Artificial Intelligence Work Group Project

Australia

Lesley Sutton, Partner, Gilbert + Tobin, Sydney

Caryn Sandler, Partner, Gilbert + Tobin, Sydney

Jen Bradley, Special Counsel, Gilbert + Tobin, Sydney

Sophie Bogard, Lawyer, Gilbert + Tobin, Sydney

Nicholas Mendoza-Jones, Gilbert + Tobin, Sydney

1. What is the understanding or definition of AI in your jurisdiction?

There is no legal definition for artificial intelligence (AI) in Australia. Although some Commonwealth legislation explicitly refers to the use of technology or computer programs in order to permit the use of AI under that legislation,[65] no piece of Commonwealth, state or territory legislation[66] uses or defines the term 'artificial intelligence'.

The Australian Government's most recent discussion paper relating to AI regulation, *Safe and responsible AI in Australia*, proposes the following definition for AI:

> 'An engineered system that generates predictive outputs such as content, forecasts, recommendations or decisions for a given set of human-defined objectives or parameters without explicit programming. AI systems are designed to operate with varying levels of automation.'[67]

The definition goes on to distinguish between machine learning and generative AI models.

---

65 There are several examples of Commonwealth legislation specifically permitting administrative decisions to be made by computers, with these decisions deemed to have been made by the department official. Examples include the Social Security Administration) Act 1999 (Cth) s 6A, Migration Act 1958 (Cth) s 495A and Veterans' Entitlements Act 1986 (Cth) s 4B.

66 Australia has a federal system of government, with law-making powers divided between the Commonwealth (the federal, national government) and each state and territory.

67 *Safe and responsible AI in Australia – Discussion Paper* (Australian Department of Industry, Science and Resources, June 2023), https://storage.googleapis.com/converlens-au-industry/industry/p/prj2452c8e24d7a400c72429/public_assets/Safe-and-responsible-AI-in-Australia-discussion-paper.pdf accessed 29 May 2024.

The definition has been adopted in other discourse, including by Australia's eSafety Commissioner, in its *Tech Trends Position Statement on Generative AI*.[68] However, the definition has not yet been adopted uniformly across government, and there is more than one definition in use in legal policy and reform discussions on AI in Australia. For example, the previous working definition for AI was developed by the Commonwealth Scientific and Industrial Research Organisation (CSIRO) and adopted by the Australian Government in its AI Action Plan[69] (which set out a framework for Australia's vision for AI). It defined AI as:

> 'A collection of interrelated technologies used to solve problems autonomously, and perform tasks to achieve defined objectives, in some cases without explicit guidance from a human being.'[70]

Other national bodies have preferred to adopt internationally recognised definitions. For example, the Australian Human Rights Commission (AHRC) refers to the definition for AI developed by the Organisation for Economic Co-operation and Development (OECD) Group of Experts in its *Final Report on Human Rights and Technology* (the 'Final Report').[71] The OECD definition (which has been updated since the publication of the Final Report) for an AI system 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.'[72]

The above OECD definition has also been adopted by the International Organisation for Standardisation and endorsed by Australia's member body, Standards Australia.[73]

This lack of consistency in a legal and policy context in Australia in adopting definitions for AI and AI systems is also characteristic of evolving industry practice in Australia. Across the market, there is a spectrum of use cases for the term 'AI system', with one end of the spectrum referring to systems that use less

---

68 'Tech Trends Position Statement – Generative AI' (eSafety Commissioner, 15 August 2023), www.esafety.gov.au/sites/default/files/2023-08/Generative%20AI%20-%20Position%20Statement%20-%20August%202023%20.pdf accessed 29 May 2024.

69 *Australia's AI Action Plan* (Department of Industry, Science, Energy and Resources, June 2021), https://webarchive.nla.gov.au/awa/20220816053410/https://www.industry.gov.au/data-and-publications/australias-artificial-intelligence-action-plan accessed 30 May 2024.

70 S A Hajkowicz, S. Karimi, T Wark, C Chen, M Evans, N Rens, D Dawson, A Charlton, T Brennan, C Moffatt, S Srikumar and K J Tong, 'Artificial Intelligence: Solving problems, growing the economy and improving our quality of life' (CSIRO Data61 and the Department of Industry, Innovation and Science, Australian Government, 2019), p 2.

