for legal research and generated a list of cases, some of which were non-existent or incorrectly cited, and none of which stood for the proposition being argued.
- *Kaur v Royal Melbourne Institute of Technology* [2024] VSCA 264: In the Supreme Court of Victoria, where the self-represented plaintiff appeared to use ChatGPT to draft written submissions containing non-existent cases.
- *Luck v Principal Registrar and Chief Executive Office of the Federal Court of Australia* [2024] FCA 1256: In the Federal Court, where the self-represented applicant admitted to using AI to prepare her application and apologised in advance that the court might identify some citations in her document that did not exist, which was correct.

These examples were sourced from public and subscription-based legal information databases. However, we note that GenAI use in litigation may not always be apparent or relevant to the issues being considered and may not be captured in official records. Consequently, we believe that actual levels of GenAI use in litigation are significantly higher in the jurisdictions we are monitoring, which includes Victorian courts and tribunals.

A consistent pattern across these jurisdictions is that GenAI use resulting in problems within litigation processes is often by self-represented parties. This is a growing issue, even in jurisdictions where courts have specific GenAI protocols or other forms of guidance in place. The pattern suggests that self-represented parties may benefit from more targeted communications and training about the appropriate use of GenAI when researching their legal cases and preparing submissions and other evidentiary material, in addition to general AI protocols or those targeting legal professionals and judicial officers.

6. Are there uses of AI that should be considered high-risk, including in: court and tribunal administration and pre-hearing processes; civil claims; criminal matters. How can courts and tribunals manage those risks?

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

There are some uses of AI which should be considered high-risk, including in court and tribunal matters. This would include where an AI system is required to be correct in its outputs and there is no, or limited, human oversight or ability to comprehend how the system has arrived at the output. It would also include situations where the use of AI systems could result in bad outcomes *independent of* the quality of outputs (for example, where confidence in the judiciary is undermined) and situations where having a human process is important.[3]

We note that the European Union's AI Act identifies as high-risk AI systems used in the following:

- Access to essential public and private services and benefits[4] – this would include access to courts and tribunals, as essential public services; and
- Administration of justice and democratic processes, namely 'AI systems intended to be used by a judicial authority or on their behalf to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts, or to be used in a similar way in alternative dispute resolution'.[5]

In our view, this is an appropriate classification for such AI systems. Under the AI Act, where an AI system is classified as high-risk, various standards and requirements apply to producers, deployers and importers of such systems.

The AI Act also prohibits the deployment of systems designed to assess the risk of persons committing a criminal offence, based on profiling, personality traits or characteristics.[6] However, the prohibition 'shall not apply to AI systems used to support the human

[3] Lyria Bennett Moses, 'Stochastic Judges: The Limits of Large Language Models' (2024) 98(9) *Australian Law Journal* 640.
[4] EU AI Act, Annex III, 5(a), <https://eur-lex.europa.eu/eli/reg/2024/1689/oj>.
[5] EU AI Act, Annex III, 8(a).
[6] EU AI Act, Art 5(1)(d).

assessment of the involvement of a person in a criminal activity, which is already based on objective and verifiable facts directly linked to a criminal activity'.[7]

In relation to AI uses being prohibited, we note that the Supreme Court of NSW *Practice Note SC Gen 23 – Use of Generative Artificial Intelligence*, has a number of prohibitions, as follows:

- Para [9] states that information subject to: non-publication or suppression orders; the implied (*Harman*) undertaking not to use information produced under compulsion for any purposes extraneous to the proceedings without the leave of the Court; material produced on subpoena; or any material that is the subject of a statutory prohibition upon publication, must not be entered into any GenAI program.
- Para [10] states that GenAI must not be used in generating the content of affidavits, witness statements, character references or other material that is intended to reflect the deponent or witness' evidence and/or opinion, or other material tendered in evidence or used in cross examination.
- Para [17] states that GenAI cannot be used to verify citations, legal and academic authority and case law and legislative references.
- Para [20] states that (subject to para [23]) GenAI must not be used to draft or prepare the content of an expert report (or any part of an expert report) without prior leave of the Court.

We note that paragraph [9] may come to be amended, as some of these materials (i.e. information produced under compulsion such as by discovery or subpoena) is currently entered into e-discovery software. E-discovery software has security and confidentiality mechanisms in place to protect against confidential information being accessed by GenAI programs (the harm which the Court is seeking to guard against).

