

Artificial Intelligence in Victoria's Courts and Tribunals

Consultation Paper



Published by the Victorian Law Reform Commission

The Victorian Law Reform Commission was established under the *Victorian Law Reform Commission Act 2000* (Vic) as a central agency for developing law reform in Victoria.

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This publication of the Victorian Law Reform Commission follows the Melbourne University Law Review Association *Australian Guide to Legal Citation* (4th ed, 2017).

This consultation paper reflects the law at 19 September 2024.

Title:

**Artificial Intelligence in Victoria's Courts
and Tribunals: Consultation Paper**

ISBN: 978-0-6452813-2-3

This office is located on the land of the Traditional Custodians, the people of the Kulin Nations. We acknowledge their history, culture and Elders both past and present.

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We also would like to acknowledge the advice provided by Professor Tania Sourdin and Professor Jeannie Paterson.

Cover design

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Artificial Intelligence in Victoria's Courts and Tribunals

Consultation Paper

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Contents

Terms of reference	v
Question list	vi
Glossary	x
PART A: INTRODUCTION AND CONTEXT	1
1. Introduction	4
Our focus.....	4
Guide to the issues paper	5
How to tell us your views.....	5
2. What is artificial intelligence?	8
Overview	8
Definitions of artificial intelligence	8
Technologies and techniques of AI.....	9
Key attributes of AI.....	12
3. Benefits and risks of AI	18
Overview	18
Potential benefits of AI.....	18
Potential risks of AI.....	20
PART B: CURRENT AND POTENTIAL USE OF AI IN COURTS AND TRIBUNALS	29
4. AI in courts and tribunals	32
Overview.....	32
General court processes and advice	32
In-court hearings	41
Alternatives to in-court hearings.....	47
Supporting judicial decision-making	51

PART C: BROAD REGULATORY APPROACHES AND PRINCIPLES FOR AI REGULATION.....	57
5. Regulating AI: the big picture	60
Overview.....	60
Regulating AI in Australia.....	60
International approaches to regulating AI.....	63
Options for regulating rapidly developing technology	67
6. Principles for responsible and fair use of AI in courts and tribunals	72
Overview.....	72
Principles for regulating AI in courts and tribunals	72
Developing court- and tribunal-specific principles for regulating AI	75
PART D: REGULATION AND GUIDELINES FOR RESPONSIBLE USE OF AI	83
7. AI in courts and tribunals: current laws and regulation	86
Overview	86
Victorian legislation and regulation relevant to AI	86
Regulatory framework for legal professionals	94
8. Developing guidelines for the use of AI in Victoria's courts and tribunals	98
Overview	98
Guidelines for the use of AI by court and tribunal users	98
Guidelines for the use of AI by judges, tribunal members and court and tribunal staff	104
An AI assessment framework for courts and tribunals	109
9. Support for effective use of principles and guidelines about AI	114
Overview.....	114
Governance.....	114
Education and training.....	115
Appendix: Examples of international principles	118

Terms of reference

Referral to the Victorian Law Reform Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000*.

Opportunities and risks of artificial intelligence in Victoria's courts and tribunals

Artificial intelligence (AI) tools are rapidly evolving, with their application increasing across society. There is potential for the use of AI in Victoria's courts and tribunals to improve user experiences and generate efficiencies. The use of AI tools carries both risks and opportunities for fairness, accountability, transparency and privacy as well as improvements to accessibility.

The Victorian Law Reform Commission (the Commission) is asked to make recommendations on legislative reform opportunities and principles to guide the safe use of AI in Victoria's courts and tribunals.

In developing its recommendations, the Commission should consider:

- opportunities to build on existing legislation, regulations and common law in supporting the use of AI within Victoria's courts and tribunals;
- the benefits and risks of using AI in Victoria's courts and tribunals, including risks relating to accountability, privacy, transparency, and the accuracy and security of court records;
- the need to maintain public trust in courts and tribunals, and ensure integrity and fairness in the court system;
- the rapid development of AI technologies and how this may influence the extent to which such technologies should be adopted and regulated, and;
- applications of AI and how it is regulated in comparable jurisdictions and contexts (including work being done to develop a framework for regulating AI at the federal level in Australia) and potential learnings for Victoria.

The Commission is asked to provide principles or guidelines that can be used in the future to assess the suitability of new AI applications in Victoria's courts and tribunals.

The Commission is to deliver its report to the Attorney-General by 31 October 2025.

Question list

This is a list of the questions contained in the consultation paper. Please respond to these questions in preparing your submission. You can respond to as many or as few questions as you choose—you do not have to respond to them all. Information about the topics that we are asking about is found in the chapters as shown below. For information about how to make a submission, see page 5. Please send us your submission by 12 December 2024.

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?

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?

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?
6. Are there uses of AI that should be considered high-risk, including in:
 - a. court and tribunal administration and pre-hearing processes
 - b. civil claims
 - c. criminal mattersHow can courts and tribunals manage those risks?
7. Should some AI uses be prohibited at this stage?

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

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

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

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

17. Building on Table 7, are other statutes or regulations relevant to the safe use of AI in Victorian courts and tribunals?
18. Are there legislative or regulatory gaps or barriers where reform is needed for the safe use of AI in courts and tribunals?
19. What, if any, changes to legislation, rules or processes are necessary to enable courts and tribunals to:
 - a. safely use AI
 - b. consider evidence in relation to AI
 - c. implement human rights principles (Should there be a human rights impact assessment of any AI use in courts and tribunals?)
 - d. align AI use with privacy responsibilities?
20. How can changes be achieved while maintaining appropriate flexibility?
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?

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

Guidelines for courts and tribunals

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?
29. Are there tools from other jurisdictions you think should be incorporated into guidelines to support Victorian courts and tribunals in their use of AI? If so, what are they?
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?
31. Should there be different guidelines or additional considerations for the use of AI in relation to criminal and civil law matters?

Assessment framework for courts and tribunals

32. Should an assessment framework be developed to guide the assessment of the suitability of AI technology in Victorian courts and tribunals?
33. Does the NSW AI Assurance Framework provide a useful model for Victoria's courts and tribunals? Why or why not? What other models or guidelines should be considered?
34. How can risk categories (low, medium and high) be distinguished appropriately? What should be considered high risk?
35. What potential harms and benefits should an AI assessment framework for Victoria's courts and tribunals consider?



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?

Glossary

Artificial intelligence (AI)	AI is 'a machine-based system that, for explicit or implicit objectives, infers from the input it receives how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment'. ¹
AI system (vs AI model)	'In short, a system is a broader concept than a model ... An AI system comprises various components, including, in addition to the model or models, elements such as interfaces, sensors, conventional software, etc ... As any other possible component in the context of the AI value chain, the AI model can be provided by actors other than the provider of the final AI system, who determines the purpose for which the AI system can be used'. ²
Automated decision-making	Automated decision-making is 'the application of automated systems in any part of the decision-making process ... Automated systems range from traditional non-technological rules-based systems to specialised technological systems which use automated tools to predict and deliberate ... Although automated decision-making may in some instances use AI technologies, in other cases it will not'. ³
Black box	'An AI system where the data inputted is known, and the decisions made from that data are known, but the way in which the data was used to make the decisions is not understood by humans'. ⁴
Chatbot	'Chatbots are popular applications of Generative AI and large language models. A chatbot is a computer program that interacts with humans through natural language conversations. Some chatbots use large language models to generate content according to user inputs'. ⁵
Computer vision	Computer vision is the 'capability of a functional unit to acquire, process and interpret data representing images or video'. ⁶

1 OECD, *Recommendation of the Council on Artificial Intelligence* (Report No OECD/LEGAL/0449, 2024) 7.
2 David Fernández-Llorca et al, 'An Interdisciplinary Account of the Terminological Choices by EU Policymakers Ahead of the Final Agreement on the AI Act' [2024] *Artificial Intelligence and Law* 7-8 <<https://doi.org/10.1007/s10506-024-09412-y>>.
3 Definition based on the International Organisation for Standardisation (ISO) definition and adopted in: Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia: Discussion Paper* (Discussion Paper, June 2023) 5-6.
4 Toby Walsh et al, *Closer to the Machine: Technical, Social, and Legal Aspects of AI* (Report, Office of the Victorian Information Commissioner, August 2019) 3.
5 Fan Yang, Jake Goldenfein and Kathy Nickels, *GenAI Concepts: Technical, Operational and Regulatory Terms and Concepts for Generative Artificial Intelligence (GenAI)* (Report, ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S), and the Office of the Victorian Information Commissioner (OVIC), 2024) <<https://apo.org.au/node/327400>>.
6 Standards Australia Limited, 'AS ISO/IEC 22989:2023 Information Technology - Artificial Intelligence - Artificial Intelligence Concepts and Terminology' 16 [3.7.1] <<https://www.standards.org.au/standards-catalogue/standard-details?designation=as-iso-iec-22989-2023>>.

Deepfake	'A deepfake is a digital photo, video or sound file of a real person that has been edited to create an extremely realistic but false depiction of them doing or saying something that they did not actually do or say.' ⁷
Deep learning	Deep learning is a 'subset of machine learning' and an 'artificial intelligence approach to creating rich hierarchical representations through the training of neural networks with many hidden layers.' ⁸
Ex ante regulation (vs ex post)	'By requiring quality control measures before AI is deployed, an ex ante approach would often mitigate and sometimes entirely prevent injuries that AI causes or contributes to. Licensing is an important tool of ex ante regulation, and should be applied in many high-risk domains of AI.' ⁹
Expert system	'An expert system is an AI system that encapsulates knowledge provided by a human expert in a specific domain to infer solutions to problems. An expert system consists of a knowledge base, an inference engine and a user interface. The knowledge base stores declarative knowledge of a specific domain, which encompasses both factual and heuristic information.' ¹⁰
Fine-tuning	'Fine-tuning is a term borrowed from the world of engineering, meaning to make small adjustments to improve performance. In the context of AI, fine-tuning refers to a similar process: refining a pre-trained model to enhance its accuracy and efficacy, particularly for a specific task or dataset.' ¹¹ 'The difference between retrieval augmented generation and fine-tuning is that retrieval augmented generation augments a natural language processing model by connecting it to an organization's proprietary database, while fine-tuning optimizes deep learning models for domain-specific tasks. Retrieval augmented generation and fine-tuning have the same intended outcome: enhancing a model's performance to maximize value for the enterprise that uses it.' ¹²
Generative AI	'Generative AI or GenAI are both short for generative artificial intelligence. These are software systems that create content as text, images, music, audio and videos based on a user's "prompts".' ¹³

7 eSafety Commissioner, 'Deepfake Trends and Challenges - Position Statement', *eSafety Commissioner* (Web Page, 19 August 2024) <<https://www.esafety.gov.au/industry/tech-trends-and-challenges/deepfakes>>.

8 Standards Australia Limited, 'AS ISO/IEC 22989:2023 Information Technology - Artificial Intelligence - Artificial Intelligence Concepts and Terminology' 10 [3.4.4] <<https://www.standards.org.au/standards-catalogue/standard-details?designation=as-iso-iec-22989-2023>>.

9 Gianclaudio Malgieri and Frank Pasquale, 'Licensing High-Risk Artificial Intelligence: Toward Ex Ante Justification for a Disruptive Technology' (2024) 52 *Computer Law & Security Review* 105899, 1, 6. reactive tools. This approach has proven inadequate, as numerous foreseeable problems arising out of commercial development and applications of AI have harmed vulnerable persons and communities, with few (and sometimes no

10 Standards Australia Limited, 'AS ISO/IEC 22989:2023 Information Technology - Artificial Intelligence - Artificial Intelligence Concepts and Terminology' 46 [8.5.2] <<https://www.standards.org.au/standards-catalogue/standard-details?designation=as-iso-iec-22989-2023>>.

11 Neural Ninja, 'The Art of Fine-Tuning AI Models: A Beginner's Guide', *Let's Data Science* (Web Page, 29 January 2024) <<https://letsdatascience.com/the-art-of-fine-tuning-ai-models/>>.

12 Ivan Belcic and Cole Stryker, 'RAG vs. Fine-Tuning', *IBM Think* (Web Page, 14 August 2024) <<https://www.ibm.com/think/topics/rag-vs-fine-tuning>>.

13 Fan Yang, Jake Goldenfein and Kathy Nickels, *GenAI Concepts: Technical, Operational and Regulatory Terms and Concepts for Generative Artificial Intelligence (GenAI)* (Report, ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S), and the Office of the Victorian Information Commissioner (OVIC), 2024) 2 <<https://apo.org.au/node/327400>>.

Hallucination	'Hallucination refers to AI models making up facts to fit a prompt's intent. When a large language model processes a prompt, it searches for statistically appropriate words, not necessarily the most accurate answer. An AI system does not "understand" anything, it only recognises the most statistically likely answer. That means an answer might sound convincing but have no basis in fact. This creates significant risks for organisations that rely on chatbots to give advice about products or services because that advice might not be accurate.' ¹⁴
Large language model	'Large language models are data transformation systems. They are trained with large numbers of parameters, which are numerical values that developers adjust to shape the inputs and outputs of AI models. When a user inputs a prompt, the model generates text content in response.' ¹⁵
Machine learning	'Machine learning (sometimes seen as ML) is a set of techniques for creating algorithms so that computational systems can learn from data.' ¹⁶
Machine learning algorithm	A machine learning algorithm is 'a set of rules or processes used by an AI system to conduct tasks—most often to discover new data insights and patterns, or to predict output values from a given set of input variables'. ¹⁷
Narrow AI or Artificial Narrow Intelligence	'A "narrow AI" system is able to solve defined tasks to address a specific problem (possibly much better than humans would do). A "general AI" system addresses a broad range of tasks with a satisfactory level of performance. Current AI systems are considered as "narrow". It is not yet known whether "general" AI systems will be technically feasible in the future.' ¹⁸
Natural language processing	'Natural language processing is information processing based upon natural language understanding and natural language generation. This encompasses natural language analysis and generation, with text or speech. By using natural language processing capabilities, computers can analyse text that is written in human language and identify concepts, entities, keywords, relations, emotions, sentiments and other characteristics, allowing users to draw insights from content. With those capabilities, computers can also generate text or speech to communicate with users.' ¹⁹
Online alternative dispute resolution	Online alternative dispute resolution is an example of online dispute resolution. It represents 'dispute resolution outside the courts, which originally emerged in the mid-1990s as an adjunct to various forms of alternative dispute resolution (ADR) and as a response to disputes arising from the expansion of ecommerce. As a result, it focussed on using technology to resolve customer complaints and sought to support negotiation, mediation and arbitration'. ²⁰

14 Ibid 28.

15 Ibid 5.

16 See also Standards Australia Limited, 'AS ISO/IEC 23053 - Framework for Artificial Intelligence (AI) Systems Using Machine Learning (ML)' <<https://www.iso.org/standard/74438.html>>; Fan Yang, Jake Goldenfein and Kathy Nickels, *GenAI Concepts: Technical, Operational and Regulatory Terms and Concepts for Generative Artificial Intelligence (GenAI)* (Report, ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S), and the Office of the Victorian Information Commissioner (OVIC), 2024) 4 <<https://apo.org.au/node/327400>>.

17 IBM, 'What Is a Machine Learning Algorithm?', *IBM Think* (Web Page, 3 November 2023) <<https://www.ibm.com/topics/machine-learning-algorithms>>.

18 Standards Australia Limited, 'AS ISO/IEC 22989:2023 Information Technology - Artificial Intelligence - Artificial Intelligence Concepts and Terminology' 17 [5.2] <<https://www.standards.org.au/standards-catalogue/standard-details?designation=as-iso-iec-22989-2023>>.

19 Ibid 51 [9.2.1].

20 Felicity Bell et al, *AI Decision-Making and the Courts A guide for Judges, Tribunal Members and Court Administrators* (Report, the Australasian Institute of Judicial Administration, December 2023), 22.

Online dispute resolution	'Online dispute resolution involves the use of information and communications technology to help parties resolve disputes. Within a court and tribunal system, online dispute resolution is a digital platform that allows people to progress through dispute resolution for low-value disputes, from the commencement of a claim to final determination, entirely online.' ²¹
Open domain (vs closed domain)	Open domain 'question answering is a task that answers factoid questions using a large collection of documents.' ²² 'A closed domain system, also known as domain-specific, focuses on a particular set of topics and has limited responses based on the business problem ... On the other hand, an open domain system is expected to understand any topic and return relevant responses.' ²³
Open-source (vs closed source)	'Open-source LLMs (Large Language Models) have publicly accessible source code and underlying architecture, allowing developers, deployers, researchers and enterprises to use, modify and distribute them freely or subject to limited restrictions ... Closed-source large language models have proprietary underlying source code and architecture. They are accessible only under specific terms defined by their developers.' ²⁴
Retrieval augmented generation	Retrieval augmented generation 'enhances LLMs (Large Language Models) by retrieving relevant document chunks from external knowledge base through semantic similarity calculation. By referencing external knowledge, retrieval augmented generation effectively reduces the problem of generating factually incorrect content. Its integration into LLMs has resulted in widespread adoption, establishing retrieval augmented generation as a key technology in advancing chatbots and enhancing the suitability of large language models for real-world applications'. ²⁵
Rule based system	'A rule based system is a type of software system that uses rules as the basis for making decisions or solving problems. These rules are defined in a format that the system can interpret and process, typically in the form of "if-then" statements. Rule-based systems are a branch of artificial intelligence and are used in various applications, from expert systems to data processing and business automation.' ²⁶
Rules as code	'Rules as code is a public sector innovation, which involves a preparation of a machine-consumable version of some legislation. The term 'machine-consumable' implies that the rules are written in a way that they can be processed directly as rules by a computer. This can be done using a computer coding language or by using one of the platforms specifically built for this purpose.' ²⁷

21 Peter Cashman and Eliza Ginnivan, 'Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions' (2019) 19 *Macquarie Law Journal* 39, 41.

22 Vladimir Karpukhin et al. 'Dense Passage Retrieval for Open-Domain Question Answering' in Bonnie Webber et al (eds), *Proceedings of the 2020 Conference on Empirical Methods in Natural Language Processing (EMNLP)* (Conference Paper, EMNLP 2020, November 2020) 6769 <<https://aclanthology.org/2020.emnlp-main.550>>.

23 Team Symbal, 'Conversation Understanding: Open Domain vs. Closed Domain', *Symbal Ai Blog* (Web Page, 10 December 2020) <<https://symbal.ai/developers/blog/conversation-understanding-open-domain-vs-closed-domain/>>.

24 Fan Yang, Jake Goldenfein and Kathy Nickels, *GenAI Concepts: Technical, Operational and Regulatory Terms and Concepts for Generative Artificial Intelligence (GenAI)* (Report, ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S), and the Office of the Victorian Information Commissioner (OVIC), 2024) 9 <<https://apo.org.au/node/327400>>.

25 Yunfan Gao et al, 'Retrieval-Augmented Generation for Large Language Models: A Survey' (arXiv, 27 March 2024) 1 <<https://arxiv.org/abs/2312.10997>>.

26 'Rule Based System', *DeepAI* (Web Page, 17 May 2019) <<https://deepai.org/machine-learning-glossary-and-terms/rule-based-system>>.

27 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration, December 2023) 11.

Self-represented litigant	A self-represented litigant is 'anyone who is attempting to resolve any component of a legal problem for which they do not have legal counsel, whether or not the matter actually goes before a court or tribunal'. ²⁸
Speech recognition	Speech recognition is 'conversion, by a functional unit, of a speech signal to a representation of the content of the speech. Digitized speech is a form of sequential data, so that techniques that can handle data associated with a time interval can be used to process phonemes from speech'. ²⁹
Supervised learning (vs unsupervised learning)	'Supervised machine learning is defined as "machine learning that makes use of labelled data during training". In this case, machine learning models are trained with training data that include a known or determined output or target variable (the label)... Supervised learning can be used for classification and regression tasks, as well as for more complex tasks pertaining to structured prediction'. ³⁰
Technology assisted review	Technology assisted review is a 'process for prioritizing or coding a collection of documents using a computerized system that harnesses human judgements of one or more subject matter expert(s) on a smaller set of documents and then extrapolates those judgements to the remaining document collection'. ³¹

28 Elizabeth Richardson, Tania Sourdin and Nerida Wallace, *Self-Represented Litigants: Gathering Useful Information, Final Report - June 2012* (Report, Australian Centre for Justice Innovation, Monash University, October 2012) 4 [1.15] <<https://research.monash.edu/en/publications/self-represented-litigants-gathering-useful-information-final-rep>>.

29 Standards Australia Limited, 'AS ISO/IEC 22989:2023 Information Technology - Artificial Intelligence - Artificial Intelligence Concepts and Terminology' 53 [9.2.2.4] <<https://www.standards.org.au/standards-catalogue/standard-details?designation=as-iso-iec-22989-2023>>.

30 Ibid 21 [5.11.1].

31 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration, December 2023) 19.

**PART A:
INTRODUCTION
AND CONTEXT**

CHAPTER
01

Introduction

- 4 Our focus
- 5 Guide to the issues paper
- 5 How to tell us your views

1. Introduction

- 1.1 The Victorian Law Reform Commission has been asked to make recommendations on legislative reform and principles to guide the safe use of artificial intelligence (AI) in Victoria's courts and tribunals. This includes principles or guidelines that can be used in the future to assess the suitability of new AI applications in Victoria's courts and tribunals.
- 1.2 The Commission will report to the Attorney-General by 31 October 2025.

Our focus

- 1.3 AI systems and tools are rapidly evolving and increasingly used across society. The scope of this review is limited to the use of AI in Victoria's courts and tribunals.
- 1.4 We have been asked to focus on:
 - opportunities to build on existing legislation, regulations and common law in supporting the use of AI within Victoria's courts and tribunals;
 - the benefits and risks of using AI in Victoria's courts and tribunals, including risks relating to accountability, privacy, transparency and the accuracy and security of court materials;
 - the need to maintain public trust in courts and tribunals, and ensure integrity and fairness in the court and tribunal system;
 - the rapid development of AI technologies and how this may influence the extent to which such technologies should be adopted and regulated; and
 - applications of AI and how it is regulated in comparable jurisdictions and contexts (including work being done to develop a framework for regulating AI at the federal level in Australia) and potential learnings for Victoria.

For the complete terms of reference see page v.

- 1.5 The scope of this review includes use of AI by courts and tribunals (including judicial officials, tribunal members and staff working for courts and tribunals), legal professionals and court users. Our scope also includes court functions ranging from automated administrative tasks through to judicial decision-making.
- 1.6 We want to hear your views about the use of AI in Victoria's courts and tribunals, including risks and opportunities. We also want to hear about how to ensure safe and effective use.

Guide to the issues paper

- 1.7 People have different views about the issues, opportunities and risks of using AI in Victorian courts and tribunals. These views may differ based on how and when AI is used, and who uses it. You may wish to consider all the issues raised in the issues paper or focus on particular areas.

Figure 1: Overview of this issues paper

Issues paper	Main topics
A. Introduction and context	<ul style="list-style-type: none"> • What is AI? • General risks and benefits of AI
B. Current and potential use of AI	<ul style="list-style-type: none"> • Current and potential use of AI in courts and tribunals and associated risks and opportunities
C. Broad regulatory approaches and principles for AI regulation	<ul style="list-style-type: none"> • Overarching context of AI regulation • Principles for responsible and fair use of AI in courts and tribunals
D. Regulation and guidelines for responsible use of AI	<ul style="list-style-type: none"> • Current Victorian laws and regulation • Developing guidelines for safe use of AI in Victorian courts and tribunals, including for court users.

How to tell us your views

- 1.8 We are seeking written submissions that respond to our terms of reference. We will publish submissions on our website, unless you request the submission remains confidential.
- 1.9 We encourage you to use the questions raised in this issues paper to guide your response (see page vi). You may choose to answer some or all of the questions.
- 1.10 We will consider the responses we receive together with our own research. We will undertake further consultation after we have received and considered written submissions.
- 1.11 Please make your submission by 12 December 2024. You can provide your submission by:
- email: artificial.intelligence@lawreform.vic.gov.au
 via a form on our website: lawreform.vic.gov.au/submissions
 mail: GPO Box 4637, Melbourne, Victoria 3001

CHAPTER
02

What is artificial intelligence?

- 8** Overview
- 8** Definitions of artificial intelligence
- 9** Technologies and techniques of AI
- 12** Key attributes of AI

2. What is artificial intelligence?

Overview

- AI is a broad term which captures a range of existing and potential technologies.
- We outline AI technologies most relevant to use in courts and tribunals.
- AI has attributes that set it apart from previous technologies and computer systems. Understanding these differences may help in thinking about the opportunities and risks for using AI in courts and tribunals.

Definitions of artificial intelligence

- 2.1 There is no universally agreed definition of AI. This is partly because the technology continues to rapidly evolve, and so do the ways it is regulated.
- 2.2 A range of broad definitions are included in guidance materials developed by courts in Australia and overseas.¹
- 2.3 General definitions are commonly cited from peak standards organisations including the International Organization for Standardization,² Standards Australia³ and the United States National Institute of Standards and Technology.⁴

1 See for examples Courts of New Zealand, *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals: Judges, Judicial Officers, Tribunal Members and Judicial Support Staff* (Report, 7 December 2023); County Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Report, 3 July 2024) <<https://www.countycourt.vic.gov.au/practice-notes>>; Supreme Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Guidelines, Supreme Court of Victoria, 6 May 2024) <<http://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/guideline-responsible-use-of-ai-in-litigation>>; James E Baker, Laurie Hobart N and Matthew Mittelsteadt, *An Introduction to Artificial Intelligence for Federal Judges* (Report, Federal Judicial Centre, 2023) 5 citing National Security Commission on Artificial Intelligence (NSCAI), Interim Report 8 (Nov. 2019), https://www.nsc.ai.gov/wp-content/uploads/2021/01/NSCAI-Interim-Report-forCongress_201911.pdf.

2 The International Organization for Standardization defines an AI system as 'an engineered system that generates outputs such as content, forecasts, recommendations or decisions for a given set of human defined objectives' see International Organization for Standardization (ISO), 'What Is Artificial Intelligence (AI)?', *ISO* (Web Page) <<https://www.iso.org/cms/render/live/en/sites/isoorg/contents/news/insights/AI/what-is-ai-all-you-need-to-know.evergreen.html>> citing; ISO, 'ISO/IEC 22989:2022 Information Technology — Artificial Intelligence — Artificial Intelligence Concepts and Terminology', *ISO* (Web Page) <<https://www.iso.org/standard/74296.html>>.

3 Standards Australia Limited, 'AS ISO/IEC 22989:2023 Information Technology - Artificial Intelligence - Artificial Intelligence Concepts and Terminology' <<https://www.standards.org.au/standards-catalogue/standard-details?designation=as-iso-iec-22989-2023>>.

4 National Institute of Standards and Technology (U.S.), *Artificial Intelligence Risk Management Framework (AI RMF 1.0)* (Report No NIST AI 100-1, 26 January 2023) 1 <<http://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf>> Defines an AI system as 'an engineered or machine-based system that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy'.

- 2.4 The Organisation for Economic Co-Operation and Development (OECD) has recently updated its definition for AI:

A machine-based system that, for explicit or implicit objectives, infers from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment.⁵

- 2.5 The OECD definition is recognised internationally,⁶ and has been adopted by the Australian Government.⁷ For this issues paper, the OECD definition is the one we have used.

Technologies and techniques of AI

- 2.6 AI is a broad term referring to a range of computational techniques. We set out a range of technologies within the scope of the review below.

Expert systems

- 2.7 Expert systems are computer programs that use pre-defined rules ('if-then rules') and a knowledge base to infer conclusions. Expert systems were an early example of AI, although not all expert systems are considered AI. Unlike more recent AI technologies, traditional expert systems do not learn and adapt without human intervention.

The HYPE tool is a legal expert system developed through AustLii's Datalex platform which automatically generates large-scale mark-ups of legal documents.⁸

Machine learning and deep learning

- 2.8 Machine learning is a 'set of techniques for creating algorithms so that computational systems can learn from data'.⁹ Machine learning models are trained on large volumes of data to find patterns which can be applied to make predictions or decisions. These types of AI can improve their performance, 'learning' over time based on experience and feedback about previous responses.

AI algorithms used by social media apps are an example of machine learning. These algorithms filter and recommend content based on what the user chooses to view on platforms such as Facebook, Instagram and YouTube.

5 OECD, *Recommendation of the Council on Artificial Intelligence* (Report No OECD/LEGAL/0449, 2024).

6 The OECD is an authoritative international body that plays a leading role in setting international standards. It has 38 member states including Australia, Canada, New Zealand, Germany, Japan, UK, USA, France and Denmark. 'Members and Partners', *OECD* (Web Page) <<https://www.oecd.org/en/about/members-partners.html>>.

7 Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia: Proposals Paper for Introducing Mandatory Guardrails for AI in High-Risk Settings* (Proposals Paper, September 2024) 8.

8 Graham Greenleaf, Andrew Mowbray and Philip Chung, 'Building Sustainable Free Legal Advisory Systems: Experiences from the History of AI & Law' (2018) 34(1) *Computer Law & Security Review* 1, 5.

9 Fan Yang, Jake Goldenfein and Kathy Nickels, *GenAI Concepts: Technical, Operational and Regulatory Terms and Concepts for Generative Artificial Intelligence (GenAI)* (Report, ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S), and the Office of the Victorian Information Commissioner (OVIC), 2024) 4 <<https://apo.org.au/node/327400>>.

- 2.9 Deep learning is a 'subset of machine learning that is loosely based on the information-processing architecture of the brain'.¹⁰ This kind of AI uses neural networks to analyse complex patterns and learn 'rules' from vast amounts of data. Deep learning is used in many kinds of AI technology including image recognition, face recognition and speech recognition.

Personal voice assistants like Apple's Siri or Amazon's Alexa are common examples of how deep learning approaches are applied to voice-to-voice interaction.

Generative AI

- 2.10 Generative AI is a subset of machine learning that generates new content by recognising patterns and making statistical predictions about the best response to a prompt.¹¹ A prompt is 'an instruction, query or command that a user enters into an interface to request a response from the system'.¹² Outputs created by generative AI may not always be the same, even when the same prompt is used. Generative AI models are trained on huge amounts of data. Text, code, images, video and audio are some of the outputs that can be created through generative AI.
- 2.11 Common among many generative AI-based systems are complex supply arrangements, meaning data and technology moves between multiple parties. Sometimes these parties are based in different jurisdictions. In contrast, older types of AI such as rules-based or expert systems typically require limited movement of data between parties or locations.
- 2.12 Large language models are a type of generative AI. They use natural language processing to generate language-based outputs, such as text or code. The data used by large language models is dependent upon a developer's preferences in shaping that system's inputs and outputs, and often will include rules to exclude certain sources or content.

ChatGPT is an example of a large language model. Legal-specific generative AI systems include Lexis+ AI and Thomson Reuters CoCounsel.¹³

10 ASEAN Guide on AI Governance and Ethics (Report, ASEAN: Association of South East Asian Nations, February 2024) 9 <https://asean.org/wp-content/uploads/2024/02/ASEAN-Guide-on-AI-Governance-and-Ethics_beautified_201223_v2.pdf>.

11 Fan Yang, Jake Goldenfein and Kathy Nickels, *GenAI Concepts: Technical, Operational and Regulatory Terms and Concepts for Generative Artificial Intelligence (GenAI)* (Report, ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S), and the Office of the Victorian Information Commissioner (OVIC), 2024) 5 <<https://apo.org.au/node/327400>>.

12 Ibid 2.

13 'CoCounsel. Focus on the Work That Matters with a Trusted Gen AI Assistant', *Thomson Reuters Australia* (Web Page) <<https://www.thomsonreuters.com.au/en-au/products/cocounsel.html>>; 'Introducing Protégé Your Personalized Legal AI Assistant', *Lexis+ AI* (Web Page) <<https://www.lexisnexis.com/en-us/products/lexis-plus-ai.page#top>>.

Automation

- 2.13 Automation refers to the use of technology to undertake tasks or processes with minimal human input. But not all automated systems are considered AI. Automation and AI are overlapping but distinct concepts, with AI enabling more complex tasks to be automated.¹⁴ Low-level automation that does not involve AI is not part of this review, as automation has impacted the legal system over a much longer period of time than AI has.

The Commonwealth Courts Portal and the National Court Framework's eLodgment are examples of automated systems. They facilitate the centralised lodgment of documents and access by parties to files and hearing dates.¹⁵

Algorithmic or automated decision-making

- 2.14 Algorithmic or automated decision-making refers to computational systems which assist or replace decisions by humans.
- 2.15 Automated decision-making can range from analysis or predictions that support human decisions through to fully automated AI systems which produce final decisions.¹⁶ Some automated decision-making, such as routine rule-based tasks, does not involve AI. Other automated decision-making uses machine learning and other AI technologies.
- 2.16 Automated decision-making can be represented on a scale of increasing automation and decreasing human involvement. This means an automated system could:
1. Collect and present information for consideration by a decision-maker
 2. Filter information to provide a set of cases for a decision-maker to consider
 3. Provide guidance through the decision-making process
 4. Recommend a course of action
 5. Make final decisions.¹⁷
- 2.17 The issues and risks of automated decision-making and AI are inter-related. They include bias, privacy, procedural fairness, transparency, security and contestability.

Mobile detection cameras used in New South Wales are supported by AI to provide automated decision-making. The AI system filters images that show potential illegal mobile phone use. An authorised officer then reviews the filtered images and decides whether to issue a penalty notice with the information supplied.¹⁸

¹⁴ Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023) 9.

¹⁵ 'eLodgment', *Federal Court of Australia* (Web Page, August 2024) <<https://www.fedcourt.gov.au/online-services/elodgment>>.

¹⁶ Kimberlee Weatherall et al, *Automated Decision-Making in New South Wales: Mapping and Analysis of the Use of ADM Systems by State and Local Governments* (Research Report, ARC Centre of Excellence on Automated Decision-Making and Society (ADM+S), March 2024) 13 <<https://apo.org.au/node/325901>>.

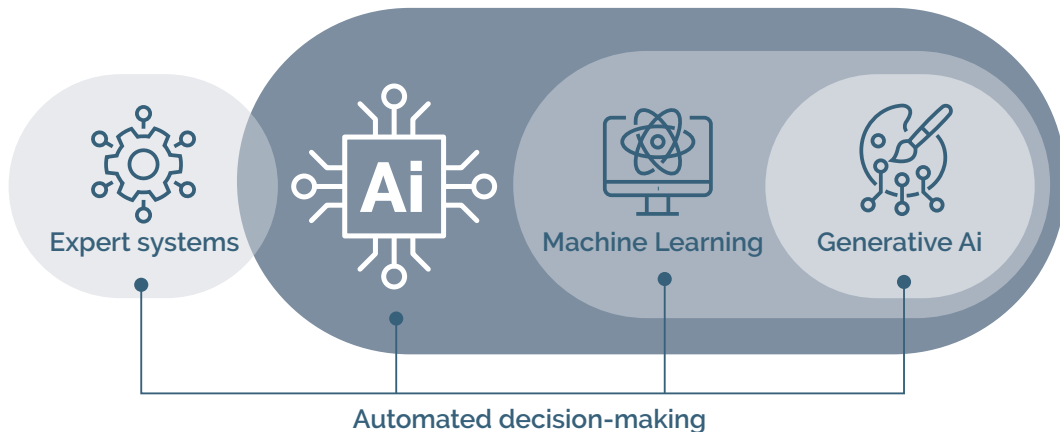
¹⁷ Ibid.

¹⁸ NSW Ombudsman, *The New Machinery of Government: Using Machine Technology in Administrative Decision-Making* (Report, 29 November 2021) 16.

2.18 The figure below illustrates the interaction of the key terms we have now covered. The figure highlights that:

- Machine learning is a subset of AI, and generative AI is a subset of machine learning
- Expert systems can involve AI, but often do not
- Automated decision-making intersects with all types of AI, as well as systems that are not AI.

Figure 2: Interactions of AI technologies



Key attributes of AI

How is AI different to traditional computer systems?

2.19 AI systems differ from traditional computer systems and automation. This is important as we consider benefits and risks. The Australian Government's recent proposals paper, *Safe and Responsible AI*, identifies key differences between AI and other types of software:¹⁹

- **Autonomy:** AI systems can make decisions autonomously, without human intervention at any stage of the decision-making process.
- **General cognitive capabilities:** General purpose systems like large language models can exhibit behaviour that, in humans, would require general cognitive capabilities, as opposed to specific capabilities to solve a task.
- **Adaptability and learning:** AI systems can adapt and improve their performance over time by learning from data.
- **Speed and scale:** AI has an unparalleled capacity to analyse massive amounts of data in a highly efficient and scalable way. It also allows for real-time decision-making and distribution of outputs at a very large scale.
- **Opacity or lack of explainability (the 'black box' problem):** The most advanced AI models are trained on data that is often too vast and too complex for humans to efficiently process, and which may not have been curated or documented prior to ingestion. Techniques used to reason from data are multi-layered and understudied, contributing to a limited understanding of their outputs. Decisions that AI systems make are not always traceable.

- **High realism:** AI has reached a point where it can emulate human-like behaviours. It can be difficult to distinguish AI interactions or outputs from human interactions or outputs.
- **Versatility:** AI models are a multipurpose technology that can perform tasks beyond those intended by their developers.
- **Ubiquity:** AI, particularly generative AI, is an increasing part of our everyday lives and continues to be developed and adopted rapidly.