71 *Human Rights and Technology: Final Report* (Australian Human Rights Commission, 2021), https://humanrights.gov.au/our-work/technology-and-human-rights/publications/final-report-human-rights-and-technology, p 17, accessed 19 May 2024.

72 'OECD AI Principles Overview' (OECD, AI Policy Observatory), https://oecd.ai/en/ai-principles.

73 ISO/IEC 22982:2002 Information Technology – Artificial Intelligence – Artificial Intelligence Concepts and Terminology. As identically adopted by Standards Australia under AS ISO/IEC 22989:2023 Information Technology – Artificial Intelligence – Artificial Intelligence concepts and terminology.

sophisticated technology, such as systems which perform primarily document or workflow automation functions using decision logic. In these contexts, the use of the term 'AI' or 'AI system' is a more expansive or generous use of the term than that adopted by other market players and technical AI experts, who would consider a system to be an 'AI system' only where that system was performing a more sophisticated human-like function using AI concepts such as natural language processing and machine learning algorithms, beyond basic decision logic.

2. In your jurisdiction, besides legal tech tools (ie, law firm or claim management, data platforms, etc), are there already actual AI tools or use cases in practice for legal services?

Since the public release of ChatGPT in November 2022, Generative AI ('GenAI') has rapidly evolved to becoming considered a business-critical technology in Australia. The proliferation of GenAI applications, and the increasing capability of the large language models (LLMs) that underpin them, mirrors the ever-increasing interest and usage of GenAI across both public and enterprise domains.

By early 2024, reportedly 50 to 66 per cent of Australian lawyers were utilising GenAI tools for professional purposes.[74] While it is likely the majority of these users are leveraging 'generalist' tools such as ChatGPT and Microsoft Copilot, it is likely lawyers will increasingly use these generalist GenAI tools together with adopting new, legal-specific GenAI tools and functionality.

From transactional AI tools to legal AI assistants and enhanced productivity

Before the arrival of GenAI capability, AI tools for legal services were typically focused in the Australian market on due diligence processes or contract reviews. Until recently, the transactional AI products most commonly used in the Australian market included Kira and Luminance.[75] These transactional AI tools were trained on a set of documents (either public or private clause banks), whereby certain clauses of a contract are tagged, curated and maintained. This training model helps the tool automatically classify documents by type, identify relevant clauses and potential risks (eg, due to the absence of a particular clause, or due to a significant variation identified in a particular type of clause), and extract clauses in a table where a user may compare all similar clauses side by side.

While these transactional AI products remain in the market, the arrival of GenAI has expanded the capability for AI to assist with a broader spectrum of legal tasks.

74 'Generative AI and the future of the legal profession – 2023-2024 ANZ AI Sentiment Survey Findings' (London: LexisNexis, 2024), p 5; Sarah Mateljan, '2/3 Australian lawyers are using ChatGPT for legal work' *Lawyers Weekly* (28 March 2024), www.lawyersweekly.com.au/biglaw/39363-2-3-australian-lawyers-are-using-chatgpt-for-legal-work accessed 30 May 2024.

75 We note Luminance has also developed GenAI capability, including its end-to-end contract negotiation tool Luminance Autopilot (currently in Beta). J Goodman, 'Generative AI – one year on' *The Law Society Gazette* (1 December 2023), www.lawgazette.co.uk/features/generative-ai-one-year-on/5118084.article accessed 30 May 2024.

In addition to document review and extracting key data/contract information, new GenAI tools with a focus on the legal industry leverage LLM capabilities and legal-specific training[76] to perform a range of 'legal AI assistant' tasks:

- creating first drafts of documents and correspondence;
- analysing and editing contracts;
- searching databases; and
- summarising document(s).

Products being used in the Australian market include CoCounsel,[77] Lexis+ AI, Harvey, Spellbook and Robin AI. Such tools have only recently come to the Australian market, with larger law firms typically leading the adoption, experimentation and live matter usage (for now).

In addition to these new GenAI tools, a range of existing legal technologies already present in the Australian legal market have augmented their tools with GenAI functionality, enhancing the productivity uplift already being delivered to lawyers. For example:

1. Workflow automation platforms such as Checkbox and Josef have added GenAI capability to their chatbot/Q&A tools (named AI Chatbot Assistant and Josef Q, respectively), allowing users to submit legal queries that are answered using an organisation's underlying policies and playbooks.