The underlying concern sought to be addressed by paragraphs [10], [17] and [20] is that this material needs to be true and/or correct and GenAI may not produce responses that are true and/or correct. Whether this result can only be obtained by banning the use of GenAI is unclear. It may be sufficient to rely on lawyers' and experts' professional obligations and

[7] ibid.

other prohibitions such as the offence of perjury.[8] The NSW position could be compared with the Supreme Court of Victoria, *Guidelines for litigants: responsible use of artificial intelligence in litigation* (May 2024) which advise caution rather than banning use.

Chapter 5: Regulating AI: the big picture

8. Are there lessons from international approaches that we should consider in developing a regulatory response for Victorian courts and tribunals?

The international examples discussed in Chapter 5 concern technology-specific regulation of AI in broader contexts (beyond courts and tribunals). While some may include within scope the use of AI either by courts, by litigants and/or in the context of evidence, the focus is far broader. Australia's approach is being considered by the Australian Government Department of Industry Science and Resources. Some states (notably New South Wales and South Australia) have looked into the question of AI regulation as well. However, separate technology-specific regulation in each state and territory would create significant problems for Australia's AI industry without compensating benefits. In any event, the question of state-specific AI regulation in Victoria would seem beyond the scope of a law reform project focussing on courts and tribunals.

9. What would the best regulatory response to AI use in Victorian courts and tribunals look like? Consider:

- **a. which regulatory tools would be most effective, including rules, regulations, principles, guidelines and risk management frameworks, in the context of rapidly changing technology.**
- **b. whether regulatory responses should be technologically neutral, or do some aspects of AI require specific regulation?**

In the context of the examples considered in Chapter 5, these are broader questions for the reasons stated in response to Question 8, above. The submission of Lyria Bennett Moses to similar questions at the Commonwealth level can be found here. Additional considerations that apply at state level can be found in submissions in NSW and SA. Overall, technologically

[8] See Michael Legg, 'Ethical and Effective Witness Preparation' (2024) 11 *Journal of Civil Litigation and Practice* 101 (discussing penalties for false affidavits); Michael Legg, '"Fake it 'til you Make it" – Not with AI and the Courts: Lawyers' Duties as Protections for the Administration of Justice' (2024) 98(9) *Australian Law Journal* 685.

neutral approaches have significant advantages where the concerns (accuracy, fairness, transparency) are not necessarily tied to the use of any specific technology (even where they may be implicated by some technological practices).

10. How should court and tribunal guidelines align with AI regulation by the Australian Government?

Any court and tribunal guidelines should align with any AI-specific laws introduced that apply to courts and tribunals. In addition, in its own use of AI systems, courts and tribunals should refer to relevant guidelines that promote good governance (noting that some guidelines are designed for other contexts). Courts and tribunals should not only avoid inconsistency, but also avoid the duplication that can occur where different jurisdictions phrase similar requirements differently, thus increasing compliance costs for little gain.

Chapter 6: Principles for responsible and fair use of AI in courts and tribunals

As noted, three of the authors of this submission also authored the AIJA Guide, 'AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators' for the Australasian Institute of Judicial Administration. In this report, we identified core judicial values: impartiality and equality before the law; access to justice; judicial accountability; independence; open justice; public trust; procedural fairness; efficiency. The VLRC effectively combines this set of principles with 'common AI regulatory principles', being: fairness and equity, accountability, human oversight, transparency, contestability, privacy and data security, to come up with the following:

1) Impartiality and fairness
2) Accountability and independence
3) Transparency and open justice
4) Contestability and procedural fairness
5) Privacy and data security
6) Access to justice
7) Efficiency
8) Human oversight and monitoring

11. Are the principles listed in this chapter appropriate to guide the use of AI in Victorian courts and tribunals? What other principles might be considered?

In a fast moving area, guiding principles are necessary as more specific regulation may lag behind developments. The eight principles listed are appropriate. However, there are significant limitations to their operability noting that the meanings of many terms are contested, complex and/or have different meanings when considered in a technical sense as opposed to a legal sense. For example, impartiality is often taken to mean an absence of bias. However, 'bias' is a heavily contested concept[9] that is difficult to define.[10] Further comments are made below in relation to some of the different principles.

Impartiality and fairness

As noted, the meaning of terms such as 'fairness' and 'bias' are contested within machine learning. While most people would agree that any AI tool used by the courts should be 'fair', the precise content of fairness is challenging to define. Should fairness in sentencing be measured by consistency with previous comparable sentences or by the extent to which it takes into account factors that are subjective, or unique to the individual being sentenced? Can fairness be achieved by retaining the oversight of a human decision-maker who can modify or overturn the result of an AI system,[11] or does this risk further biasing effects (such as an anchoring effect) and/or render the AI tool pointless?