2.20 AI poses different risks when compared to traditional software because:²⁰

- the system is trained on large amounts of data that may not be true, representative or appropriate for the intended use
- systems rely on complex and distributed operational supply chains and data flows
- there may be biases built into the system
- it may provide different outputs for the exact same prompt
- it can be difficult to predict or detect adverse impacts
- the system needs to be maintained to remain accurate and up to date
- the underlying technology and how it operates can be opaque
- it can be difficult to define and allocate accountability across the AI lifecycle
- testing and validation of AI systems is a difficult task in pre- and post-market contexts, compared to traditional software.²¹

Open and closed AI systems

2.21 AI technology is often described as 'open' or 'closed'. This can refer to two different concepts:

- **open and closed source** refers to whether access to the underlying model is freely available
- **open and closed domain** refers to the type of data used by that AI system.

2.22 These concepts of 'open' and 'closed' are not necessarily binary and can be considered on a spectrum.²²

Open and closed source

2.23 AI models are called 'open source' when the underlying architecture is freely available and publicly accessible. Developers, researchers and administrators can use the source code, collaborate and modify programs subject to any applicable open-source licenses.²³

2.24 'Closed source' models do not provide access to the underlying architecture.²⁴ Intellectual property laws may protect closed source models, making it difficult to understand the underlying technology or how outputs are generated. This 'opacity' can impact both institutional independence and judicial impartiality in the context of courts and tribunals.²⁵

20 National Institute of Standards and Technology (U.S.), *Artificial Intelligence Risk Management Framework (AI RMF 1.0)* (Report No. NIST AI 100-1, 26 January 2023) 38 <<http://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf>>.

21 Ibid.

22 David Gray Widder, Sarah West and Meredith Whittaker, 'Open (For Business): Big Tech, Concentrated Power, and the Political Economy of Open AI' (SSRN, 18 August 2023) 2 <<https://www.ssrn.com/abstract=4543807>>."plainCitation": "David Gray Widder, Sarah West and Meredith Whittaker, 'Open (For Business

23 Fan Yang, Jake Goldenfein and Kathy Nickels, *GenAI Concepts: Technical, Operational and Regulatory Terms and Concepts for Generative Artificial Intelligence (GenAI)* (Report, ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S), and the Office of the Victorian Information Commissioner (OVIC), 2024) 10-11 <<https://apo.org.au/node/327400>>.

24 Ibid.

25 Monika Zalnieriute, *Technology and the Courts: Artificial Intelligence and Judicial Impartiality* (Submission No. 3 to Australian Law Reform Commission Review of Judicial Impartiality, June 2021) 4 <<https://www.alrc.gov.au/wp-content/uploads/2021/06/3--Monika-Zalnieriute-Public.pdf>>.

- 2.25 There are merits in using either open- or closed-source AI. Open source models provide greater transparency and can assist in making an AI system more customised. The organisation implementing the AI system can access the underlying architecture to modify the system to perform specific tasks. This can also mean more community and research collaboration and faster development and innovation.²⁶ However, risks include concerns about data privacy, regulatory challenges where a model has decentralised control and widespread distribution, and vulnerability to security breaches. Individuals can apply open AI models to produce harmful content or breach confidentiality requirements.²⁷

ChatGPT4 is an example of a closed source large language model which does not disclose the system architecture, hardware or training data, amongst other things.²⁸

Llama 3.1 is an open source large language model that can be downloaded freely, but then potentially trained on closed domain data.²⁹ Open Justice was one of the first global open source large language models designed for the administration of law.³⁰

Open and closed domain

- 2.26 'Open domain' AI refers to a large language model that is trained on a broad range of data or inputs, and can respond to a wide range of topics. For example, ChatGPT draws on publicly available material from the internet.³¹
- 2.27 'Closed domain' AI refers to a large language model that is trained on a defined set of material, often subject specific. This distinction is important for retrieval-augmented generation, a training technique that draws on a specified domain of material and anchors responses in that material. This has been shown to improve the reliability of responses and reduce the likelihood of error.³²

Examples of closed domain AI that use retrieval-augmented generation are Lexis Nexis's AI Legal Assistant and Thompson Reuters CoCounsel (discussed further below).³³

26 Dominik Hintersdorf, Lukas Struppek and Kristian Kersting, 'Balancing Transparency and Risk: The Security and Privacy Risks of Open-Source Machine Learning Models' (arXiv, 18 August 2023) 6 <<http://arxiv.org/abs/2308.09490>>.

27 Ibid 5-6.

28 OpenAI et al, 'GPT-4 Technical Report' (No arXiv:2303.08774, arXiv, 4 March 2024) <<http://arxiv.org/abs/2303.08774>>; Chloe Xiang, 'OpenAI's GPT-4 Is Closed Source and Shrouded in Secrecy', *VICE* (online, 16 March 2023) <<https://www.vice.com/en/article/openai-gpt-4-is-closed-source-and-shrouded-in-secrecy/>>; Chloe Xiang, 'OpenAI Is Now Everything It Promised Not to Be: Corporate, Closed-Source, and For-Profit', *VICE* (online, 28 February 2023) <<https://www.vice.com/en/article/openai-is-now-everything-it-promised-not-to-be-corporate-closed-source-and-for-profit/>>.

29 'Meet Llama 3.1', *Meta* (Web Page) <<https://llama.meta.com/>>.

30 Conflict Analytics Lab, *OpenJustice* (Web Page) <<https://openjustice.ai/>>; Samuel Dahan et al, 'OpenJustice.Ai: A Global Open-Source Legal Language Model' in *Volume 379: Legal Knowledge and Information Systems, JURIX 2023: The Thirty-Sixth Annual Conference, Maastricht, the Netherlands, 18-20 December 2023* (IOS Press, 2023) 387.

31 'ChatGPT', *OpenAI* (Web Page, 2024) <<https://openai.com/chatgpt/>>.

32 Varun Magesh et al, 'Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools' (arXiv, 2024) <<https://arxiv.org/abs/2405.20362>>.

33 'CoCounsel Drafting - Save Valuable Time with CoCounsel Drafting', *Thomson Reuters* (Web Page) <<https://legal.thomsonreuters.com/en/products/cocounsel-drafting/>>; 'LexisNexis Launches Second-Generation Legal AI Assistant on Lexis+ AI', *LexisNexis* (Web Page, 23 April 2024) <<https://www.lexisnexis.com/community/pressroom/b/news/posts/lexisnexis-launches-second-generation-legal-ai-assistant-on-lexis-ai>>.

General purpose AI

- 2.28 'General purpose AI' refers to AI models which are trained on a large amount of data and can undertake a wide array of tasks.³⁴ Earlier AI technology was often only competent at a discrete task or application.
- 2.29 General purpose AI has been adopted as a regulatory category by the European Union in the *Artificial Intelligence Act* (EU AI Act) and is defined to mean an AI model that:
- displays a significant generality and is capable of performing a wide range of distinct tasks regardless of the way the model is placed on the market that can be integrated into a variety of downstream systems or applications.³⁵
- 2.30 Foundation models are often described as general purpose AI. They are trained on large datasets which can be applied to a wide range of applications.³⁶ Users can download open source foundation models and then adapt them for particular uses.³⁷

Artificial general intelligence

- 2.31 Artificial general intelligence or 'general AI' refers to AI systems with cognitive abilities similar to human beings.³⁸ It is beyond the scope of this review because it remains theoretical. Its likely impact is hard to define without real applications.³⁹
- 2.32 The lack of cognitive ability in current AI can help us to think about the ethical and appropriate use of AI in courts and tribunals.⁴⁰ Some AI systems and models can simulate legal reasoning, but none can exercise reason.⁴¹ AI technology based on deep learning may be patterned on the human brain, but it produces outputs based on statistical probability.⁴²
- 2.33 When AI creates an output it is not expressing an opinion. Understanding the moral consequence of a decision, including exercising empathy, compassion, discretion or mercy, remains beyond the capability of any current AI technology.⁴³

34 Fan Yang, Jake Goldenfein and Kathy Nickels, *GenAI Concepts: Technical, Operational and Regulatory Terms and Concepts for Generative Artificial Intelligence (GenAI)* (Report, ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S), and the Office of the Victorian Information Commissioner (OVIC), 2024) 6 <<https://apo.org.au/node/327400>>.

35 Regulation (EU) 2024/1689 (*Artificial Intelligence Act*) [2024] OJ L 2024/1689, Ch I Art 3(63).

36 Fan Yang, Jake Goldenfein and Kathy Nickels, *GenAI Concepts: Technical, Operational and Regulatory Terms and Concepts for Generative Artificial Intelligence (GenAI)* (Report, ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S), and the Office of the Victorian Information Commissioner (OVIC), 2024) 7 <<https://apo.org.au/node/327400>>; G Bell, J Burgess and S Sadiq, *Generative AI: Language Models and Multimodal Foundation Models* (Rapid Response Information Report, Australian Council of Learned Academies, 24 March 2023) 27.

37 Fan Yang, Jake Goldenfein and Kathy Nickels, *GenAI Concepts: Technical, Operational and Regulatory Terms and Concepts for Generative Artificial Intelligence (GenAI)* (Report, ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S), and the Office of the Victorian Information Commissioner (OVIC), 2024) 7 <<https://apo.org.au/node/327400>>.

38 International Organization for Standardization (ISO), 'What Is Artificial Intelligence (AI)?', *ISO* (Web Page) <<https://www.iso.org/cms/render/live/en/sites/isoorg/contents/news/insights/AI/what-is-ai-all-you-need-to-know.evergreen.html>> This distinction is sometimes characterised as the difference between 'weak AI' and 'strong AI'. Artificial General Intelligence or general AI is also often distinguished from 'narrow AI'. See the Glossary for further explanation.

39 Ibid.

40 Many legal experts have explored how the technical limitations of AI shape their views over its most appropriate applications. These include Tania Sourdin, 'Judge v Robot? Artificial Intelligence and Judicial Decision-Making' (2018) 41(4) *University of New South Wales Law Journal* 1114, 1122–24; Monika Zalnieriute and Felicity Bell, 'Technology and the Judicial Role' in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021) 116, 138–141; John Zeleznikow, 'The Benefits and Dangers of Using Machine Learning to Support Making Legal Predictions' (2023) 13(4) *WIREs Data Mining and Knowledge Discovery* e1505, 16–17; Simon Chesterman, Lyria Bennett Moses and Ugo Pagallo, 'All Rise for the Honourable Robot Judge? Using Artificial Intelligence to Regulate AI' [2023] *Technology and Regulation* 45, 47–48, 55; John Morison and Tomás McInerney, 'When Should a Computer Decide? Judicial Decision-Making in the Age of Automation, Algorithms and Generative Artificial Intelligence' in S Turenne and M Moussa (eds), *Research Handbook on Judging and the Judiciary* (Edward Elgar-Routledge, 2024) 28–34; Tania Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge* (Edward Elgar Publishing, 2021) 209–35.

41 For example, this argument is explored for Large Language Models in John Morison and Tomás McInerney, 'When Should a Computer Decide? Judicial Decision-Making in the Age of Automation, Algorithms and Generative Artificial Intelligence' in S Turenne and M Moussa (eds), *Research Handbook on Judging and the Judiciary* (Edward Elgar-Routledge, 2024) 6.

42 Yannick Meneceur and Clementina Barbaro, 'Artificial Intelligence and the Judicial Memory: The Great Misunderstanding' (2022) *2 AI and Ethics* 269.

43 For further consideration of the unique human qualities embedded in judicial discretion see Justice Melissa Perry, *AI and Automated Decision-Making: Are You Just Another Number?* (Speech, Kerr's Vision Splendid for Administrative Law: Still Fit for Purpose? – Online Symposium on the 50th Anniversary of the Kerr Report, Gilbert + Tobin Centre of Public Law, UNSW Law & Justice NSW Chapter, Australian Institute of Administrative Law, 4 November 2021) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perry/perry-j-20211021#_ftnref11>.

Questions

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?

CHAPTER
03

Benefits and risks of AI

- 18 Overview
- 18 Potential benefits of AI
- 20 Potential risks of AI

3. Benefits and risks of AI

Overview

- The use of AI in Victoria's courts and tribunals could result in benefits, risks and challenges.
- These risks and benefits will be different depending on the type of AI system and how it is used. For example, the risks and opportunities of generative AI are different to those of expert systems.
- Risks and benefits will change depending on whether an AI system is applied to a scenario it was designed and tested for, and whether it is used for a proper and legitimate purpose.
- This section sets out the overarching benefits and risks of AI. Part B will discuss specific applications in courts and tribunals and will draw out where benefits and risks might differ based on their use and application.

Potential benefits of AI

3.1 AI offers potential benefits:

- **Efficiency** through the sustainable administration of justice, and by reducing public and private costs.
- **Access to justice** including improved access to legal advice and representation. This might help people understand and participate in resolving legal problems in new ways. Disputes might be solved through alternative processes, rather than through a court or tribunal.
- **Improved quality of processes and outcomes** made possible by AI technologies through new and innovative approaches.

Efficiency

3.2 AI may help courts, tribunals and the legal profession improve their efficiency and cost effectiveness.¹

3.3 AI systems can process huge amounts of data and provide analysis, new content or decisions much faster than humans. It can summarise legal cases or documents much faster than a human researcher.² AI tools are already used by Australian legal professionals for a variety of legal tasks, including legal research, writing emails and analysing and summarising documents.³

1 Efficiency can refer to reducing costs for services or to better allocating resources for the most appropriate purpose. Cost-effectiveness involves a range of considerations including efficiency in the provision of services. For further discussion of these terms, see Australian Government, *On Efficiency and Effectiveness: Some Definitions* (Staff Research Note, Productivity Commission, May 2013).

2 Samuel Hodge, 'Revolutionizing Justice: Unleashing the Power of Artificial Intelligence' (2023) 26(2) *SMU Science and Technology Law Review* 217, 227.

3 LexisNexis, *Generative AI and the Future of the Legal Profession* (Report, LexisNexis, 2024) 5-7.

- 3.4 There may be opportunities to reduce the time taken to deliver tasks that involve a high degree of repetition and little discretion, such as by automating some administrative and case management processes.⁴ This is significant given that only a small proportion of cases involving a higher court proceed to a hearing before a judge.⁵
- 3.5 AI offers efficiencies but there also costs related to procuring and managing new technology. The adoption of AI systems will require financial investment in buying software, training staff, technical adjustments to improve performance, accuracy and reliability, and costs associated with maintenance and monitoring.
- 3.6 AI can only increase cost-effectiveness if the risks of using it — such as inaccuracy and bias—can be mitigated. Importantly, efficiency needs to be balanced with principles of trust, fairness and other fundamental values that underpin the justice system (see Part C).

Access to justice

- 3.7 AI may improve access to justice by providing new, more effective ways for people to resolve their legal problems.
- 3.8 AI could help people to avoid or contain legal disputes by promoting access to legal information.⁶ In *The Justice Project* report, the Law Council of Australia noted that access to justice extends beyond the formal justice system to include access to 'legal information and education, non-court based dispute resolution and law reform'.⁷
- 3.9 AI may help people to understand their legal problems and access timely advice and representation. Chatbots and intake tools are designed to help people understand and categorise legal problems, then connect them with appropriate legal advice or representation.⁸ AI can also provide alternative methods to resolve disputes, reducing the number of matters that proceed to court.⁹
- 3.10 Where AI is integrated into hearings through real-time captions or translations, it may help some court users engage more easily with proceedings. AI may even assist self-represented litigants to engage with the court system.¹⁰ (See Part B).

Innovative approaches to improve outcomes and processes

- 3.11 AI creates unique opportunities for innovation that arise from the pace of technological change.¹¹ ChatGPT reached 100 million monthly active users just two months after launch.¹² In 2023, 149 foundation AI models (like ChatGPT) were released, more than doubling the number in 2022.¹³ AI patents increased by over 60 per cent between 2021 and 2022.¹⁴

4 Michael Legg and Felicity Bell, 'Artificial Intelligence and the Legal Profession: Becoming the AI-Enhanced Lawyer' (2019) 38(2) *University of Tasmania Law Review* 34, 42.

5 For example, research by Naomi Burstyner and others estimate that only 4% of the 1,890 cases filed in 2013-14 proceeded to judgment, and only 6.4% of NSW Supreme Court cases were finalised by a final order determination in 2014; Naomi Burstyner et al, 'Why Do Some Civil Cases End up in a Full Hearing? Formulating Litigation and Process Referral Indicia through Text Analysis' (2016) 25 *Journal of Judicial Administration* 257.

6 Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019) 66-70.

7 Law Council of Australia, *The Justice Project* (Final Report, August 2018) 48 <https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20_%20Final%20Report%20in%20full.pdf>.

8 The Law Society of England and Wales, *Technology, Access to Justice and the Rule of Law* (Report, The Law Society of England and Wales, September 2019) 8.

9 Nicola Tulk, Chris Gorst and Louisa Shanks, *The Legal Access Challenge: Closing the Legal Gap through Technology Innovation* (Report, Solicitors Regulation Authority, June 2020) 16.

10 Amy Schmitz and John Zeleznikow, 'Intelligent Legal Tech to Empower Self-Represented Litigants' [2022] 23(1) *Science and Technology Law Review* 142.

11 Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia: Discussion Paper* (Discussion Paper, June 2023) 7.

12 Krystal Hu, 'ChatGPT Sets Record for Fastest-Growing User Base - Analyst Note', *Reuters* (online, 2 February 2023) <<https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/>>.

13 Nestor Maslej et al, *The AI Index 2024 Annual Report* (Report, AI Index Steering Committee, Institute for Human-Centered AI, Stanford University, April 2024) 30 <https://aiindex.stanford.edu/wp-content/uploads/2024/04/HAI_2024_AI-Index-Report.pdf>.

14 *Ibid.*

- 3.12 The legal sector is adopting AI at rapidly increasing rates. A recent survey of 560 Australian lawyers found that half of respondents use generative AI for legal tasks.¹⁵ The use of AI by lawyers will increasingly impact our courts, particularly in the production of evidence (see Part B). Courts may benefit from innovative uses of AI in a range of ways. One possibility is to reduce vicarious trauma for court staff by minimising exposure to large amounts of distressing material (see Part B).
- 3.13 Victorian courts and tribunals have an opportunity to strategically plan systemic improvements, rather than react to change. In the United Kingdom, Her Majesty's Courts & Tribunal Service reform programme deployed over 50 projects to support digital uses by the courts.¹⁶ Likewise, the New Zealand Chief Justice has considered implementing AI as part of its *Digital Strategy for Courts and Tribunals*.¹⁷

Potential risks of AI

- 3.14 We have considered opportunities for the legal system to benefit from AI. Careful consideration of its limitations and risks can help us to understand where and how these opportunities might be best realised.
- 3.15 Key risks and limitations discussed below draw on examples identified by the Australasian Institute of Judicial Administration¹⁸ and overseas jurisdictions. These include:
- **Data security and privacy** concerns
 - **Explainability** and the opacity of AI technology
 - **Bias** including data bias and reinforcing bias
 - **Inaccuracy** including hallucinations (fictional outputs) and deepfakes
 - **Reduced quality of outputs** and devaluing of human judgement
 - **Access to justice** challenges.
- 3.16 Other issues might include:
- deskillling justice professionals
 - impacts on judicial independence
 - harm to public trust in judges and courts
 - 'truth decay' caused by a decline of trust in legal decisions.¹⁹

Data insecurity and loss of privacy

- 3.17 Significant privacy and data security risks arise from the way AI systems access and use data.²⁰ Many AI technologies are trained and tested on large data sets. Automated decision-making systems usually collect, use and store personal and organisational data.

15 LexisNexis, *Generative AI and the Future of the Legal Profession* (Report, LexisNexis, 2024) 5.

16 House of Commons Justice Committee, *Court and Tribunal Reforms* (Second Report of Session 2019 No HC 190, 30 October 2019) 8 <<https://publications.parliament.uk/pa/cm201919/cmselect/cmjust/190/190.pdf>>. See also; Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims* (Report, Civil Justice Council, February 2015); Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019) 95–109.

17 Office of the Chief Justice of New Zealand, *Digital Strategy for Courts and Tribunals* (Report, Courts of New Zealand, March 2023) <<https://www.courtsofnz.govt.nz/assets/7-Publications/2-Reports/20230329-Digital-Strategy-Report.pdf>>.

18 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023).

19 Chief Justice Andrew Bell, 'Truth Decay and Its Implications: An Australian Perspective' (Speech, 4th Judicial Roundtable, Durham University, 23 April 2024) <<https://supremecourt.nsw.gov.au/supreme-court-home/about-us/speeches/chief-justice.html>>.

20 Office of the Victorian Information Commissioner, *Artificial Intelligence – Understanding Privacy Obligations* (Report, April 2021) <<https://ovic.vic.gov.au/privacy/resources-for-organisations/artificial-intelligence-understanding-privacy-obligations/>>.

- 3.18 Privacy risks depend on the ways an AI system uses personal information and whether the data collected is secure. Personal information should only be used for the purposes for which it was collected, and for which consent was provided. But AI can use existing data to draw conclusions based on personal characteristics.²¹ This may be outside the scope of its original collection and consent.
- 3.19 Data security and privacy issues will vary depending on whether an AI system is developed for the organisation or supplied by a third-party.²² Many organisations and institutions use off-the-shelf AI systems, which might mean that data moves from the court or tribunal to other organisations or jurisdictions.²³ Court data may be passed onto a third party when an AI system is trained on internal court data. The host or provider may also retain information for training purposes. The provider may monitor the inputs and outputs of an AI system as part of the terms of service or its licencing requirements. Security risks will also vary depending on whether and how securely data is stored, and how long it is retained.
- 3.20 Malicious actors may conduct cyberattacks or may seek to exploit vulnerabilities in the underlying architecture, the operating protocols or the use of AI tools. These attacks may attempt to access and exploit personal data, disrupt court operations or simply cause enough reputational damage to reduce public trust.

Explainability and the 'black box'

- 3.21 'Explainability' and the 'black box' refer to the ability to explain how an AI system makes predictions or decisions. It is important that courts and tribunals can explain their decisions, and that people can understand and challenge how decisions are made. This has implications for important principles that guide courts and tribunals, especially:
- fairness
 - natural justice
 - public trust.
- 3.22 Two types of barriers to understanding the outputs from an AI system are set out below. These are the technical 'black box' and legal opacity.²⁴

Technical 'black box'

- 3.23 It is often difficult to explain how AI algorithms operate. Their complex architecture makes it difficult to understand how they reach answers. Even when the inputs are known, it can be unclear how the AI model transforms this into an output.²⁵ This is a larger problem when a deep learning model is involved, as it draws on vast amounts of data through a layered, complex structure. Outputs can emerge from calculations that are not reviewable, and even developers may not fully understand what is going on.²⁶

²¹ Ibid 4–7.

²² For example, see privacy risks related to use of ChatGPT discussed in Privacy and Data Protection Deputy Commissioner, *Use of Personal Information with ChatGPT* (Public Statement, Office of the Victorian Information Commissioner, February 2024).

²³ Office of the Victorian Information Commissioner, *Artificial Intelligence – Understanding Privacy Obligations* (Report, April 2021) 8 <<https://ovic.vic.gov.au/privacy/resources-for-organisations/artificial-intelligence-understanding-privacy-obligations/>>.

²⁴ Other barriers to explainability which have been identified by academics include intentional secrecy, technical illiteracy, non-intuitiveness, inherent inscrutability due to scale and poor documentation which are discussed in the following: Jenna Burrell, 'How the Machine "Thinks": Understanding Opacity in Machine Learning Algorithms' (2016) 3(1) *Big Data & Society* 1; Andrew D Selbst and Solon Barocas, 'The Intuitive Appeal of Explainable Machines' (2018) 87 *Fordham Law Review* 1085; Henry Fraser, Rhyle Simcock and Aaron J Snoswell, 'AI Opacity and Explainability in Tort Litigation' (Conference Paper, FAccT '22: 2022 ACM Conference on Fairness, Accountability, and Transparency, 21–24 June 2022) <<https://dl.acm.org/doi/10.1145/3531146.3533084>>.

²⁵ Han-Wei Liu, Ching-Fu Lin and Yu-Jie Chen, 'Beyond State v. Loomis: Artificial Intelligence, Government Algorithmization, and Accountability' (2019) 27(2) *International Journal of Law and Information Technology* 122, 140; Georgios Pavlidis, 'Unlocking the Black Box: Analysing the EU Artificial Intelligence Act's Framework for Explainability in AI' (2024) 16(1) *Law, Innovation & Technology* 293, 294–5.

²⁶ Georgios Pavlidis, 'Unlocking the Black Box: Analysing the EU Artificial Intelligence Act's Framework for Explainability in AI' (2024) 16(1) *Law, Innovation & Technology* 293, 295. *Innovation & Technology* 293, 295.

3.24 There is a growing field of 'explainable AI' which attempts to bridge the gap between machine-based decision-making and the need for human comprehension.²⁷ For now, the technical black box remains problematic.

Legal opacity

3.25 AI may not be explainable when developers seek to protect their interest in the intellectual property of their technology. Owners and developers may not want to explain how an AI model works and may seek legal protection to maintain commercial advantage.²⁸ In the United States, a risk assessment tool was developed to assess how likely it was that convicted offenders would reoffend. The company that developed it refused to explain to a court the underlying method, on the basis that it was proprietary.²⁹ This kind of opacity has been described as a 'legal black box'.³⁰

3.26 Some academics have proposed that the laws of negligence, product liability and other torts could be used to overcome the issue of legal opacity in AI.³¹

3.27 *ACCC v Trivago* provides an example of how the Federal Court has managed issues relating to commercial sensitivity and algorithmic outputs.³² In response to commercial sensitivity about the algorithm and data held by Trivago, the court ordered concurrent evidence from two experts in closed court.

Bias

3.28 AI can sometimes result in bias against groups of people. If this happens in courts and tribunals it has a fundamental impact on principles that are central to the justice system, especially fairness and non-discrimination.

3.29 AI may assist in reducing or identifying human bias in some circumstances.³³ Human decision-making is not immune from conscious or unconscious bias. But bias in AI technology raises important concerns. There are two main types of bias:

- data bias
- system bias.

Data bias

3.30 Bias can occur due to:

- underlying bias in the data that an AI system is trained on
- the use of selective or unrepresentative data.

27 Ibid.

28 Jenna Burrell, 'How the Machine "Thinks": Understanding Opacity in Machine Learning Algorithms' (2016) 3(1) *Big Data & Society* 1, 3-4; Andrew D Selbst and Solon Barocas, 'The Intuitive Appeal of Explainable Machines' (2018) 87 *Fordham Law Review* 1085, 1092.

29 *State of Wisconsin v Loomis* 371 Wis.2d 235 (2016).

30 Han-Wei Liu, Ching-Fu Lin and Yu-Jie Chen, 'Beyond State v. Loomis: Artificial Intelligence, Government Algorithmization, and Accountability' (2019) 27(2) *International Journal of Law and Information Technology* 122, 138-9.

31 Henry Fraser, Rhyle Simcock and Aaron J Snoswell, 'AI Opacity and Explainability in Tort Litigation' (Conference Paper, FAccT '22: 2022 ACM Conference on Fairness, Accountability, and Transparency, 21-24 June 2022) <<https://dl.acm.org/doi/10.1145/3531146.3533084>>.

32 *Trivago NV v Australian Consumer and Competition Commission* [2020] FCAFC 185; (2020) 384 ALR 496, [69].

33 Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 2021) 41; Law Commission of Ontario, *Accountable AI* (LCO Final Report, June 2022) 18.

- 3.31 If the model is built and tested using biased data, such as patterns of inequality, discrimination or prejudice, this bias will be replicated in the outputs.³⁴ This is a critical issue for courts, where fairness and non-discrimination is fundamental.
- 3.32 The risk of bias is also a concern because some groups are overrepresented in Victoria's justice system. First Nations people account for 12.6 per cent of all prisoners in Victoria,³⁵ but only 1.2 per cent of the Victorian population.³⁶ Using data with overrepresented groups could reinforce assumptions based on race or other discriminatory factors.
- 3.33 Bias from AI can arise in risk assessment or other automated decision-making tools. Risk assessment tools that draw on data related to offences where certain groups are overrepresented may result in the AI system overemphasising the risk of recidivism for those groups. Even if the input is not intentionally discriminatory, the AI system may correlate other inputs that result in bias.³⁷ For example, information about a person's education, socio-economic background and geographic location may act as a proxy for race.
- 3.34 Bias due to the limitations of training data has been a common criticism of facial recognition technology, with problems reported about misidentification and inaccuracy with some ethnic groups.³⁸
- 3.35 Human bias in the design of AI systems is also a risk. Assumptions may be built into the AI model. This can occur during the development stage, such as in the choice of input and output variables, or during the training stage.³⁹

System bias

- 3.36 Machine learning has the risk of reinforcing the bias in its future learning and application of data. An algorithmic risk assessment tool that overemphasises the risk of reoffending for a particular group may lead to people from that group being incarcerated at a higher rate or for longer.⁴⁰ Where the tool uses machine learning, there is a risk that bias will be amplified over time, as the model continues to learn or re-train on new data. The system might also create new biases by finding new statistical relationships about certain groups and applying them to predictions or decisions.⁴¹

Inaccuracy

- 3.37 AI can provide complex analysis of large amounts of data very quickly, but there are risks relating to the accuracy of its outputs. AI rule-based or expert systems can analyse data with increased precision, which can lead to a reduction in errors.⁴² But even rule-based or expert systems can generate inaccuracies. This can happen when the data an AI model is trained on is too narrow and the model is unable to meaningfully adapt to new inputs. Generative AI poses different inaccuracy risks, because it can produce hallucinations, as we discuss later.

34 Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 27 May 2021) 106–7 <<https://humanrights.gov.au/our-work/technology-and-human-rights/projects/final-report-human-rights-and-technology>>; Paul Grimm, Maura Grossman and Gordon Cormack, 'Artificial Intelligence as Evidence' (2021) 19(1) *Northwestern Journal of Technology and Intellectual Property* 9, 42.

35 Australian Bureau of Statistics, 'Prisoners in Australia: Aboriginal and Torres Strait Islander Prisoners', *Australian Bureau of Statistics* (Web Page, 25 January 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#aboriginal-and-torres-strait-islander-prisoners>>.

36 Australian Bureau of Statistics, 'Estimates of Aboriginal and Torres Strait Islander Australians', *Australian Bureau of Statistics* (Web Page, 31 August 2023) <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release#:~:text=At%2030%20June%202021%2C%20there,Queensland%20and%20Western%20Australia%20combined.>>>.

37 Paul Grimm, Maura Grossman and Gordon Cormack, 'Artificial Intelligence as Evidence' (2021) 19(1) *Northwestern Journal of Technology and Intellectual Property* 9, 43.

38 Nicholas Davis, Lauren Perry and Edward Santow, *Facial Recognition Technology: Towards a Model Law* (Report, Human Technology Institute, The University of Technology Sydney, September 2022) 28.

39 Centre for Data Ethics and Innovation (CDEI), *Review into Bias in Algorithmic Decision-Making* (Report, Centre for Data Ethics and Innovation (CDEI), November 2020) 28.

40 Ibid 100.

41 Ibid 26, 28.

42 Sarah Grace, 'Embracing the Evolution: Artificial Intelligence in Legal Practice' [2024] (183) *Precedent* 30, 32.

- 3.38 It is not always obvious when AI is wrong. Inaccurate outputs may appear to be true and correct. The risk of inaccuracy is amplified because people are less likely to check the results. This risk is particularly pronounced with generative AI systems that tend towards affirmative responses and express an overconfidence in outputs and results.⁴³
- 3.39 Inaccuracies arising from the use of AI by courts and tribunals could lead to unfairness and a loss of public trust. Even errors in administrative functions can have considerable implications. The risk of error in decision-making involving people's rights or liberty can have significant consequences. These errors undermine confidence in the justice system, whether the decision is made by a human or machine. Aspects of AI that raise issues of accuracy are further discussed below.

Examples of errors by legal professionals using generative AI for court submissions are increasingly common. In Zhang v Chen, counsel filed a notice of application containing non-existent legal authorities, which had been made-up ('hallucinated') by ChatGPT.⁴⁴ In another example, an administrative error by pre-approved divorce software used in family courts in England and Wales required 2,235 cases to be re-opened and resubmitted.⁴⁵

Data quality

- 3.40 AI systems are trained on huge quantities of data. Many are trained on public data 'scraped' from the internet, where there is no control for accuracy or bias. If the data is inaccurate, unreliable, incomplete or skewed, then the system will reflect these inaccuracies in its content or decisions.⁴⁶ Legal journals often sit behind paywalls, meaning that non-specialised AI systems are unlikely to be trained on scholarly reviewed articles or information specific to the legal sector. Another risk is that training data might be focused on other jurisdictions, rather than Australian case law and legislation.

AI systems trained on primarily United States case law may produce answers based on patterns identified in American text and use terms and concepts that are not applicable in the Australian context.⁴⁷

43 Which is a result of how the systems are trained, for example see Aaron J Snoswell and Jean Burgess, 'The Galactica AI Model Was Trained on Scientific Knowledge – but It Spat out Alarming Plausible Nonsense', *The Conversation* (online, 30 November 2022) <<http://theconversation.com/the-galactica-ai-model-was-trained-on-scientific-knowledge-but-it-spat-out-alarming-plausible-nonsense-195445>>.

44 *Zhang v Chen* [2024] BCSC 285.

45 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration, December 2023) 58 citing, Francesco Contini, 'Artificial Intelligence and the Transformation of Humans, Law and Technology Interactions in Judicial Proceedings' (2020) 2(1) *Law, Technology and Humans* 4, 9.

46 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023) 16.

47 *Ibid* 50.

Hallucinations

- 3.41 Generative AI can create entirely wrong or fictional outputs, often described as hallucinations. Hallucinations are more common with general purpose large language models but can also occur in domain-specific applications. In a recent study, open domain AI was found to have a high rate of hallucinations when performing legal tasks.⁴⁸ The likelihood of hallucinations varied across the complexity of the task, types of cases, court jurisdictions and the year the case was decided. Large language models performed more accurately when performing simple tasks based on more prominent cases from higher level courts.⁴⁹
- 3.42 Large language models in particular can hallucinate in different ways. They may produce a response that is inaccurate or in conflict with the prompt. This can lead to inaccuracy in summarising judicial opinion or extracting irrelevant case material. Large language models can also produce a response that is convincing but entirely wrong or fictional. Several examples from overseas have involved barristers unintentionally relying on non-existent case law, generated by AI.⁵⁰
- 3.43 The risk for courts and tribunals was outlined in one United States case where counsel relied on a non-existent case generated by ChatGPT:
- Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavours. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.⁵¹

Reducing hallucinations

- 3.44 Some domain-specific applications have introduced 'retrieval-augmented generation' to try and reduce hallucinations. This allows large language models to use domain-specific data to produce answers linked to source material. To summarise a legal case, a retrieval-augmented generation system would first look up the case name in a legal database, retrieve the relevant metadata, and then provide that to the large language model to respond to the user prompt.⁵² This has the benefit of drawing on higher quality, jurisdiction-specific data. This approach can reduce the risk of error, but not completely eliminate it.
- 3.45 Some legal technology providers claim that retrieval-augmented generation largely prevents hallucination in legal tasks.⁵³ While hallucinations are reduced relative to general purpose applications (such as ChatGPT), a recent study found hallucinations can still occur.⁵⁴ The study noted that retrieval-augmented generation is 'unlikely to fully solve the hallucination problem'.⁵⁵

48 Matthew Dahl et al. 'Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models' (2024) 16(1) *Journal of Legal Analysis* 64, 81.

49 Ibid 73-4, 76, 79

50 *Zhang v Chen* [2024] BCSC 285.

51 *Mata v Avianca, Inc* 678 F.Supp.3d 443 (2023), 448-9.

52 Varun Magesh et al. 'Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools' (arXiv, 2024) 5-6 <<https://arxiv.org/abs/2405.20362>>.

53 Ibid 2.

54 Varun Magesh et al. 'Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools' (arXiv, 2024) <<https://arxiv.org/abs/2405.20362>>.

55 Ibid 6.

Deepfakes

- 3.46 While the court's role in identifying forgeries and determining the authenticity of evidence is not new, deepfakes present new challenges. A deepfake is any form of media 'that has been altered or entirely or partially created from scratch'.⁵⁶
- 3.47 Generative AI can be used to create deepfakes that are difficult to detect.⁵⁷ AI technology makes it easy for individuals to create a multilayered and complex web of false information. For example, AI can be used to create:
- a fake video, fake websites that host the video and generate disinformation and misinformation about what is displayed in the video, fake Twitter accounts that link to the video, fake accounts on discussion forums that discuss the content of the fake video.⁵⁸
- 3.48 Deepfakes raise evidentiary issues for courts and tribunals where they are tendered as evidence in the form of manipulated videos, images, audio or text.⁵⁹ Courts and tribunals will need to determine matters concerning deepfake material. For example, there may be a copyright dispute that turns on a deepfake image.⁶⁰
- 3.49 The proliferation of deepfakes may lead to suspicion and dispute of evidence that is actually authentic.⁶¹ International collaborations are under way to increase trust in the legitimacy of genuine audio-visual content, including content relied upon by police and prosecutorial bodies.⁶²

*A falsified audio recording in which a parent was heard to threaten their child was submitted in a custody dispute in the United Kingdom. The deepfake was detected in that case. But it is clear the risk of deepfakes emerging in evidence applies to other jurisdictions.*⁶³

Reduced quality of outputs and devaluing of human judgement

- 3.50 Faster and cheaper processes do not necessarily result in better outcomes. AI systems present opportunities to increase efficiency and productivity but can reduce quality. Increasing use of AI can also undervalue human judgement, replacing processes enhanced by human insight with more generic outcomes.
- 3.51 Legg and Bell note that AI might replace some mechanistic aspects of a lawyer's role but 'legal skills that draw on the lawyer's humanity and ethics, and which AI cannot provide, will be more sought after and more valuable'.⁶⁴ They argue that legal professional judgement will become increasingly important for several reasons. AI systems cannot reason in context, do not provide reasons and explanations for outputs, and are not bound by the legal and ethical obligations owed by lawyers.⁶⁵

56 Miriam Stankovich et al, *Global Toolkit on AI and the Rule of Law for the Judiciary* (Report No CI/DIT/2023/AIRoL/01, UNESCO, 2023) 20 <<https://unesdoc.unesco.org/ark:/48223/pf0000387331>>.

