



**SUPREME COURT OF WESTERN
AUSTRALIA**

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Supreme Court of Western Australia

Artificial Intelligence practice direction: Consultation note

Introduction

- 1 The Supreme Court of Western Australia is considering the development of a practice direction on the use of Artificial Intelligence (AI) by the legal profession in proceedings before the court.
- 2 AI is a broad term which captures a range of available and emerging technologies. This consultation is focused exclusively on the use of generative AI, a subset of AI that includes large language models capable of producing text-based content which mimics human writing. This consultation is not focused on AI tools such as e-discovery software and predictive analytics, which perform more structured, rule-based tasks.
- 3 The increasing use of AI in the legal profession presents both opportunities and challenges. The purpose of this consultation note is to seek input on the appropriate use of generative AI by the legal profession in relation to court proceedings and the content of any practice direction concerning its use.

Generative AI

What is generative AI?

- 4 Generative AI refers to AI systems capable of generating 'content' such as text, images or music in response to prompts. In the legal profession,

the most commonly discussed type of generative AI involve large language models that generate text. Examples of these kinds of generative AI tools include Chat GPT, Gemini and Claude AI. These large language models produce text-based content that mimics human writing, and can be used to summarise information or draft documents, memos or responses to queries. The produced text can be modified or altered by the generative AI in response to further prompts from the user.¹

Limitations and pitfalls of generative AI

- 5 One of the primary concerns regarding generative AI is its tendency to produce inaccurate or misleading information. Generative AI and large language models predict the most likely next word or phrase based on vast amounts of training data; they do not possess reasoning capabilities. This means that outputs can contain factual errors. Within the context of legal information, generative AI may produce outdated legal references or fabricated citations (sometimes referred to as 'hallucinations'). This can include instances where generative AI has been asked to provide its 'reasoning' and generative AI has produced hallucinated sources to justify its text outputs.²
- 6 Additionally, use of generative AI raises concerns regarding confidentiality and data security. Many AI tools require users to input queries and documents into external systems, which could expose confidential information. If the system used is able to learn from inputs, then it is possible that private or confidential information could be

¹ Australasian Institute of Judicial Administration, *AI Decision Making and the Courts* (Guide, June 2022, revised and republished December 2023) (AIJA Guide), 15.

² AIJA Guide, 16, 44, 59.

recycled indirectly into another user's output.³ The use of AI tools must be carefully managed to prevent unintentional data leaks or breaches of professional conduct rules.

Approach in other jurisdictions

- 7 Other jurisdictions have taken varying approaches to the regulation and guidance of the use of generative AI in legal settings. Some jurisdictions have published guidelines (as a singular document or as different documents for lawyers, non-lawyers and court staff) while others have issued practice notes to practitioners.
- 8 New Zealand has implemented separate guidelines for judges and court staff, lawyers and non-lawyers which are tailored to the way AI may be used by each section of court user. The guidelines for the legal profession emphasise the continued application of existing professional obligations to any AI use in legal proceedings.
- 9 New South Wales has taken a prohibitive stance on the use of AI by the legal profession. Practice note 'SC Gen 23 - Use of Generative Artificial Intelligence' prohibits practitioners from using AI to draft affidavits, witness statements, expert reports or other evidentiary materials. The practice note directs that where generative AI has been used to prepare or assist with the preparation of submissions, summaries or skeletons of arguments, the practitioner must verify the accuracy and relevance of all citations, legal and academic authority, case law and legislative references. New South Wales has also produced guidelines for judges which prohibit using generative AI for editing or proofreading

³ AIJA Guide, 40.

judgments, with additional warnings about the unreliability of generative AI to conducting legal research.

- 10 Queensland has developed guidelines for non-lawyers only, focusing on AI capabilities, confidentiality concerns, and ethical considerations. Victoria's Supreme Court has issued 'Guidelines for Litigants' on responsible AI use.
- 11 The United Kingdom has introduced AI guidelines for judicial office holders. These guidelines stress judicial officers' responsibility for all work, including that produced by their staff. The guidelines also indicate how to identify whether work submitted to the court has been produced by generative AI.
- 12 In general, most guidelines include information and guidance on the following topics:
 1. Common terms.
 2. Understanding the use and limits of AI.
 3. Maintaining confidentiality and security, including what to do in case of breach.
 4. Ensuring accuracy and accountability.
 5. Ethical issues (including AI bias).
 6. How to identify AI use by others & disclosure of AI use.
 7. Examples of appropriate and inappropriate tasks to use AI for.

Consultation questions

- 13 The court seeks the perspectives of legal professionals and other stakeholders on how best to address these challenges while utilising the benefits of generative AI. Specifically, we welcome input on:
1. How is the legal profession currently using generative AI, and what are the expected future applications?
 2. Should there be a formal AI practice direction for the legal profession? If so:
 - (a) who should it apply to?
 - (b) should any practice direction separately address lawyers and non-lawyers?
 - (c) what form should any practice direction take (eg guidelines, proscriptive policy, practice note)?
 - (d) what specific topics should any practice direction address?
 3. Are there particular areas of legal practice where the use of generative AI should be restricted or prohibited?
 4. Should legal professionals using generative AI be required to disclose its use? If so:
 - (a) under what circumstances?
 - (b) how should generative AI assisted work be disclosed?
 5. What steps should legal professionals take to verify generative AI assisted work?

6. What safeguards should be in place to ensure the accuracy and ethical use of AI-generated legal content?

14 The court will seek to meet with key stakeholders in relation to these questions. Any written submissions should be forwarded to the court by 31 March 2025, at associate.justice.mitchell@justice.wa.gov.au.