Transparency and open justice

Transparency may mean both:

1. Disclosure of how humans/human processes use AI;
2. Disclosure of how an AI system itself works.

In relation to point 1, in our view, it is imperative to disclose when AI is being used in a human process within courts or tribunals, which are rule of law promoting institutions. This

[9] See, eg, Julia Angwin et al, 'Machine Bias', ProPublica, 23 May 2016, <www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>; AW Flores, K Bechtel and CT Lowenkamp, 'False Positives, False Negatives, and False Analyses: A Rejoinder to "Machine Bias"' (2016) 80 (2) *Federal Probation* 38; Jon Kleinberg, Sendhil Mullainathan and Manish Raghavan, 'Inherent Trade-Offs in the Fair Determination of Risk Scores' (2016) <https://arxiv.org/abs/1609.05807>.

[10] Sandra Wachter, 'Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the European Union, the United States, and Beyond' (2024) 26(3) *Yale Journal of Law & Technology* 671 (noting the absence of a definition of 'bias').

[11] Eg, as held in *State v Loomis,* 881 N.W.2d 749 (Wis 2016).

should apply even if the process in question is in a seemingly mundane area (such as filing) and its use is for administrative rather than judicial purposes. The importance of disclosure is heightened if court and tribunal users are required to disclose their own AI use.[12] In our view, disclosure in relation to point 1 can be general (i.e., identifying the type of system and where it is being deployed).

In relation to point 2 above, transparency in how an AI system works, it is important to note that in many cases, transparency alone will be insufficient or not meaningful due to the complexity of the systems in question.[13] Recognition of this fact has led to calls for interpretable, trustworthy or explainable AI.

Explainable AI (xAI) has as its purpose the goal of creating simpler models or approximations of extremely complex 'black box' functions. This is, however, distinct from the concept of explanation or reason-giving as used in law, which is justificatory.[14] A similar point has been made about the concept of accountability, which has different meanings when used in the sense of technical accountability as opposed to social or legal accountability.[15] Building in 'explanation' to ML systems may not enable justification as the explanation may depend on correlations in data rather than patterns of causality.[16] On the other hand, it has been suggested that counterfactual explanations are helpful for laypersons in understanding decisions made by AI systems.[17]

Further, there are many different facets of explanation, as summarised in Table 1.

Table 1: Facets of explanation

Scope of what is to be explained	Local – why a specific decision was arrived at
	How a process or model has been designed/trained
	How a process or model is operating

[12] Supreme Court of Victoria, *Guidelines for litigants: responsible use of artificial intelligence in litigation* (May 2024).
[13] See on this Wachter (n 10).
[14] Brent Mittelstadt, Chris Russell and Sandra Wachter, 'Explaining Explanations in AI', <https://arxiv.org/abs/1811.01439>; Andrew D Selbst and Solon Barocas, 'The Intuitive Appeal of Explainable Machines' (2018) 87 *Fordham Law Review* 1085.
[15] Deven R Desai and Joshua A Kroll, 'Trust but Verify: A Guide to Algorithms and the Law' (2017) 31 *Harvard Journal of Law and Technology* 1, 10.
[16] Selbst and Barocas (n 14) 1123–26.
[17] Sandra Wachter, Brent Mittelstadt and Chris Russell, 'Counterfactual explanations without opening the black box: Automated decisions and the GDPR' (2018) 31(2) *Harvard Journal of Law & Technology* 841.

Point in time at which explanation produced	Explanation of training data
	Pre-deployment
	Post-hoc auditing
	Post-deployment monitoring
Nature of explanation itself[18]	Explanation of the main factor(s) influencing outcome
	Explanation of the determining factor(s) influencing outcome
	Explanation of why two similar cases were treated differently (counterfactual explanation)
Quality of explanation itself[19]	Reliability of explanation
	Comprehensibility of explanation to intended audience
	Meaningfulness of explanation to intended audience
Purpose of explanation	To enable audience to know who is accountable for an outcome or output (accountability)
	To enable audience to understand the reasons for an outcome or output (comprehension)
	To enable audience to challenge an outcome or output (contestation)

In our submission, it is generally not appropriate for courts or tribunals to make use of AI systems which lack some form of explainability, though the type of explainability required will depend on the context. However, it may be acceptable to do so in situations where a human is entirely accountable for the output of an AI system or there is a simple, accessible and quick way for a person to escalate the output of an AI system to human review. This relates to the proposed principles of accountability and of contestability, discussed below.

Courts or tribunals should not use AI systems which are unable to provide explanation or where the creators of such systems resist doing so for commercial purposes.