2. Document management systems including NetDocuments (via its PatternBuilder MAX suite) and iManage (in development) are adding GenAI capabilities to their platforms to enable enhanced information retrieval, management and analysis.

3. Contract Lifecycle Management platforms such as Ironclad, ContractPodAi, Juro and Henchman are now integrating GenAI to assist contract review, negotiation, redlining, analysis and data extraction.

Litigation

AI has been in use in Australia in various forms for large scale document review for the past ten to 15 years.

76 See Question 6 for more detail.

77 Thomson Reuters acquired Casetext Inc in August 2023 for US$650 million, including its flagship GenAI tool CoCounsel. See 'Thomson Reuters Completes Acquisition of Casetext Inc' (Thomson Reuters, 17 August 2023), www.thomsonreuters.com/en/press-releases/2023/august/thomson-reuters-completes-acquisition-of-casetext-inc.html accessed 30 May 2024.

Litigation AI tools are often used in very large matters where millions of documents (and many types of file formats, such as emails) may need be reviewed, for example, to assess which specific documents among a larger group may need to be produced to a court in connection with legal proceedings, or to a regulator in connection with a regulatory investigation. Generally, these 'eDiscovery' AI tools are used to predict the relevance or responsiveness of documents to a certain production request. They are therefore trained for a bespoke project based on training provided by lawyers coding an initial set of documents.

The eDiscovery tools most commonly used in the Australian market include Nuix (previously Ringtail), Relativity and Reveal. Relativity and Reveal have both added GenAI capabilities to their solutions, named aiR and Ask, respectively.[78]

Legal research

Online legal research solutions are evolving with ever-increasing sophistication, and the most significant recent development has been the integration of GenAI. Two key products in the Australian market will be Lexis+ AI by LexisNexis[79] and Westlaw by Thomson Reuters.[80]

These platforms will combine GenAI functionality with their respective legal content repositories, meaning lawyers can ask conversational research questions and receive curated responses with citations. For example, Lexis+ AI spans 1.23 million documents in seconds and is 'anticipated to save Australian lawyers an average of 11 hours per week across research, drafting, client communications, and case summarisation activity'.[81]

Knowledge management

Knowledge management (KM) AI tools have emerged in legal practice in Australia (primarily used within law firms, rather than by in-house counsel). Categories of KM tools in use in Australia include:

---

78 C Coyer, 'Relativity Announces Upcoming Gen AI "Relativity aiR" Products, RelativityOne Updates' (*Law.com*, 29 January 2024), www.law.com/legaltechnews/2024/01/29/relativity-announces-upcoming-gen-ai-relativity-air-products-relativityone-updates/ accessed 30 May 2024; 'Reveal Launches "Ask": A Game-Changing Generative AI Tool for the Legal Sector' (*AIM Research*, 11 January 2024), https://aimresearch.co/generative-ai/reveal-launches-ask-a-game-changing-generative-ai-tool-for-the-legal-sector accessed 30 May 2024.

79 At the time of writing, Lexis AI+ is currently in commercial preview, with a full market release expected in 2024.

80 At the time of writing, Westlaw's GenAI-assisted research product has been launched within Westlaw Precision for the US and within Westlaw Edge for the UK.

81 'LexisNexis unveils the most comprehensive legal generative AI solution in the world – Australian commercial preview' (LexisNexis, 7 February 2024), www.lexisnexis.com.au/en/insights-and-analysis/media-release/2024/lexisnexis-unveils-the-most-comprehensive-legal-generative-ai-solution-in-the-world-australian-commercial-preview accessed 29 May 2024.

- AI enterprise search solutions that allow for unified searching across multiple systems/repositories of both structured and unstructured data in an organisation; and

- AI tools that assist providing contemporaneous clause/drafting recommendations to lawyers based on existing data available to the firm.

While there is significant potential for these kinds of KM AI tools, in order for them to be useful there must be precision of data. This presents a challenge for most legal practice contexts, where data is not often consistently captured. Without clean, structured data, the capability and potential of these kinds of tools is significantly hampered. As a result, while there has been a slow uptake by Australian organisations in using these tools, there has not been significant progression or infiltration of these tools in the market. It will be interesting to observe whether the above obstacles can be overcome by KM AI tool providers uplifting their products with GenAI functionality (for example, in 2023 DraftWise incorporated GenAI into its product).[82]

3. If yes, are these AI tools different regarding:
• independent law firms;
• international law firms; and
• in-house counsel;
and what are these differences?