57 Agnieszka McPeak, 'The Threat of Deepfakes in Litigation: Raising the Authentication Bar to Combat Falsehood' (2021) 23(2) *Vanderbilt Journal of Entertainment & Technology Law* 433, 438.

58 Miriam Stankovich et al, *Global Toolkit on AI and the Rule of Law for the Judiciary* (Report No CI/DIT/2023/AIRoL/01, UNESCO, 2023) 121 <<https://unesdoc.unesco.org/ark:/48223/pf0000387331>>.

59 Agnieszka McPeak, 'The Threat of Deepfakes in Litigation: Raising the Authentication Bar to Combat Falsehood' (2021) 23(2) *Vanderbilt Journal of Entertainment & Technology Law* 433, 438–9.

60 Fan Yang, Jake Goldenfein and Kathy Nickels, *GenAI Concepts: Technical, Operational and Regulatory Terms and Concepts for Generative Artificial Intelligence (GenAI)* (Report, ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S), and the Office of the Victorian Information Commissioner (OVIC), 2024) 31 <<https://apo.org.au/node/327400>>.

61 Paul W Grimm, Maura R Grossman and Gordon V Cormack, 'Artificial Intelligence as Evidence' (2021) 19(1) *Northwestern Journal of Technology and Intellectual Property* 9, 73.

62 For example, see 'Restoring Trust and Transparency in the Age of AI', *Content Authenticity Initiative* (Web Page, 2024) <<https://contentauthenticity.org/>>.

63 Agnieszka McPeak, 'The Threat of Deepfakes in Litigation: Raising the Authentication Bar to Combat Falsehood' (2021) 23(2) *Vanderbilt Journal of Entertainment & Technology Law* 433, 438.

64 Michael Legg and Felicity Bell, 'Artificial Intelligence and the Legal Profession: Becoming the AI-Enhanced Lawyer' (2019) 38(2) *University of Tasmania Law Review* 34, 36.

65 *Ibid* 55–56.

- 3.52 If an automated AI system conducts client interviews instead of a lawyer, the questions it asks may be standardised and not consider the context or the individual circumstances of the client.⁶⁶ The AI system may not be able to apply contextual judgement to determine if the client is withholding information.⁶⁷ While an AI may process a higher volume of intake assessments than a human, this may not result in the best outcome for the client.
- 3.53 It is important to recognise the value of human judgement in judicial matters. For instance, therapeutic or restorative justice approaches use human insight and discretion to ensure meaningful opportunities to participate in the legal process, and to guide sentencing towards positive behavioural change.⁶⁸

Access to justice challenges

- 3.54 There are concerns that AI could make existing barriers to justice worse. The risk of bias could entrench marginalisation for some groups. Increased use of technology can also create additional barriers for court users with poor digital skills, limited access to technology or low levels of literacy.⁶⁹ These issues are discussed further in the principles section of Part C.
- 3.55 The cost of technology raises issues about access to justice. AI offers the opportunity to access legal advice more quickly and at lower cost. But companies that own proprietary data (such as legal databases) might dominate the market for specialised AI tools. The tools may then become unaffordable for small organisations or individuals. These factors may increase inequities related to cost and access to legal advice.
- 3.56 There are concerns that 'a focus on the cheap and quick resolution of disputes will come at the cost of just outcomes'.⁷⁰ The centrality of fairness as a principle of justice is considered in Part C.

Judicial independence and trust in the courts

- 3.57 Specific risks to principles of justice are raised by the use of AI in courts and tribunals, including principles of judicial independence and public trust. A spectrum of potential AI uses exist across courts and tribunals, ranging from assistance with court administration to judicial decision-making. At the extreme end, there has been speculation that AI may replace the role of judges.
- 3.58 Chief Justice Allsop has described courts as involving 'human reasoning and emotion, and that the courts are humane'.⁷¹ The human element of decision-making is an important factor in maintaining trust in courts. Many ethical questions arise about using machines as judges and whether they can possess 'the rational and emotional authority to make decisions in place of a human judge'.⁷² We consider these issues further in Part C.

66 Ibid 55.

67 Ibid.

68 Pauline Spencer, 'From Alternative to the New Normal: Therapeutic Jurisprudence in the Mainstream.' (2014) 39(4) *Alternative Law Journal* 222, 223.

69 Tania Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge* (Edward Elgar Publishing, 2021) 178.

70 Ibid 179.

71 James Allsop, 'Technology and the Future of Courts' (2019) 38(1) *University of Queensland Law Journal* 1, 2.

72 Tania Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge* (Edward Elgar Publishing, 2021) 249.

Questions

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?

**PART B:
CURRENT AND
POTENTIAL USE OF
AI IN COURTS AND
TRIBUNALS**

CHAPTER
04

AI in courts and tribunals

- 32 Overview
- 32 General court processes and advice
- 41 In-court hearings
- 47 Alternatives to in-court hearings
- 51 Supporting judicial decision-making

4. AI in courts and tribunals

Overview

- This chapter outlines the current and potential use of artificial intelligence (AI) in courts and tribunals.
- The experiences of other jurisdictions are provided to illustrate the opportunities and risks posed by different applications of AI.
- This chapter considers the use of AI in:
 - general court processes and advice
 - in-court hearings
 - alternatives to in-court hearings
 - judicial decision-making.
- AI will create different opportunities and risks for various court and tribunal stakeholders, based on the kind of AI tool and the ways it is used or misused.

General court processes and advice

Table 1: Current and potential uses of AI in general court processes and advice

Uses	Court users				Courts and Tribunals		
	Public	SRLs	Legal professionals	Prosecutorial bodies	Court administrators	Judges/Tribunal members	Juries
e-Filing and allocation of court matters		✓	✓	✓	◆	+	
Case analysis and legal research		✓	✓	✓		✓	
Engaging court users	+	+	+	+	◆		
Drafting documents		✓	✓	✓		✓+	
Predictive analytics		✓	✓	✓		✓	
Virtual legal advice	✓	✓					

KEY

- ✓ User: Uses an AI system to produce a product or service
 - ◆ Host: Delivers and maintains the AI system
 - +
- Receiver: Relies on material or services produced by AI

E-filing and allocation of court matters

- 4.1 'Workflow automation' means using technology to streamline and automate repetitive tasks.¹ It involves software systems that can perform actions automatically, reducing the need for manual intervention.
- 4.2 Victorian courts and tribunals use automation for some workflow processes including case management.² Victorian courts have used e-filing systems for electronic submission of documents for over two decades, but this process does not use AI.³ Some online systems integrate different court responsibilities into a single portal. The New South Wales Online Court and Online Registry integrates e-filing, case allocation and case management.⁴
- 4.3 AI might play a role in providing more advanced case management and advice for Victorian court and tribunal users than current systems.⁵ E-filing and case management tools have developed from expert systems to include machine learning. This can provide more advanced functions including classifying, extracting and redacting documents.⁶
- 4.4 The Brazilian VICTOR project supports case allocation by using natural language processing to filter appeals.⁷ This tool is expected to reduce the time required for court staff to classify applications for appeal. It automatically filters appeals depending on whether the appeal meets the constitutional threshold to be heard by the Supreme Court and the relevant areas of law.⁸

1 Heidi Alexander, 'Easy Automation' (2019) 45(4) *Law Practice* 32, 37.

2 Nintex, 'Revitalizing Public Service with Process Automation: A Case Study on County Court of Victoria', *IoT ONE* (Web Page) <<https://www.iotone.com/case-study/revitalizing-public-service-with-process-automation-a-case-study-on-county-court-of-victoria/c6934>>.

3 Victorian Civil and Administrative Tribunal, *VCAT Residential Tenancies Hub - Login* (Web Page) <<https://online.vcat.vic.gov.au/vol/common/login.jsp>>; Notably VCAT Online began as the first electronic filing system implemented in Australia see Marco Fabri and Giampiero Lupo, *Judicial Electronic Data Interchange in Europe: Applications, Policies and Trends* (Report, Research Institute on Judicial Systems of the National Research Council of Italy (IRSIG - CNR), 2003) 86; Marco Fabri and Giampiero Lupo, *Some European and Australian E-Justice Services* (Report, Research Institute on Judicial Systems of the National Research Council of Italy (IRSIG - CNR), 19 October 2012) 20 <<https://www.cyberjustice.ca/en/publications/some-european-and-australian-e-justice-service/>>.

4 Operating with the General List in the District Court of NSW since October 2018, the NSW Online Court is active in selected local court matters, the Corporations and Equity General Lists of the Supreme Court, the General List of the District Court at Sydney and the Land and Environment Court NSW Government, 'NSW Online Court', *NSW Government, Communities and Justice* (Web Page, 3 December 2023) <<https://courts.nsw.gov.au/courts-and-tribunals/going-to-court/online-services/online-court.html>>. Another example is the Common Platform which is a case management system used in all criminal courts in England and Wales and allows parties to serve documents and access self-service case materials 'HMCTS Common Platform: Registration for Defence Professionals', *GOV.UK* (Web Page, 10 June 2024) <<https://www.gov.uk/guidance/hmcts-common-platform-registration-for-defence-professionals>>.

5 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023) 35–6.

6 For instance, IntellidactAI is used in the US court system to process e-Filed documents. Computing System Innovations, *Intellidact AI Data Redaction* (Web Page, 2022) <<https://csisoft.com/intellidact/>>.

7 Fausto Martin De Sanctis, 'Artificial Intelligence and Innovation in Brazilian Justice' (2021) 59(1) *International Annals of Criminology* 1, 2–3 <https://www.cambridge.org/core/product/identifier/S0003445221000040/type/journal_article>; Pedro Henrique Luz de Araujo et al, 'VICTOR: A Dataset for Brazilian Legal Documents Classification' in Nicoletta Calzolari et al (eds), *Proceedings of the Twelfth Language Resources and Evaluation Conference* (Conference Paper, LREC 2020, 11–16 May 2020) 1449, 1450 <<https://aclanthology.org/2020.lrec-1.181>> Appeals heard by the Brazilian Supreme Court must meet the jurisdictional requirements set out through Constitutional Amendment 45/04. Commonly in Brazilian jurisprudence, this is referred to as a 'topic of general repercussion'.

8 Fausto Martin De Sanctis, 'Artificial Intelligence and Innovation in Brazilian Justice' (2021) 59(1) *International Annals of Criminology* 1, 2–3 <https://www.cambridge.org/core/product/identifier/S0003445221000040/type/journal_article>; Pedro Henrique Luz de Araujo et al, 'VICTOR: A Dataset for Brazilian Legal Documents Classification' in Nicoletta Calzolari et al (eds), *Proceedings of the Twelfth Language Resources and Evaluation Conference* (Conference Paper, LREC 2020, 11–16 May 2020) 1449, 1450 <<https://aclanthology.org/2020.lrec-1.181>> Appeals heard by the Brazilian Supreme Court must meet the jurisdictional requirements set out through Constitutional Amendment 45/04. Commonly in Brazilian jurisprudence, this is referred to as a 'topic of general repercussion'.

Opportunities	Risks
<ul style="list-style-type: none"> Reduction in the workload of court staff by automating repetitive administrative tasks. Improved access to justice. AI-facilitated case management can assist court administrators to process more cases in a timely and efficient manner. Reduction in court workload if cases are automatically directed to an appropriate court or judge. 	<ul style="list-style-type: none"> The handling of large amounts of sensitive, personal court data by AI has significant data security risks. Overreliance on AI may lead to a reduction in overall human oversight of case management and a decline in staff case management skills.

Case analysis and legal research

- 4.5 AI-powered legal research and analysis tools are changing the way case analysis and legal research is done. AI can improve people's ability to quickly access and analyse large amounts of legal information. AI providers claim their tools can sift through legal databases and identify and summarise legal arguments faster than traditional research tools.⁹
- 4.6 These types of AI tools can be accessed via licences, and could be used by judicial officers, court staff (including judges' associates and court researchers) and legal professionals.
- 4.7 AI research and analysis tools can incorporate natural language processing and generative AI functions. This allows people to search in conversational English and create summaries of information.¹⁰ In contrast, traditional legal research tools use key word or Boolean searches (search terms such as 'and' or 'or'). It has been argued that traditional search tools are not good at making sense of legal data.¹¹
- 4.8 Providers of specialised legal AI services claim that AI increases accuracy and reliability in case analysis and legal research. But law-specific AI products may have hallucination rates between 17 and 33 per cent.¹² In the United States, legal professionals who have relied on large language models such as ChatGPT for legal research have found that it sometimes hallucinates fake cases and precedents.¹³

9 As an example the legal research tool ROSS is claimed to be able to 'sift through over a billion text documents a second and return the exact passage the user needs' D Farrands, 'Artificial Intelligence and Litigation - Future Possibilities', *Handbook for Judicial Officers - Artificial Intelligence* (Judicial Commission of New South Wales, September 2022) <https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/artificial_intelligence_and_litigation.html>.

10 See for example LexisNexis, *Lexis+ AI: Conversational Search Platform* (Web Page) <<https://www.lexisnexis.com.au/en/products-and-services/lexis-plus-ai>>.

11 D Farrands, 'Artificial Intelligence and Litigation - Future Possibilities', *Handbook for Judicial Officers - Artificial Intelligence* (Judicial Commission of New South Wales, September 2022) <https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/artificial_intelligence_and_litigation.html>.

12 Varun Magesh et al, 'Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools' (arXiv, 2024) <<https://arxiv.org/abs/2405.20362>>.

13 See Chief Justice Andrew Bell, 'Truth Decay and Its Implications: An Australian Perspective' (Speech, 4th Judicial Roundtable, Durham University, 23 April 2024) <<https://supremecourt.nsw.gov.au/supreme-court-home/about-us/speeches/chief-justice.html>>. In terms of specific cases, see *Mata v Avianca, Inc* 678 F.Supp.3d 443 (2023). In *Mata v Avianca Inc* a federal judge imposed fines on a legal firm where lawyers blamed ChatGPT for their submission of fictitious legal research about an aviation injury. See also *People v Zachariah C Crabhill* 23PDJ067; *Park v Kim* 91 F.4th 610 (2024); *In Re: Thomas G Neusom, Esq Respondent* [2024] MD Fla 2:23-cv-00503-JLB-NPM; *Zhang v Chen* [2024] BCSC 285.

Opportunities	Risks
<ul style="list-style-type: none"> AI can identify, analyse and summarise complex information much faster than a human. 	<ul style="list-style-type: none"> Errors or hallucinations. Reduced access to justice if specialist tools are cost prohibitive for small firms, not-for-profit organisations and the public. Overreliance on AI may undermine the training of junior court staff and junior lawyers.

Engaging and triaging potential court users

- 4.9 AI offers new opportunities to engage court and tribunal users. AI-powered virtual court assistants could provide people with immediate, accessible information and guidance about how the court works.
- 4.10 Natural language processing tools, including chatbots, can support court functions. Chatbots can mimic human conversation through text or voice interactions.¹⁴ Some chatbots use large language models and generative AI to generate content based on inputs.¹⁵ Chatbots trained on court procedures and guidance could provide people with general information about court processes and timelines, advice on preparing procedural documents, or information about where to go next.¹⁶
- 4.11 AI chatbots can assist with language translation, providing support for marginalised communities with low literacy skills or with hearing or sight impairments (see discussion on transcription and translation tools from 4.43).
- 4.12 In Michigan, in 2018, the Court Operated Robot Assistant (CORA) was implemented as a physical courthouse 'conciierge' to assist court users.¹⁷ CORA provides directions, searchable court dockets and responses to frequently asked questions through voice-to-voice interaction in Spanish and English.¹⁸
- 4.13 Chatbots can assist with automated payment of fines.¹⁹ Since 2016, an AI-powered online assistant 'Gina' has been used in California to advise motorists how to pay traffic tickets, schedule court dates and sign up for traffic lessons.²⁰ Gina can also translate information into six languages.²¹
- 4.14 AI systems present opportunities to more efficiently triage people's legal issues and connect them with legal advice and representation.²²

14 Lise Embley, *Getting Started with a Chatbot* (JTC Quick Response Bulletin, National Centre for State Courts Joint Technology Committee, 20 April 2020).

15 Fan Yang, Jake Goldenfein and Kathy Nickels, *GenAI Concepts: Technical, Operational and Regulatory Terms and Concepts for Generative Artificial Intelligence (GenAI)* (Report, ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S), and the Office of the Victorian Information Commissioner (OVIC), 2024) 6 <<https://apo.org.au/node/327400>>.

16 For example, the United States has developed administrative guidance in the development of court chatbots see Aubrie Souza and Zach Zarnow, *Court Chatbots: How to Build a Great Chatbot for Your Court's Website* (Report, National Centre for State Courts, 2024); Lise Embley, *Getting Started with a Chatbot* (JTC Quick Response Bulletin, National Centre for State Courts Joint Technology Committee, 20 April 2020).

17 'Ottawa County Testing Out New Staffer: CORA the Robot', *Ottawa County, Michigan* (Blog Post, 14 November 2018) <<https://content.govdelivery.com/accounts/MIOTTAWA/bulletins/21b6ded>>.

18 Ibid.

19 The next phase for Michigan's CORA will include translation across 30 languages, instant messaging and automated onsite payment of traffic fines and child support. See Marcus Reinkensmeyer and Raymond Billotte, 'Artificial Intelligence (AI): Early Court Project Implementations and Emerging Issues' (August 2019) 34(3) *Court Manager: a publication of the National Association for Court Management* <<https://thecourtmanager.org/articles/artificial-intelligence-ai-early-court-project-implementations-and-emerging-issues/>>.

20 'Traffic Division', *Superior Court of California, County of Los Angeles* (Web Page, 2024) <<https://www.lacourt.org/division/traffic/traffic2.aspx>>; See also Jumpei Komoda, 'Designing AI for Courts' (2023) 29(3) *Richmond Journal of Law & Technology* 145.

21 Ibid.

22 In the early 2000s, Victorian Legal Aid trialled the GetAid system, which was a rules-based program intended to deliver a test that would assess whether a person should receive legal aid. VLA experts tested and developed this program and GetAid was used in-house before it was discarded after five years see John Zeleznikow, 'Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts' (2017) 8(2) *International Journal for Court Administration* 30, 37–8 <<https://iacajournal.org/articles/10.18352/ijca.223>>.

4.15 Justice Connect, in partnership with the University of Melbourne, developed a natural language processing AI model to triage and identify people's legal problems.²³ It allows people to use plain English to describe their problem and suggests a legal category for that issue.²⁴ Justice Connect uses this tool to support online client intake by matching people with an appropriate legal service.

Opportunities	Risks
<ul style="list-style-type: none"> • Legal information is provided in plain English to simplify the legal process. • Advice is accessible at a time convenient to court users, including when court staff are not around. • Errors are identified in drafts of court documents early. • Court users can be prompted to submit outstanding documents. 	<ul style="list-style-type: none"> • Provision of outdated or inaccurate information to court users if the system is not continuously maintained. • Privacy risks if users' personal information is used to train the model.

Rules as code

4.16 'Rules as code' is the translation of legislation into a machine readable format. Natural language legislation or rules are translated into a version that can be understood and interpreted directly as code by a computer.²⁵

4.17 Rules as code use expert systems that rely on pre-defined rules.²⁶ It enables the creation of websites that allow people to ask questions about legislation, including through a chatbot.

4.18 Rules as code could support AI-assisted automated decision-making by government agencies.²⁷ This could be seen in the automated issuing of licences, where:

- a person submits a licence application on an online platform
- an AI automated decision-making tool applies the rules as code to the individual's situation
- the AI system decides whether to issue a licence or not.

4.19 A rules as code project was implemented in New South Wales when a digital version of the *Community Gaming Regulation 2020* (NSW) was created. The state government published versions of the regulation readable by humans and readable by machines.²⁸ This allowed people to use an online questionnaire to understand how the regulation applied to their situation.²⁹

4.20 Austlii's Datalex platform provides software tools for users to develop rules as code applications.³⁰

²³ 'Bringing AI to the Legal Help Ecosystem with a Free Licence for NFPs', *Justice Connect* (Web Page, 7 March 2023) <<https://justiceconnect.org.au/fairmatters/bringing-ai-to-the-legal-help-ecosystem-with-a-free/>>.

²⁴ Ibid.

²⁵ Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023) 11.

²⁶ Ibid.

²⁷ James Mohun and Alex Roberts, *Cracking the Code: Rulemaking for Humans and Machines* (OECD Working Papers on Public Governance No 42, 2020) 49 <https://www.oecd-ilibrary.org/governance/cracking-the-code_3afe6ba5-en>.

²⁸ NSW Government Beyond Digital Team, 'In an Australian First, NSW Is Translating Rules as Code to Make Compliance Easy', *Digital NSW* (Web Page, 21 July 2020) <<https://www.digital.nsw.gov.au/article/an-australian-first-nsw-translating-rules-as-code-to-make-compliance-easy>>.

²⁹ Ibid.

³⁰ Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration, December 2023) 9.

Opportunities	Risks
<ul style="list-style-type: none"> • Develop programs that assist people to understand the law. • Enhance the public's access to primary legal sources, as well as expert legal commentary. • Interpret and translate complex legal language into plain English. 	<ul style="list-style-type: none"> • Machine-readable legal texts may be protected by proprietary laws and may not be accessible to the public. • Negative impacts for transparency and trustworthiness if reasoning and conclusions of AI tools are not explainable.

Drafting affidavits, statements, orders and other documents

- 4.21 AI can be used to generate legal documents. Large language models that use generative AI and machine learning can be used to draft submissions, statements, judgments and orders.³¹
- 4.22 AI drafting tools could assist parties, legal professionals, prosecutorial bodies and judicial members. Some AI tools may include suggestions for improvements to legal language, clarity and precision, and over time, compliance with legal norms. Others may generate initial drafts based on predefined templates or specific legal criteria.
- 4.23 Some generative AI tools can streamline drafting of legal documents by generating standardised contracts, reviewing clauses for potential errors and ensuring that they comply with legal standards.³² Future tools may facilitate more collaborative, personalised legal documents tailored to client requirements and needs.³³
- 4.24 AI tools that use natural language processing and speech recognition could assist self-represented litigants to express evidence and submissions more clearly.³⁴ But issues around inaccuracy remain significant, particularly for non-legal court users who may not be able to check whether AI outputs are correct.
- 4.25 Another issue is that AI drafting tools could result in a significant rise in vexatious litigation and the generation of too much material without a strong basis in law.
- 4.26 There are major risks with using generative AI to prepare court documents. Generative AI models depend on sophisticated statistical calculations and large data sets to predict what text might be used in a response. But they cannot verify or understand if an output is true.
- 4.27 Generative AI tools may distort the meaning or tone of a witness statement. Warnings about the use of large language models in evidential submissions emerged in *Director of Public Prosecutions v Khan*.³⁵ Justice Mossop held that little weight could be placed on a character reference from the offender's brother because the reference appeared to be generated by an AI program such as ChatGPT.³⁶

31 Cary Coglianese, Maura Grossman and Paul W Grimm, 'AI in the Courts: How Worried Should We Be?' (2024) 107(3) *Judicature* 65, 69 <<https://judicature.duke.edu/articles/ai-in-the-courts-how-worried-should-we-be/>>; Vasily A Laptev and Daria R Feyzrakhmanova, 'Application of Artificial Intelligence in Justice: Current Trends and Future Prospects' [2024] *Human-Centric Intelligent Systems* 9 <<https://doi.org/10.1007/s44230-024-00074-2>>.

32 For an example of an AI legal drafting tool see Thomson Reuters AI CoCounsel 'CoCounsel Drafting - Save Valuable Time with CoCounsel Drafting', *Thomson Reuters* (Web Page) <<https://legal.thomsonreuters.com/en/products/cocounsel-drafting>>. Looplegal, 'The Future of Online Contract Review: Trends and Predictions', *Medium* (Web Page, 15 December 2023) <<https://medium.com/@looplegaluk/the-future-of-online-contract-review-trends-and-predictions-co8bea1635b8>>.

34 *Youssef v Eckersley* [2024] QSC 35. In *Youssef v Eckersley & Anor*, the Court had no problem with the plaintiff who was a self-representing litigant using ChatGPT to assist in organisational structure and additional flourishes to the submissions, but in part because the plaintiff was upfront with disclosing the purpose and specific uses of the AI tool.

35 *Director of Public Prosecutions (ACT) v Khan* [2024] ACTSC 19.

36 *Ibid.*

Opportunities	Risks
<ul style="list-style-type: none"> Increased efficiency and productivity of judicial members and legal professionals. Increased speed and accuracy of drafting legal documents. Automatic review of draft legal documents for compliance with legal standards and regulations. 	<ul style="list-style-type: none"> Increased workload for courts and tribunals if self-represented litigants submit AI drafted materials without being able to identify legal inaccuracies. Increased workload for courts if AI tools are used by vexatious litigants to initiate matters without a legal basis. Privacy and data concerns if sensitive client data is entered into AI drafting tools.

Predicting outcomes of decisions

- 4.28 Predictive analytics that rely on AI models are said to be able to predict the outcome of legal cases. Lex Machina reportedly performed better than experienced lawyers and scholars at predicting outcomes of the US Supreme Court.³⁷ Predictive analytics have been used in Australia. Macquarie University designed a program to analyse judicial decision-making patterns in migration cases heard in the Federal Circuit Court.³⁸ But these tools have not been developed or used widely in Australia compared to other jurisdictions.³⁹
- 4.29 Traditionally, predictive analytics used expert systems to identify patterns. They developed to incorporate machine learning to predict the likely outcome of cases with reportedly good accuracy.⁴⁰ But inaccuracy remains an issue, particularly of data. Predictive analytics tools may be less accurate when they are trained on specific local data, which is then applied to a broader set of facts or to another jurisdiction.⁴¹
- 4.30 AI tools that predict potential case outcomes in general are different from tools that predict specific outcomes related to a particular judge. General court analytics can provide litigants with broad expectations about the likely outcome of mediation or legal action. In contrast, 'judicial analytics' look at the history of individual judges to make predictions about their future behaviour.
- 4.31 Predictive analytics can provide litigants with information to help them decide whether to bring cases.⁴² But these tools come with risks. Critics argue they use 'data and patterns that ignore legal precedent and the specifics of individual cases.'⁴³ This data can then influence courtroom tactics, legal arguments and possibly even judicial outcomes if litigants withdraw or settle claims based on predictions.⁴⁴

37 Lyria Bennett Moses, 'Artificial Intelligence in the Courts, Legal Academia and Legal Practice' (2017) 91(7) *Australian Law Journal* 561, 566.

38 Monika Zalnieriute, *Technology and the Courts: Artificial Intelligence and Judicial Impartiality* (Submission No. 3 to Australian Law Reform Commission Review of Judicial Impartiality, June 2021) 6 <<https://www.alrc.gov.au/wp-content/uploads/2021/06/3--Monika-Zalnieriute-Public.pdf>>.

39 Pamela Stewart and Anita Stuhmcke, 'Judicial Analytics and Australian Courts: A Call for National Ethical Guidelines' (2020) 45(2) *Alternative Law Journal* 82, 83 <<https://search.informit.org/doi/epdf/10.3316/informit.247278180194024>>.

40 Monika Zalnieriute, *Technology and the Courts: Artificial Intelligence and Judicial Impartiality* (Submission No. 3 to Australian Law Reform Commission Review of Judicial Impartiality, June 2021) 6 <<https://www.alrc.gov.au/wp-content/uploads/2021/06/3--Monika-Zalnieriute-Public.pdf>>.

41 This was observed by Chief Justice Gleeson in relation to the small number of High Court cases, as cited in Pamela Stewart and Anita Stuhmcke, 'Judicial Analytics and Australian Courts: A Call for National Ethical Guidelines' (2020) 45(2) *Alternative Law Journal* 82, 84 <<https://search.informit.org/doi/epdf/10.3316/informit.247278180194024>>.

42 Ibid.
 43 Ibid 85.
 44 Ibid.

- 4.32 France banned the use of predictive 'judicial analytics' in 2019 imposing a criminal penalty of up to five years in prison.⁴⁵ France's Constitutional Council said the reform would prevent judicial profiling which could 'lead to undesirable pressures on judicial decision-making and strategic behaviour by litigants'.⁴⁶
- 4.33 In contrast, the 'smart court' system in China has deployed judicial analytics for performance management. In China's Jiangxi Provincial High Court the Trial e-Management Platform system ensures a judge's activities can be measured and compared to their peers.⁴⁷ Judges are encouraged to use judicial analytics to strengthen procedural fairness.

Opportunities	Risks
<ul style="list-style-type: none"> Predictive analytics can help litigants decide whether to bring cases, avoid unnecessary legal costs or assist in resolving matters early by providing insight into the outcomes of prospective legal action. 	<ul style="list-style-type: none"> Judicial analytics may be used by litigants for 'court shopping', leading to interference with judicial independence. Judicial analytics may influence legal arguments and litigation outcomes. Judicial analytics tools could be used to monitor and regulate the performance of judicial members which may interfere with judicial independence.

Virtual legal advice

- 4.34 AI may improve access to justice by increasing the accessibility and reducing the cost of legal advice. Chatbots and virtual legal assistants can provide access to 'basic legal guidance, answer common legal questions, and direct individuals to relevant resources'.⁴⁸ People can access virtual services in their own homes, at a time that suits them. In some jurisdictions AI products claim to provide lower cost, more convenient virtual legal options for people who cannot afford traditional legal representation.⁴⁹

45 Jena McGill and Amy Salzyn, 'Judging by the Numbers: Judicial Analytics, the Justice System and Its Stakeholders' (2021) 44(1) *Dalhousie Law Journal* 249, 250 referencing, LOI n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice (1), 24 March 2019, Article 33, online: <https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000038261761?r=Xox7hUcdZ5> as translated by Rebecca Loescher, a professor of French at St. Edward's University in France, and reported in Jason Tashea "France bans publishing of judicial analytics and prompts criminal penalty" (7 June 2019), online: ABA Journal <<http://www.abajournal.com/news/article/france-bans-and-creates-criminalpenalty-for-judicial-analytics>>.

46 Jena McGill and Amy Salzyn, 'Judging by the Numbers, Conseil Constitutionnel, *Loi de Programmation et de Réforme Pour La Justice* [Law on Programming and Reform for the Justice System] (No Décision n° 2019-778 DC, 21 March 2019) <<https://www.conseil-constitutionnel.fr/rapport-activite-2019-numerique/dc-2019-778.php>>.

47 Straton Papagiannas and Nino Junius, 'Fairness and Justice through Automation in China's Smart Courts' (2023) 51 *Computer Law & Security Review* 105897, 6 <<https://www.sciencedirect.com/science/article/pii/S0267364923001073>>.

48 Samuel Hodge, 'Revolutionizing Justice: Unleashing the Power of Artificial Intelligence' (2023) 26(2) *SMU Science and Technology Law Review* 217, 229 <<https://scholar.smu.edu/scitech/vol26/iss2/3/>>.

49 AI Lawtech, *AI Lawyer: Your Personal Legal AI Assistant* (Web Page, 2024) <<https://ailawyer.pro/>>; DoNotPay, 'Save Time and Money with DoNotPay!', *DoNotPay* (Web Page, 2024) <<https://donotpay.com/>>; Legal Robot Inc, 'Know What You Sign', *Legal Robot* (Web Page) <<https://legalrobot.com/>>.

- 4.35 Reliance on generative AI legal advice could diminish the perceived need for professional legal assistance. This could deprive court users of the human judgement that legal professionals provide. AI may in future replace some mechanistic aspects of a lawyer's role.⁵⁰ But critics argue that AI cannot replace lawyers' professional judgement and their ability to apply humanity and ethics to decision-making⁵¹ (see Part A). Also, AI systems are not bound by the legal and ethical obligations that lawyers are.⁵²
- 4.36 The use of AI to provide legal advice raises issues of unlawful and unqualified legal practice. An entity providing unqualified legal practice is a criminal offence in Victoria.⁵³ Lawyers must hold a valid practicing certificate to be licenced to engage in legal practice.⁵⁴ AI tools cannot hold a practicing certificate.⁵⁵ This raises questions as to who is responsible for virtual legal advice and what people who rely on it can do when things go wrong.⁵⁶
- 4.37 Another issue with AI legal advice is the risk of inaccuracy. Emerging case law highlights instances where generative AI tools have produced mistaken legal interpretations. This risk is worse for self-represented litigants who rely on AI legal advice without understanding its limitations. This may result in misguided legal actions.

Opportunities	Risks
<ul style="list-style-type: none"> • Improved access to timely legal advice for free or at lower expense. • Increased access to justice, as publicly funded AI tools can provide universal access to basic legal information and improve access to legal information for socially disadvantaged and marginalised communities. • Potential to improve the clarity and argument of self-represented litigant applications. 	<ul style="list-style-type: none"> • Self-represented litigants rely on automated legal advice without fully understanding their limitations and commence misguided legal actions. • Increased burden on the court system, as judges and court staff spend additional time correcting errors and ensuring fairness. • Provision of unqualified and unlawful legal advice.

50 Michael Legg and Felicity Bell, 'Artificial Intelligence and the Legal Profession: Becoming the AI-Enhanced Lawyer' (2019) 38(2) *University of Tasmania Law Review* 34, 35–6.

51 *Ibid* 55–6.

52 *Ibid* 56.

53 *Legal Profession Uniform Law Application Act 2014* (Vic) Sch 1, Pt 2.1 s 10.

54 'Unqualified Legal Practice', *Victorian Legal Services Board + Commissioner* (Web Page, 2 August 2022) <<https://lsbc.vic.gov.au/consumers/registers-lawyers/unqualified-legal-practice>>.

55 Note in *MillerKing, LLC v DoNotPay, Inc* 3:23-CV-863-NJR, 2023 WL 8108547 the law firm MillerKing LLC, challenged the online subscription service DoNotPay Inc, which offers a 'robot lawyer' to consumers for legal services, on the basis that DoNotPay's robot lawyer was not actually licensed to practice law. The United States District Court dismissed the case, due in part to a lack of standing.

56 Mia Bonardi and L Karl Branting, 'Certifying Legal Assistants for Unrepresented Litigants: A Global Survey of Access to Civil Justice, Unauthorised Practice of Law' (SSRN, 22 July 2024) 9–10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4901658>. 22 July 2024

In-court hearings

Table 2: Current and potential uses of AI for in-court hearings

Uses	Court users				Courts and Tribunals		
	Public	SRLs	Legal professionals	Prosecutorial bodies	Court administrators	Judges/Tribunal members	Juries
Technology assisted review and e-Discovery			✓	✓			
Transcription and translation	+	+	+	✓◆+	◆	+	+
Evidence		✓+	✓+	✓+	◆	+	+

KEY

- ✓ User: Uses an AI system to produce a product or service
- ◆ Host: Delivers and maintains the AI system
- +

Technology assisted review and e-Discovery

- 4.38 Discovery is a pre-trial process where a party to a proceeding discloses and makes available relevant documents to other parties. Discovery is critical to support an 'informed assessment of the risks and prospects faced by parties involved in civil litigation.'⁵⁷ In Victoria, parties are obliged to conduct a 'reasonable search' for documents relevant to the issues in dispute.⁵⁸ The increase in electronic documents, like email, means that the scope of potentially discoverable documents is much greater. Manual discovery is therefore much more time-consuming and expensive.⁵⁹
- 4.39 'Technology assisted review' is a process that uses computer software to electronically classify documents. It has been used to undertake large-scale document discovery (such as e-Discovery). Technology assisted review initially used predictive coding, with more sophisticated models employing machine learning for large-scale document review by identifying patterns in textual data. Using AI on a smaller set of documents, technology assisted review applies the patterns to larger document collections. Technology assisted review can use different levels of human involvement in fine-tuning a program's training, ranging from supervised to unsupervised machine learning.⁶⁰ There are several commercial technology assisted review products available in Australia.⁶¹
- 4.40 In December 2016, the Supreme Court of Victoria in *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors* established a precedent approving the use of technology assisted review in Victoria.⁶² The Victorian Supreme Court then developed a practice note stating that legal professionals should educate themselves in the potential use of technology assisted review in the discovery process.⁶³

57 Judicial College of Victoria, 3.1 Scope of discovery, *Civil Procedure Bench Book* (Online Manual, 2024) <<https://resources.judicialcollege.vic.edu.au/article/1041737/section/2248>>.

58 Ibid.

59 Michael Legg and Felicity Bell, 'Artificial Intelligence and the Legal Profession: Becoming the AI-Enhanced Lawyer' (2019) 38(2) *University of Tasmania Law Review* 34, 44.

60 Ibid 44–48.

61 Commercial examples include 'Nuix Discover Technology', *Nuix* (Web Page, 2024) <<https://www.nuix.com/technology/nuix-discover>>; Relativity ODA LLC, 'Relativity - eDiscovery & Legal Search Software Solutions', *Relativity* (Web Page, 2024) <<https://www.relativity.com/>>; Computing System Innovations, *Intellidact AI Data Redaction* (Web Page, 2022) <<https://csisoft.com/intellidact/>>.