[18] See Finale Doshi-Velez, Mason Kortz, et al, 'Accountability of AI Under the Law: The Role of Explanation' Berkman Klein Center Working Group on Explanation and the Law, Berkman Klein Center for Internet & Society Working Paper, 2017, <https://arxiv.org/abs/1711.01134> 3.

[19] See Lyria Bennett Moses et al, *AI Decision-Making and the Courts* (Australasian Institute of Judicial Administration, 2023) 18 ('AIJA Guide').

Contestability and procedural fairness

Procedural fairness or natural justice is clearly implicated in many uses of AI, whether by court users or by courts and tribunals themselves.[20]

Use by parties or their legal representatives: There are many applications of AI in legal services (e.g., in research, drafting, communications) which may therefore find their way into court or tribunal proceedings. A particular concern is around the use of AI to generate material submitted as evidence, whether in the form of written material such as affidavits or witness statements, or video or photographic material.[21]

Use to scrutinise court and tribunal decision-making: AI may be used to identify patterns in decision-making and thereby for prediction of decisions. This may be both a potential opportunity to reduce bias or detect overwork or lack of resourcing[22] but may also result in issues for judicial independence.

Use by courts and tribunals: There are many potential applications for courts themselves to use AI in administrative processes, triage, guidance or even pre-judgment[23] or judgment writing (or parts thereof, for example procedural summaries).

In our submission, even where AI is used in administrative processes, there must be easily available and quick options to escalate to human review, as such processes affect access to justice.

We also consider that, where courts are issuing guidelines or rules for litigants and lawyers concerning the use of AI, adapted guidelines should also apply to judicial officers. For instance, if lawyers must disclose their AI use, judges should also.[24]

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[20] ibid [4.4].
[21] See, eg, *Christopher Kohls v Keith Ellison*, Case No. 24-cv-3754 (LMP/DLM), 10 January 2025, United States District Court District of Minnesota; David Thomas, 'Judge rebukes Minnesota over AI errors in 'deepfakes' lawsuit', Reuters (online), 14 January 2025, <https://www.reuters.com/legal/government/judge-rebukes-minnesota-over-ai-errors-deepfakes-lawsuit-2025-01-13/>.
[22] See Daniel Ghezelbash, Keyvan Dorostkar and Shannon Walsh, 'A Data Driven Approach to Evaluating and Improving Judicial Decision-Making: Statistical Analysis of the Judicial Review of Refugee Cases in Australia' (2022) 45(3) *University of New South Wales Law Journal* 1085.
[23] See Bennett Moses et al, *AI Decision-Making and the Courts* (n 19) [3.5].
[24] This is the approach adopted by the Supreme Court of New South Wales, *Practice Note SC Gen 23 – Use of Generative Artificial Intelligence* and *Guidelines for New South Wales Judges in Respect of Use of Generative AI* (21 November 2024).

Access to justice

There is great hope for AI's potential to increase access to justice. However, there are also concerns related to AI's capacity to exacerbate, rather than diminish, existing inequalities of access when it comes to legal services and courts and tribunals. Sandefur's (2019) US research demonstrates that access to justice is not equal, and that technology does not always solve the problem because people on low incomes are less able to benefit from technology for reasons of cost, internet access, digital literacy, and lack of human centered design.[25] Therefore, some people may lack the necessary skills and resources needed to take advantage of any of the potential benefits of AI technology.[26] For example, people who use AI tools for assistance when they cannot afford the services of a lawyer, may be dependent on less reliable, free versions of AI products. There is a risk that only those with resources will be able to leverage the benefits of AI and this will serve to exacerbate, rather than alleviate, existing inequalities.[27]

12. Are principles sufficient, or are guidelines or other regulatory responses also required?

13. What regulatory tools, including guidelines, could be used to implement these high-level principles in Victoria's courts and tribunals?

In our submission, principles alone are helpful but insufficient. However, as we have noted above in response to Chapter 5, duplication of regulation is also unhelpful and simply increases compliance costs. Practice Notes on the use of AI issued by courts are one means of regulating the use of AI within the court or tribunal's specific domain. This approach can be useful if courts are prepared to undertake appropriate consultation and subject the guidance to regular review and updating. Within courts, the AIJA Guide used a different approach, which is to raise questions that encourage a full thinking-through of the implications of AI projects within courts and tribunals.

[25] Rebecca L Sandefur, *Legal Tech for Non-Lawyers: Report of the Survey of US Legal Technologies* (American Bar Foundation, 2019).
[26] Francine Ryan and Liz Hardie, 'ChatGPT, I have a Legal Question? The Impact of Generative AI Tools on Law Clinics and Access to Justice' (2024) 31(1) *International Journal of Clinical Legal Education;* Ashwin Telang, 'The Promise and Peril of AI Legal Services to Equalize Justice', *JOLT Digest*, 14 March 2023, <https://jolt.law.harvard.edu/digest/the-promise-and-peril-of-ai-legal-services-to-equalize-justice>.
[27] See, eg, Drew Simshaw, 'Access to A.I. Justice: Avoiding an Inequitable Two-Tiered System of Legal Services' (2022) 24 *Yale Journal of Law & Technology* 150.

It should also be recalled that existing laws, procedural and substantive, and professional responsibilities can be applied to new technologies such as AI. As referred to above, the criminal law on perjury can be applied to a false affidavit created by GenAI. In relation to 'deep fakes', concerns about authenticity can be addressed through the rules of evidence.[28] However, care is needed as evidence rules have been moving towards making it easier for new technologies, such as email and social media, to be admitted into evidence. That same approach to 'deep fakes' could be problematic.[29]

14. How can the use of AI by courts and tribunals be regulated without interfering with courts' independence, and what risks should be considered?

Our views on the interaction between court and tribunal regulation and general AI regulation are set out above in response to Chapter 5. However, we note the potential for society-wide AI regulation to impinge on courts' ability to control their own procedures. We would expect general AI regulation to assist the courts in addressing concerns about, and risks of, AI. However, if governments attempted to interfere with the ways that courts used AI (for instance, mandating that AI is used to increase the speed of decision-making) this could interfere with court administration and infringe judicial independence.

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

16. Who should be able to contest an AI decision, and when? Is the capacity to contest necessary for decisions made by court administration staff, or only judicial decisions? Consider how courts and tribunals can ensure sufficient information is available to enable decisions to be contested.

In our view, high levels of transparency are desirable across the board and regardless of who within the court is using AI and in what capacity. The type of transparency or explainability required will depend on the context. For example, anyone affected by a decision should have a readily accessible means of obtaining sufficient information to enable them to query or

[28] Michael Legg and Kayleen Manwaring, 'New Sources of Discovery and Evidence: Electronically Stored Information, Social Media, Artificial Intelligence and the Internet of Things' in Michael Legg (ed) *Resolving Civil Disputes* (LexisNexis, 2nd ed 2024) 351–356.

[29] Rebecca A Delfino, 'Deepfakes on Trial: A Call to Expand the Trial Judge's Gatekeeping Role to Protect Legal Proceedings from Technological Fakery' (2023) 74 *Hastings Law Journal* 293, 334–35, referring to Federal Rules of Evidence (US) r 902(13) and (14); but the argument is equally applicable to the Uniform Evidence Law ss 146 and 147.

challenge that decision. We know that technological systems are not infallible and reliance on imperfect systems may cause significant harm to individuals. Transparency in court internal systems, including where AI is used, and provides reassurance to members of the public, enables human scrutiny and oversight and supports faith in the rule of law.

Chapter 7: AI in courts and tribunals: current laws and regulation

21. Is there a need to strengthen professional obligations to manage risks relating to AI? If so, what changes might be required to the Legal Profession Uniform Law, Civil Procedure Act or regulations?

Existing professional obligations are adequate to address risks relating to AI, but the intersection between the obligations and AI risks needs to be better communicated and understood. The academic literature has taken this step.[30] A variety of professional courses and publications also exist. But continuing education explaining the intersection between the obligations and AI risks is needed.

One response to the intersection between technology and professional obligations is to include competence with technology within the lawyer's general obligation of competence.[31] The American Bar Association (ABA) in 2012 approved changes to its Model Rules of Professional Conduct to add a comment to rule 1.1 (Competence) to make clear that lawyers have a duty to be competent not only in the law and its practice, but also in technology. A majority of US States have adopted the comment (Comment 8) which provides:

> *To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.*

In jurisdictions outside the US where there is no specific rule or commentary addressing technology, such as Australia, the general requirement of competence may nonetheless be

[30] See eg Legg, '"Fake it 'til you Make it"' (n 8); Michael Legg and Felicity Bell, *Artificial Intelligence and the Legal Profession* (Hart, 2020).
[31] Rule 4 in the Australian Solicitors' Conduct Rules provides that a solicitor must 'deliver legal services competently, diligently and as promptly as reasonably possible'.

viewed as including competence with technology. Just as lawyers need to keep up with changes in the law, lawyers need to keep up with relevant changes in technology. This argument can be made on the basis that it is not possible to carry out competent legal representation without being able to use relevant technology.[32] Technology is central to legal research and often part of document review and drafting. The advantage of a specific rule is that helps with education and compliance because it is written in black and white, rather than requiring the above explanation.