62 *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1)* [2016] VSC 734; (2016) 51 VR 421. In the course of arbitration between the plaintiffs and defendants over the liability of the defendants as insurers to compensate McConnell Dowell Constructors for the failed development of a natural gas pipeline in Queensland, 1.4 million documents were identified. The parties agreed to a TAR protocol where only 20,000 documents would be reviewed, assisted by a computer algorithm. The protocols required a 'validation round' to ensure the algorithm's outcomes were consistent with the human assessment.

63 Supreme Court of Victoria, *Practice Notes SC Gen 5: Technology in Civil Litigation* (Practice Note, Supreme Court of Victoria, 29 June 2018) <https://www.supremecourt.vic.gov.au/sites/default/files/2018-10/gen_5_use_of_technology_first_revision.pdf>.

4.41 Technology assisted review has been used to assist in the e-Discovery process in civil matters for years. Similar tools could be used to assist in criminal matters to process large amounts of digital evidence.⁶⁴ Criminal defence lawyers have noted an increase in the time and resources required to process digital evidence, including data from:

- mobile phones
- computers
- web searches
- CCTV
- body-worn camera and dash camera footage.⁶⁵

4.42 Some criminal law firms use AI tools to process large amounts of digital evidence. They use AI to identify 'connections between vast amounts of text, including emails, text messages, other documents and records, as well as phone transcripts'.⁶⁶ It is likely these tools will play an increasing role in the management of digital evidence in criminal matters.

Opportunities	Risks
<ul style="list-style-type: none"> • Technology assisted review can reduce the time and effort required to discover documents, allowing legal professionals to focus on more strategic tasks. • E-Discovery tools can use data analytics to highlight key facts in a case or identify key witnesses. 	<ul style="list-style-type: none"> • Poor quality training data may lead to inaccurate results from the technology assisted review software, undermining the reliability of the review process. • Handling sensitive and confidential information through technology assisted review software poses privacy and security risks.

Transcription and translation

4.43 Natural language processing refers to the way AI systems acquire, process and interpret natural language. This includes deep learning methods to enable the conversion of audio to text or to translate one language to another.⁶⁷

4.44 Recently, translation and transcription tools have advanced significantly. They have improved in speed, accuracy and reliability. A competitive industry exists based on voice recognition and transcription. But there is concern about inaccuracy and whether AI systems can contextualise information. Some claim there is an ongoing need for human oversight in the form of editing and reviewing information.⁶⁸

4.45 Commercial applications have been developed for transcription and translation tools in court. There could be more extensive use of real-time voice recognition, transcription and translation services in Victorian courts and tribunals.⁶⁹

4.46 In Canada, court guidance on AI use flagged that the courts' technology committee will pilot potential uses of AI for internal administration. This includes AI translating court decisions, with results to be reviewed for accuracy by a translator.⁷⁰

64 Karin Derkley, 'Digital Discovery' (2024) 98(9) *Law Institute Journal* 11 <https://www.liv.asn.au/Web/Law_Institute_Journal_Land_News/Web/LIJ/Year/2024/09September/Digital_discovery.aspx?_zs=LK4d&_zl=eHo43>.

65 Ibid.

66 Ibid.

67 Standards Australia Limited, 'AS ISO/IEC 22989:2023 Information Technology - Artificial Intelligence - Artificial Intelligence Concepts and Terminology' 14, 51-2 <<https://www.standards.org.au/standards-catalogue/standard-details?designation=as-iso-iec-22989-2023>>.

68 Kim Neeson, 'Is AI Coming to a Legal Transcript Near You?' [2019] *The Lawyers Daily* <<https://www.lexisnexis.ca/en-ca/sl/2019-06/is-ai-coming-to-a-legal-transcript-near-you.page>>.

69 For instance, see 'EpiqFAST: Produce and Securely Share Live Transcripts of Legal Proceedings.', *Epiq* (Web Page) <<https://www.epiqglobal.com/en-gb/services/court-reporting/epiqfast>>.

70 Federal Court of Canada, *Interim Principles and Guidelines on the Court's Use of Artificial Intelligence* (Web Page, 20 December 2023) 1 <<https://www.fct-cf.gc.ca/en/pages/law-and-practice/artificial-intelligence>>.

- 4.47 In India, the Supreme Court uses AI to translate decisions and orders into nine local languages.⁷¹ This increases accessibility for people who do not speak English.⁷² India's Tis Hazari Court recently announced a pilot of the use of speech-to-text facilities in court hearings.⁷³ This aims to streamline the recording of evidence and address case delays due to the lack of court stenographers.⁷⁴
- 4.48 The New Zealand Chief Justice has announced plans to investigate and pursue 'automated speech to text hearing transcription' and 'automated interpretation' services in New Zealand's courts and tribunals.⁷⁵

Opportunities	Risks
<ul style="list-style-type: none"> • Transcribe court proceedings in real-time, reducing the time needed to produce transcripts and providing court users with faster access to court records. • Translate court documents into other languages and provide support to people with hearing impairments. 	<ul style="list-style-type: none"> • Speech recognition software may not always accurately capture spoken words, especially where there is background noise, technical jargon or unfamiliar accents. • The use of AI in court transcription may replace aspects of human jobs.

Evidence

- 4.49 Evidence before courts will increasingly involve AI. In addition to the use of AI to develop expert reports, AI might be used in evidence in other ways. For example:
- predictive models of future events, including risk assessment
 - analysis of forensic evidence and other expert evidence
 - audio and visual evidence produced or altered by generative AI (records of interview, body camera or dash camera footage). Generative AI also introduces the risk of 'deepfake' evidence.
- 4.50 AI, and evidence concerning AI, may also be of particular relevance to certain causes of action (the set of facts that give rise to legal action). For example, this may include:
- breach of privacy
 - discrimination
 - copyright infringement
 - malicious uses, such as defamation
 - cyber breaches
 - employment-related issues.⁷⁶
- 4.51 AI could also give rise to criminal proceedings, such as deepfake offences.⁷⁷

71 The United Nations Educational, Scientific and Cultural Organization, *Global Toolkit on AI and the Rule of Law for the Judiciary* (No CI/DIT/2023/AIRoL/01, 2023) 73 <<https://unesdoc.unesco.org/ark:/48223/pf0000387331>>.

72 Ibid.

73 'AI Takes Legal Action': Delhi Gets First 'Pilot Hybrid Court'; Here's How It Will Work', *The Times of India* (online, 21 July 2024) <<https://timesofindia.indiatimes.com/city/delhi/ai-takes-legal-action-delhi-gets-first-pilot-hybrid-court-heres-how-it-will-work/articleshow/111875546.cms>>.

74 Ibid.

75 Office of the Chief Justice of New Zealand, *Digital Strategy for Courts and Tribunals* (Report, Courts of New Zealand, March 2023) 27 <<https://www.courtsofnz.govt.nz/assets/7-Publications/2-Reports/20230329-Digital-Strategy-Report.pdf>>.

76 New York State Bar Association, *Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence* (Report, New York State Bar Association Task Force on Artificial Intelligence, April 2024) 49.

77 Ibid.

Reducing vicarious trauma through review of evidence

- 4.52 AI may improve court and tribunal staff's wellbeing by reducing the need to review traumatic material. Vicarious trauma can occur by exposure to graphic material such as visual images and evidence of violence, including offences against children and sexual assault.⁷⁸
- 4.53 Vicarious trauma is a significant issue for courts, with a study finding that three-quarters of judicial officers suffered negative effects from vicarious trauma.⁷⁹ This is also an issue for court support staff and other professionals interacting with the court system.
- 4.54 AI tools can be used to reduce vicarious trauma. For example, some law enforcement agencies involved in child sexual abuse cases utilise 'hash matching' technology. This technology uses predictive algorithms and machine learning to assign images and videos a unique digital signature.⁸⁰ This can automate the processing of documents, so that human staff members are less exposed to disturbing images.⁸¹
- 4.55 AI systems such as 'computer vision', draw information from images, videos and other visual input, can replace visual images with text. This could reduce exposure to harmful and distressing imagery.

Forensic evidence

- 4.56 AI is changing how forensic experts involved in criminal investigations work. AI can be used for data aggregation, analytics and pattern recognition.
- 4.57 AI uses have been identified in forensic fields such as anthropology, odontology, pathology and genetics.⁸² Experts in these fields have started to investigate how AI tools can be integrated to analyse data and identify patterns in images and videos.⁸³
- 4.58 AI can support digital forensics, which focuses on evidence found on digital devices or related to computer-based crime.⁸⁴ Digital evidence analysis involves data such as surveillance footage, financial transactions, emails and social media.
- 4.59 Advances in deep neural networks have highlighted the potential for computer vision applications to support forensic experts involved in facial recognition.⁸⁵ There is also potential for generative AI to assist in crime scene reconstructions based on machine learning models that combine physical evidence and eyewitness accounts.⁸⁶
- 4.60 There are risks with the forensic application of AI tools. Racial biases have been identified in the use of computer vision technologies.⁸⁷ Robust AI management systems are critical to ensure proper testing and assurance of AI systems, to eliminate inaccuracies and biases.
- 4.61 These developments may spill over into other areas of law, such as the application of AI in medical and actuarial evidence used in personal injury cases.

78 Jill Hunter et al, 'A Fragile Bastion: UNSW Judicial Traumatic Stress Study' (2021) 33(1) *Judicial Officers' Bulletin* 1, 7.

79 *Ibid* 1.

80 Sigurður Ragnarsson, 'Using Automated Image Moderation Solutions to Reduce Human Trauma', *Videntifier* (Web Page, 18 October 2023) <<https://www.videntifier.com/post/using-automated-image-moderation-solutions-to-reduce-human-trauma>>.

81 *Ibid*.

82 Nicola Galante, 'Applications of Artificial Intelligence in Forensic Sciences: Current Potential Benefits, Limitations and Perspectives' (2023) 137 *International Journal of Legal Medicine* 445 <<https://link.springer.com/article/10.1007/s00414-022-02928-5>>.

83 *Ibid* 448.

84 Faye Mitchell, 'The Use of Artificial Intelligence in Digital Forensics: An Introduction' (2014) 7 *Digital Evidence and Electronic Signature Law Review* 35 <<http://journals.sas.ac.uk/deeslr/article/view/1922>>.

85 Gaurav Gogia and Parag Rughani, 'An ML Based Digital Forensics Software for Triage Analysis through Face Recognition' (2023) 17(2) *Journal of Digital Forensics, Security and Law* Article 6 <<https://commons.erau.edu/jdfsl/vol17/iss2/6>>.

86 Mfundo A Maneli and Omowunmi E Isafiade, '3D Forensic Crime Scene Reconstruction Involving Immersive Technology: A Systematic Literature Review' (2022) 10 *IEEE Access* 88821 <<https://ieeexplore.ieee.org/document/9858116/?arnumber=9858116>>.

87 Nayeon Lee et al, 'Survey of Social Bias in Vision-Language Models' (arXiv, 24 September 2023) 10 <<http://arxiv.org/abs/2309.14381>>.

Expert evidence

- 4.62 AI will likely be used in the preparation and delivery of expert evidence. Experts may use large language models to prepare evidence for courts and tribunals. This may lead to inaccuracies in court reports and submissions. It was recently reported that Australian academic experts unintentionally relied on fake case studies generated by Google Bard in their submission to a Federal parliamentary inquiry.⁸⁸
- 4.63 An increase in matters involving AI will also require courts and tribunals to engage with AI experts such as computer scientists on the technology underlying AI systems.

Deepfake evidence and offences

- 4.64 Generative AI can be used to create 'deepfake' materials including text, audio, photos and videos.⁸⁹ A deepfake is any form of media 'that has been altered or entirely or partially created from scratch'.⁹⁰ Deepfakes raise issues for courts as they may be submitted as evidence and are difficult to detect.⁹¹ See Part A for further discussion of deepfakes.
- 4.65 Australia recently created new criminal offences relating to making and distributing sexually explicit deepfake images and videos.⁹² Similar offences have been introduced in the United Kingdom.⁹³
- 4.66 Prosecutors, counsel and judicial officers will face difficult questions as they decide whether experts are competent to explain whether evidence tendered in court is legitimate or fabricated. Juries, too, may need to make decisions based upon such expert advice.

Other uses by prosecutorial bodies

- 4.67 Prosecutorial bodies, which make decisions about who enters the criminal justice system, are using AI. The Victorian Office of Public Prosecution works in collaboration with law enforcement agencies, including Victoria Police.
- 4.68 AI is playing a growing role in criminal investigations and policing. AI facial recognition tools are increasingly used by police to identify individuals, including in criminal investigations. The developers claim these tools can process and compare thousands of faces in seconds, reducing the time and resources needed to identify victims and suspects.⁹⁴ But facial recognition tools have faced criticism and have been the subject of legal action for violating privacy laws. Australian authorities have raised concerns where companies have collected and used images without individuals' consent.⁹⁵ Australian researchers have called for specific laws to regulate facial recognition technology.⁹⁶

88 Henry Belot, 'Australian Academics Apologise for False AI-Generated Allegations against Big Four Consultancy Firms', *The Guardian* (online, 3 November 2023) <<https://www.theguardian.com/business/2023/nov/02/australian-academics-apologise-for-false-ai-generated-allegations-against-big-four-consultancy-firms>>.

89 Robert Chesney and Danielle K Citron, 'Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security' (2019) 107 *California Law Review* 1753, 1785–6 <<https://www.californialawreview.org/print/deep-fakes-a-looming-challenge-for-privacy-democracy-and-national-security>>.

90 Miriam Stankovich et al, *Global Toolkit on AI and the Rule of Law for the Judiciary* (Report No CI/DIT/2023/AIRoL/01, UNESCO, 2023) 20 <<https://unesdoc.unesco.org/ark:/48223/pf0000387331>>.

91 Agnieszka McPeak, 'The Threat of Deepfakes in Litigation: Raising the Authentication Bar to Combat Falsehood' (2021) 23(2) *Vanderbilt Journal of Entertainment & Technology Law* 433, 438–9 <<https://www.vanderbilt.edu/jetlaw/2021/04/09/the-threat-of-deepfakes-in-litigation-raising-the-authentication-bar-to-combat-falsehood/>>.

92 Criminal Code Amendment (Deepfake Sexual Material) Bill 2024 (Cth).

93 *Ibid.*, *Sexual Offences Act 2003* (UK) ss 66A, 66B introduced offences for the sending and sharing of intimate images.

94 'Clearview AI Principles', *Clearview AI* (Web Page, 2024) <<https://www.clearview.ai/principles>> Clearview AI is a facial recognition tool which claims to have a 99% accuracy rate in identifying individuals in any given photo.

95 Rita Matulionyte, 'Australia's Privacy Regulator Just Dropped Its Case against "troubling" Facial Recognition Company Clearview AI. Now What?', *The Conversation* (online, 22 August 2024) <<https://theconversation.com/australias-privacy-regulator-just-dropped-its-case-against-troubling-facial-recognition-company-clearview-ai-now-what-237231>> For example in 2021, Australia's privacy regulator ruled Clearview AI's facial recognition tool had breached privacy laws by using images from social media sites to train its AI facial recognition tool without individual's consent.

96 'Facial Recognition Technology: Towards a Model Law', *University of Technology Sydney* (Web Page, 23 September 2022) <<https://www.uts.edu.au/human-technology-institute/projects/facial-recognition-technology-towards-model-law/>> For example, the Human Technology Institute has proposed a model law for facial recognition in Australia.

- 4.69 In response to the growing role of AI in policing, Victoria Police introduced the *Victoria Police Artificial Intelligence Ethics Framework*.⁹⁷ It aims to ensure the use of AI by Victoria Police is ethical and consistent with its existing obligations including:
- Victoria Police's Organisational Values
 - Code of Conduct
 - *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁹⁸
- 4.70 The Ethics Framework reflects Victoria Police's commitment to implementing the Australia New Zealand Policing Advisory Agency's AI principles (see Part D).⁹⁹
- 4.71 AI is likely to have an increasing role in sorting and analysing large amounts of digital evidence in criminal cases.¹⁰⁰ This includes phone records and body-worn camera footage.¹⁰¹ AI tools may reduce the time and resources needed to analyse digital evidence, and prosecutors may be expected to do this. It has been argued that 'the Crown has a role to play in ensuring any digital evidence is provided in a way that makes it easy to process and analyse'.¹⁰²
- 4.72 AI will increasingly be used in forensic and expert evidence, including by prosecutorial bodies and within the coronial system. Speech recognition could prepare records of interview with suspects and witnesses. It may also be used to prepare victim impact statements through the transcription of verbal testimony. Generative AI tools could assist prosecutorial bodies by preparing witness statements automatically,¹⁰³ or assist law enforcement through suspect sketching, licence plate searches and automated report preparation.¹⁰⁴ Natural language processing tools such as chatbots could use cognitive interview techniques that help witnesses to recall more accurately,¹⁰⁵ and may deploy interview techniques less likely to lead a subject.¹⁰⁶
- 4.73 AI technology is likely to be adopted by Victoria's regulators to improve regulatory practice. This may include using AI tools to monitor compliance and to support enforcement in collecting evidence or preparing court materials.
- 4.74 As of 2021, there were 62 regulators in Victoria with compliance and enforcement functions, some of which can commence criminal prosecutions.¹⁰⁷ The Environment Protection Authority can pursue sanctions against government, businesses or individuals, including issuing infringement notices and commencing civil proceedings in court.¹⁰⁸ It can commence a criminal prosecution in some circumstances.¹⁰⁹ The Environment Protection Authority's *Strategic Plan 2022-27* recognises the need to take advantage of new technologies including AI to improve its regulatory reach and effectiveness.¹¹⁰

97 Victoria Police, *Victoria Police Artificial Intelligence Ethics Framework* (Policy, Victoria Police, 23 April 2024) <<https://www.police.vic.gov.au/victoria-police-artificial-intelligence-ethics-framework>>.

98 Ibid. See also Victoria Police, *Our Values - About Victoria Police* (Web Page, 15 August 2024) <<https://www.police.vic.gov.au/about-victoria-police>>; Victoria Police, *Victoria Police - Code of Conduct* (Report, Victoria Police, February 2022) <<https://www.police.vic.gov.au/sites/default/files/2022-02/Code%20of%20Conduct%20-%20Accessible%20Version.pdf>>; *Charter of Human Rights and Responsibilities Act 2006* (Vic).

99 Australia New Zealand Policing Advisory Agency (ANZPAA), *Australia New Zealand Police Artificial Intelligence Principles* (Report, 14 July 2023) <<https://www.anzpa.org.au/resources/publications/australia-new-zealand-police-artificial-intelligence-principles>>.

100 Karin Derkley, 'Digital Discovery' (2024) 98(9) *Law Institute Journal* 11 <https://www.liv.asn.au/Web/Law_Institute_Journal_Land_News/Web/LIJ/Year/2024/09September/Digital_discovery.aspx?_zs=LK4dI&_zl=eHo43>.

101 Ibid.

102 Ibid.

103 For example, the Genie AI tool provides witness statement templates *Witness Statement Templates - UK* (Web Page, 2022) <<https://www.genieai.co/document-types/witness-statement>>.

104 'Artificial Intelligence', *NSW Police Force* (Web Page) <https://www.police.nsw.gov.au/about_us/research_with_nsw_police_force/research_themes/artificial_intelligence>.

105 Rashid Minhas, Camilla Elphick and Julia Shaw, 'Protecting Victim and Witness Statement: Examining the Effectiveness of a Chatbot That Uses Artificial Intelligence and a Cognitive Interview' (2022) 37(1) *AI & SOCIETY* 265 <<https://link.springer.com/10.1007/s00146-021-01165-5>>.

106 Victoria Turk, 'This Bot for Workplace Harassment Takes the Bias out of Reporting', *WIRED* (online, 9 October 2018) <<https://www.wired.com/story/julia-shaw-spot-ai-workplace-harassment-reporting-startup/>>; Julia Shaw, 'How Reliable Are Witness Statements and Can AI Help Improve Them?', *Communities - The Law Society* (Web Page, 5 February 2019) <<https://communities.lawsociety.org.uk/features-and-comment/how-reliable-are-witness-statements-and-can-ai-help-improve-them/5066850.article>>.

107 State of Victoria, *Victorian Regulators: An Overview* (Report, Better Regulation Victoria, November 2021) <<https://www.vic.gov.au/sites/default/files/2022-02/Victorian%20Regulators%202021%20Final%20-%20November%202021.pdf>>.

108 *Environment Protection Act 2017* (Vic) The civil penalty provisions are listed in the table at section 314(3).

109 Ibid. For example s 27 carries a penalty of 4,000 penalty units or 5 years imprisonment.

110 Environment Protection Authority Victoria, *Strategic Plan 2022-27 Environment Protection Authority Victoria* (Report, 2022) 5 <<https://online.flippingbook.com/view/122585736/5/#zoom=true>>.

Opportunities	Risks
<ul style="list-style-type: none"> • AI excels at pattern recognition, potentially resulting in increased accuracy and reliability of forensic evidence, digital evidence and evidence related to other areas of law, such as medical and actuarial evidence used in personal injury cases. • Improvements to the quality and efficiency of prosecutorial bodies and coronial system processes, including through use of speech recognition technology used to prepare records of interview. • Reduction in the need for court and tribunal staff to review graphic evidence, including offences against children and sexual assault. • Increases in the efficiency and effectiveness of compliance and enforcement measures by Victoria's regulators. 	<ul style="list-style-type: none"> • The increasing misuse of deepfake evidence in court cases as well as increasing challenges to the validity of legitimate evidence. • Unfair or discriminatory outcomes if biases present in training data are not altered, particularly problematic in legal contexts where impartiality is crucial. • Challenges for expert witnesses, judges and juries in understanding or explaining how AI tools have produced specific outputs. • Public concerns with procedural fairness where AI is used in regulatory compliance and enforcement.

Alternatives to in-court hearings

Table 3: Current and potential uses of AI as alternatives to in-court hearings

Uses	Court users				Courts and Tribunals		
	Public	SRLs	Legal professionals	Prosecutorial bodies	Court administrators	Judges/Tribunal members	Juries
Online alternative dispute resolution		✓	✓				
Online dispute resolution within courts and tribunals		✓	✓		◆	✓	
Virtual courts and tribunals		+	+	+	◆	+	+

KEY

- ✓ User: Uses an AI system to produce a product or service
 - ◆ Host: Delivers and maintains the AI system
 - +
- Receiver: Relies on material or services produced by AI

Online dispute resolution

- 4.75 Online dispute resolution is a broad term referring to the use of the internet and technology to help resolve disputes. It can be applied to:
- online alternative dispute resolution outside of courts
 - processes within courts and tribunals.¹¹¹
- 4.76 Online dispute resolution systems have given rise to innovative and interactive applications of AI. These systems can reduce the administrative burden for courts and the financial burden for parties. Their use is discussed in the following sections.

Online alternative dispute resolution

- 4.77 Online alternative dispute resolution refers to dispute resolution processes outside of courts. It can be administered privately or publicly. The aim is to resolve disputes through technology, using negotiation, mediation and arbitration.¹¹²
- 4.78 Online alternative dispute resolution was developed in response to the growth of e-commerce. It was used to deal with 'high-volume, low-value, consumer disputes arising from online transactions on e-commerce websites such as Amazon, eBay and PayPal'.¹¹³ It allows geographically distant parties to resolve disputes online, at a low cost, avoiding the need to go to court.¹¹⁴ These online platforms rely on AI to adjudicate disputes. They have been used to resolve a very large number of disputes. In 2011, eBay's AI-assisted online dispute resolution system resolved 60 million disputes.¹¹⁵ The use of online alternative dispute resolution systems has been adopted from private commercial disputes into public dispute systems.¹¹⁶
- 4.79 Online alternative dispute resolution previously used expert systems, relying on rules encoded by humans. These systems have developed to use algorithms and machine learning AI technology, which has enabled more advanced mediation and decision-making. Michael Legg gives the example of 'blind bidding' systems which use multivariate algorithms to calculate an optimal solution based on how the disputants have ranked their key issues.¹¹⁷
- 4.80 AI-integrated online alternative dispute resolution tools have been used in a public setting in Australia. Amica is a free online alternative dispute resolution platform designed to help separating couples reach agreement on financial arrangements.¹¹⁸ It uses AI to guide parties to a resolution without the need for lawyers or courts, by providing:
- a suggested division of property based on an analysis of their circumstances;
 - agreements reached by other separating couples in similar situations; and
 - how courts generally handle disputes of the same nature.¹¹⁹

111 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration, December 2023) 22; Peter Cashman and Eliza Ginnivan, 'Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions' (2019) 19 *Macquarie Law Journal* 39 <<https://search.ebscohost.com/login.aspx?direct=true&AuthType=shib&db=agh&AN=141372967&site=ehost-live&scope=site&custid=ns215746>>.

112 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023) 22.

113 Peter Cashman and Eliza Ginnivan, 'Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions' (2019) 19 *Macquarie Law Journal* 39, 41 <<https://search.ebscohost.com/login.aspx?direct=true&AuthType=shib&db=agh&AN=141372967&site=ehost-live&scope=site&custid=ns215746>>.

114 Ibid 42.

115 Vicki Wayne et al, 'Maximising the Pivot to Online Courts: Digital Transformation, Not Mere Digitisation' (2021) 30(3) *Journal of Judicial Administration* 126, 127.

116 Ibid.

117 Michael Legg, *The Future of Dispute Resolution: Online ADR and Online Courts* (University of New South Wales Faculty of Law Research Series No 71, 2016) 3 <<https://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/UNSWLRS/2016/71.html>>.

118 amica and National Legal Aid, 'The Simple, Low Cost, Smart Way to Separate or Divorce Online', *Amica* (Web Page) <<https://amica.gov.au/>>.

119 Australian Government, 'Amica – An Online Dispute Resolution Tool', *Attorney-General's Department* (Web Page) <<https://www.ag.gov.au/families-and-marriage/families/family-law-system/amica-online-dispute-resolution-tool>>.

Online dispute resolution within courts and tribunals

- 4.81 Internationally, online dispute resolution techniques have been integrated into existing court and tribunal processes. They can support parties in different ways, from information gathering, obtaining advice, direct and supported negotiation through to adjudication.¹²⁰
- 4.82 British Columbia's Civil Resolution Tribunal is an AI-assisted online alternative dispute resolution system.¹²¹ It has four phases:
1. A purpose-built expert system, Solution Explorer, asks parties questions to understand the legal claim, classify and narrow the matters in dispute, and provide tailored legal information and appropriate forms.
 2. An automated negotiation tool is used to support interparty communication and prepare draft agreements.
 3. A facilitation phase is undertaken with an expert facilitator to help parties reach a consensual agreement.
 4. If parties are still unable to reach agreement the matter proceeds to adjudication by a Tribunal Member.¹²²
- 4.83 One study of the Civil Resolution Tribunal reported high levels of user satisfaction.¹²³ From beginning to end the process takes an average of 90 days to resolve a matter.¹²⁴
- 4.84 The Singaporean judiciary recently partnered with Harvey AI to develop a generative AI tool to assist self-represented litigants. The tool aims to support litigants in small claims to navigate the legal process, and potentially assist Small Claims Tribunal magistrates in examining evidence.¹²⁵ The Harvey AI tool will use generative AI to provide automated pre-court advice and assistance with court processes, including the auto-filling of forms. It may also advise on the likely outcomes of a claim and prompt parties to reach a settlement or consider mediation.¹²⁶

Virtual courts and tribunals

- 4.85 Virtual or remote courtrooms allow judges, tribunal members, court staff, lawyers and witnesses to participate through video conferencing. The hearing is conducted virtually, including the giving of evidence and the making of oral submissions.

120 Vicki Waye et al, 'Maximising the Pivot to Online Courts: Digital Transformation, Not Mere Digitisation' (2021) 30(3) *Journal of Judicial Administration* 126, 134.

121 CRT was Canada's first online tribunal providing 'end-to-end' virtual solutions to resolve small claims disputes. Solution Explorer is the AI tool supporting CRT users as the first step before a trial even arises. British Columbia Civil Resolution Tribunal, 'Solution Explorer' <<https://civilresolutionbc.ca/solution-explorer/>>.

122 Vicki Waye et al, 'Maximising the Pivot to Online Courts: Digital Transformation, Not Mere Digitisation' (2021) 30(3) *Journal of Judicial Administration* 126, 145; Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34(1) *Windsor Yearbook of Access to Justice* 112, 125 <<https://wyaj.uwindsor.ca/index.php/wyaj/article/view/5008>>.

123 Vicki Waye et al, 'Maximising the Pivot to Online Courts: Digital Transformation, Not Mere Digitisation' (2021) 30(3) *Journal of Judicial Administration* 126, 145.

124 Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34(1) *Windsor Yearbook of Access to Justice* 112, 121 <<https://wyaj.uwindsor.ca/index.php/wyaj/article/view/5008>>.

125 Justice Aedit Abdullah, 'Technology as a Bridge to Justice' (Speech, Singapore Courts - Conversations with the Community, 30 May 2024) <<https://www.judiciary.gov.sg/news-and-resources/news/news-details/justice-aedit-abdullah-speech-delivered-at-conversations-with-the-community-on-30-may-2024>>. See also Chief Justice Sundaresh Menon, 'Legal Systems in a Digital Age: Pursuing the Next Frontier' (Speech, 3rd Annual France-Singapore Symposium on Law and Business, 11 May 2023) <<https://www.judiciary.gov.sg/news-and-resources/news/news-details/chief-justice-sundaresh-menon-speech-delivered-at-3rd-annual-france-singapore-symposium-on-law-and-business-in-paris-france>>.

126 Lee Li Ying, 'Small Claims Tribunals to Roll out AI Program to Guide Users through Legal Processes', *The Straits Times* (online, 27 September 2023) <<https://www.straitstimes.com/singapore/small-claims-tribunal-to-roll-out-ai-program-to-guide-users-through-legal-processes>>.

- 4.86 Virtual courts do not generally involve AI. But the development of the 'Smart Court' system in China shows how AI can be used in virtual court platforms. The Smart Court system has integrated AI technology to confirm litigant identity through facial recognition and provide enhanced voice-to-text approaches in court proceedings.¹²⁷
- 4.87 In Australia, the COVID-19 pandemic accelerated the use of technology in courts. In-person hearings were replaced with virtual hearings, civil trials and conferences.¹²⁸
- 4.88 Australian courts and tribunals have also adopted online case management systems.¹²⁹ In New South Wales an online court has operated since 2018, providing case management for select local court matters.¹³⁰ So far, virtual courtrooms and case management systems in Australia have not evolved to incorporate AI. But the advances in AI courtroom technology in China show how AI may be used in the context of online courts and tribunals globally.

Opportunities	Risks
<ul style="list-style-type: none"> • Online alternative dispute resolution systems can guide parties to a resolution without the intervention of lawyers or courts. • The addition of natural language processing-based AI tools may assist with high-volume, low complexity legal matters, including by simplifying the legal process for court users and assisting in the drafting of submissions or forms. 	<ul style="list-style-type: none"> • Virtual court forums have heightened vulnerability to deepfake technology uses, such as through voice cloning in ID verification.

127 Simon Chesterman, Lyria Bennett Moses and Ugo Pagallo, 'All Rise for the Honourable Robot Judge? Using Artificial Intelligence to Regulate AI' [2023] *Technology and Regulation* 45 <<https://techreg.org/article/view/17979>>; Straton Papagiannenas and Nino Junius, 'Fairness and Justice through Automation in China's Smart Courts' (2023) 51 *Computer Law & Security Review* 105897 <<https://www.sciencedirect.com/science/article/pii/S0267364923001073>>; Changqing Shi, Tania Sourdin and Bin Li, 'The Smart Court – A New Pathway to Justice in China?' (2021) 12(1) *International Journal for Court Administration* 1 <<https://iacajournal.org/articles/10.36745/ijca.367>>; Alison (Lu) Xu, 'Chinese Judicial Justice on the Cloud: A Future Call or a Pandora's Box? An Analysis of the "Intelligent Court System" of China' (2021) 26(1) *Information & Communications Technology Law* 59 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2918513>.

128 Kyle Denning, 'Fully Online Civil Proceedings: Risks, Rewards and the Rule of Law' (2024) 98(3) *Australian Law Journal* 210, 212–3 <<https://search.informit.org/doi/10.3316/informit.T2024031700010001290470374>>; A Victorian example is the Online Magistrates' Court which applies across criminal, civil and specialist jurisdictions, enabling matters to be heard with parties appearing from remote locations. Magistrates Court of Victoria, *Online Magistrates' Court: Information about Online Hearings for Practitioners* (Web Page, 6 October 2022) 15, 19 <<https://www.mcv.vic.gov.au/lawyers/online-magistrates-court>>.

129 Tania Sourdin, 'Technology and Judges in Australia' (2023) 97 *Australian Law Journal* 636, 637.

130 NSW Government, 'NSW Online Court', *NSW Government, Communities and Justice* (Web Page, 3 December 2023) <<https://courts.nsw.gov.au/courts-and-tribunals/going-to-court/online-services/online-court.html>>; Felicity Parkhill and Melissa Fenton, 'Watch Your Inbox!: Online Court Has Arrived' (February 2019) (52) *Law Society Journal* 90 <<https://search.informit.org/doi/epdf/10.3316/agis.20190226007215>>.

Supporting judicial decision-making

Table 4: Current and potential uses of AI in judicial decision-making

Uses	Court users				Courts and Tribunals		
	Public	SRLs	Legal professionals	Prosecutorial bodies	Court administrators	Judges/Tribunal members	Juries
Case summaries					◆	✓	
Risk assessment, bail and criminal sentencing		+	+	✓	◆	✓	
Automated decision-making		+	+	+✓	◆	✓	

KEY

- ✓ User: Uses an AI system to produce a product or service
- ◆ Host: Delivers and maintains the AI system
- +

- 4.89 The potential uses of AI to support judges and tribunal members in their role as decision-makers is discussed in the section below.
- 4.90 Advances in AI over the last decade have led to the development of a wide selection of tools that might support judicial decision-making. These tools are being used in some jurisdictions.¹³¹ These tools can automate routine tasks and functions that save judicial officers' time. They can also provide context or technical advice for judicial decision-making.
- 4.91 But AI may be used in ways that have significant consequences for fundamental principles of justice and raise serious ethical dilemmas. Such uses include using AI in a way that influences or removes judicial discretion, for example, in offender risk assessments or criminal sentencing. These risks and the implications for principles of justice are discussed in Parts A and C and are further addressed below.

Preparation and review of pre- and post-hearing summaries

- 4.92 Generative AI tools could assist court staff in the preparation of case summaries. Internationally, a summary of a case is sometimes prepared for judicial members when receiving a new case for hearing. In England and Wales, Lord Justice Birss highlighted the potential use of AI in providing case summaries, which he saw as useful in assisting a judge to get across a case more quickly.¹³²
- 4.93 AI could assist in identifying key points and arguments by automatically summarising information. Some tools claim to provide capabilities that could enable judges or tribunal members to review and scrutinise summaries prepared with that technology.¹³³

¹³¹ As recognised by UNESCO, *AI and the Rule of Law: Capacity Building for Judicial Systems* (Web Page) <<https://www.unesco.org/en/artificial-intelligence/rule-law/mooc-judges>>. See also Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration, December 2023) 32–34.

¹³² The Rt. Hon Lord Justice Birss, Deputy Head of Civil Justice, 'Future Visions of Justice' (Speech, King's College London Law School, 18 March 2024) <<https://www.judiciary.uk/speech-by-the-deputy-head-of-civil-justice-future-visions-of-justice/>>.

¹³³ For example see iCrowdNewswire, 'CaseMark Unveils Revolutionary AI-Assisted Page-Line Deposition Summary Workflow: Transforming Legal Analysis with Unmatched Efficiency and Precision' (Web Page, 13 February 2024) <<https://icrowdnewswire.com/2024/02/13/casemark-unveils-revolutionary-ai-assisted-page-line-deposition-summary-workflow-transforming-legal-analysis-with-unmatched-efficiency-and-precision/>>.

Opportunities	Risks
<ul style="list-style-type: none"> Assistance to judicial members in the preparation of pre- and post-hearing summaries, saving time and reducing errors. 	<ul style="list-style-type: none"> Indirectly shaping judicial decision-making where automated case summaries do not include all relevant facts, or place emphasis on immaterial issues.

Risk assessment, bail and criminal sentencing

- 4.94 AI might be used to inform decisions about bail and sentencing.
- 4.95 Predictive tools that assist with risk assessment and criminal sentencing are common in the United States. The Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) is an algorithm used to conduct assessments of offenders at risk of reoffending. It draws on historical case data and the offender's conduct and background.¹³⁴
- 4.96 In *State of Wisconsin v Loomis* Justice Bradley found the use of COMPAS was permissible for certain aspects of sentencing if the judge was notified of the tool's limitations and if the judge made the final sentence determination.¹³⁵ This case created a procedural safeguard by requiring a written advisement with any pre-sentence report that included a COMPAS risk assessment.¹³⁶ This advisement must include the limitations and risks associated with COMPAS. Some have argued this is an ineffective precaution as it does not factor in a judge's competency to evaluate the quality of the outcome.¹³⁷
- 4.97 The *Loomis* case is also significant because of the proprietary nature of the AI technology underpinning COMPAS. The Wisconsin Supreme Court found that despite the methodology of COMPAS not being available to the court or the defendant, as it was a trade secret, the use of COMPAS in sentencing did not violate the defendant's right to due process.¹³⁸ This case illustrates the 'black box problem' for more advanced AI tools, where it may not be technically possible to determine how the algorithm reached a specific result.
- 4.98 There are significant risks of bias associated with AI predictive analytic tools. An analysis of COMPAS by ProPublica found the tool had systematised racial bias against African Americans.¹³⁹ African American defendants were more likely to be flagged as 'high risk', despite not in fact being high risk, compared to white defendants.¹⁴⁰
- 4.99 Evidence suggests decision-makers struggle to determine if or when they should diverge from an algorithmic recommendation.¹⁴¹ Ben Green argues that policymakers should not rely on individual 'human oversight' to mitigate the potential harms of algorithms. Green argues 'institutional oversight' is needed where institutions outline the rationale for specific technologies.¹⁴²

134 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration, December 2023) 28–31.