Professional obligations may also be addressed by the courts directly. For example, the use of technology-assisted review (**TAR**) in discovery is addressed by the Supreme Court of Victoria Practice Note SC Gen 5 Technology in Civil Litigation. The Practice Note states that 'the use of common technologies is a core skill for lawyers and a basic component of all legal practice'.[33] The *Civil Procedure Act 2010* (Vic) sets out a number of overarching obligations,[34] including a duty not to engage in conduct which is misleading or deceptive. Additional obligations dealing with the use of technology could be added. The Act could require/permit lawyers (and parties as it is important to take account of represented and self-represented litigants) to utilise technology where it improves the efficiency or effectiveness of the steps needed for the conduct or resolution of a civil proceeding provided the use of technology does not compromise the administration of justice.

Chapter 8: Developing guidelines for the use of AI in Victoria's courts and tribunals

Guidelines for court and tribunal users

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

23. Should guidelines require disclosure of AI use? If so, who should it apply to:

- **a. legal professionals**
- **b. expert witnesses**
- **c. the public (including self-represented litigants and witnesses)?**

[32] Legg and Bell (n 30) 292.
[33] Supreme Court of Victoria, *Practice Note SC Gen 5 Technology in Civil Litigation*, 29 June 2018, [4.3].
[34] *Civil Procedure Act 2010* (Vic) ss 16-27.

As the current Supreme and County Court guidelines state,[35] encouraging court users to disclose AI use may help the court and other parties to understand how submissions were crafted and what weight to place on their contents, particularly when a submission is prepared by a self-represented litigant or other court user who may lack legal training or an understanding of court protocols. However, as noted above in response to Questions 1 and 2, AI is increasingly embedded in many technologies commonly used for litigation preparation and in business productivity products (for example, Microsoft Word). Many users, including those with legal training, may not realise that they are using AI features in technology products. This makes it challenging for court users to meet, and for courts to enforce, mandatory disclosure requirements, adding additional compliance and administration costs to litigation.

However, formal disclosure requirements of AI use in litigation should be proportionate to the level of risk that AI use may create for particular types of matters and scenarios. The focus should be on encouraging responsible adoption, rather than introducing a blanket approach to disclosure that applies to all courts, proceedings and users, which may deter AI adoption. Court requirements should also be regularly reviewed and adjusted to account for improvements in technology, increasing rates of user adoption, and growth in user digital literacy.

One alternative to mandatory disclosure is the discretionary approach adopted by the Singapore Courts and Tribunals in their recent *Guide on the Use of Generative Artificial Intelligence Tools by Court Users*.[36] This Guide does not prohibit GenAI use when preparing court documents, provided the user complies with the Guide, relevant legislation, rules, codes of conduct, and practice directions. Court users must check and adapt AI-generated output, verify it against known accurate sources, and be prepared to identify to the court which sections of court documents contain AI-generated content and explain how it has been verified. Singapore Courts may also require a court user to declare to the court that

[35] Supreme Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (6 May 2024); County Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (3 July 2024).
[36] Singapore Courts, *Guide on the Use of Generative Artificial Intelligence Tools by Court Users* (October 2024) <https://www.judiciary.gov.sg/docs/default-source/news-and-resources-docs/guide-on-the-use-of-generative-ai-tools-by-court-users.pdf?sfvrsn=3900c814_1>.

they have complied with the guide and may direct that the declaration is made in affidavit form. This approach has the advantage of being flexible, encouraging responsible adoption of generative AI by court users and adherence to pre-existing protocols and standards, while making it clear that the court has discretion to discipline or penalise users who do not comply.

Another alternative is not to impose AI disclosure requirements at all and to adopt an approach similar to that of the Illinois Supreme Court, which recently introduced a new policy and judicial guidance on AI. This Policy acknowledges the need to try to keep up with this rapidly changing technology and understand its capabilities and limitations. Judicial officers and court users in Illinois are encouraged to explore the potential benefits of AI use to enhance court services and promote equitable access to justice, while staying within the boundaries of safe AI use that complies with relevant laws and regulations and upholds 'the highest ethical standards in the administration of justice'.[37] Lawyers and self-represented litigants may be penalised if submissions to a court are legally or factually unfounded, whether or not they have used AI in their preparation, relying on existing court protocols and rules rather than introducing new AI-specific requirements.[38]

24. What are the benefits and risks of disclosure? If mandatory, what form should disclosure take?

In our submission, it is important that there is consistency among courts and tribunals around Australia on this topic. The guidelines and Practice Notes that have been issued to date (see below response to Question 26) are not consistent with one another. This has real potential to increase the burden on lawyers, parties and witnesses who may find that some AI tools or products are acceptable in one court but not another. Ideally, courts and tribunals would work together to achieve unified national guidance where possible.

The challenges of mandating disclosure of AI use are that, as per our response to Questions 1 and 2 and as noted above, 'AI' in some form may be a component of many technological

[37] Illinois Supreme Court, *Policy on Artificial Intelligence* and *Judicial Reference Sheet* (Effective 1 January 2025) <https://www.illinoiscourts.gov/News/1485/Illinois-Supreme-Court-Announces-Policy-on-Artificial-Intelligence/news-detail/>.
[38] Illinois Supreme Court, *Illinois Supreme Court Policy of Artificial Intelligence: Judicial Reference Sheet* (1 January 2025) <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/cb3d6da3-66c7-469d-97f3-41568bdeee8c/ISC%20AI%20Policy%20Bench%20Card.pdf>.

tools which are in common use and do not necessarily present risks. People may be unaware that a tool they are using includes AI and therefore inadvertently fail to disclose. Disclosure of AI use which does not present a risk, will also increase the administrative burden on courts and tribunals without a corresponding benefit. On the other hand, general obligations of disclosure may be a straightforward way to identify where a person has used AI tools which do pose a risk.

25. What is the role for courts in regulating use of AI by legal professionals? What is the role of professional bodies such as the Victorian Legal Services Board and Commissioner, the Law Institute of Victoria and the Bar Association?

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

An active role by courts in regulating AI use by legal professionals and other court users is appropriate within the context of the overall administration of justice and court and tribunal processes. However, AI use is also growing across legal services delivered outside of courts and tribunals, and in these contexts, the responsible use of AI by legal professionals is more appropriately regulated by the relevant professional body. We reiterate the need for national consistency between Australian courts and tribunals on this topic and recommend that legal profession regulators also aim for national alignment to avoid creating duplication and inconsistency in AI-related requirements.

The VLRC Consultation Paper already refers to many of the existing AI guidelines relevant to court users. Following the release of the VLRC Consultation Paper, the Supreme Court of New South Wales issued *Practice Note SC Gen 23 – Use of Generative Artificial Intelligence*, which commences on 3 February 2025. Several other New South Wales courts subsequently adopted this practice note, see Table 2 for details.

Table 2: AI Guidelines

Court or tribunal	Name of guideline	Date issued
NSW Supreme Court	*Practice Note SC Gen 23 – Use of Generative Artificial Intelligence*	Nov 2024
NSW Land & Environment Court	*Practice Note: Use of Generative Artificial Intelligence (Gen AI)*	Nov 2024

NSW District Court	*General Practice Note 2: Generative AI Practice Note and Judicial Guidelines*	Dec 2024

In addition to the examples of international guidelines on AI listed in Table 9 of the VLRC Consultation Paper, the following may also be of interest:

- **Hong Kong:** *Guidelines on the Use of Generative Artificial Intelligence for Judges and Judicial Officers and Support Staff of the Hong Kong Judiciary*, issued July 2024.
- **Singapore:** *Guide on the Use of Generative Artificial Intelligence Tools by Court Users*, effective October 2024.
- **United States – State of Illinois:** *Illinois Supreme Court Policy on Artificial Intelligence* and *Judicial Reference Sheet*, effective 1 January 2025.
- **Other North American orders and guidance**: A comprehensive resource from Responsible AI in Legal Services (RAILS) tracks AI related court orders and guidance across multiple jurisdictions (albeit with a focus on North America), and is periodically updated: RAILS, *AI Use in Courts Tracker* (Database, accessed 17 January 2025).

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?

28. Should there be dedicated guidelines for judicial officeholders?

This is addressed in our response to Chapter 6, above. Judicial officeholders and administrative staff each perform different roles. However, poor AI use by administrative staff may directly or indirectly impact judicial officeholders, creating risks when administrative staff assist with tasks such as performing legal research or drafting judgements. Accordingly, guidelines need to be crafted to reflect the tasks that court and tribunal staff and judicial officeholders work on together.

It should also be made clear what technology is covered by any guidelines, as not all AI use necessarily carries the same risks.

Some thoughts on appropriate use of AI by judicial officeholders are found in Lyria Bennett Moses, 'Stochastic Judges: The Limits of Large Language Models' (2024) 98(9) *ALJ* 640. It argues that judges should think carefully about their use of AI, considering the quality of outputs, other relevant outcomes from such use, and where having a human process is itself important.