135 *State of Wisconsin v Loomis* 371 Wis.2d 235 (2016), [16]–[20]. Notably the judgment stated COMPAS scores could not be used to determine whether an offender is to be incarcerated or to determine the length of a sentence; [18].

136 *Ibid* [20].

137 'Recent Cases: *State v. Loomis*' (2017) 130(5) *Harvard Law Review* 1530 <<https://harvardlawreview.org/print/vol-130/state-v-loomis/>>.

138 *State of Wisconsin v Loomis* 371 Wis.2d 235 (2016), [14].

139 Julia Angwin et al, 'Machine Bias', *ProPublica* (online, 23 May 2016) <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>>; Jeff Larson et al, 'How We Analyzed the COMPAS Recidivism Algorithm', *ProPublica* (online, 23 May 2016) <<https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>>.

140 Julia Angwin et al, 'Machine Bias', *ProPublica* (online, 23 May 2016) <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>>; Jeff Larson et al, 'How We Analyzed the COMPAS Recidivism Algorithm', *ProPublica* (online, 23 May 2016) <<https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>>.

141 Ben Green, 'The Flaws of Policies Requiring Human Oversight of Government Algorithms' (2022) 45 *Computer Law & Security Review* 105681, 8 <<https://www.sciencedirect.com/science/article/pii/S0267364922000292>>.

142 *Ibid* 2–3.

- 4.100 AI predictive analytic tools have also been used to influence decision-making by prosecutorial bodies. In London in 2022, the Metropolitan Police faced legal action for the use of the Gangs Violence Matrix, a predictive analytics tool used to forecast gang related violence in London.¹⁴³ This system produced a risk rating which informed whether police would exercise their stop and search powers. The tool was ultimately found to be unlawful as it was racially discriminatory and contravened human rights.¹⁴⁴
- 4.101 Generative AI has also been used to provide information to inform bail decisions. The Punjab and Haryana High Court relied on ChatGPT to support a determination around bail in 2023. Justice Chitkara disclosed the use of ChatGPT and the purpose of its use, explaining that it was used to provide context about bail jurisprudence rather than for matters of fact or relating to the merits of the case.¹⁴⁵

Opportunities	Risks
<ul style="list-style-type: none"> Support for judicial decision-making where predictive analytics tools provide accurate and reliable statistically based risk assessments for bail and criminal sentencing outcomes. 	<ul style="list-style-type: none"> Outcomes that are not explainable if decisions are informed by AI models that are opaque. Existing human biases are perpetuated if AI systems are not adjusted in relation to historical case data.

Judicial review of administrative decisions

- 4.102 The rise of AI systems to support or fully automate administrative decisions will impact courts and tribunals. It is likely to result in a significant increase in the judicial review of administrative decisions made using AI systems.
- 4.103 In New South Wales a survey showed 136 automated decision-making systems were reportedly in use, being piloted or planned for use within three years across 77 government departments and agencies.¹⁴⁶ This survey found the most common use or planned use of AI was for compliance functions.¹⁴⁷ Some organisations also reported using automated decision-making systems for adjudication and justice.¹⁴⁸ The types of systems included fully automated systems, rules-based systems, structured decision-making tools, risk assessment tools and natural language processing tools (chatbots and large language models). Automated decision-making systems were more often used to support, rather than replace, human decision-making.¹⁴⁹

Automated decision-making

- 4.104 AI systems can potentially be designed to replace judicial discretion through automated decision-making. But fully automating decisions raises significant ethical and legal issues.
- 4.105 In other jurisdictions, like the European Union, the use of AI in judicial decision-making has been categorised as high-risk and protected as a 'human driven activity'.¹⁵⁰ The EU AI Act 2023 clarifies that 'high-risk' does not include 'ancillary administrative activities...' that do not affect the '...actual administration of justice in individual cases'.¹⁵¹

143 Harriet Green, 'Consciousness over Code: How Judicial Review Can Address Algorithmic Decision-Making in Policing' (2024) 5(8) *York Law Review* 8, 17–19.

144 *Ibid* 18–19.

145 ANI, 'In a First, Punjab and Haryana High Court Uses Chat GPT to Decide Bail Plea', *The Times of India* (online, 28 March 2023) <<https://timesofindia.indiatimes.com/india/in-a-first-punjab-and-haryana-high-court-uses-chat-gpt-for-deciding-upon-bail-plea/articleshow/99070238.cms>>.

146 Kimberlee Weatherall et al, *Automated Decision-Making in New South Wales: Mapping and Analysis of the Use of ADM Systems by State and Local Governments* (Research Report, ARC Centre of Excellence on Automated Decision-Making and Society (ADM+S), March 2024) 21 <<https://apo.org.au/node/325901>> In total, 206 departments and agencies were surveyed, with 77 responding.

147 *Ibid* 23.

148 *Ibid*.

149 *Ibid* 26.

150 *Regulation (EU) 2024/1689 (Artificial Intelligence Act)* [2024] OJ L 2024/1689, Recital (61).

151 *Ibid*.

- 4.106 The risks and benefits vary significantly depending on how automated decision-making might be used in courts and tribunals. It may be suitable for less complex, routine decisions that do not involve much discretion, or in areas that relate to classification. Complex issues that involve discretion or legal reasoning are far less likely to be suitable for automated decision-making. Similarly, criminal matters involving a person's liberty may be less suitable than civil or procedural matters. As Tania Sourdin notes, 'there are some opportunities for AI processes to support judges and potentially supplant them. Initially, however, the impacts are likely to be confined to lower level decision-making'.¹⁵²
- 4.107 International case studies provide insight into the risks and benefits attributed to automated decision-making. In Mexico, the EXPERTIUS system advises judicial members on specific administrative matters, such as whether a plaintiff is eligible to receive social benefits.¹⁵³
- 4.108 In China, the 'Smart Court' system has integrated AI, including to automate judgments in some cases.¹⁵⁴ This may provide efficiency benefits. But it raises the risk of automated drafting tools influencing judicial independence (as discussed in Part C).
- 4.109 In other jurisdictions, the potential for automated decision-making to displace judicial decision-making has been too contentious to implement. In 2019, Estonia's Chief Data Officer reportedly outlined a plan to use AI to automate adjudication of small claim disputes. This drew international attention about the potential replacement of judges by AI.¹⁵⁵ The Estonian Ministry of Justice later clarified it was not seeking to replace human judges and its focus was on automating procedural steps.¹⁵⁶ It has since outlined a range of ways that AI systems support court procedures, including text translation, transcription, facial recognition for identity verification, anonymisation and de-identification of court records.¹⁵⁷
- 4.110 Other countries have expressly ruled out possible uses of automated judicial decision-making for now. In July 2020, Canada's Federal Court Strategic Plan stated that:
- At this point in time, AI is not being considered to assist with the adjudication of contested disputes. Rather, the Court is exploring how AI may assist it to streamline certain of its processes (e.g., the completion of online 'smart forms') and may be a potential aid in mediation and other types of alternative dispute resolution.¹⁵⁸

152 Tania Sourdin, 'Judge v Robot? Artificial Intelligence and Judicial Decision-Making' (2018) 41(4) *University of New South Wales Law Journal* 1114, 118 <<https://www.unswlawjournal.unsw.edu.au/article/judge-v-robot-artificial-intelligence-and-judicial-decision-making/>>.

153 Ibid 119.

154 Changqing Shi, Tania Sourdin and Bin Li, 'The Smart Court – A New Pathway to Justice in China?' (2021) 12(1) *International Journal for Court Administration* 1, 9–10 <<https://iacajournal.org/articles/10.36745/ijca.367>>.

155 Ibid.

156 Maria-Elisa Tuulik, 'Estonia Does Not Develop AI Judge', *Republic of Estonia, Ministry of Justice* (Web Page, 16 February 2022) <<https://www.just.ee/en/news/estonia-does-not-develop-ai-judge>>.

157 Republic of Estonia, Ministry of Justice, 'AI Solutions', *RIK: Centre of Registers and Information Systems* (Web Page) <<https://www.rik.ee/en/international/ai-solutions>>.

158 *Federal Court Strategic Plan 2020-2025* (Report, Federal Court of Canada, 15 July 2020) 16 <<https://www.fct-cf.gc.ca/content/assets/pdf/base/2020-07-15%20Strategic%20Plan%202020-2025.pdf>>.

Questions

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?
6. Are there uses of AI that should be considered high-risk, including in:
 - a. court and tribunal administration and pre-hearing processes
 - b. civil claims
 - c. criminal matters

How can courts and tribunals manage those risks?
7. Should some AI uses be prohibited at this stage?

**PART C:
BROAD REGULATORY
APPROACHES AND
PRINCIPLES FOR AI
REGULATION**

CHAPTER
05

Regulating AI: the big picture

60 Overview

60 Regulating AI in Australia

63 International approaches to regulating AI

67 Options for regulating rapidly developing technology

5. Regulating AI: the big picture

Overview

- The widespread use of AI has led to a range of regulatory responses across different countries. This includes broad, sector-wide responses to regulate the safe and ethical use of AI.
- This chapter provides an overview of broad AI regulatory frameworks in Australia and overseas. While Australia does not currently have AI-specific legislation, the Australian Government is considering regulatory options. It is necessary to understand this context before considering principles and guidelines specific to Victorian courts and tribunals.

Regulating AI in Australia

- 5.1 Our terms of reference require us to consider regulatory changes specific to courts and tribunals in this review. Broader legislative and regulatory change is beyond the scope of the project.
- 5.2 However, any court and tribunal specific approach will need to be aware of the broader regulatory framework. That includes developments by the Australian Government and lessons from international approaches to regulating artificial intelligence (AI).
- 5.3 There is no AI-specific legislation in Australia. In August 2024, the Australian Government released the *Voluntary AI Safety Standard* which contains 10 voluntary 'guardrails' to support the safe and responsible use of AI by Australian organisations.¹ Because the guardrails are voluntary, they do not create legal duties for organisations. But they encourage organisations to make commitments to a set of ongoing activities to create organisational and systems level processes.² These voluntary guardrails aim to align Australian practices with other jurisdictions by drawing on existing international standards, including those of the International Standards Organization and the United States National Institute for Standards and Technology.³

1 Department of Industry, Science and Resources (Cth) and National Artificial Intelligence Centre, *Voluntary AI Safety Standard* (Report, August 2024).

2 *Ibid* 14–15.

3 *Ibid* 5.

Australia's voluntary AI 'guardrails'⁴

1. Establish, implement, and publish an accountability process including governance, internal capability and a strategy for regulatory compliance.
2. Establish and implement a risk management process to identify and mitigate risks.
3. Protect AI systems and implement data governance measures to manage data quality and provenance.
4. Test AI models and systems to evaluate model performance and monitor the system once deployed.
5. Enable human control or intervention in an AI system to achieve meaningful human oversight.
6. Inform end-users regarding AI-enabled decisions, interactions with AI and AI-generated content.
7. Establish processes for people impacted by AI systems to challenge use or outcomes.
8. Be transparent with other organisations across the AI supply chain about data, models and systems to help them effectively address risks.
9. Keep and maintain records to allow third parties to assess compliance with 'guardrails'.
10. Engage your stakeholders and evaluate their needs and circumstances, with a focus on safety, diversity, inclusion and fairness.

- 5.4 The Australian Government has also published a consultation paper proposing the introduction of mandatory guardrails for AI in high-risk settings.⁵ The proposed mandatory guardrails largely replicate the *Voluntary AI Safety Standard*.⁶
- 5.5 The Australian Government has proposed a risk-based framework, where only AI systems that are categorised as high-risk are required to comply with the mandatory guardrails.⁷ In determining whether an AI system is high-risk, it is proposed that consideration is given to severity and extent of adverse impacts to individuals and to the community (this is discussed further in 5.34).⁸ However, it is proposed that all general-purpose AI systems be automatically required to comply with the guardrails.⁹
- 5.6 The paper identifies three regulatory reform options to mandate the guardrails:¹⁰
- **A domain-specific approach:** Reform existing regulatory frameworks to incorporate the guardrails on a sector-by-sector basis.
 - **A framework approach:** Introduce a new framework legislation including definitions, the guardrails and thresholds for when they apply, and amend existing legislation, to enable enforcement by existing regulators.
 - **A whole of economy approach:** Introduce a new AI-specific act, which would include definitions, thresholds, guardrails and create a new AI regulator with enforcement and monitoring powers.

4 Ibid iv.

5 Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia: Proposals Paper for Introducing Mandatory Guardrails for AI in High-Risk Settings* (Proposals Paper, September 2024).

6 Ibid 35.

7 Ibid 19.

8 Ibid.

9 Ibid 29.

10 Ibid 46.

- 5.7 If the proposal for mandatory guardrails is implemented, it will apply across Australia. The *Voluntary AI Standard* and proposed mandatory guardrails build on the *Safe and Responsible AI in Australia* discussion paper¹¹ and Australian Government's interim response.¹²
- 5.8 These reforms sit alongside *Australia's AI Ethics Framework*,¹³ which contains eight ethics principles for the safe, reliable and transparent use of AI. However, the Australian Government has recognised that voluntary compliance with the ethics principles may not be enough to regulate AI in high-risk settings and effective regulation and enforcement will be necessary.¹⁴
- 5.9 Other relevant reforms at the federal level include the implementation of privacy law reforms,¹⁵ a review of the *Online Safety Act 2021* (Cth)¹⁶ and new laws relating to misinformation and disinformation.¹⁷ The Australian Government has also committed to reviewing consumer and copyright laws to consider how they deal with AI.¹⁸

Regulating AI use by Australian Government agencies

- 5.10 In June 2024, Australia's data and digital ministers, representing the Australian, state and territory governments, endorsed a *National Framework for the Assurance of Artificial Intelligence in Government*.¹⁹ This framework adopts a risk-based framework and aims to provide a consistent approach to AI by governments, aligned to internationally recognised standards. It includes standards for the development, procurement and deployment of AI. The National Framework also refers to the NSW AI Assessment Framework (see below).²⁰
- 5.11 In August 2024, the Australian Government published the *Policy for Responsible Use of AI in Government*, which outlines mandatory requirements for the safe and responsible use of AI by Australian government agencies.²¹ The policy encourages agencies to participate in the pilot of the AI Assurance Framework.²²
- 5.12 The Australian Government is also developing a framework in relation to the use of automated decision-making. It includes but is not limited to AI automated decision-making systems.²³
- 5.13 The New South Wales (NSW) Government has developed an *AI Ethics Policy* and *AI Assessment Framework* to provide guidance for designing, building and using AI technology.²⁴ It includes questions and considerations around risk and governance. The NSW government has mandated the use of the recently updated AI Framework for government agencies, as well as a Digital Assurance Framework for high-value projects.

11 Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia: Discussion Paper* (Discussion Paper, June 2023).

12 Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia Consultation: Australian Government's Interim Response* (Report, 2024) The Interim Response committed to setting up an expert AI group and investigating possible legislation for introducing mandatory guardrails for AI in high-risk settings.

13 Australian Government, 'Australia's AI Ethics Principles - Australia's Artificial Intelligence Ethics Framework', *Department of Industry, Science and Resources* (Web Page, 5 October 2022) <<https://www.industry.gov.au/publications/australias-artificial-intelligence-ethics-framework/australias-ai-ethics-principles>>.

14 Ibid.

15 Privacy and Other Legislation Amendment Bill 2024 (Cth).

16 Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia Consultation: Australian Government's Interim Response* (Report, 2024) 5.

17 Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2024 (Cth).

18 Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia: Proposals Paper for Introducing Mandatory Guardrails for AI in High-Risk Settings* (Proposals Paper, September 2024) 56.

19 Australian Government et al, *National Framework for the Assurance of Artificial Intelligence in Government: A Joint Approach to Safe and Responsible AI by the Australian, State and Territory Governments*. (Report, 21 June 2024).

20 Digital NSW, *The NSW AI Assessment Framework* (Report, 2024) <<https://arp.nsw.gov.au/assets/ars/attachments/Updated-AI-Assessment-Framework-V3.pdf>>.

21 Digital Transformation Agency (Cth), *Policy for the Responsible Use of AI in Government* (Version 1.1, September 2024).

22 Ibid 11, 13.

23 Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia: Proposals Paper for Introducing Mandatory Guardrails for AI in High-Risk Settings* (Proposals Paper, September 2024) 57.

24 Digital NSW, *The NSW AI Assessment Framework* (Report, 2024) <<https://arp.nsw.gov.au/assets/ars/attachments/Updated-AI-Assessment-Framework-V3.pdf>>.

- 5.14 The Victorian Government has endorsed the *National Framework for the Assurance of Artificial Intelligence in Government*,²⁵ and is developing Victorian-specific guidance based on it. Work is also underway to develop policy and guidance on the safe and responsible use of generative AI across the public sector, which will include public service bodies and public entities.²⁶ Additionally, the Commissioner for Economic Growth is due to report on Victoria's use of AI by 31 October 2024.²⁷ This work is focused on economic opportunities for the use of AI, including 'whole of government activities for facilitating the adoption of AI, including appropriate policy, legislative and regulatory frameworks'.²⁸ Some Victorian agencies have already released targeted guidance on AI, such as the Office of the Victorian Information Commissioner's *Artificial Intelligence – Understanding Privacy Obligations*.²⁹

International approaches to regulating AI

- 5.15 AI is regulated in a range of ways around the world. Between 2016 and 2023, at least 148 AI-related bills were passed across 128 countries.³⁰ The diverse approaches of overseas jurisdictions provide useful context. We consider three approaches in particular:
- AI-specific legislation
 - risk-based approaches
 - principles-based regulation.

AI legislation

European Union *Artificial Intelligence Act*

- 5.16 The European Union has introduced AI-specific regulation. The *Artificial Intelligence Act 2024* (EU AI Act) is intended to be a comprehensive regulatory and legal framework across all sectors.³¹
- 5.17 The EU AI Act bans or imposes strict conditions for high-risk applications of AI, such as biometrics, law enforcement and administration of justice.³²
- 5.18 High-risk systems are subject to regulatory requirements relating to:
- data governance
 - transparency and provisions of information
 - human oversight
 - robustness
 - accuracy
 - security.³³

25 Australian Government, 'Data and Digital Ministers Meeting Communique', *Department of Finance* (Web Page, 21 June 2024) <<https://www.finance.gov.au/publications/data-and-digital-ministers-meeting-outcomes/21-june-2024>>

26 Zander Hunter, *Artificial Intelligence and Recordkeeping* (Research Paper, Public Record Office Victoria, 2023) 2 <https://prov.vic.gov.au/sites/default/files/files/documents/AI_Research_Paper_October_2023.pdf>

27 Commissioner for Economic Growth, 'Review of Artificial Intelligence Use in Victoria - Terms of Reference', *VIC.GOV.AU* (Web Page, 5 June 2024) <<https://www.vic.gov.au/review-artificial-intelligence-use-victoria-terms-reference>>

28 Ibid.

29 Office of the Victorian Information Commissioner, *Artificial Intelligence – Understanding Privacy Obligations* (Report, April 2021) <<https://ovic.vic.gov.au/privacy/resources-for-organisations/artificial-intelligence-understanding-privacy-obligations/>>

30 Nestor Maslej et al, *The AI Index 2024 Annual Report* (Report, AI Index Steering Committee, Institute for Human-Centered AI, Stanford University, April 2024) 376 <https://aiindex.stanford.edu/wp-content/uploads/2024/04/HAI_2024_AI-Index-Report.pdf> The AI Index analysed legislation containing 'artificial intelligence' in 128 select countries.

31 *Regulation (EU) 2024/1689 (Artificial Intelligence Act)* [2024] OJ L 2024/1689.

32 Ibid annex III.

33 Ibid ch III, arts 8-15.

- 5.19 The Australasian Institute for Judicial Administration notes that the EU AI Act may raise issues for judicial independence and accountability.³⁴ The EU AI Act creates control, compliance and testing obligations for system 'providers'.³⁵ The EU AI Act defines system providers broadly which could include executive and legislative bodies.³⁶ Judicial independence requires the judiciary to operate separately to the executive and the legislature. If government bodies are responsible for developing and testing AI systems used in courts, this could impact judicial accountability and independence.³⁷ The EU AI Act also lists several bodies that will be responsible for conducting assessments of AI tools. The Australasian Institute for Judicial Administration suggests that the role of these various bodies in monitoring AI tools used in courtrooms could also impact judicial independence and accountability.³⁸
- 5.20 Another perspective is that regulating AI is complex, and courts may not have the necessary resources to appropriately scrutinise AI tools they choose to use. The EU AI Act proposes a pre-deployment (ex-ante) regulation system where some high-risk forms of AI systems are prohibited from deployment and commercialisation. AI systems must undertake a conformity assessment to demonstrate compliance with basic principles such as transparency, human oversight and data protection.³⁹ This would provide a base level of assurance about security, safety and fairness.

Other risk-based legislation

- 5.21 Other countries are considering a range of risk-based legislative responses. (See Table 5 for examples).

Table 5: Jurisdictions considering risk-based legislation

<p>Canada</p>	<ul style="list-style-type: none"> • A Bill was introduced in 2022 for the <i>Artificial Intelligence and Data Act</i>⁴⁰ which would adopt a risk-based approach to regulating AI. The Bill has not been passed and remains under committee consideration. • If an AI system were assessed as high impact, a risk mitigation plan would be required, including measures to monitor risks, and information provided about how the system will be used and whether it will generate decisions, recommendations or predictions.⁴¹
<p>Brazil</p>	<ul style="list-style-type: none"> • A Bill was introduced in May 2023 outlining general rules for the development, implementation and responsible use of AI.⁴² • Includes a risk assessment framework to register and monitor high-risk AI systems and prohibit certain practices.⁴³ The administration of justice is listed as high risk.⁴⁴

34 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023) 48.
 35 Regulation (EU) 2024/1689 (Artificial Intelligence Act) [2024] OJ L 2024/1689. Chs 3, section 3.
 36 Ibid art 3.
 37 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023) 48.
 38 Ibid.
 39 Gianclaudio Malgieri and Frank Pasquale, 'Licensing High-Risk Artificial Intelligence: Toward Ex Ante Justification for a Disruptive Technology' (2024) 52 *Computer Law & Security Review* 105899, 7 <<https://www.sciencedirect.com/science/article/pii/S026736492301097>>.reactive tools. This approach has proven inadequate, as numerous foreseeable problems arising out of commercial development and applications of AI have harmed vulnerable persons and communities, with few (and sometimes no) Bill C-27, Digital Charter Implementation Act 2022 (Canada).
 40 Government of Canada, 'The Artificial Intelligence and Data Act (AIDA) – Companion Document', *Innovation, Science and Economic Development Canada (ISED): Innovation for a Better Canada* (Web Page, 13 March 2023) <<https://ised-isde.canada.ca/site/innovation-better-canada/en/artificial-intelligence-and-data-act-aida-companion-document>> Examples of high risks systems include: screening systems impacting access to services or employment; biometric systems used for identification and inference; systems that can influence human behaviour at scale; systems critical to health and safety.
 42 PL 2338/2023 [Bill No. 2338, of 2023] (Plenary of the Federal Senate, Brazil).
 43 Ana Frazão, 'Regulation of Artificial Intelligence in Brazil: Examination of Draft Bill No. 2338/2023' [2024] 10(1) *UNIO – EU Law Journal* 54 <<https://revistas.uminho.pt/index.php/unico/article/view/5842>>.
 44 Ibid.

South Korea	<ul style="list-style-type: none"> • A Bill to consolidate the AI regulatory landscape remains under review.⁴⁵ • It would require high-risk areas to establish ethical principles and ensure reliability and safety. Criminal investigations and arrests are considered high risk.⁴⁶
United States	<ul style="list-style-type: none"> • A Bill was introduced in 2022 for a proposed <i>Algorithmic Accountability Act</i>.⁴⁷ • The Californian legislature recently passed a Bill for the <i>Safe and Secure Innovation for Frontier Artificial Intelligence Models Act</i>.⁴⁸
China	<ul style="list-style-type: none"> • Regulations were introduced to respond to aspects of AI, such as deepfakes (or deep synthesis), generative AI and recommendation algorithms.⁴⁹ Chinese authorities have outlined an intention to introduce a general AI law in future.⁵⁰

Principles-based regulation and frameworks

5.22 Some countries have developed a principles-based policy or other similar regulatory approaches, rather than adopting comprehensive AI legislation at this stage (See Table 6 for examples).

Table 6: Jurisdictions developing principles-based regulation

United Kingdom	<ul style="list-style-type: none"> • The AI framework sets out core principles to guide AI use.⁵¹ Regulators will implement the framework across sectors, with possible targeted legislative interventions to address gaps in the regulatory framework.⁵² • It also allows for regulatory 'sandboxes', which are controlled environments to trial AI with the oversight of a regulator.⁵³ • The recently elected British Government intends to introduce binding regulations focused on the most powerful AI models.⁵⁴
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45 National Assembly South Korea, *National Assembly Subcommittee 2 Subcommittee on National Defense Bill, 'Metaverse Act' and 'Artificial Intelligence Act'* (Web Page, 14 February 2023) <<https://www.assembly.go.kr/portal/bbs/B0000051/view.do?nttlid=2095056&menuNo=600101&sddate=&edate=&pageUnit=10&pageIndex=1>> The Bill was initially passed by a Committee of the Korean National Assembly in February 2023 but remains under review.

46 'Korea Update: Legislative Framework and Practical Implications of "Law on Nurturing the AI Industry and Establishing a Trust Basis"', *Transatlantic Law International* (Web Page, 22 March 2023) <<https://www.transatlanticlaw.com/content/korea-update-legislative-framework-and-practical-implications-of-law-on-nurturing-the-ai-industry-and-establishing-a-trust-basis/>>.

47 *Algorithmic Accountability Act of 2022, H.R.6580, 117th Congress (2021-2022)*. The Bill was introduced by Senator Ron Wyden, Senator Cory Booker and Representative Yvette Clark. The Bill has not passed and has been referred to the Subcommittee on Consumer Protection and Commerce.

48 *Safe and Secure Innovation for Frontier Artificial Intelligence Models Act, SB-1047*. (California Senate, Regular Session (2023–2024)). The Bill is yet to be signed into law by the Californian Governor.

49 Matt Sheehan, *Tracing the Roots of China's AI Regulations* (Report, Carnegie Endowment for International Peace, 27 February 2024) 9–10 <<https://carnegieendowment.org/research/2024/02/tracing-the-roots-of-chinas-ai-regulations?lang=en>>. Carnegie Endowment for International Peace, 27 February 2024

50 General Office of the State Council and Chinese Government Network, *Notice of the General Office of the State Council on Printing and Distributing the 2023 Legislative Work Plan of the State Council* (State Council Fa [2023] No. 18, 6 June 2023) <https://www.gov.cn/zhengce/content/202306/content_6884925.htm>.

51 Department for Science, Innovation and Technology (UK), *A Pro-Innovation Approach to AI Regulation* (Report No CP 815, March 2023).

52 Ibid 39 [65].

53 Ibid 59–61 [93–100].

54 The Labour Party, *Change - Labour Party Manifesto 2024* (Report, 2024) 35 <<https://labour.org.uk/change/kickstart-economic-growth/>>. Martin Coulter, 'Britain's New Government Aims to Regulate Most Powerful AI Models', *Reuters* (online, 17 July 2024) <<https://www.reuters.com/technology/artificial-intelligence/britains-new-government-aims-regulate-most-powerful-ai-models-2024-07-17/>>; His Majesty King Charles III, 'The King's Speech 2024' (Speech, House of Lords, UK Parliament, 17 July 2024) <<https://www.gov.uk/government/speeches/the-kings-speech-2024>>.

New Zealand	<ul style="list-style-type: none"> • <i>Trustworthy AI in Aotearoa: AI Principles</i>⁵⁵ provides five overarching principles to guide the design, development and deployment of AI in New Zealand. They include: fairness and justice; reliability, security and privacy; transparency; human oversight and accountability; and wellbeing. • The <i>Algorithm Charter for Aotearoa New Zealand</i>⁵⁶ contains a risk management framework to support government agencies to manage how algorithms are used. This includes overarching commitments to transparency, partnership, people, data, privacy, ethics and human rights, and human oversight.
Japan	<ul style="list-style-type: none"> • Japan has adopted a principles-based approach to AI, including principles for human-centric AI, as well as governance guidelines for implementing AI principles.⁵⁷
United States	<ul style="list-style-type: none"> • The <i>New Standards for AI Safety and Security</i> Executive Order contains principles and risk-management practices which are binding on federal authorities.⁵⁸ • Partly in response to the Executive Order, the National Institute of Standards and Technology (NIST) developed a framework to assist organisations to consider the risks of generative AI.⁵⁹ • The White House Office of Science and Technology Policy has also developed the <i>Blueprint for an AI Bill of Rights</i>,⁶⁰ which outlines voluntary principles for safe and effective systems.
Canada	<ul style="list-style-type: none"> • The <i>Directive on Automated Decision-Making</i> was introduced for federal government agencies, although it does not apply to the use of AI or automated decision-making in the federal criminal justice system.⁶¹ It includes risk and impact assessment tools. • Canada also has a voluntary <i>Code of Conduct on the Responsible Development and Management of Advanced Generative AI Systems</i> for the private sector.⁶² Signatories agree to implement a range of measures for addressing risks associated with AI, in addition to existing legal obligations.

55 AI Forum New Zealand, *Trustworthy AI in Aotearoa: AI Principles* (Report, March 2020) 4 <<https://aiforum.org.nz/wp-content/uploads/2020/03/Trustworthy-AI-in-Aotearoa-March-2020.pdf>>.

56 New Zealand Government, *Algorithm Charter for Aotearoa New Zealand* (Report, July 2020) 3.

57 Kimberlee Weatherall and ARC Centre for Excellence for Automated Decision-Making and Society (ADM+S), *Automated Decision-Making and Society (ADM+S) Submission to Safe and Responsible AI in Australia Discussion Paper* (Submission No. 437 to Department of Industry, Science and Resource's Consultation on Safe and Responsible AI in Australia, 4 August 2023) Appendix 1.

58 President of the United States of America, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* (Executive Order No 14110, 30 October 2023).

59 Ibid.

60 United States Government, White House Office of Science and Technology Policy, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People* (White Paper, October 2022).

61 Law Commission of Ontario, *Accountable AI* (LCO Final Report, June 2022) 23.

62 Government of Canada, 'Voluntary Code of Conduct on the Responsible Development and Management of Advanced Generative AI Systems', *Innovation, Science and Economic Development Canada* (Web Page, 28 May 2024) <<https://ised-isde.canada.ca/site/ised/en/voluntary-code-conduct-responsible-development-and-management-advanced-generative-ai-systems>>.

Singapore	<ul style="list-style-type: none"> • AI Verify is a not-for profit foundation which sits under the Infocomm Media Development Authority of Singapore.⁶³ • AI Verify released an AI governance testing framework and toolkit to support organisations to voluntarily conduct a self-assessment of their AI system against 11 AI governance principles.⁶⁴ • The principles aim to be consistent with other international AI governance frameworks including the European Union and the OECD.⁶⁵
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International agreements

- 5.23 There are mechanisms to coordinate international regulation of AI. Australia is a signatory to the *Bletchley Declaration*, which establishes a shared understanding of the opportunities and risks posed by AI.⁶⁶ It was signed by 28 countries and the European Union at the AI Safety Summit in 2023. Australia is also a signatory to the *Seoul Declaration for Safe, Innovative and Inclusive AI*, which builds on the *Bletchley Declaration*.⁶⁷ It aims to foster 'international cooperation and dialogue on artificial intelligence (AI) in the face of its unprecedented advancements and the impact on our economies and societies'.⁶⁸
- 5.24 Australia is engaged in other multilateral projects regarding AI, including with the Organisation for Economic Co-operation and Development, the United Nations, the World Trade Organisation and the World Economic Forum.⁶⁹
- 5.25 The Council of Europe's Committee on Artificial Intelligence drafted the first international legally binding treaty on artificial intelligence, the *Framework Convention on Artificial Intelligence*, in May 2024.⁷⁰ It requires that the Council's 46 member states ensure public authorities and private actors comply with a range of fundamental principles, provide remedies, procedural rights and safeguards to affected persons, and implement risk and impact assessments in line with human rights, democratic processes and the rule of law.

Options for regulating rapidly developing technology

- 5.26 Thinking about the safe use of AI in courts and tribunals, we need to consider:
- Flexibility, because the technology is developing fast.
 - Keeping a balance between regulating AI technology specifically, and adopting a 'technology-neutral' approach.

We are interested in your views about these points.

- 5.27 The regulatory landscape continues to shift alongside AI technology. Regulation can take many forms, ranging from 'hard law' legislation and regulations, to regulatory 'sandboxes', principles-based regulations, frameworks and standards.

63 'AI Verify Foundation', *AI Verify Foundation* (Web Page) <<https://aiverifyfoundation.sg/ai-verify-foundation/>>.

64 AI Verify, 'Launch of AI Verify - An AI Governance Testing Framework and Toolkit', *Personal Data Protection Commission, Singapore* (Web Page, 25 May 2022) <https://aiverifyfoundation.sg/downloads/AI_Verify_Primer_Jun-2023.pdf>.

65 'What Is AI Verify', *AI Verify Foundation* (Web Page) <<https://aiverifyfoundation.sg/what-is-ai-verify/>>.

66 Prime Minister's Office, 10 Downing Street, Foreign, Commonwealth & Development Office and Department for Science, Innovation and Technology (UK), *The Bletchley Declaration by Countries Attending the AI Safety Summit, 1-2 November 2023* (Policy Paper, 1 November 2023) <<https://www.gov.uk/government/publications/ai-safety-summit-2023-the-bletchley-declaration/the-bletchley-declaration-by-countries-attending-the-ai-safety-summit-1-2-november-2023>>.

67 Australian Government, 'The Seoul Declaration by Countries Attending the AI Seoul Summit, 21-22 May 2024', *Department of Industry Science and Resources* (Web Page, 24 May 2024) <<https://www.industry.gov.au/publications/seoul-declaration-countries-attending-ai-seoul-summit-21-22-may-2024>>.

68 Ibid.

69 Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia: Discussion Paper* (Discussion Paper, June 2023) 16.

70 Council of Europe, *Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law*, opened for signature 5 September 2024, CETS 225 - Artificial Intelligence, <<https://www.coe.int/en/web/artificial-intelligence/the-framework-convention-on-artificial-intelligence>>

5.28 Regulatory reforms need to balance flexibility and risk mitigation. We need to consider whether legislative change is required, or whether changes to rules or regulations together with governance structures are enough to address the risks. Principles and guidelines can assist in developing a more flexible approach. Addressing regulation through court and tribunal rules and procedures, as well as guidelines, may provide greater flexibility than legislative reforms.

Technology-neutral or AI-specific responses

- 5.29 Regulatory responses can be directed to the particular technology used to achieve an outcome ('AI-specific'), or be more broadly about regulating activities, processes and outcomes, rather than the technology itself ('technology-neutral').⁷¹
- 5.30 A technology-neutral response has the advantage of staying relevant even as the technology develops. On the other hand, AI-specific approaches may be better when developing frameworks or guidelines, or to address regulatory gaps that arise due to the technology.
- 5.31 The Human Technology Institute outlines steps for regulating AI, including: 'identify how existing laws apply, or ... should be applied, to the development and use of AI' and 'ensure gaps are generally filled by technology-neutral law', or technology-specific law reform if required.⁷²
- 5.32 In courts and tribunals, any reforms or responses to AI should consider whether they need to be AI-specific. Examples of AI specific responses by courts includes guidelines published by the Courts of New Zealand in 2023, on the use of generative artificial intelligence in courts and tribunals.⁷³
- 5.33 Another distinction is whether regulation is ex-ante (before the event) or ex-post (after the event). An ex-ante regulatory approach to AI would require companies to meet certain standards before an AI system can be deployed. Ex-post regulation tries to regulate a system after deployment, for example by issuing fines or other penalties.⁷⁴ Some experts argue that because regulating AI systems is so complex, an ex-ante proactive approach may be more 'effective in preventing harm and ensuring accountability.'⁷⁵

Risk-based responses

- 5.34 Another flexible approach to regulation is based on level of risk. The Australian Government is considering imposing mandatory guardrails when an AI system is classified as high risk.⁷⁶ It has proposed a set of principles to decide whether an AI system is high risk.⁷⁷ These are the risks to be considered:⁷⁸
- adverse impacts to an individual's rights as recognised in Australian and international human rights law
 - adverse impacts to an individual's physical or mental health or safety
 - adverse legal effects, defamation or similarly significant effects on an individual

71 Productivity Commission, *Making the Most of the AI Opportunity - Research Paper 2: The Challenges of Regulating AI* (Report, January 2024) 5–6.