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? What other mechanisms could courts and tribunals use to promote the accountable and transparent use of AI?

As mentioned in our response to Question 5(b), we recommend that the VLRC or courts and tribunals consult with providers of technologies commonly used in the preparation and conduct of litigation. This consultation will help the VLRC to understand how AI is integrated within these solutions and the end-user experience, which may impact how prohibitions on or disclosure requirements about the use of AI are implemented and enforced. See further below in our response to Chapter 9.

Chapter 9: Support for effective use of principles and guidelines about AI

36. Are there appropriate governance structures in courts and tribunals to support safe use of AI?

37. What governance tools could be used to support the effective use of AI in courts and tribunals such as:

- **a. an AI register for AI systems used in the justice system?**
- **b. accreditation of AI systems?**

38. Who should be responsible for developing and maintaining these systems?

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

40. Are there opportunities to improve the current continuing professional development system for legal professionals about AI?

Governance

The determination of governance structures is a matter for the court in keeping with judicial independence. However, courts, like other organisations, need to be able to translate AI principles into actionable practice. In organisations such as corporations the aim of governance structures for AI is to ensure that its use is consistent with the law, as well as

corporate culture and values. The focus is often on processes and procedures to ensure data security, confidentiality, customer/employee privacy, compliance with consumer protection and anti-discrimination laws.

An example of a definition of AI governance is:

> *AI governance is a system of rules, practices, processes, and technological tools that are employed to ensure an organization's use of AI technologies aligns with the organization's strategies, objectives, and values; fulfills legal requirements; and meets principles of ethical AI followed by the organization.*[39]

As the authors of the definition explain, the key elements of an AI governance system are rules, practices, processes, and technological tools to regulate behaviour to ensure compliance. The practices and processes need to include hiring and/or training employees in the rules and tools so they are aware of, and have the skills to comply with, legal and organisational requirements. Governance is not just policies and procedures, it is ensuring those policies and procedures are followed.

The above form of AI governance is applicable to courts in that they may have AI embedded in products and services that the courts use in finance, human resources, information technology and registry services such as court timetabling, case filings and document management.

Australian courts need adequate funding and expertise to be able to develop and/or implement AI principles or guidelines.

Education

Education is key to understanding what AI is, how it functions and its limitations and risks. Education is also central to compliance with legal and organisational requirements. Ideally court employees and judicial officers would receive education that is not just about how to use a particular 'tech' tool which utilises AI, but also would have a broader understanding of the various forms of AI and what particular AI is being deployed in the tools they are using or are likely to encounter.

[39] Matti Mäntymäki et al, 'Defining organizational AI governance' (2022) *AI Ethics* 603, 604 <https://doi.org/10.1007/s43681-022-00143-x>.

Education for the courts may come from the Judicial College of Victoria or the Australasian Institute of Judicial Administration, such as the AIJA Guide.

However, there also needs to be training at a more granular level on particular tech tools that employ AI, which may need to be delivered by vendors or court staff.

As explained above in relation to Chapter 7, education also performs the role of reminding members of the legal profession of their ethical obligation and how those obligations interact with AI use.

From an educational perspective we suggest two ways to promote awareness and understanding of ethical obligations related to AI use:

1. Make technology competence a mandatory topic for CPD. CPD is a statutory condition imposed on all Australian practising certificates, pursuant to s 52 of the Legal Profession Uniform Law (NSW/Vic/WA). This statutory condition requires the certificate holder to comply with the Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015. The Rules require that a lawyer complete ten (10) CPD units each year. This includes at least one CPD unit in each of the following compulsory fields: (1) Ethics and professional responsibility; (2) Practice management and business skills; (3) Professional skills; and (4) Substantive law. The Rules could be amended to add technology as a fifth compulsory field.
2. Introduce a technology certification for lawyers. A certification is one way in which lawyers might seek education in relation to technology. A certification could also be used to demonstrate to clients, other parties and courts that a lawyer had undertaken such education and understood, for example, how AI functioned, its risks and how consistent with professional obligations a lawyer avoided or guarded against those risks. It could also be one way in which a lawyer could meet the above CPD requirement. In the United Kingdom, a not-for-profit organisation was formed (LTC4) to produce a commonly accepted industry standard for IT competency among law firms.[40] It has issued over 38,000 certificates of competency to date.[41]

[40] See LTC4, Legal Technology Core Competencies Certification Coalition, Website, <https://ltc4.org/>
[41] See ibid.