72 Nicholas Davis, Sophie Farthing and Edward Santow, *Department of Industry, Science and Resources Discussion Paper, 'Safe and Responsible AI in Australia' Submission, Human Technology Institute, UTS* (Submission No. 476 to Department of Industry, Science and Resource's Consultation on Safe and Responsible AI in Australia, 9 August 2023) 14. The steps were advice to the federal government in considering AI law reform.

73 Courts of New Zealand, *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals: Judges, Judicial Officers, Tribunal Members and Judicial Support Staff* (Report, 7 December 2023); Courts of New Zealand, *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals: Lawyers* (Report, 7 December 2023); Courts of New Zealand, *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals: Non-Lawyers* (Report, 7 December 2023).

74 Gianclaudio Malgieri and Frank Pasquale, 'Licensing High-Risk Artificial Intelligence: Toward Ex Ante Justification for a Disruptive Technology' (2024) 52 *Computer Law & Security Review* 105899, 2 <<https://www.sciencedirect.com/science/article/pii/S0267364923001097>>.

75 Ibid.

76 Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia: Proposals Paper for Introducing Mandatory Guardrails for AI in High-Risk Settings* (Proposals Paper, September 2024).

77 Ibid 19.

78 Ibid.

- adverse impacts to groups of individuals or collective rights of cultural groups
 - adverse impacts to the broader Australian economy, society, environment and rule of law
 - the severity and extent of those adverse impacts outlined above.
- 5.35 The Australian Government has asked for feedback on the principles, compared to an exclusive list of high-risk uses.⁷⁹ Some jurisdictions, including the EU and Canada, have developed or proposed risk-based regulatory approaches (see Table 5), which contain a specific list of high-risk use cases.⁸⁰ The use of AI systems in law enforcement and the administration of justice are identified as high-risk in some jurisdictions.⁸¹
- 5.36 The Australian Government has also proposed to classify all general-purpose AI models as high-risk and needing to comply with the mandatory guardrails because it poses unforeseeable risks.⁸²
- 5.37 Some jurisdictions have developed risk-based frameworks to support their regulatory responses. Under its Directive on Automated Decision-Making, Canada has developed an algorithmic impact assessment, which outlines requirements based on risk.⁸³ The directive applies to federal government agencies but not the criminal justice system.⁸⁴ These are not legal specific frameworks, but may be helpful when considering regulation in Victorian courts and tribunals. (See Part D.)

Questions

8. Are there lessons from international approaches that we should consider in developing a regulatory response for Victorian 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?
10. How should court and tribunal guidelines align with AI regulation by the Australian Government?

79 Ibid 25–27.

80 Ibid.

81 Ibid.

82 Ibid 28–9.

83 Treasury Board of Canada Secretariat (TBS), 'Algorithmic Impact Assessment Tool', *Responsible Use of Artificial Intelligence in Government* (Web Page, 30 May 2024) <<https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/algorithmic-impact-assessment.html>>.

84 Ibid.

CHAPTER
06

Principles for responsible and fair use of AI in courts and tribunals

72 **Overview**

72 **Principles for regulating AI in courts and tribunals**

75 **Developing court- and tribunal-specific principles for
regulating AI**

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

Overview

- This chapter proposes principles for guiding safe and responsible use of AI in courts and tribunals. The proposed principles draw on:
 - broad principles relating to AI
 - core principles of justice relevant to courts and tribunals.

Principles for regulating AI in courts and tribunals

6.1 Our terms of reference ask us to develop principles to guide the safe use of AI in Victoria's courts and tribunals. We have considered a combination of common principles for regulating AI and principles of justice, discussed in the two tables below.

Common AI regulatory principles

6.2 A broad range of principles have been developed across Australia and overseas to regulate the safe use of AI. As shown in Appendix A, there is significant similarity in the principles other jurisdictions have used to regulate AI. The principles below are summarised from a range of international sources.

Common AI regulatory principles
Fairness and equity AI systems should be fair and equitable, and not discriminate against individuals or groups. This is particularly important given the risk of bias. AI should also be accessible and not marginalise vulnerable groups.
Accountability There should be clearly identified accountability for the safe use of AI throughout the lifecycle. This includes risk management in the development and ongoing use of AI. AI systems should be tested and evaluated before use, and monitored after implementation.
Human oversight Human oversight should be retained as a check on AI systems. The level of oversight will vary depending on the context.
Transparency There should be transparency about when AI is used, and information on the data and methodology used should be readily available. The AI should be explainable enough for people to ask questions and challenge outcomes.

Common AI regulatory principles

Contestability

People whose rights or interests are affected by AI should have a process to challenge the use or output of an AI system.

Privacy and data security

AI systems should be developed and deployed with respect for privacy and data protection. This requires careful data collection, use and storage and appropriate governance and management.

Principles of justice

- 6.3 The principles above offer useful guidance. But additional principles are fundamental to the justice system. Any principles about AI in courts and tribunals need to be anchored in core judicial values. The following discussion draws on the judicial values outlined in *AI Decision-Making and the Courts*.¹

Principles of justice

Impartiality and equality before the law

Impartiality has been described as 'the fundamental quality required of a judge and the core attribute of the judiciary'.² Judges take an oath to 'do right to all manner of people according to the law without fear or favour, affection or ill will'.³ Impartiality and equality are also fundamental to the right to a fair hearing by 'a competent, independent and impartial court or tribunal'.⁴

Access to justice

Access to justice is fundamental to a fair and effective justice system. If people are unable to access justice in a fair, timely and cost-effective way, they cannot exercise or defend their rights or hold decision makers to account. Access to justice extends beyond the formal justice system of lawyers and courts. It includes access to 'legal information and education, non-court based dispute resolution and law reform'.⁵

Judicial accountability

Judicial accountability involves explaining decisions and demonstrating that they are independent, impartial and based on evidence. A key mechanism for judicial accountability is the obligation to give adequate reasons. This allows decisions to be scrutinised by parties, appellate courts and the public. It also promotes good decision-making and the acceptability of decisions.

1 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023) This was a joint project by the Australasian Institute for Judicial Administration and UNSW to prepare a guide for judges, tribunal members and court administrators on AI in the courtroom.

2 *Commentary on the Bangalore Principles of Judicial Conduct* (Report, United Nations Office on Drugs and Crime, September 2007) [52] <https://www.unodc.org/conig/uploads/documents/publications/Otherpublications/Commentary_on_the_Bangalore_principles_of_Judicial_Conduct.pdf>.

3 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (ALRC Final Report No 138, December 2021) 39 <<https://www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-Judicial-Impartiality-138-Final-Report.pdf>> citing The Hon Chief Justice M Gleeson AC, 'The Right to an Independent Judiciary' (Speech, 14th Commonwealth Law Conference, September 2005).

4 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24.

5 Law Council of Australia, *The Justice Project* (Final Report, August 2018) 48 <https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20_%20Final%20Report%20in%20full.pdf>.

Principles of justice

Independence

A key aspect of judicial independence is that the judiciary operates separately to the executive and the legislature (i.e. the separation of powers). However, the principle is broader than this. It requires that 'a judge be, and be seen to be, independent of all sources of power or influence in society, including the media and commercial interests'.⁶

Open justice

A fundamental aspect of the system of justice in Australia is that it is open to public scrutiny and assessment.⁷ The *Open Courts Act 2013* (Vic) describes how the principle of open justice 'is a fundamental aspect of the Victorian legal system'. It 'maintains the integrity and impartiality of courts and tribunals' and 'strengthens public confidence in the system of justice'.⁸

Open justice involves accountability for processes and decisions, and transparency in court operations.⁹ Open justice is promoted by conducting proceedings in 'open court', where the public can access and observe hearings, and by allowing fair and truthful reports of judicial proceedings.¹⁰ Giving judgments in public and making reasons accessible also contributes to open justice.¹¹

Public trust

Public trust is central to the rule of law. Public confidence is 'invoked as a guiding principle in relation to the conduct of judges ... and in relation to the institutional conduct of courts'.¹² The general acceptance of judicial decisions has been described as resting 'not upon coercion, but upon public confidence'.¹³ Confidence and trust require that the public is satisfied the justice system is based on judicial independence, impartiality, integrity and fairness.

Procedural fairness

Procedural fairness, or natural justice, 'lies at the heart of the judicial function'.¹⁴ It requires that a court be impartial and that each party is provided 'an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it'.¹⁵ Procedural fairness requires that a person has sufficient understanding of the evidence or decision to be able to challenge the case against them. The ability to interrogate evidence and the basis for decisions is also necessary to appeal a decision.

Efficiency

Courts and tribunals should provide modern and cost-effective services where possible, while maintaining outcomes that align with core judicial values. This is highlighted by the *Civil Procedure Act 2010* (Vic), which has an overarching objective 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.¹⁶

6 Australian Institute of Judicial Administration (AIJA), *Guide to Judicial Conduct, Third Edition (Revised)* (Report, December 2023) 7 <https://aija.org.au/wp-content/uploads/2024/04/Judicial-Conduct-guide_revised-Dec-2023-formatting-edits-applied.pdf>.

7 *John Fairfax Publications Pty Ltd v District Court (NSW)* [2004] NSWCA 324; (2004) 61 NSWLR 344, 118.

8 *Open Courts Act 2013* (Vic) Part 1 s 1 (aa) (i) and (ii).

9 Frank Vincent, *Open Courts Act Review* (Report, September 2017) [31] <<https://files.justice.vic.gov.au/2021-11/Open%20Courts%20Act%20Review%20-%20March%202018.pdf>>.

10 *Ibid* [80].

11 *Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181, 206 [39], 208 [54] (French CJ and Kiefel J).

12 The Hon Chief Justice Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 76 *Australian Law Journal* 558, 558.

13 *Ibid*.

14 *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49; (2009) 240 CLR 319, 354 [54] (French CJ).

15 *Ibid*.

16 *Civil Procedure Act 2010* (Vic) s 1(c).

Developing court- and tribunal-specific principles for regulating AI

- 6.4 Drawing on a combination of (a) principles for regulating AI and (b) the principles of justice identified above, we propose eight potential principles to guide the safe use of AI in Victoria's courts and tribunals:
- impartiality and fairness
 - accountability and independence
 - transparency and open justice
 - contestability and procedural fairness
 - privacy and data security
 - access to justice
 - efficiency
 - human oversight and monitoring
- 6.5 These proposed principles are discussed below and would underpin the guidelines discussed in Part D.
- 6.6 The principles will provide a foundation for maintaining public trust in the courts. Maintaining public trust requires that courts and tribunals carefully consider the risks of using AI and how it aligns with judicial values. Public trust and confidence is fundamental to the acceptance of judicial decisions and the operation of the law.
- 6.7 We are interested in your views about whether these principles are appropriate and sufficient to guide the regulation of AI in courts and tribunals. We recognise that these are high-level principles, so we are also interested in how they can be tailored more specifically to courts and tribunals.
- 6.8 There has been criticism that the 'ethical AI approach' is not enough to address the risks of AI, particularly in high-risk settings. Some critics say principles are not specific enough and rely on voluntary compliance.¹⁷ We are also interested in whether principles are sufficient, or if further regulatory intervention is necessary.

Impartiality and fairness

Principle 1: Impartiality and fairness

AI systems should be fair and equitable, and not discriminatory. AI should not undermine judicial independence and impartiality, or the right to procedural fairness.

Courts and tribunals should understand the risk of bias with the proposed AI technology. They should understand who designed it and why, what data the system is trained on, and the quality and relevance of that data.

Legal professionals and experts relying on AI should be aware of potential bias and only use AI for the appropriate purpose.

- 6.9 AI systems sometimes incorporate bias, and can even add to it (see Parts A and B). This raises significant issues for principles of impartiality and equality. There may be inherent bias in AI systems created by the data they are trained on, and biased assumptions may underpin the algorithms. Furthermore, AI's capacity for continual learning can reinforce bias.
- 6.10 Because AI can continually learn and adapt, courts and tribunals need to monitor and evaluate AI systems after they have been deployed, to detect bias and ensure fairness. As a result of the 'black box' phenomenon (see Part A) it can be difficult to detect and rectify bias, so some AI tools may need to be subject to strict oversight, or not applied to high-risk uses that impact individual rights and liberties.
- 6.11 It is essential that courts and tribunals take measures to minimise the risk of bias when they use AI systems.

Accountability and independence

Principle 2: Accountability and independence

When AI is used in courts, it should be clear who is accountable. Courts should be accountable for the use of AI in court processes or decision-making, and court users accountable for their own use of AI.

Courts and tribunals that use AI will need to be clear about who is accountable for its design, development and deployment. There should be clear lines of accountability where third-party AI systems are used.

In applying the principle of accountability, courts and tribunals should consider how accurate the tool is and how to explain and understand it.

- 6.12 Courts and tribunals will need appropriate accountability processes to ensure public confidence in any AI systems.
- 6.13 Developers are responsible for the design and accuracy of AI systems, but courts and tribunals will be accountable for how they are used and how accurate the outputs are. They will need to take care to ensure that the different actors involved in the system are accountable for their part of it.¹⁸
- 6.14 One of the guardrails in the Australian Government's *Voluntary AI Safety Standard* is for organisations to 'establish, implement and publish an accountability process including governance, internal capability and a strategy for regulatory compliance'.¹⁹ Courts and tribunals will need to decide what information they need from AI developers and suppliers so that they can implement accountability processes and maintain human oversight.
- 6.15 Officers of courts and tribunals will need to establish who is accountable for testing, evaluating and monitoring AI systems after they have been deployed. The *Voluntary AI Safety Standard* highlights the need to monitor AI systems to detect any behaviours, changes or unintended consequences of deploying them.²⁰
- 6.16 Some court guidelines require court officials or judicial officers to disclose when AI is used, or oblige them to consult with the public on the use of AI. The Australian Human Rights Commission stated in its report *Human Rights and Technology* that 'individuals should be made aware when they are subject to AI-informed decision-making'.²¹ There is more accountability when the public knows and understands how AI is being used.

18 Jennifer Cobbe, Michael Veale and Jatinder Singh, 'Understanding Accountability in Algorithmic Supply Chains' [2023] *FACCT '23: Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency* 1186 <<https://dl.acm.org/doi/10.1145/3593013.3594073>>.

19 Department of Industry, Science and Resources (Cth) and National Artificial Intelligence Centre, *Voluntary AI Safety Standard* (Report, August 2024) 13.

20 Ibid 25–26.

21 Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 2021) 61.

Who makes the decisions?

- 6.17 AI may interfere with judicial independence when it is used to support decision-making. Even more significant ethical and legal issues would arise if AI was used in future for fully automated decision-making.
- 6.18 Judges may be less able to provide reasons for judicial decisions if they can't explain the part played by AI tools, either for proprietary reasons, or because they don't understand the technology. This would make it harder for court users to understand and challenge those decisions. Tania Sourdin notes that the right to appeal a judge's decision has been emphasised by several commentators.²² In her view, 'automation can compromise individual due process rights by undermining the ability of a party to challenge a decision affecting them'.²³ Sourdin also says that it is important to 'ensure automated processes do not prevent parties from accessing or assessing the information used to make the decision'.²⁴
- 6.19 Difficulties may also arise where it is not clear that AI has been used, for example preparing written submissions or expert opinions.

Who designs and regulates AI tools?

- 6.20 How AI is regulated raises considerations for judicial independence. If government seeks to regulate the use of AI in courts and tribunals, can it do so without interfering with judicial independence? Would legislation prohibiting AI impinge on judicial independence?
- 6.21 There may be issues of independence if external bodies are responsible for overseeing AI tools used by courts. For example, assessing the suitability of new AI applications could be done internally by courts, or externally by another body. The Australasian Institute for Judicial Administration notes that under the EU AI Act, tools used by the judiciary will be placed under the control of many entities. The EU AI Act lists a range of bodies that will assess AI systems. The roles of such external bodies could impact judicial independence and accountability.
- 6.22 The design of AI systems could also affect judicial independence. This could happen if governments are involved in designing AI systems used in courts, including those operated by third parties.²⁵ It could also happen when private companies design AI tools used in courts. There may be risks of interference from foreign states where AI tools are hosted in international jurisdictions and are subject to different regulatory requirements. Examples of this have already been identified.²⁶

Transparency and open justice

Principle 3: Transparency and open justice

Courts and tribunals should be transparent about when they use AI, and information on the data and methodology should be readily available. Courts should

- provide sufficient information for a person affected by a decision to understand and contest the use of AI where their rights are affected.
- consider when it is appropriate to disclose the use of AI, including obligations for court staff, judicial officers and court users.

The principle of transparency also applies to court users. Disclosure by parties about the use of AI tools in courts and tribunals may be appropriate to assess its potential misuse and to minimise unintended consequences.

22 Tania Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge* (Edward Elgar Publishing, 2021) 246.

23 Ibid.

24 Ibid.

25 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023) 46.

26 Ibid 48.

- 6.23 There are opportunities for AI to promote open justice. For example, AI could make transcripts more readily available than they are now. But AI also poses risks for open justice and transparency:
- The complexity of AI systems makes them difficult to explain, and it will not always be apparent that AI is being used.
 - Proprietary interests could make it more difficult to explain or assess the AI system.²⁷ Expert evidence about the technology might be heard in closed court,²⁸ but should be balanced with transparency and open justice considerations.
 - How to maintain 'openness' when matters are determined in alternative forums, such as online or by automated processes, rather than open hearings.
- 6.24 It is critical for courts and tribunals to be transparent about the AI they are using, so that there can be proper oversight. That means transparency about what technology is used and how it is trained, tested and monitored. Other considerations include:
- when to disclose use of AI
 - to what degree to explain the underlying technology
- 6.25 The degree of transparency may vary depending on how the AI is used, and whether it is used by court administration or judicial officers. Where an AI application is developed by a third party, such as an automated software system, it may be difficult for courts to provide information that they do not have.
- 6.26 The people who use AI technology might not always need to understand or explain how the algorithm works, if they can verify the results. Court staff who use AI for administrative tasks may not need to understand the technology but will need to be able to check it is accurate. However, if a judge, magistrate or tribunal member uses AI to assist with the exercise of discretion, it will be essential to understand exactly how results are produced, and to explain the AI process so people can appeal or contest the decision.

Contestability and procedural fairness

Principle 4: Contestability and procedural fairness

People whose rights or interests are affected by AI should have access to a process to challenge the use or output of an AI system. Contestability is especially important when an individual's rights are affected but may also be necessary for some procedural decisions by court administration.

- 6.27 The level of automation and the use of AI is relevant in considering the impact on procedural fairness. Automating administrative functions, such as case management, will not impact procedural fairness as much as automation in areas where judicial decision-making is exercised.
- 6.28 Where AI supports judicial decision-making, the difficulties in understanding and explaining AI may undermine procedural fairness. For example, if AI was used in risk assessment for sentencing, it would be necessary for a court user to understand the methodology of the tool before they could contest it or launch an appeal.
- 6.29 The possibility of fully automated judicial decision-making raises significant issues about how parties advance their cases and contest evidence and decisions.²⁹ The very nature of appellate review may need to be reconsidered if a first instance decision is fully automated.

27 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration, December 2023) 29.

28 *Trivago NV v Australian Consumer and Competition Commission* [2020] FCAFC 185; (2020) 384 ALR 496.

29 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023) 54.

- 6.30 Courts will need to consider appropriate procedures for contesting decisions or findings based on AI and provide adequate information to enable court users to challenge a decision.

Privacy and data security

Principle 5: Privacy and data security

AI systems should be developed and deployed with respect for privacy and data protection. This requires careful collection, use and storage of data and appropriate data governance and management. Courts and tribunals must consider how personal information is handled by AI systems, including where data is stored, and who has access to it, including third parties. Courts should be guided by privacy guidelines and standards.

- 6.31 Courts and tribunals will need appropriate procedures to ensure privacy and data security.
- 6.32 The risk of data insecurity and loss of privacy caused by using AI systems in courts and tribunals is detailed in Part A.

Access to justice

Principle 6: Access to justice

People should be able to access the justice system in a fair, timely and cost-effective way. The use of AI should support access to justice and minimise existing barriers or inequalities. Courts and tribunals should consider how any proposed use of AI may create new barriers to accessing justice, or any unintended consequences.

- 6.33 AI may address some barriers to justice which affect all court and tribunal users. AI could provide lower-cost legal advice and faster access to courts and tribunals through increased efficiency.
- 6.34 A range of factors can make it more difficult for some court users to access the justice system, including physical or mental impairment, geographical or social isolation, economic disadvantage, language or other cultural factors, and barriers related to discrimination and bias. AI can potentially reduce these barriers.
- 6.35 But AI technology can also heighten the risk of exclusion.³⁰ People experiencing marginalisation or disadvantage already face additional barriers to justice. The Australian Human Rights Commission *Human Rights and Technology* report noted the potential for AI 'to cause harm is disproportionately experienced by people who are already vulnerable and marginalised'.³¹
- 6.36 The use of AI may add to a 'digital divide' for people who do not have access to technology or have low digital literacy. For example, older Australians continue to be the 'least likely age cohort to have access to a computer or internet due to physical (for example physical disability) and/or psychological barriers (for example lack of confidence)'.³²

30 Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 2021) 137.

31 Ibid 45.

32 Charlene H Chu et al, 'Digital Ageism: Challenges and Opportunities in Artificial Intelligence for Older Adults' (2022) 62(7) *The Gerontologist* 947, 949 <<https://academic.oup.com/gerontologist/article/62/7/947/6511948>>.

- 6.37 There is a digital divide between First Nations and non-First Nations people, and between capital cities and other parts of the country.³³ In a study of digital exclusion, those who are 'highly excluded' were found to be more likely than others to have a disability, live in public housing, not have completed secondary school, or be aged over 75.³⁴ The principle of access to justice needs to balance gains from efficiency and increased accessibility with not undermining inclusion.
- 6.38 A related issue is how AI will impact the way that court users, victims and the public engage with the justice system. For some court users, the notion of justice includes the opportunity to be heard in open court and before a judge. There are inherently human factors in judicial decision-making, such as human experience, emotion, morality and creativity. Tania Sourdin and Richard Cornes consider the unconscious reasoning process of a human judge and note that an AI judge is unlikely to replicate this process.³⁵ Losing these elements may 'fundamentally change what justice looks like'.³⁶

Efficiency

Principle 7: Efficiency

The adoption of AI systems by courts and tribunals should contribute to the overall efficiency of the justice system.

Timely and cost-effective court services are a critical feature of a fair justice system.

Courts and tribunals should consider and adopt AI systems which are demonstrated to save time and reduce the cost of court and tribunal procedures.

- 6.39 AI tools when appropriately used can significantly save time, reduce costs and simplify proceedings.
- 6.40 Potential benefits of AI systems to deliver efficiencies for courts and tribunals are discussed in Part A.

Human oversight and monitoring

Principle 8: Human oversight and monitoring

Human oversight should be retained as a check on AI systems to address risks relating to bias, reliability and accuracy. It is critical for courts and tribunals to ensure fairness, natural justice, impartiality, transparency and accuracy. The level of oversight will vary depending on the use and risks of AI in specific contexts. Courts and tribunals should have appropriate governance arrangements. AI systems and outputs should be evaluated and tested before use and monitored after implementation, with ongoing assessment.

33 Julian Thomas et al, *Measuring Australia's Digital Divide: Australian Digital Inclusion Index 2023* (Report, ARC Centre of Excellence for Automated Decision-Making and Society, RMIT University, Swinburne University of Technology, and Telstra., 2023) 9–10 <https://www.digitalinclusionindex.org.au/wp-content/uploads/2023/07/ADI-2023-Summary_Report_Final-1.pdf>.

34 Ibid 10.

35 Tania Sourdin and Richard Cornes, 'Do Judges Need to Be Human? The Implications of Technology for Responsive Judging' in *The Responsive Judge: International Perspectives* (Springer, 2018) 87, 104; Tania Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge* (Edward Elgar Publishing, 2021) 215.

36 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023) 56.

- 6.41 Human oversight is an important mechanism for addressing bias and accuracy, as well as maintaining public trust. Although connected to accountability, human oversight is critical in its own right in the context of courts and tribunals. Justice Perry has commented that 'proper verification and audit mechanisms need to be integrated into the systems from the outset, and appropriate mechanisms put in place for review in the individual case by humans.'³⁷ Human oversight can include human 'in-the-loop', referring to human involvement in selecting and guiding inputs, and human 'on-the-loop', where humans are involved at the final stage by overseeing or correcting AI predictions or decisions.³⁸ The level of human oversight required will vary depending on the context. The EU AI Act classifies AI tools used in the administration of justice as high risk. This includes 'tools intended to assist judicial authorities to conduct research and interpret and apply the law'. It requires high-risk tools to have human oversight, as well as a range of other regulatory obligations.

Questions

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

37 Justice Melissa Perry, 'iDecide: Digital Pathways to Decision' (Conference Paper, 2019 CPD Immigration Law Conference, 21 March 2019) 7 <<https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-perry/perry-j-20190321>>.

38 Tania Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge* (Edward Elgar Publishing, 2021) 247.

**PART D:
REGULATION AND
GUIDELINES FOR
RESPONSIBLE USE
OF AI**

CHAPTER
07

AI in courts and tribunals: current laws and regulation

86 Overview

86 Victorian legislation and regulation relevant to AI

94 Regulatory framework for legal professionals

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

Overview

- Our terms of reference ask us to consider opportunities to build on existing legislation, regulation and common law, so that AI is used safely in Victoria's courts and tribunals.
- We consider:
 - any gaps in the law where reform may be required to ensure AI is used safely
 - any barriers in the law preventing AI being used in courts and tribunals
 - existing legal professional obligations and how these may support AI to be used safely.

Victorian legislation and regulation relevant to AI

- 7.1 There is no AI-specific legislation or regulations in Victoria. But elements of Victoria's broader legislative and regulatory framework are relevant in considering how AI can be safely used in Victoria's courts and tribunals.
- 7.2 The Australian Government has proposed mandatory 'guardrails' for the use of AI in high-risk settings.¹ If implemented, they may have implications for courts and tribunals.
- 7.3 In this section we explore whether the existing legal framework can manage the risks of AI in courts and tribunals. We also consider what changes may be needed to the law.

Table 7: Legislation and regulations relevant to AI in Victorian courts and tribunals

	Regulation
Court rules and procedures	<p><i>Criminal Procedure Act 2009 (Vic)</i></p> <p><i>Civil Procedure Act 2010 (Vic)</i></p> <p><i>Evidence Act 2008 (Vic)</i></p> <p><i>Criminal Procedure Regulations 2020 (Vic)</i></p> <p><i>Open Courts Act 2013 (Vic)</i></p> <p>Statutory rules on court procedure, including:</p> <p><i>Supreme Court (General Civil Procedure) Rules 2015 (Vic)</i></p> <p><i>Supreme Court (Criminal Procedure) Rules 2017 (Vic)</i></p> <p><i>County Court Civil Procedure Rules 2018 (Vic)</i></p> <p><i>County Court Criminal Procedure Rules 2019 (Vic)</i></p> <p><i>Magistrates' Court General Civil Procedure Rules 2020 (Vic)/ Criminal Procedure Rules 2019 (Vic)</i></p> <p><i>Coroner's Court Rules 2019 (Vic)/Coroner's Court Regulations 2019 (Vic)</i></p> <p><i>Children's Court Criminal Procedure Rules 2019 (Vic)</i></p> <p><i>VCAT Rules 2018 (Vic)</i></p>
Privacy and data regulation	<p><i>Privacy and Data Protection Act 2014 (Vic)</i></p> <p><i>Privacy Act 1988 (Cth)</i></p>
Administrative law	<p><i>Administrative Law Act 1978 (Vic)</i></p> <p><i>Administrative Decisions (Judicial Review) Act 1977 (Cth)</i></p>
Human rights	<p><i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i></p> <p><i>Equal Opportunity Act 2010 (Vic)</i></p>

Court rules and procedures

- 7.4 If AI is to be permitted in Victoria's courts and tribunals for a range of processes and functions, court rules and procedures will need to change. Introducing AI into court processes requires us to consider existing procedural rules. Changes are also likely to be required if AI is *not* permitted (at least, to ensure there is clarity in relation to what is or is not authorised).

AI use by courts and tribunals

- 7.5 Court and tribunal rules have already changed to support the use of technology. Changes may be needed to allow even low-level automation.

7.6 The following recent examples, although not involving AI, show how court procedures have changed to enable new technology:

- Amendment to the Children's Court rules to support the introduction of an electronic case management system in the Children's Court.²
- During the COVID-19 pandemic, legislation was introduced to enable the use of technology in courts.³ This enabled electronic service of documents, audio-visual links and the ability to make decisions based on written submissions or in the absence of a party.⁴

7.7 In England and Wales, online pilots have required new practice directions to supplement civil procedure rules:

- Practice Direction 7E was introduced to facilitate the pilot of the Money Claim Online system for small claims.⁵
- Practice Direction 36E was introduced to allow online filing applications in certain matrimonial and civil partnership proceedings.⁶
- Practice Direction 36ZD was introduced to facilitate a pilot for an online system for certain private law proceedings relating to children and some protective orders and appeals.⁷

Procedural considerations for court users

7.8 Changes to court and tribunal procedures may be needed to allow for appropriate consideration of AI. The court or parties involved in matters involving AI may need access to information about an AI system, such as its source code, data, variables or other information. Because AI systems are so complex, this could result in the need for extensive disclosure, involving huge volumes of data and millions of lines of code. The volume and complexity of materials may require new and different disclosure requirements. Changes may allow for system testing results to be produced rather than millions of lines of code.

7.9 Matters involving AI disputes (such as infringements of copyright) will require consideration. Existing procedural rules may be sufficiently adaptable to allow parties to navigate an AI dispute fairly. But AI's novelty and complexity suggests that legal professionals and judges will need further education.

Privacy and data regulation

7.10 AI raises significant issues related to privacy and data security. Existing legislation and regulations provide some legal protections. The Office of the Victorian Information Commissioner is responsible for overseeing the *Privacy and Data Protection Act 2014* (Vic) (PDP Act). The PDP Act establishes information privacy principles about collection, use and disclosure, data quality and security, anonymity, transborder data flows and sensitive information.⁸ The principles apply to Victorian public sector organisations and government contractors.⁹ The PDP Act does not explicitly reference AI. But the principles can be applied to AI systems and broadly align with the privacy and data protection principles for regulating AI, as discussed in Part C.

² For example, see *Children's Court Authentication and Electronic Transmission Rules 2020* (Vic).

³ *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic).

⁴ *Ibid.*

⁵ This has been subsequently amended to Practice Direction 7C. Ministry of Justice (UK), *Practice Direction 7C - Money Claim Online* (Practice Direction, HM Courts and Tribunals Service, 1 October 2022).

⁶ Ministry of Justice (UK), *Practice Direction 36e - Pilot Scheme: Procedure for Online Filing of Applications in Certain Proceedings for a Matrimonial Order* (Practice Direction, HM Courts and Tribunals Service, 30 July 2018) <https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-36e-pilot-scheme-procedure-for-online-filing-of-applications-in-certain-proceedings-for-a-matrimonial-order>.

⁷ Ministry of Justice (UK), *Practice Direction 36zd - Pilot Scheme: Online System for Certain Private Law Proceedings Relating to Children, Certain Protective Orders and Certain Appeals* (Practice Direction, HM Courts and Tribunals Service, 28 April 2024) <https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-36zd-pilot-scheme-online-system-for-certain-private-law-proceedings-relating-to-children-and-for-certain-protective-orders>.

⁸ *Privacy Data and Protection Act 2014* (Vic) pt 3, Div 2.

⁹ *Ibid* s 13.

- 7.11 There is also privacy regulation at the national level. The *Privacy Act 1988* (Cth) applies to some private sector organisations (generally with a turnover of \$3 million), as well as most Australian Government agencies.¹⁰

Office of the Victorian Information Commissioner Privacy and Artificial Intelligence Guide

- 7.12 The Office of the Victorian Information Commissioner released a guide in 2021 about AI and privacy.¹¹ It is designed to assist public sector organisations to consider privacy obligations under the PDP Act when using AI systems.
- 7.13 The guide encourages public sector organisations to be aware of the unique risks AI can pose across the 'collection, use, handling and governance of personal information'.¹²
- 7.14 The Office of the Victorian Information Commissioner has raised particular concerns about generative AI systems and privacy obligations.¹³ Recently an investigation by the Victorian Information Commissioner found that a child protection worker used ChatGPT to draft reports, including a report for the Children's Court. The Office of the Victorian Information Commissioner found this was a serious breach of information privacy principles because it involved personal and sensitive information.¹⁴ The use of ChatGPT also resulted in inaccuracies and downplayed risks to the child.¹⁵ As a result, the Office of the Victorian Information Commissioner issued a compliance notice requiring the Department of Families, Fairness and Housing to ban child protection workers from using ChatGPT and similar tools.¹⁶
- 7.15 The Victorian Privacy and Data Protection Deputy Commissioner issued a statement that Victorian public sector organisations 'must ensure staff and contracted service providers do not use [their own or other peoples'] personal information with ChatGPT'.¹⁷ Further, public sector organisations have been advised not to use ChatGPT to 'formulate decisions, undertake assessments, or [...] for other administrative actions that may have consequences for individuals'.¹⁸

Privacy and data considerations for courts and tribunals

- 7.16 Victorian courts and tribunals aim to follow state and national privacy laws.¹⁹ This includes the Office of the Victorian Information Commissioner principles for collecting and handling personal information.²⁰ But courts and tribunals are generally exempt from the PDP Act in relation to their judicial or quasi-judicial functions.²¹ This includes judicial or quasi-judicial officer holders, registry or other office holders and staff.²²

10 *Privacy Act 1988* (Cth) pt 1, Div 2.

11 Office of the Victorian Information Commissioner, *Artificial Intelligence – Understanding Privacy Obligations* (Report, April 2021) <<https://ovic.vic.gov.au/privacy/resources-for-organisations/artificial-intelligence-understanding-privacy-obligations/>>; Note this resource is being updated following public consultation. Public consultation closed on 19 June, 2024. See Office of the Victorian Information Commissioner, 'Artificial Intelligence – Understanding Privacy Obligations', *Office of the Victorian Information Commissioner* (Web Page) <<https://ovic.vic.gov.au/privacy/resources-for-organisations/artificial-intelligence-understanding-privacy-obligations/>>.

12 Office of the Victorian Information Commissioner, *Artificial Intelligence – Understanding Privacy Obligations* (Report, April 2021) 3 <<https://ovic.vic.gov.au/privacy/resources-for-organisations/artificial-intelligence-understanding-privacy-obligations/>>.

13 Privacy and Data Protection Deputy Commissioner, 'Public Statement: Use of Personal Information with ChatGPT', (Report, Office of the Victorian Information Commissioner, September 2024) 1 <<https://ovic.vic.gov.au/privacy/resources-for-organisations/public-statement-use-of-personal-information-with-chatgpt/>>.

14 Office of the Victorian Information Commissioner, *Investigation into the Use of ChatGPT by a Child Protection Worker* (Report, Office of the Victorian Information Commissioner, September 2024) 5–7 <<https://ovic.vic.gov.au/regulatory-action/investigation-into-the-use-of-chatgpt-by-a-child-protection-worker/>>.

15 Ibid.

16 Ibid 8.

17 Privacy and Data Protection Deputy Commissioner, 'Public Statement: Use of Personal Information with ChatGPT', *Office of the Victorian Information Commissioner* (Web Page, February 2024) 1 <<https://ovic.vic.gov.au/privacy/resources-for-organisations/public-statement-use-of-personal-information-with-chatgpt/>>.

18 Ibid.

19 Supreme Court of Victoria, 'PRIVACY: Privacy Statement for the Supreme Court of Victoria Website', *The Supreme Court of Victoria* (Web Page, 2024) <<http://www.supremecourt.vic.gov.au/privacy/>>; County Court of Victoria, 'Privacy Statement', *County Court of Victoria* (Web Page, 7 October 2021) <<https://www.countycourt.vic.gov.au/privacy-statement/>>.

20 Office of the Victorian Information Commissioner, *Privacy Management Framework* (Report, Office of the Victorian Information Commissioner, April 2021) <<https://ovic.vic.gov.au/privacy/resources-for-organisations/privacy-management-framework/>>.

21 *Privacy Data and Protection Act 2014* (Vic) s 10.

22 Ibid.

- 7.17 The use of AI in courts and tribunals could raise privacy issues in many ways. Considerations include:
- how information is uploaded into an AI system
 - how third parties are engaged by the courts or tribunals to develop, operate or maintain an AI system
 - how data is managed
 - how consent is obtained for data use and whether consent extends to the purpose for which that data is used.
- 7.18 Courts and tribunals need to carefully identify the purpose and use of information across the AI system lifecycle, and ensure every use is lawful.

Administrative law

- 7.19 AI raises issues for administrative law, particularly in relation to the use of automated decision-making tools by government.
- 7.20 There are questions about whether an automated decision is a legally valid decision for administrative law purposes.²³ The use of automated decision-making tools by government may create barriers for people seeking judicial review of decisions.²⁴
- 7.21 The majority of the Federal Court of Australia in *Pintarich v Deputy Commissioner of Taxation*²⁵ (*Pintarich*) set a precedent that an output of an autonomous machine may not be recognised by law as a decision.²⁶ The majority reasoned that autonomous machines cannot make decisions because they do not have a subjective mental capacity.²⁷ This case suggests that 'fully automated discretionary decisions may not be reviewable'²⁸ under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). This may prevent persons affected by fully automated discretionary decisions from seeking judicial review of those decisions.
- 7.22 Whether the use of automated decision-making tools will create barriers to judicial review may depend on the level of human involvement. It has been argued by Yee-Fui Ng and Maria O'Sullivan that:
- If a human makes a decision guided or assisted by automated systems, this would still be a decision under the ADJR Act under the majority's interpretation, as it would still involve a mental process of deliberation and cogitating by a human decision-maker.²⁹
- 7.23 Justice Kerr delivered a dissenting judgment in *Pintarich*. He stated the legal understanding of a decision should not remain static.³⁰ Further, the concept of decisions should be reconsidered based on advancements in technology:
- The expectation that a 'decision' will usually involve human mental processes of reaching a conclusion ... is being challenged by automated 'intelligent' decision-making systems that rely on algorithms to process applications and make decisions.³¹

23 Yee-Fui Ng and Maria O'Sullivan, 'Deliberation and Automation – When Is a Decision a Decision?' (2019) 26(21) *Australian Journal of Administrative Law* 21, 23.

24 See discussion in NSW Ombudsman, *The New Machinery of Government: Using Machine Technology in Administrative Decision-Making* (Report, 29 November 2021).

25 *Pintarich v Federal Commissioner of Taxation* [2018] FCAFC 79; (2018) 262 FCR 41.

26 Anna Huggins, 'Addressing Disconnection: Automated Decision-Making, Administrative Law and Regulatory Reform' (2021) 44(3) *University of New South Wales Law Journal* 1048, 1062 <<https://www.unswlawjournal.unsw.edu.au/article/addressing-disconnection-automated-decision-making-administrative-law-and-regulatory-reform/>>.

27 *Ibid.*

28 *Ibid* 1064.

29 Yee-Fui Ng and Maria O'Sullivan, 'Deliberation and Automation – When Is a Decision a Decision?' (2019) 26(21) *Australian Journal of Administrative Law* 21, 30.

30 *Pintarich v Federal Commissioner of Taxation* [2018] FCAFC 79; (2018) 262 FCR 41, [49].

31 *Ibid.*

- 7.24 Justice Kerr stated it would 'undermine fundamental principles of administrative law' if a decision maker could deny a decision had been made because a machine had been used to make it.³²
- 7.25 The Australian Human Rights Commission recommended that legislation be introduced to require that 'any affected individual is notified where AI is materially used in making an administrative decision. That notification should include information about how an affected individual can challenge a decision'.³³ The extent to which AI is 'material' will be important to consider as AI continues to be increasingly built into a wider range of applications.
- 7.26 'Rules as code' also raises issues for administrative law. Rules as code seeks to translate legislation and regulation into code that can be interpreted and applied by a computer³⁴ (see examples in Part B). The Australasian Institute for Judicial Administration has highlighted that rules as code projects may in future create 'implications for statutory interpretation and administrative decision-making'.³⁵ If Rules as code is given legal recognition and applied to produce lawfully enforceable decisions, this could create challenges for existing judicial review avenues.³⁶ These risks could potentially be reduced by ensuring there are avenues to appeal automated decisions to a human decision maker.³⁷

Evidence

- 7.27 AI tools may be used in the collection, generation and assessment of evidence. This raises challenges for decision makers about the 'reliability, transparency, interpretability and bias of evidence'.³⁸ How AI may be used to prepare and assess evidence, including deepfakes, is discussed in Part B. Changes to the *Evidence Act 2008* (Vic) or existing codes of conduct or practice notes may be needed to respond to evidence involving AI.
- 7.28 The Australasian Institute of Judicial Administration suggests that:
- Where AI systems are used in the courtroom or tribunal hearing, a report should accompany its use which provides a sufficient explanation to the judge and parties, appropriate for the context of its use. Where such safeguards are not in place, courts should be wary of using AI systems' outputs in ways that affect the rights and obligations of individuals in circumstances where they have no real prospects of understanding or challenging the operation of the system.³⁹
- 7.29 We want to hear your views about whether there are sufficient safeguards in place in relation to the use of AI in the collection, generation and assessment of evidence in courts and tribunals.

32 Ibid.

33 Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 2021) 60.

34 Ronan Kennedy, 'Rules as Code and the Rule of Law: Ensuring Effective Judicial Review of Administration by Software' [2024] *Law, Innovation and Technology* 1, 2–3.

35 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration, December 2023) 11.

36 James Mohun and Alex Roberts, *Cracking the Code: Rulemaking for Humans and Machines* (OECD Working Papers on Public Governance No 42, 2020) 94 <https://www.oecd-ilibrary.org/governance/cracking-the-code_3afe6ba5-en>.

37 Ibid.

38 UNESCO, 'How to Determine the Admissibility of AI-Generated Evidence in Courts?', *UNESCO* (Web Page, 26 July 2023) <<https://www.unesco.org/en/articles/how-determine-admissibility-ai-generated-evidence-courts>>.

39 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023) 46.

Assessing evidence involving AI

- 7.30 AI is new and evolving. In assessing evidence involving AI it may be useful for decision makers to consider:
- Context: Does the purpose for which the AI system was designed align with how it is being used?⁴⁰
 - Input factors: What metrics does the system rely on and how are they weighted? Is the data suitable and what training data was used?⁴¹
 - Risk of bias: What data was used, including training data, and how representative is it? Are proxies being used inappropriately (such as for racial bias)?
 - Accuracy: Has it been tested? Has the accuracy of the system and outputs been validated? Where testing has occurred, what are the limitations and error rate?
- 7.31 The use of generative AI and large language models raises additional issues. Decision makers may need to consider what, if any, fine-tuning has been undertaken, how the system has been prompted, and whether (and what) retrieval-augmented generation has been used.

Expert opinion evidence

- 7.32 The use of AI gives rise to difficult questions in relation to expert evidence. For example, what kind of expert evidence is required to establish the reliability and admissibility of AI-related evidence? This issue will arise in relation to evidence about AI itself, but also where AI has been used in the assessment, collection or generation of evidence.
- 7.33 Because AI is new and complex, consideration may need to be given to the best ways for judges to assess expert evidence in relation to AI. The *Civil Procedure Act 2010* (Vic) enables court-appointed experts,⁴² a single joint expert⁴³ (an expert witness engaged jointly by both parties) or concurrent evidence⁴⁴ (where experts can be questioned jointly and the judge and counsel for either party can ask questions). These processes provide opportunities to ask experts questions and engage with different views. The Victorian Supreme and County Courts have issued practice notes on *Expert Evidence in Criminal Trials* which makes provision for evidence to be heard concurrently, if parties agree.⁴⁵
- 7.34 The Federal Court of Australia in *Trivago v ACCC* showed how courts can examine expert evidence about AI.⁴⁶ The court had assistance from two computer science experts about algorithms on the Trivago website. The evidence was given concurrently and focused on specific questions. One of the experts had access to the algorithms underlying metrics and their ratings. The other expert had to rely on results from testing the system.⁴⁷
- 7.35 Different considerations will arise in criminal trials. Issues relating to the use of expert evidence about AI in the criminal context may require specific attention.

40 For example, the FBI's facial recognition application reportedly has a high match rate when comparing an image with a local database but much lower accuracy when compared against another country's dataset that it was not trained on: James E Baker, Laurie N Hobart and Matthew Mittelsteadt, *An Introduction to Artificial Intelligence for Federal Judges* (Report, Federal Judicial Centre, 2023) 52–3.

41 For example, in considering AI driven bail or sentencing tools, it is important to ensure that inappropriate or unlawful factors were not included and that relevant factors are weighted appropriately by the AI system.

42 *Civil Procedure Act 2010* (Vic) s 65M.

43 *Ibid* s 65L.

44 *Ibid* s 65K.

45 Supreme Court of Victoria, *SC CR 3 Expert Evidence in Criminal Trials* (Report, 30 January 2017) [13.1] <<http://www.supremecourt.vic.gov.au/areas/legal-resources/practice-notes/sc-cr-3-expert-evidence-in-criminal-trials>>; County Court of Victoria, *Practice Note: Expert Evidence in Criminal Trials* (Report, 24 June 2014) [11.1] <<https://www.countycourt.vic.gov.au/files/documents/2019-10/expert-evidence-criminal-trials.pdf>>.

46 *Trivago NV v Australian Consumer and Competition Commission* [2020] FCAFC 185; (2020) 384 ALR 496.

47 *Ibid* [81].

- 7.36 Practice Notes and Codes of Conduct, such as the Victorian Supreme and County Court's *Expert Evidence in Criminal Trials*⁴⁸ and the *Expert Witness Code of Conduct*,⁴⁹ may need to be updated to consider the risks and limitations of AI and whether disclosure about AI is required.

Human rights

- 7.37 The use of AI in courts and tribunals may have implications for human rights. The risk of bias associated with AI systems raises issues concerning discrimination and accessibility. In some circumstances, the use of AI may also raise concerns relating to a fair hearing. UNESCO states that 'human rights and fundamental freedoms must be respected, protected and promoted throughout the life cycle of AI systems'.⁵⁰
- 7.38 Existing laws relating to privacy and anti-discrimination provide some protection. The *Equal Opportunity Act 2010* (Vic) protects against discrimination, sexual harassment and victimisation.⁵¹ The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) contains basic rights, freedoms and responsibilities. This includes protection from unlawful discrimination, the protection of privacy and reputation, and criminal procedural rights.
- 7.39 Courts and tribunals must, as far as possible, interpret all Victorian laws in a way that upholds the rights outlined in the Charter.⁵² The Charter applies to certain functions of courts and tribunals.⁵³
- 7.40 The Australian Human Rights Commission recommended that the Australian Government adopt a human rights-centred approach to AI development and deployment.⁵⁴ It also recommended that human rights be protected in procurement law, policy and guidelines with the design and development of any AI-informed decision-making tools procured by the Australian Government.⁵⁵ Further, it recommended human rights impact assessments to assess whether any proposed AI-informed decision-making system:
- complies with human rights law
 - involves automating any element of discretion
 - provides appropriate review by human decision makers
 - is authorised and governed by legislation.⁵⁶
- 7.41 Human rights issues for courts and tribunals may include:
- detecting and responding to discrimination in any AI process
 - considering the impact of AI on marginalised cohorts and people experiencing barriers to justice
 - ensuring human rights are respected by court users who use AI.

48 Supreme Court of Victoria, *SC CR 3 Expert Evidence in Criminal Trials* (Report, 30 January 2017) 6.2 <<http://www.supremecourt.vic.gov.au/areas/legal-resources/practice-notes/sc-cr-3-expert-evidence-in-criminal-trials>>; County Court of Victoria, *Practice Note: Expert Evidence in Criminal Trials* (Report, 24 June 2014) 4.2 <<https://www.countycourt.vic.gov.au/files/documents/2019-10/expert-evidence-criminal-trials.pdf>>.

49 Supreme Court (General Civil Procedure) Rules 2015 (Vic) Form 44A.

50 UNESCO, *Recommendation on the Ethics of Artificial Intelligence* (Report No SHS/BIO/PI/2021/1, 2022) 18 <<https://unesco.org/ark:/48223/pf0000381137>>.

51 *Equal Opportunity Act 2010* (Vic).

52 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32.

53 *Ibid* s 6(2)(b).

54 Australian Human Rights Commission, *Australian Human Rights Commission Submission to the Select Committee on Adopting Artificial Intelligence* (Report, Australian Human Rights Commission, 15 May 2024) 12 <<https://humanrights.gov.au/our-work/legal/submission/adopting-ai-australia>>.

55 Australian Human Rights Commission, *Human Rights and Technology* (Final Report, 2021) 100.

56 *Ibid* 55.

Questions

17. Building on Table 7, are other statutes or regulations relevant to the safe use of AI in Victorian courts and tribunals?
18. Are there legislative or regulatory gaps or barriers where reform is needed for the safe use of AI in courts and tribunals?
19. What, if any, changes to legislation, rules or processes are necessary to enable courts and tribunals to:
 - a. safely use AI
 - b. consider evidence in relation to AI
 - c. implement human rights principles (Should there be a human rights impact assessment of any AI use in courts and tribunals?)
 - d. align AI use with privacy responsibilities?
20. How can changes be achieved while maintaining appropriate flexibility?

Regulatory framework for legal professionals

Legal professionals

- 7.42 In addition to the legal framework discussed above, barristers and solicitors are bound by legal professional duties. Risks relating to AI may challenge existing legal professional obligations.
- 7.43 There are risks to justice if legal professionals use AI without checking for accuracy. Issues relating to client privilege, privacy and bias are key considerations for legal professionals.
- 7.44 Barristers and solicitors are bound by professional conduct rules and ethical obligations under the Legal Profession Uniform Acts and Barrister and Solicitor Conduct Rules.⁵⁷ Under this framework barristers and solicitors owe duties to their clients, their colleagues and to the court. Provided below are examples of barristers' duties, noting similar rules also apply to solicitors.

Duty to courts

- 7.45 Barristers have an overriding duty to the court to act with independence in the administration of justice.⁵⁸ As officers of the court, barristers must not deceive or mislead the court.⁵⁹ They must take all necessary steps to ensure the accuracy of information they provide to the court and correct any misleading statements.⁶⁰
- 7.46 The *Civil Procedure Act 2010* (Vic) also creates a paramount duty to the court to further the administration of justice in relation to any civil proceeding. Legal professionals must act honestly, ensure claims have a proper basis and not mislead or deceive the court.⁶¹

57 *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW); *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015* (NSW).

58 *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) r 23.

59 *Ibid* r 24.

60 *Ibid* r 25.

61 *Civil Procedure Act 2010* (Vic) ss 10(b), 16–27 The paramount duty is to further the administration of justice (s 16). Overarching obligations relevant to the use of AI include the obligations to act honestly (s17), ensure claims have a proper basis (s18) and not to mislead or deceive the court (s 21).

- 7.47 AI raises risks in relation to legal professionals meeting their duties to the courts, particularly relating to accuracy. As discussed in Parts A and B, there are risks relating to the accuracy of AI, particularly generative AI. If legal professionals rely on AI tools without applying their own judgment, this may result in them providing misleading or inaccurate information to courts.

Duty to clients

- 7.48 Barristers owe duties to their clients and must promote and protect their client's best interests.⁶² Barristers must also maintain confidentiality and legal professional privilege.⁶³ But there is also an obligation for barristers to use their own judgment and not act simply as a messenger of their client.⁶⁴
- 7.49 AI tools can produce one-size-fits-all templates and responses which do not consider an individual's unique circumstances. To act in a client's best interests, legal professionals need to apply their own judgment when using AI, including in drafting documents and preparing legal advice.⁶⁵
- 7.50 The use of AI may lead to a breach of a client's privacy, depending on how the AI uses personal information (see privacy discussion in Parts A and B).

Implication of legal professional obligations for AI

- 7.51 These existing rules might provide a way for legal professionals to manage AI risks. Breaches of professional conduct rules and ethical obligations are generally handled by legal professional bodies such as the Victorian Legal Services Board and Commissioner. Legal professional bodies including those in New South Wales and Victoria have provided guidance to lawyers and barristers on their duties in relation to using AI (see discussion below from section XX).⁶⁶
- 7.52 The uniform conduct rules for barristers and solicitors outline a requirement to act with competence and diligence in the administration of justice.⁶⁷ It has been suggested, that in the future, if legal professionals do *not* use AI when it can provide better, quicker and less costly legal services, this might raise issues about diligence and the need to protect clients' interests.⁶⁸ In some places the duty of diligence has been interpreted to require an understanding of relevant technologies. The American Bar Association approved changes to its *Model Rules of Professional Conduct* in 2012.⁶⁹ This change highlighted that professional competency included understanding relevant technologies associated with law.⁷⁰
- 7.53 Additionally, the court has inherent jurisdiction to supervise the conduct of its officers (solicitors and barristers).⁷¹ This ensures standards are maintained to enable the proper administration of justice. A court can take disciplinary action where it has been recklessly misled.⁷² Therefore, courts can direct and discipline lawyers and, in principle, would have the capacity to direct how lawyers use AI in court matters.

62 *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) r 35.

63 *Ibid* r 114.

64 *Ibid* r 42.

65 Michael Legg and Felicity Bell, 'Artificial Intelligence and the Legal Profession: Becoming the AI-Enhanced Lawyer' (2019) 38(2) *University of Tasmania Law Review* 34, 55–7.

66 'Generative AI and Lawyers', *Victorian Legal Services Board + Commissioner* (Web Page, 17 November 2023) <<https://lsbc.vic.gov.au/news-updates/news/generative-ai-and-lawyers>>; NSW Bar Association, *Issues Arising from the Use of AI Language Models (Including ChatGPT) in Legal Practice* (Guidelines, NSW Bar Association, 22 June 2023) <<https://inbrief.nswbar.asn.au/posts/ge292ee2fc90581f795ff1df0105692d/attachment/NSW%20Bar%20Association%20GPT%20AI%20Language%20Models%20Guidelines.pdf>>; The Law Society of NSW, *A Solicitor's Guide to Responsible Use of Artificial Intelligence* (Report, 10 July 2024) <https://www.lawsociety.com.au/sites/default/files/2024-07/LS4527_MKG_ResponsibleAIGuide_2024-07-10.pdf>.

67 *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) r 4 (c); *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015* (NSW) r 4.1.3.

68 Michael Legg and Felicity Bell, 'Artificial Intelligence and Solicitors' Ethical Duties' [2022] (85) *Law Society Journal* 77.

69 *Ibid*.

70 *Ibid*.

71 GE Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 7th ed, 2021) 572 [17.20] and 574 [17.25].

72 *Ibid* 574 [17.25].

Prosecutorial bodies

- 7.54 AI is playing a growing role in criminal investigations and the determination of policing matters (see discussion in Part B).
- 7.55 Victoria Police developed an *AI Ethics Framework* to support the ethical and lawful use of AI.⁷³ This framework aims to mitigate key risks of AI, including risks to human rights or legal consequences, or where AI may replace or influence police discretion.⁷⁴ The framework is modelled on Australia's *AI Ethics Principles*, in conjunction with the *Police Artificial Intelligence Principles* developed by the Australian New Zealand Policy Advisory Agency.⁷⁵
- 7.56 This framework highlights that any use of AI must be compatible with Victoria Police's existing legal obligations, including under the Charter. The framework sets out eight overarching principles that the use of AI must comply with, which includes:
- human rights
 - community benefit
 - fairness
 - privacy and security
 - transparency
 - accountability
 - human oversight
 - skills and knowledge.⁷⁶
- 7.57 Implementation of the Australia New Zealand Police Advisory Agency's principles include a commitment to community safety, harm minimisation and community confidence in the adoption and deployment of AI. This includes ensuring information about the use of AI is publicly available to the greatest extent possible, without undermining policing objectives.⁷⁷
- 7.58 Other jurisdictions have developed guidelines for the use of AI by policing agencies. In Canada, the Toronto Police Service Board recently updated its AI policy.⁷⁸ This policy contains nine guiding principles for the use of AI by Toronto Police and requires a risk assessment before the procurement, use or deployment of any new AI technology. There is also a requirement to implement a public engagement strategy to 'transparently inform the public of the use of new AI technology'.⁷⁹

Question

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?

73 Victoria Police, *Victoria Police Artificial Intelligence Ethics Framework* (Policy, Victoria Police, 23 April 2024) <<https://www.police.vic.gov.au/victoria-police-artificial-intelligence-ethics-framework>>.

74 Ibid.

75 Australian Government, 'Australia's AI Ethics Principles - Australia's Artificial Intelligence Ethics Framework', *Department of Industry, Science and Resources* (Web Page, 5 October 2022) <<https://www.industry.gov.au/publications/australias-artificial-intelligence-ethics-framework/australias-ai-ethics-principles>>; Australia New Zealand Policing Advisory Agency (ANZPAA), *Australia New Zealand Police Artificial Intelligence Principles* (Report, 14 July 2023) <<https://www.anzpa.org.au/resources/publications/australia-new-zealand-police-artificial-intelligence-principles>>.

76 Victoria Police, *Victoria Police Artificial Intelligence Ethics Framework* (Policy, Victoria Police, 23 April 2024) <<https://www.police.vic.gov.au/victoria-police-artificial-intelligence-ethics-framework>>.

77 Australia New Zealand Policing Advisory Agency (ANZPAA), *Australia New Zealand Police Artificial Intelligence Principles* (Report, 14 July 2023) <<https://www.anzpa.org.au/resources/publications/australia-new-zealand-police-artificial-intelligence-principles>>.

78 Toronto Police Service Board, *Use of Artificial Intelligence Technology* (Report, Toronto Police Service Board, 11 January 2024) <<https://tpsb.ca/policies-by-laws/board-policies/195-use-of-artificial-intelligence-technology>>.

79 Ibid.

CHAPTER
08

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

98 Overview

98 Guidelines for the use of AI by court and tribunal users

104 Guidelines for the use of AI by judges, tribunal members and court and tribunal staff

109 An AI assessment framework for courts and tribunals

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

Overview

- Our terms of reference ask us to consider what guidelines may be needed so that AI is used safely in Victoria's courts and tribunals. This includes the use of AI by:
 - Court users—parties, legal professionals and prosecutorial agencies
 - Courts and tribunals—court administrators, the judiciary and tribunal members.
- We have also been asked to consider guidelines to support Victoria's courts and tribunals when considering whether to implement new AI systems.
- In this section we consider how the experience of other jurisdictions can inform guidelines for Victoria's courts and tribunals.

Guidelines for the use of AI by court and tribunal users

- 8.1 Courts and professional bodies have published guidelines for court users including self-represented litigants and legal professionals to guide the safe use of AI in courts and tribunals.
- 8.2 Each jurisdiction has its own approach. But there are common elements which often relate to disclosure requirements and ethical and legal risks associated with AI, including privacy and security.

Court-issued guidelines about AI

- 8.3 Courts have issued guidelines to court users concerning AI. Guidelines vary in their level of detail and requirements.
- 8.4 The Victorian Supreme and County Courts developed guidelines to assist legal practitioners and unrepresented litigants using AI.¹ Queensland appears to be the only other Australian jurisdiction to have published court-issued guidelines on AI.² This is focused on the use of AI by non-lawyers.³
- 8.5 Court-issued guidelines for court users, including overseas examples, are listed in Table 8 and described in more detail below.

1 Supreme Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Guidelines, Supreme Court of Victoria, 6 May 2024) <<http://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/guideline-responsible-use-of-ai-in-litigation>>; County Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Report, 3 July 2024) <<https://www.countycourt.vic.gov.au/practice-notes>>.

2 Queensland Courts, *The Use of Generative Artificial Intelligence (AI) Guidelines for Responsible Use by Non-Lawyers* (Guidelines, Queensland Courts, 13 May 2024) <<https://www.courts.qld.gov.au/about/news/news233/2024/the-use-of-generative-artificial-intelligence-ai>>.

3 Ibid.

Table 8: Guidelines relevant to use of AI by court users

	Guidelines to court users
Australia	<p>Victorian Supreme Court and County Court—<i>Guidelines to Litigants</i>⁴</p> <ul style="list-style-type: none"> Parties and practitioners should disclose to each other the assistance provided by AI programs. Self-represented litigants are encouraged to disclose AI use in the documents filed with the court. <p>Queensland Courts—<i>The Use of Generative Artificial Intelligence (AI) Guidelines for Responsible Use by Non-Lawyers</i>⁵</p> <ul style="list-style-type: none"> Guidelines are targeted at non-lawyers to highlight risks and limitations of generative AI. There are no disclosure requirements.
New Zealand	<p><i>Guidelines for the Use of Generative Artificial Intelligence in Courts and Tribunals</i>⁶</p> <ul style="list-style-type: none"> Separate guidelines for lawyers and non-lawyers about the use of generative AI in courts and tribunals. Assumes that risks are managed if guidelines are complied with, but that a court or tribunal may require disclosure of AI use (noting judges are not required to disclose use of generative AI).
Canada	<p>Federal Court <i>Notice to Parties and the Profession</i>⁷</p> <ul style="list-style-type: none"> Requires court users to disclose AI-generated content. The Court of King's Bench of Manitoba and Supreme Court of Yukon have similar requirements to declare AI use.
United States	<p>AI Standing Orders—various district courts e.g. Texas, Illinois, Pennsylvania⁸</p> <ul style="list-style-type: none"> Some district courts require mandatory disclosure of AI use.

Disclosure

8.6 Disclosure is a common element across the guidelines. Some jurisdictions require mandatory disclosure of the use of AI, others note the limitations and risks of AI and encourage disclosure where relevant.

4 Supreme Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Guidelines, Supreme Court of Victoria, 6 May 2024) 1 <<http://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/guideline-responsible-use-of-ai-in-litigation>>; County Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Report, 3 July 2024) 1 <<https://www.countycourt.vic.gov.au/practice-notes>>.

5 Queensland Courts, *The Use of Generative Artificial Intelligence (AI) Guidelines for Responsible Use by Non-Lawyers* (Guidelines, Queensland Courts, 13 May 2024) <<https://www.courts.qld.gov.au/about/news/news233/2024/the-use-of-generative-artificial-intelligence-ai>>.

6 Courts of New Zealand, *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals: Lawyers* (Report, 7 December 2023).

7 Federal Court of Canada, *Notice to Parties and the Profession - The Use of Artificial Intelligence in Court Proceedings* (Report, 7 May 2024).

8 Court of King's Bench of Manitoba, *Re: Use of Artificial Intelligence in Court Submissions* (Practice Direction, 23 June 2023); Supreme Court of Yukon, *Use of Artificial Intelligence Tools* (Practice Direction General No 29, 26 June 2023).

Non-mandatory disclosure

- 8.7 In Victoria, disclosure is encouraged but not mandated in the Supreme and County Courts. The respective court guidelines both state:
- ordinarily parties and their practitioners should disclose to each other the assistance provided by AI programs to the legal task undertaken. Where appropriate (for example, where it is necessary to enable a proper understanding of the provenance of a document or the weight that can be placed upon its contents), the use of AI should be disclosed to other parties and the court.⁹
- 8.8 Self-represented litigants and witnesses are encouraged to identify the use of AI by including a statement in the document noting the AI tool used. The guidelines note that this will 'not detract from the contents of the document being considered by the relevant judicial officer on its merits but will provide useful context to assist the judicial officer'.¹⁰
- 8.9 These guidelines note the use of AI is subject to legal professional obligations, including the obligation of candour (honesty) to the court and obligations imposed by the *Civil Procedure Act 2010 (Vic)* that documents prepared and submitted must have a proper basis.¹¹
- 8.10 The guidelines encourage caution where AI is used in expert reports, and state that they should comply with the Expert Witness Code of Conduct.¹²
- 8.11 In Queensland, courts have issued guidelines that outline the risks and limitations of AI use for non-lawyers.¹³ There is no requirement to disclose AI use.¹⁴
- 8.12 Courts of New Zealand issued separate guidelines for lawyers and non-lawyers which explain their respective disclosure obligations in the use of generative AI. The guideline for lawyers sets out the limitations, risks and ethical issues of AI. It also notes existing professional obligations of lawyers apply to the use of AI.¹⁵ These guidelines assume that if they are complied with, such as by checking for accuracy, the key risks of generative AI have been adequately addressed. However, a court or tribunal may ask or require disclosure.¹⁶

Mandatory disclosure

- 8.13 Some jurisdictions have introduced mandatory disclosure requirements. In Canada, the Canadian Federal Court introduced mandatory disclosure requirements where AI is used in the preparation of materials filed with the court.¹⁷
- 8.14 There is an obligation for counsel, parties and 'interveners' to provide notice and to consider principles of 'caution', 'human in the loop' and 'neutrality' if they use AI to prepare documentation filed with the Federal Court.¹⁸

9 Supreme Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Guidelines, Supreme Court of Victoria, 6 May 2024) 1 <<http://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/guideline-responsible-use-of-ai-in-litigation>>; County Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Report, 3 July 2024) 1 <<https://www.countycourt.vic.gov.au/practice-notes>>.

10 Supreme Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Guidelines, Supreme Court of Victoria, 6 May 2024) 2 <<http://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/guideline-responsible-use-of-ai-in-litigation>>; County Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Report, 3 July 2024) 2 <<https://www.countycourt.vic.gov.au/practice-notes>>.

11 Supreme Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Guidelines, Supreme Court of Victoria, 6 May 2024) 1–2 <<http://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/guideline-responsible-use-of-ai-in-litigation>>.

12 Ibid 3; County Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Report, 3 July 2024) 3 <<https://www.countycourt.vic.gov.au/practice-notes>>.

13 Queensland Courts, *The Use of Generative Artificial Intelligence (AI) Guidelines for Responsible Use by Non-Lawyers* (Guidelines, Queensland Courts, 13 May 2024) <<https://www.courts.qld.gov.au/about/news/news233/2024/the-use-of-generative-artificial-intelligence-ai>>.

14 Ibid.

15 Courts of New Zealand, *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals: Lawyers* (Report, 7 December 2023) 1.

16 Ibid 4.

17 Federal Court of Canada, *Notice to Parties and the Profession - The Use of Artificial Intelligence in Court Proceedings* (Report, 7 May 2024).

18 Ibid 2–3.

- 8.15 Parties are only required to disclose AI use if content in the material was directly provided by AI, not if it was used 'to suggest changes, provide recommendations, or critique content already created by a human who could then consider and implement the changes'.¹⁹ The Court of King's Bench of Manitoba and Supreme Court of Yukon have similar requirements to declare AI use.²⁰
- 8.16 In consulting on the development of the guidelines, the Canadian Bar Association criticised the proposal for certification as unnecessary, given existing professional obligations. This includes obligations on counsel to sign submissions to the Court and to:
- use tactics that are legal, honest and respectful of the courts, to act with integrity and professionalism, to maintain their overarching responsibility to ensure civil conduct, and to educate clients about the court processes in the interest of promoting the public's confidence in the administration of justice.²¹
- 8.17 It was noted that certification could burden registry staff and create filing delays, depending on the form the certification takes and assessment by the court.²² In response to this, the final court notice clarified the form of declaration necessary.²³
- 8.18 Similarly, some United States district courts require lawyers and litigants appearing before court to declare if their filings were drafted using generative AI. This includes the Northern District of Texas and Northern District of Illinois for civil cases.²⁴ The Eastern District of Pennsylvania made similar orders, although directed at AI tools more generally rather than generative AI.²⁵

Guidelines about AI for legal practitioners by professional bodies

- 8.19 Legal professional bodies have developed guidance about legal professionals using AI.
- 8.20 The Victorian Legal Services Board and Commissioner has advised lawyers to ensure the use of AI is consistent with their legal professional duties.²⁶ It warns lawyers to be particularly careful when using generative AI and issued the following direction:
- ChatGPT can be a very helpful tool, but you must use it ethically and safely. All the rules of ethics apply in your use of this tool, including your duties of competence and diligence, of supervision, to the court and the administration of justice, and to maintain client confidentiality.²⁷
- 8.21 The Victorian Legal Services Board and Commissioner identified the potential improper use of AI by lawyers as a key risk in 2024.²⁸

19 Ibid 1.

20 Court of King's Bench of Manitoba, *Re: Use of Artificial Intelligence in Court Submissions* (Practice Direction, 23 June 2023); Supreme Court of Yukon, *Use of Artificial Intelligence Tools* (Practice Direction General No 29, 26 June 2023).

21 Intellectual Property Section of the Canadian Bar Association, *Submission to the Federal Court of Canada's Consultation on the Draft Federal Court Practice Direction on AI Guidance* (Report, Canadian Bar Association, 24 November 2023) 2 <<https://www.cba.org/CMSPages/GetFile.aspx?guid=3d500f72-96ff-4ff8-817e-32ac96e5ceeb>>.

22 Ibid.

23 Federal Court of Canada, *Notice to Parties and the Profession - The Use of Artificial Intelligence in Court Proceedings* (Report, 7 May 2024).

24 *Standing Order Regarding Use of Artificial Intelligence* (Standing Order, 394th Judicial District Court of Texas, 9 June 2023) <<https://img1.wsimg.com/blobby/go/2f8cb9d7-adb6-4232-a36b-27b72fdcd38/downloads/Standing%20order%20Regarding%20Use%20of%20Artificial%20Intelligence.pdf?ver=1720638374301>>; *Standing Order For Civil Cases Before Magistrate Judge Fuentes* (Standing Order, District Court of Northern Illinois, 31 May 2023) <[https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20rev%27d%205-31-23%20\(002\).pdf](https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20rev%27d%205-31-23%20(002).pdf)>.

25 *Standing Order Re Artificial Intelligence ('AI') in Cases Assigned to Judge Baylson* (Standing Order, District Court for the Eastern District of Pennsylvania, 6 June 2023) <<https://www.paed.uscourts.gov/sites/paed/files/documents/locrules/standord/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf>>.

26 'Generative AI and Lawyers', *Victorian Legal Services Board + Commissioner* (Web Page, 17 November 2023) <<https://lsbc.vic.gov.au/news-updates/news/generative-ai-and-lawyers>>.

27 Ibid.

28 '2024 Risk Outlook', *Victorian Legal Services Board + Commissioner* (Web Page, 1 August 2024) <<https://lsbc.vic.gov.au/lawyers/risk-outlook/2024-risk-outlook>>.

- 8.22 In New South Wales, the Law Society and the Bar Association have issued guidelines to solicitors and barristers about how their professional obligations align with the use of AI.²⁹ The Bar Association guidelines outline the need for barristers to comply with existing legal professional rules and obligations when using generative AI.³⁰ It advises that a solicitor using generative AI 'should employ the same level of care and caution as they would to any legal assistant or paralegal'.³¹ Further, it advises 'AI must be used responsibly to supplement (rather than substitute) legal services'.³²
- 8.23 The Queensland Law Society issued a guiding statement on the use of AI in legal practice.³³ The statement sets out principles rather than specific obligations arising from the use of AI, which relate to:
- competence and diligence when using AI
 - confidentiality, transparency and disclosure to clients about the use of AI
 - the need for supervision and accountability to ensure AI does not replace professional judgment.³⁴

International guidelines about AI

- 8.24 Legal professional bodies in other countries have developed similar guidelines. In England and Wales, the Law Society has a guide on the use of generative AI, including a checklist to consider before using it, and considerations for risk management.³⁵
- 8.25 The New York Bar Association has comprehensive guidelines for legal practitioners, following publication of a special taskforce report in April 2024.³⁶ These include the benefits and risks of AI and potential impacts on professional obligations. The report states the Bar Association should establish a standing committee to oversee AI updates, and makes broader recommendations about education and gaps in existing legislation.³⁷
- 8.26 The American Bar Association *Model Rules of Professional Conduct* includes with its guidelines a training and education requirement:
- 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.³⁸
- 8.27 A form of this rule has been adopted by at least 27 states across the United States.³⁹ Some states, such as Florida, require technology training as part of continuing education requirements.⁴⁰

29 The Law Society of NSW, *A Solicitor's Guide to Responsible Use of Artificial Intelligence* (Report, 10 July 2024) <https://www.lawsociety.com.au/sites/default/files/2024-07/LS4527_MKG_ResponsibleAIGuide_2024-07-10.pdf>; NSW Bar Association, *Issues Arising from the Use of AI Language Models (Including ChatGPT) in Legal Practice* (Guidelines, NSW Bar Association, 22 June 2023) <<https://inbrief.nswbar.asn.au/posts/9e292ee2fc90581f795ff1df0105692d/attachment/NSW%20Bar%20Association%20GPT%20AI%20Language%20Models%20Guidelines.pdf>>.

30 The Law Society of NSW, *A Solicitor's Guide to Responsible Use of Artificial Intelligence* (Report, 10 July 2024) 3 <https://www.lawsociety.com.au/sites/default/files/2024-07/LS4527_MKG_ResponsibleAIGuide_2024-07-10.pdf>.

31 *Ibid.*

32 *Ibid.*

33 Queensland Law Society, *No.37 Artificial Intelligence in Legal Practice* (Guidance Statement, 2023) <<https://www.qls.com.au/Guidance-Statements/No-37-Artificial-Intelligence-in-Legal-Practice>>.

34 *Ibid.*

35 The Law Society of England and Wales, *Generative AI – the essentials: checklist* (Report, The Law Society of England and Wales, 17 November 2023) <<https://www.lawsociety.org.uk/en/Topics/AI-and-lawtech/Guides/Generative-AI-the-essentials>>.

36 New York State Bar Association, *Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence* (Report, New York State Bar Association Task Force on Artificial Intelligence, April 2024).

37 *Ibid.* 53, 53–54.

38 American Bar Association, 'Model Rules of Professional Conduct: Rule 1.1 Competence - Comment', *ABA Centre for Professional Responsibility* (Web Page, 2024) <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/>.

39 Lauri Donahue, 'A Primer on Using Artificial Intelligence in the Legal Profession', *JOLT Digest* (Web Page, 3 January 2018) <<https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession>>.

40 Mark Killan, 'Court Approves CLE Tech Component', *The Florida Bar: The Florida Bar News* (Web Page, 15 October 2016) <<https://www.floridabar.org/the-florida-bar-news/court-approves-cle-tech-component/>>.

Response of courts to professional obligations and AI

- 8.28 In Canada and some other countries, courts can have regard to guidance by law societies when assessing legal responsibilities and AI use. The Law Society of British Columbia developed *Guidance on Professional Responsibility and Generative AI*.⁴¹ In *Zhang v Chen* a judge referred to guidance from the Law Society, noting it confirmed 'lawyers are responsible for work products generated using technology-based solutions' and urged lawyers to 'review the content carefully and ensure its accuracy'.⁴² In this case, legal counsel used generative AI to prepare court materials which contained references to non-existent cases. The court ordered the lawyer to pay costs for the additional expenses and effort incurred by the citation of fake cases.⁴³
- 8.29 The United States case of *Mata v Avianca* demonstrates how inaccuracy risks associated with generative AI tools can conflict with lawyers' professional obligations.⁴⁴ Legal counsel used ChatGPT, which hallucinated a non-existent case.⁴⁵ The court found the lawyer had breached the Federal Rules of Civil Procedure, which prohibits the misrepresenting of facts or making frivolous legal arguments.⁴⁶ The lawyer was ordered to pay a \$5,000 fine⁴⁷ and was required to inform their client and the judges whose names were wrongfully used.⁴⁸
- 8.30 A similar issue occurred in a recent Australian matter of *Dayal*,⁴⁹ which cited *Mata v Avianca*. In this case a Victorian solicitor used an AI legal research tool to generate a list and summary of cases that were provided to the court.⁵⁰ The cases were found to be inaccurate hallucinations. The court referred the matter to the Victorian Legal Services Board and Commissioner for their consideration.⁵¹ The court noted that, 'Whilst the use of AI tools offer opportunities for legal practitioners, it also comes with significant risks'.⁵²

Developing guidelines for Victorian court and tribunal users

- 8.31 Guidelines inform court users, including self-represented litigants and legal professionals, how AI should be used in courts and tribunals.
- 8.32 Legal professional bodies will likely play a role in issuing guidelines for the legal profession about using AI. They may include:
- Law Institute of Victoria—developing guidelines for legal professionals about AI risks, opportunities and how it is used across the profession (for example, the Law Society in New South Wales. has developed guidelines for legal professionals)⁵³
 - Victorian Legal Services Board and Commissioner—developing guidelines for legal professionals about professional obligations and AI, and implications for breaching professional obligations.
 - Victorian Bar Association—developing guidelines for barristers about using AI and implications for professional obligations.
- 8.33 We want to hear your views on whether stronger or more comprehensive guidelines are needed to ensure AI is used safely by court users.

41 Law Society of British Columbia, *Guidance on Professional Responsibility and Generative AI* (Practice Resource, October 2023).

42 *Zhang v Chen* [2024] BCSC 285, [35].

43 *Ibid* [43].

44 *Mata v Avianca, Inc* 678 F.Supp.3d 443 (2023).

45 *Ibid*.

46 *Federal Rules of Civil Procedure* 2023 (US) r 11.

47 *Mata v Avianca, Inc* 678 F.Supp.3d 443 (2023), [466].

48 *Ibid*.

49 *Dayal* [2024] FedCFamC2F 1166.

50 *Ibid* [1].

51 *Ibid* [22].

52 *Ibid* [10].

53 The Law Society of NSW, *A Solicitor's Guide to Responsible Use of Artificial Intelligence* (Report, 10 July 2024) <https://www.lawsociety.com.au/sites/default/files/2024-07/LS4527_MKG_ResponsibleAIGuide_2024-07-10.pdf>.

Questions

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

Guidelines for the use of AI by judges, tribunal members and court and tribunal staff

Victorian guidelines

- 8.34 The Supreme and County Courts are the only Victorian courts to have published guidelines concerning AI.⁵⁴ These guidelines mainly provide direction to court users. But they briefly discuss AI for judicial officers:

AI is not presently used for decision making nor used to develop or prepare reasons for decision because it does not engage in a reasoning process nor a process specific to the circumstance before the court.⁵⁵

- 8.35 The guidelines also refer to the Australasian Institute for Judicial Administration's *AI Decision Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators*.⁵⁶ This guide highlights that AI use should be consistent with core judicial values.⁵⁷ It is the first guide to consider in detail the challenges and opportunities created by AI in Australian courts and tribunals. It looks at legislation, case law and policies from around the world. The guide covers AI concepts, uses, benefits and risks. It also identifies core judicial values impacted by AI.

- 8.36 The Commission is not aware of any other internal court-issued guidelines about the use of AI by courts and tribunals in Victoria. We therefore consider below the experience of other jurisdictions and how this may help us to develop guidelines for Victoria's courts and tribunals.

54 Supreme Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Guidelines, Supreme Court of Victoria, 6 May 2024) <<http://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/guideline-responsible-use-of-ai-in-litigation>>; County Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Report, 3 July 2024) <<https://www.countycourt.vic.gov.au/practice-notes>>.

55 Supreme Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Guidelines, Supreme Court of Victoria, 6 May 2024) 4 <<http://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/guideline-responsible-use-of-ai-in-litigation>>; County Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Report, 3 July 2024) 3 <<https://www.countycourt.vic.gov.au/practice-notes>>.

56 Felicity Bell et al, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators* (Report, Australasian Institute of Judicial Administration Incorporated, December 2023) 43.

57 Ibid.

International guidelines

- 8.37 Other countries have developed guidelines, often issued by courts, to assist courts and judicial office holders in the safe use of AI. Examples are set out in Table 9.
- 8.38 These examples assist in considering potential guidelines for Victorian courts and tribunals. The examples vary significantly in the scope of technology and the detail of advice.

Table 9: International guidelines relevant to use of AI in courts

	Guidelines for courts
Canada	<p>Canadian Federal Court—<i>Interim Principles and Guidelines on the Courts' Use of AI</i>⁵⁸</p> <ul style="list-style-type: none"> • Provides principles for the use of AI by the Federal Court: <ul style="list-style-type: none"> - Accountability: The Court will be fully accountable to the public for any potential use of AI in its decision-making function. - Respect of fundamental rights, including the right to a fair hearing before an impartial decision-maker. - Non-discrimination: The Court will ensure that its use of AI does not reproduce or aggravate discrimination. - Accuracy: For processing of judicial decisions and data for purely administrative purposes, the Court will use certified or verified sources and data. - Transparency: The Court will authorise external audits of any AI-assisted data processing methods that it embraces. - Cybersecurity: Data will be managed and stored securely and will protect confidentiality and privacy. - 'Human in the loop': Members of the Court and clerks will verify the results of any AI-generated outputs used in their work. • Public consultation is required before using AI. Further, if a 'specific use of AI by the Court may have an impact on the profession or public, the Court will consult the relevant stakeholders before implement[ion]'.⁵⁹ • Recognises AI's potential to improve efficiency and fairness. • Commits to investigating and piloting potential uses of AI for internal administrative purposes.

<p>England and Wales</p>	<p>Courts and Tribunals Judiciary (England & Wales)—<i>Artificial Intelligence Guidance for Judicial Officers</i>⁶⁰</p> <ul style="list-style-type: none"> • Provides support for the judiciary, their clerks and other support staff on their interactions with AI. • Outlines limitations and risks of AI relating to confidentiality and privacy, accountability and accuracy, bias, security and responsible use of AI by legal professionals and unrepresented litigants.⁶¹ • Provides examples where AI is useful, such as in summarising text, writing presentations or administrative tasks. • AI is not recommended for legal research or analysis.
<p>United States</p>	<p>The Federal Justice Centre—<i>An Introduction to AI for Federal Judges</i>⁶²</p> <ul style="list-style-type: none"> • Provides technical background on AI and highlights potential legal issues arising from the use of AI in courts. • Provides considerations for judges to assist when thinking about the application of AI, including when admitting AI applications into evidence.⁶³ • Notes that AI is iterative and should be tested and validated continuously.⁶⁴ Recognises that behind each AI application are human values and choices, and courts should know who designed the algorithm, metrics used and who validated the data.⁶⁵ • Discusses the importance of judges as evidentiary gatekeepers of AI in courts, including how judges determine whether AI will assist the finder of fact in court, and how the rule of evidence will guide this determination. • Other areas where AI may arise in the courtroom are also discussed, including litigants introducing AI in a variety of civil and criminal contexts including risk assessments.

60 Courts and Tribunals Judiciary (UK), *Artificial Intelligence (AI): Guidance for Judicial Office Holders* (Report, 12 December 2023).
61 Ibid 3-5.
62 James E Baker, Laurie N Hobart and Matthew Mittelsteadt, *An Introduction to Artificial Intelligence for Federal Judges* (Report, Federal Judicial Centre, 2023).
63 Ibid. Notably this document does not mention generative AI or ChatGPT.
64 Ibid 24.
65 Ibid 25-6.

<p>New Zealand</p>	<p>Courts of New Zealand—<i>Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals</i>⁶⁶</p> <ul style="list-style-type: none"> • Outlines key risks and limitations of AI and provides examples of AI use. • Separate guidance for judicial officers and court staff, lawyers and non-lawyers. The guidelines for judges, judicial officers, tribunal members and judicial support staff were developed to assist them in the use of generative AI in their work.⁶⁷ • Any use of generative AI chatbots or other generative AI tools must be consistent with overarching obligation to protect the integrity of the administration of justice and court/tribunal processes.⁶⁸ • Outlines examples where AI may be used, key risks and potential ways to mitigate risks, as well as areas where AI may be useful including summarising information, speech writing and administrative tasks. Tasks requiring extra care include legal research and analysis.⁶⁹
<p>Brazil</p>	<p>National Council of Justice—<i>Resolution No. 332 of 08/21/2020</i></p> <ul style="list-style-type: none"> • Provides direction to the Brazilian judiciary (excluding the Brazilian Supreme Court) on 'ethics, transparency and governance in the production and use of Artificial Intelligence in the Judiciary'.⁷¹ • Establishes principles relating to respect for fundamental rights, such as non-discrimination, equality, security, publicity and transparency, user control, governance and quality. • Information needs to be clear and in precise language about the use of AI in services. • Where AI is used to support a judicial decision, it requires 'steps that led to the result'.⁷² • The National Council of Justice has not explicitly prohibited the use of large language models such as ChatGPT by the judiciary.⁷³ But the use of AI models in criminal matters is not encouraged, especially for predictive decision models.⁷⁴

66 Courts of New Zealand, *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals: Judges, Judicial Officers, Tribunal Members and Judicial Support Staff* (Report, 7 December 2023).

67 Ibid.

68 Ibid 1.

69 Ibid 5–6.

70 Eduardo Villa Coimbra Campos, 'Artificial Intelligence, the Brazilian Judiciary and Some Conundrums' (Web Page, 3 March 2023) <<https://www.sciencespo.fr/public/chaire-numerique/en/2023/03/03/article-artificial-intelligence-the-brazilian-judiciary-and-some-conundrums/>>.

71 'Resolution No. 332 of 08/21/2020', *National Council of Justice (Brazil), Research System for Normative Acts* (Web Page) <<https://atos.cnj.jus.br/atos/detalhar/3429>>.

72 Eduardo Villa Coimbra Campos, 'Artificial Intelligence, the Brazilian Judiciary and Some Conundrums' (Web Page, 3 March 2023) <<https://www.sciencespo.fr/public/chaire-numerique/en/2023/03/03/article-artificial-intelligence-the-brazilian-judiciary-and-some-conundrums/>>.

73 Fábio O Ribeiro, 'ChatGPT May Be Used with Restrictions by Brazilian Judges', *Fábio's Newsletter* (Substack Newsletter, 17 August 2023) <<https://fbio.substack.com/p/chatgpt-may-be-used-with-restrictions>>.

74 Gustavo Mascarenhas Lacerda Pedrina and Tatiana Lourenço Emmerich de Souza, 'Brazilian Report on Traditional Criminal Law Categories and AI' (2019) 5(3) *International Review of Penal Law* 93, 98 <<https://revista.ibraspp.com.br/RBDPP/article/view/265>>.

Developing guidelines for use by courts and tribunals

- 8.39 In this section we consider what could be included in guidelines for courts and tribunals.
- 8.40 We have explored principles fundamental to the administration of justice in Part C. The appropriate use of AI in Victorian courts and tribunals is shaped by perspectives of what we understand is the purpose and function of the law.⁷⁵ Guidelines for courts and tribunals on the use of AI need to be shaped by the core principles of justice.
- 8.41 Public consultation can promote key principles such as accountability and transparency. Some countries, including Canada, have guidelines that require courts and tribunals to undertake consultation with the public and legal professionals before using AI, to promote transparency.⁷⁶
- 8.42 Dedicated guidelines for judicial officeholders could be considered. AI tools may influence judicial practice and create risks for the ethics and principles guiding judicial conduct. For example, the use of predicative analytics tools such as COMPAS could negatively impact the principles of fairness in judicial-decision-making by introducing risks of bias⁷⁷ (as discussed in Part B). Judicial guidelines may include consideration about the principles of justice, including judicial independence, impartiality and procedural fairness. In the United Kingdom, a guide for the judiciary is based on the principles of equality and fairness in the application of AI.⁷⁸
- 8.43 In Australia, existing standards of ethics and conduct for judicial officers are outlined in the *Guide to Judicial Conduct*.⁷⁹ But these are not specific to the application of AI. The Judicial College of Victoria is responsible for ongoing education and professional development for judicial officers. Complaints about the conduct or capacity of a judicial officer or member of VCAT can be made to the Judicial Commission of Victoria.⁸⁰
- 8.44 New or modified guidelines and resources on AI could be developed for judicial office holders. These could be created by the Judicial College of Victoria in collaboration with the Judicial Commission of Victoria.

Questions

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?
29. Are there tools from other jurisdictions you think should be incorporated into guidelines to support Victorian courts and tribunals in their use of AI? If so, what are they?
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?

75 Tania Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge* (Edward Elgar Publishing, 2021) 257–69.

76 Federal Court of Canada, *Interim Principles and Guidelines on the Court's Use of Artificial Intelligence* (Web Page, 20 December 2023) 1 <<https://www.fct-cf.gc.ca/en/pages/law-and-practice/artificial-intelligence>>.

77 Julia Angwin et al. 'Machine Bias', *ProPublica* (online, 23 May 2016) <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>>; Jeff Larson et al. 'How We Analyzed the COMPAS Recidivism Algorithm', *ProPublica* (online, 23 May 2016) <<https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>>.

78 Courts and Tribunals Judiciary (UK), *Artificial Intelligence (AI): Guidance for Judicial Office Holders* (Report, 12 December 2023).

79 Australian Institute of Judicial Administration (AIJA), *Guide to Judicial Conduct, Third Edition (Revised)* (Report, December 2023) <https://aija.org.au/wp-content/uploads/2024/04/Judicial-Conduct-guide_revised-Dec-2023-formatting-edits-applied.pdf> The guide is an Australia-wide resource which provides high-level authoritative guidance on issues of conduct and ethics, including how core judicial values such as impartiality, independence and integrity inform the standards of conduct expected of judicial officers.

80 *Judicial Commission of Victoria Act 2016* (Vic) The Judicial Commission may make guidelines about standards of ethical and professional conduct and practices that should be adopted by judicial officers in the performance of their functions: s134.

Criminal and civil matters

- 8.45 Uses and risks of AI will be different for criminal and civil law. So far, AI guidelines have not distinguished between criminal or civil matters. The guidelines of the Victorian Supreme and County Courts are not specific to criminal or civil matters,⁸¹ and Queensland's guidelines are explicitly stated to apply to both civil and criminal proceedings.⁸²
- 8.46 Differences between criminal and civil matters may be relevant in setting guidelines for the use of AI. In Australia, the standard of proof is different in civil cases and criminal cases. This may be relevant in considering the accuracy of AI evidence, including expert and forensic evidence (see discussion in Parts B and above).
- 8.47 Specific human rights can be impacted by criminal proceedings such as the presumption of innocence and the right to liberty.⁸³ Bail and sentencing decisions in criminal law require judges to make decisions which can deprive an individual of their liberty. As discussed in Part B, there is a growing international trend for courts to rely on predictive AI tools to assist with bail and sentencing decisions. However, there have been cases 'where the use of AI algorithms in predictive policing, risk assessment and sentencing has led to sub-optimal outcomes in the criminal justice system' including where AI systems have incorporated biases or made them worse.⁸⁴

Question

31. Should there be different guidelines or additional considerations for the use of AI in relation to criminal and civil law matters?

An AI assessment framework for courts and tribunals

- 8.48 This review will consider how Victorian courts and tribunals can assess the suitability of new AI applications for use in courts and tribunals.
- 8.49 Other jurisdictions have developed risk assessment frameworks to guide decision-making on the use of a particular AI system. Existing risk assessment frameworks are not legally specific but may offer a helpful approach in Victoria's courts and tribunals.
- 8.50 We want to hear your views on what an AI risk assessment framework for courts and tribunals should include, and what AI uses should be considered high risk. As discussed in Part C, the Australian Government has proposed a set of principles to determine if an AI system is high risk and subject to mandatory 'guardrails'.⁸⁵ If implemented, this will be relevant to Victorian courts and tribunals.

81 Supreme Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Guidelines, Supreme Court of Victoria, 6 May 2024) <<http://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/guideline-responsible-use-of-ai-in-litigation>>; County Court of Victoria, *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (Report, 3 July 2024) <<https://www.countycourt.vic.gov.au/practice-notes>>.

82 Queensland Courts, *The Use of Generative Artificial Intelligence (AI) Guidelines for Responsible Use by Non-Lawyers* (Guidelines, Queensland Courts, 13 May 2024) 1 <<https://www.courts.qld.gov.au/about/news/news233/2024/the-use-of-generative-artificial-intelligence-ai>>.

83 In Victoria there is a right to liberty and security of person and specific rights in criminal proceedings: see *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 21, 25.

84 Miriam Stankovich et al. *Global Toolkit on AI and the Rule of Law for the Judiciary* (Report No CI/DIT/2023/AIRoL/01. UNESCO, 2023) 137 <<https://unesdoc.unesco.org/ark:/48223/pf0000387331>>.

85 Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia: Proposals Paper for Introducing Mandatory Guardrails for AI in High-Risk Settings* (Proposals Paper, September 2024) 19.

New South Wales AI Assessment Framework

- 8.51 The *New South Wales AI Assessment Framework*, while not specific to courts and tribunals, shows how AI risks can be assessed against a range of key principles.⁸⁶ This framework focuses on 'elevated risks' involving:
- systems influencing decisions with legal or similar level consequences, triggering significant actions, operating autonomously, using sensitive data, risking harm, and lacking explainability. All Generative AI solutions should be classified elevated risk.⁸⁷
- 8.52 The framework recognises AI may be used where there are elevated risks but only after alternative options have been considered and using AI will lead to a better outcome. It requires careful evaluation and monitoring for harm across the AI system lifecycle.⁸⁸
- 8.53 Under the framework, risks are classified across five levels:
- None or negligible: Risks and potential consequences are insignificant. For example, grammar and spell checking.
 - Low risk: Risks are reversible with negligible consequences. Potential consequences of risks are minimal and do not cause harms to individuals, organisation or society. For example, document classification and tagging.
 - Mid-range risk: Risks are reversible with moderate consequences. Potential consequences are more noticeable and may have a temporary impact. For example, customer service chatbots.
 - High risk: Risks are reversible with significant consequences. Consequences have a lasting impact on individuals, organisation or entire industries. For example, facial recognition systems.
 - Very high risk: Risks have significant or irreversible consequences. Potential consequences are severe and may have permanent or irreversible implications. For example, autonomous benefits eligibility assessment without human oversight.⁸⁹
- 8.54 Potential harms include individual physical and psychological harms to a person as well as broader harms to the community, such as the erosion of trust and social equality.⁹⁰

86 Digital NSW, *The NSW AI Assessment Framework* (Report, 2024) <<https://arp.nsw.gov.au/assets/ars/attachments/Updated-AI-Assessment-Framework-V3.pdf>>.

87 Ibid 5.

88 Ibid 11.

89 Ibid 18. Note that examples can move between risk levels depending on their specific use.

90 Ibid 28–9.

- 8.55 The framework encourages consideration of benefits, including:
- delivery of better-quality services or outcomes
 - reducing processing times
 - generating efficiencies
 - delivering a new service or outcome
 - enabling future innovation to existing services.⁹¹

International approaches

- 8.56 Some international jurisdictions, including Canada, have adopted risk-based frameworks to assess the use of AI systems by government.⁹²
- 8.57 The Canadian *Algorithmic Impact Assessment Tool* (discussed in Part C) outlines broad areas for assessing risks and impacts.⁹³ This includes the rights of individuals or communities, the health or well-being of individuals or communities, economic interests and the ongoing sustainability of an eco-system.⁹⁴ Risks are distinguished based on reversibility and expected duration. Impact is measured across four levels: little to none, moderate, high and very high.
- 8.58 In the US, the National Institute of Standards and Technology's *AI Risk Assessment Framework* and *Playbook* provides a guide for considering AI risks.⁹⁵ This includes considering the use of the AI system, the AI system's lifecycle, data and inputs, testing the AI model and verifying and validating the model and outputs.⁹⁶ A framework to consider generative AI was also released.⁹⁷
- 8.59 The Council of Europe has developed a legal-specific risk assessment framework.⁹⁸ It contains questions designed for decision makers in judicial institutions to assist in the identification of potential risks of an AI system used by the judiciary.⁹⁹ The risk-based questions are linked to the five key principles for the design and use of AI by the judiciary contained in the *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment*.¹⁰⁰

91 Ibid 23.

92 Treasury Board of Canada Secretariat (TBS), 'Algorithmic Impact Assessment Tool', *Responsible Use of Artificial Intelligence in Government* (Web Page, 30 May 2024) <<https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/algorithmic-impact-assessment.html>>.

93 Ibid.

94 Ibid.

95 National Institute of Standards and Technology (U.S.), *Artificial Intelligence Risk Management Framework (AI RMF 1.0)* (Report No NIST AI 100-1, 26 January 2023) <<http://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf>>; National Institute of Standards and Technology (U.S.), 'NIST AI RMF Playbook', *NIST: Trustworthy & Responsible AI Resource Center* (Web Page) <https://airc.nist.gov/AI_RMF_Knowledge_Base/Playbook>.

96 Ibid.

97 Chloe Autio et al, *Artificial Intelligence Risk Management Framework: Generative Artificial Intelligence Profile* (Report No NIST AI 600-1, National Institute of Standards and Technology (U.S.), July 2024) <<https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.600-1.pdf>>.

98 European Commission for the Efficiency of Justice (CEPEJ), *Assessment Tool for the Operationalisation of the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment* (Report No CEPEJ(2023)16final, Council of Europe, 4 December 2023).

99 Ibid 8–17.

100 European Commission for the Efficiency of Justice (CEPEJ), *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment* (Report, Council of Europe, December 2018) 7–12.

Developing an AI assessment framework for courts and tribunals

8.60 We want to hear your views on what an assessment framework for considering the suitability of new AI systems by Victoria's courts and tribunals might look like.

Questions

32. Should an assessment framework be developed to guide the assessment of the suitability of AI technology in Victorian courts and tribunals?
33. Does the NSW AI Assurance Framework provide a useful model for Victoria's courts and tribunals? Why or why not? What other models or guidelines should be considered?
34. How can risk categories (low, medium and high) be distinguished appropriately? What should be considered high risk?
35. What potential harms and benefits should an AI assessment framework for Victoria's courts and tribunals consider?

Support for effective use of principles and guidelines about AI

114 Overview

114 Governance

115 Education and training

9. Support for effective use of principles and guidelines about AI

Overview

- In this section, we explore the importance of appropriate governance arrangements within courts and tribunals to effectively implement AI principles and/or guidelines.
- Robust and ongoing governance is important to ensure the safe and responsible use of AI by courts and tribunals.
- Judicial independence is important. Embedding governance arrangements within courts would help to maintain judicial independence.

Governance

- 9.1 If guidelines or principles on the safe use of AI in Victoria's courts and tribunals are to be effective, appropriate governance is needed. Governance may include a person or people within an organisation with responsibility and accountability to implement principles, guidelines, monitor use and oversee risk mitigation.
- 9.2 Governance arrangements should be ongoing. This will ensure appropriate and continual monitoring of AI applications in courts and tribunals. Principles and guidelines need to be monitored and revised as new technology emerges. This is particularly important if mandatory 'guardrails' proposed by the Australian Government are implemented.¹
- 9.3 Governance is necessary to implement and manage the safe use of AI systems over the AI lifecycle. The ongoing management of AI systems is complex, as outlined in international standards,² which require appropriate procurement, periodic risk assessment and contract management.
- 9.4 The independence of courts is central to governance. If governments or external bodies have oversight of AI tools, it could unduly impact the independence of courts. Tania Sourdin has described judicial officers as 'guardians' of the justice system and emphasised their role in guiding its design.³ Embedding robust governance arrangements within courts would help to maintain judicial independence.
- 9.5 In some jurisdictions the judiciary has led the development of guidelines about AI in courts and tribunals. In New Zealand, the Office of the Chief Justice led development of the *Digital Strategy for Courts and Tribunals*.⁴ The strategy outlines a governance

1 Department of Industry, Science and Resources (Cth), *Safe and Responsible AI in Australia: Proposals Paper for Introducing Mandatory Guardrails for AI in High-Risk Settings* (Proposals Paper, September 2024) 2, 4.

2 Standards Australia Limited, 'AS ISO/IEC 42001:2023 Information Technology - Artificial Intelligence - Management System' <<https://www.standards.org.au/standards-catalogue/standard-details?designation-as-iso-iec-42001-2023>>; National Institute of Standards and Technology (U.S.), *Artificial Intelligence Risk Management Framework (AI RMF 1.0)* (Report No NIST AI 100-1, 26 January 2023) <<http://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf>>.

3 Tania Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge* (Edward Elgar Publishing, 2021) 206.

4 Office of the Chief Justice of New Zealand, *Digital Strategy for Courts and Tribunals* (Report, Courts of New Zealand, March 2023) <<https://www.courtsofnz.govt.nz/assets/7-Publications/2-Reports/20230329-Digital-Strategy-Report.pdf>>.

framework focused on periodic review by the Heads of Bench.⁵ In Singapore, the Supreme Court established the Court of the Future Taskforce which has led to the strategic implementation of automation and AI initiatives since 2017.⁶

- 9.6 Some Victorian courts and tribunals already have AI advisory groups, which may provide the basis for governance. If governance arrangements were applied across the Victorian court system, frameworks could be applied consistently. This would allow rule changes to be considered as a whole and for lessons to be shared across courts and tribunals. A coordinated approach would also assist in greater interoperability of AI systems across Victorian courts and jurisdictions.
- 9.7 An appropriate governance approach would need to be coordinated by organisations across the Victorian courts and tribunal system. We are interested in whether bodies such as the following have adequate organisational structures and capabilities and their potential role in the governance of AI in courts and tribunals:
- Court Services Victoria—provides services and facilities to Victoria’s courts, Victorian Civil and Administrative Tribunal, the Judicial College of Victoria and the Judicial Commission of Victoria.
 - Courts Council—the governing body of Court Services Victoria includes the head of each Victorian court jurisdiction, and has responsibility for directing strategy, governance and risk management.
 - Judicial College of Victoria—provides education and professional development to the Victorian judiciary.
 - Judicial Commission of Victoria—sets ethical standards for judicial officers and investigates complaints against judicial officers.

Questions

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?

Education and training

- 9.8 Education is important in raising awareness of guidelines and regulatory responses. The novelty and complexity of AI suggests that court staff and administrators, counsel and judicial decision makers, and the legal profession generally need extensive and ongoing education.
- 9.9 Education will be significant in developing a safe approach to the use of AI in courts and tribunals and to meet the complexity and range of issues they face into the future.

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6

Ibid 32.
Supreme Court Singapore, *A Future-Ready Judiciary: Supreme Court Annual Report 2017* (Report, 2017) 4 <<https://www.judiciary.gov.sg/news-and-resources/publications/publication-details/intranet.judiciary.gov.sg/news-and-resources/publications/publication-details/supreme-court-annual-report-2017>>.

- 9.10 The Judicial College of Victoria could be given responsibility to develop and coordinate educational programs and materials for courts and tribunals:
- understanding AI technologies and terminology, including basic AI concepts
 - awareness of how AI is currently used in courts and the legal profession
 - outlining the risks and limitations of AI
 - opportunities for using AI responsibly, and sharing best practice
 - legal, regulatory or professional obligations.
- 9.11 The responsibility for the profession more broadly requires a coordinated approach. This could include education and training by various professional bodies such as the Law Institute of Victoria, the Victorian Legal Services Board and Commissioner, the Victorian Bar and the Judicial College of Victoria.
- 9.12 There may also be opportunities to integrate AI education into the regulation and professional development requirements of legal practitioners.

Questions

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?

Appendix

Appendix: Examples of international principles

<p>Australia's AI Ethics Principles¹</p>	<ul style="list-style-type: none"> • Human, societal and environmental wellbeing • Human-centred values: respect human rights, diversity, autonomy • Fairness: inclusive and accessible, avoid discrimination • Privacy, protection and security • Reliability and safety • Transparency and explainability and responsible disclosure • Contestability: process to challenge outcomes • Accountability and human oversight
<p>Ethics guidelines, European Commission² (referred to by EU AI Act³)</p>	<ul style="list-style-type: none"> • Human agency and oversight • Technical robustness and safety • Privacy and data governance • Transparency • Diversity, non-discrimination and fairness • Societal and environmental well-being • Accountability
<p>OECD Principles on AI development⁴</p>	<ul style="list-style-type: none"> • Inclusive growth, sustainable development and well-being • Respect for rule of law, human rights and democratic values, including fairness and privacy • Transparency and explainability • Robustness, security and safety • Accountability <p>The principles have informed other guidance e.g. Scotland's AI Strategy.⁵ Over 47 countries are adherents to the OECD's principles on AI.⁶</p>

1 Australian Government, 'Australia's AI Ethics Principles - Australia's Artificial Intelligence Ethics Framework', *Department of Industry, Science and Resources* (Web Page, 5 October 2022) <<https://www.industry.gov.au/publications/australias-artificial-intelligence-ethics-framework/australias-ai-ethics-principles>>.

2 High-Level Expert Group on Artificial Intelligence (AI HLEG), *Ethics Guidelines for Trustworthy AI: Shaping Europe's Digital Future* (Guidelines, European Commission, 8 April 2019) 14 <<https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>>.

3 *Regulation (EU) 2024/1689 (Artificial Intelligence Act)* [2024] OJ L 2024/1689, Recital (27).

4 OECD, *Recommendation of the Council on Artificial Intelligence* (Report No OECD/LEGAL/0449, 2024).

5 Digital Scotland, *Scotland's Artificial Intelligence Strategy: Trustworthy, Ethical and Inclusive* (Report, March 2021) <<https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2021/03/scotlands-ai-strategy-trustworthy-ethical-inclusive/documents/scotlands-artificial-intelligence-strategy-trustworthy-ethical-inclusive/scotlands-artificial-intelligence-strategy-trustworthy-ethical-inclusive/govscot%3Adocument/scotlands-artificial-intelligence-strategy-trustworthy-ethical-inclusive.pdf>>.

6 'OECD Updates AI Principles to Stay Abreast of Rapid Technological Developments', *OECD* (Web Page, 3 May 2024) <<https://www.oecd.org/en/about/news/press-releases/2024/05/oecd-updates-ai-principles-to-stay-abreast-of-rapid-technological-developments.html>>.

Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law ⁷	<ul style="list-style-type: none"> • Human dignity and individual autonomy • Transparency and oversight • Accountability and responsibility • Equality and non-discrimination • Privacy and personal data protection • Reliability • Safe innovation, fostering innovation while avoiding adverse impacts on human rights, democracy and the rule of law.
UNESCO – recommendation on the ethics of AI ⁸	<ul style="list-style-type: none"> • Proportionality and do no harm • Safety and security • Fairness and non-discrimination • Sustainability • Right to privacy and data protection • Human oversight and determination • Transparency and explainability • Responsibility and accountability • Awareness and literacy • Multi-stakeholder and adaptive governance and collaboration
UK AI Framework ⁹	<ul style="list-style-type: none"> • Safety, security and robustness • Appropriate transparency and explainability • Fairness • Accountability and governance • Contestability and redress
Canada's Artificial Intelligence and Data Bill ¹⁰	<ul style="list-style-type: none"> • Human oversight and monitoring • Transparency • Fairness and equity • Safety • Accountability • Validity and robustness

7 Council of Europe, *Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law*, opened for signature 5 September 2024, CETS 225 - Artificial Intelligence, <<https://www.coe.int/en/web/artificial-intelligence/the-framework-convention-on-artificial-intelligence>>

8 UNESCO, *Recommendation on the Ethics of Artificial Intelligence* (No SHS/BIO/PI/2021/1, 2022) <<https://unesdoc.unesco.org/ark:/48223/pf0000381137>>.

9 Department for Science, Innovation and Technology (UK), *A Pro-Innovation Approach to AI Regulation* (Report No CP 815, March 2023).

10 Government of Canada, *The Artificial Intelligence and Data Act (AIDA) – Companion Document* (Web Page, 13 March 2023) <<https://ised-isde.canada.ca/site/innovation-better-canada/en/artificial-intelligence-and-data-act-aida-companion-document>>.

<p>United States Executive Order: New Standards for AI Safety and Security¹¹</p>	<ul style="list-style-type: none"> • Safe and secure • Responsible innovation, competition and collaboration • Responsible development and commitment to support American workers • AI policies must be consistent with advancing equity and civil rights • Protection of user interests, including consumer protection, and safeguards against fraud, bias, discrimination, privacy • Protection of privacy and civil liberties including secure data collection and storage • Build government capacity to regulate, govern and support AI use • Government should be a leader to technological progress
<p>Trustworthy AI in Aotearoa – AI Principles¹²</p>	<ul style="list-style-type: none"> • Fairness and justice • Reliability, security and privacy • Transparency • Human oversight and accountability • Wellbeing
<p>Brazil's National Strategy for Artificial Intelligence (EBIA)¹³</p>	<ul style="list-style-type: none"> • Inclusive growth • Sustainable development and well-being • Human-centred values and fairness • Transparency and explainability • Robustness, security and safety • Accountability. <p>In May 2023, the Brazilian Government introduced a Bill for a proposed regulatory approach to AI, containing the following principles:¹⁴</p> <ul style="list-style-type: none"> • Reliability and robustness; transparency • Explainability, intelligibility and auditability • Accountability, responsibility and full reparation for damage; non-maleficence (to do no harm) • Human participation • Non-discrimination, justice, equity and inclusion • Inclusive growth and sustainable development • Due process of law and contestability • Prevention, precaution and mitigation of systemic risks.

11 President of the United States of America, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* (Executive Order No 14110, 30 October 2023).

12 AI Forum New Zealand, *Trustworthy AI in Aotearoa: AI Principles* (Report, March 2020) <<https://aiforum.org.nz/wp-content/uploads/2020/03/Trustworthy-AI-in-Aotearoa-March-2020.pdf>>.

13 Ministry of Science, Technology, and Innovations (MCTI), 'Brazilian AI Strategy', *OECD AI Policy Observatory* (Web Page, 7 September 2022) <<https://oecd.ai/en/dashboards/policy-initiatives/http:%2F%2Faiipo.oecd.org%2F2021-data-policyInitiatives-27104>>.

14 Bruno Bioni, Marina Garrote and Paula Guedes, *Key Themes in AI Regulation: The Local, Regional and Global in the Pursuit of Regulatory Interoperability* (Report, Data Privacy Brazil Research Association, 2023).

<p>Japan's Social Principles of Human-Centric AI¹⁵</p>	<ul style="list-style-type: none"> • Human-centric • Education/literacy • Privacy protection • Ensuring security • Fair competition • Fairness, accountability, and transparency • Innovation <p>These are underpinned by three core societal values:</p> <ul style="list-style-type: none"> • Dignity • Diversity and inclusion • Sustainability
<p>South Korea Human Rights Guidelines on Development and Utilisation of AI¹⁶</p>	<p>Basic principles:</p> <ul style="list-style-type: none"> • Respect for human dignity • Common good of society • Proper use of technology <p>Key requirements:</p> <ul style="list-style-type: none"> • Safeguarding human rights • Protection of privacy • Respect for diversity • Public good • Solidarity • Data management • Accountability • Safety • Transparency
<p>Singapore - AI Verify's AI Governance and Testing Framework and Tool Kit.¹⁷</p>	<ul style="list-style-type: none"> • Transparency • Explainability • Repeatability/Reproducibility • Safety • Security • Robustness • Fairness • Data governance • Accountability • Human agency and oversight • Inclusive growth, societal and environmental well-being

15 Cabinet Secretariat of Japan, *Social Principles of Human-Centric AI* (Report, Government of Japan, 2019) <<https://www.cas.go.jp/jp/seisaku/jinkouchinou/pdf/humancentricai.pdf>>.

16 Korea Information Society Development Institute, 'The National Guidelines for AI Ethics', *AI Ethics Communications Channel* (Web Page, 2021) <<https://ai.kisdi.re.kr/eng/main/contents.do?menuNo=500011>>.

17 Verify Foundation and Infocomm Media Development Authority, *Model AI Governance Framework for Generative AI* (Report, 30 May 2024) <<https://aiverifyfoundation.sg/wp-content/uploads/2024/05/Model-AI-Governance-Framework-for-Generative-AI-May-2024-1-1.pdf>> Note AI Verify is a not-for profit foundation, which sits under the Infocomm Media Development Authority of Singapore..

South Africa National AI Policy Framework ¹⁸	<p>Strategic pillars</p> <ul style="list-style-type: none">• Talent development /Capacity development• Digital infrastructure• Research, development and innovation• Public sector implementation• Ethical AI guideline development• Privacy and data protection• Safety and security• Transparency and explainability• Fairness and mitigating bias
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Department of Communications and Digital Technologies, *South Africa National Artificial Intelligence (AI) Policy Framework 2024* (Report, August 2024) <<https://www.policyvault.africa/policy/south-africa-national-artificial-intelligence-ai-policy-framework-2024/>>.

Artificial Intelligence in Victoria's Courts and Tribunals

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