Typically, the underlying AI tools will be technically similar regardless of whether the 'customer' is a law firm or in-house counsel.[83] In each case, the AI tool will essentially be performing the same task (whether that is data extraction and labelling, summarising key terms from a contract set, creating a chronology from a correspondence dataset, etc). The main distinction is between AI tools that are tailored to, or better assist, the work performed by law firms and the work performed by in-house teams. For example, law firms will primarily make use of the AI tools for large-scale document reviews, while in-house teams are more likely to embrace AI tools in the context of matter intake/management and contract lifecycle management.

For tools that can be leveraged by both law firms and in-house teams, the user interface and specific use case for these AI tools may be distinct depending on the user and workflow process. For example, whereas law firms may use transactional AI tools to conduct a due diligence contract review for a client's transaction to

82 'Legal Tech Startup DraftWise Brings Secure Generative AI to Law Firm Intelligence' (*accesswire.com*, 6 June 2023), www.accesswire.com/759324/legal-tech-startup-draftwise-brings-secure-generative-ai-to-law-firm-intelligence accessed 30 May 2024.

83 We note that we have observed no distinction between the use cases for AI tools in independent law firms compared to international law firms and have considered these two categories as a combined category for the purpose of our response.

identify key provisions in material contracts, an in-house team may use the same AI tool to perform contract lifecycle management, applying the AI tool to identify upcoming termination dates to input into a contract management system. Larger in-house teams may also use these AI tools to expedite and improve their review of largely standardised contracts. For example, some larger Australian and international in-house teams use AI tools to identify whether the clauses of a contract align with the current protocols or standard positions adopted in their organisation. While this application of AI in an in-house context remains in its infancy, it may be bolstered by the increasing number of GenAI tools coming to market.

Lastly, law firms typically have greater resources to invest in AI tools compared with in-house legal teams, in addition to access to significant volumes of diverse data, often stored in enterprise-wide document management systems. The particular challenge facing law firms is how to structure the vast quantities of data that they hold to maximise the potential of their AI tools (including both specialty legal AI tools and enterprise AI capability such as Microsoft Copilot). By comparison, in-house teams typically did not have the resources to invest in speciality legal AI tools but are now able to leverage GenAI within enterprise technology (eg, Microsoft Copilot) and/or as new functionality integrated into existing platforms (such as contract lifecycle management).

4. What is the current or planned regulatory approach on AI in general?

Australia has signalled a risk-based approach to regulating AI.[84] In its interim response to its discussion paper on supporting safe and responsible AI ('Interim Response'), the Australian government indicated that it is currently evaluating approaches to the regulation of AI,[85] including:

- the creation of a voluntary 'AI Safety Standard' to assist industry (largely the private sector) to implement safe and responsible AI through practical guidance;
- a consideration of further guardrails and safeguards for the design, development, deployment and use of AI in 'high-risk' contexts and in frontier or general-purpose AI-models, where the risks of harm may be likely, significant and difficult to reverse. This consideration includes how 'high risk' contexts might be defined, whether the guardrails and safeguards would be mandatory or voluntary, and how they would be implemented (for example, whether through adapting existing laws or through new specific legislation); and

84 *Safe and responsible AI in Australia Consultation – Australian Government's interim response* (Department of Industry, Science and Resources, 17 January 2024), https://consult.industry.gov.au/supporting-responsible-ai accessed 30 May 2024.

85 *Safe and responsible AI in Australia Consultation – Australian Government's interim response* (Department of Industry, Science and Resources, 17 January 2024).

- options for voluntary labelling or watermarking of AI generated material in 'high-risk' settings.

The Australian Government's wider reform agenda includes reforming existing areas of law that are impacted by AI, in particular online safety reform and privacy reform (discussed in greater detail in the following section), and international cooperation, consistent with Australia's commitments under the Bletchley Declaration,86 and as part of the Global Partnership on AI.

Australia also has a set of voluntary principles (the 'AI Ethics Principles'), which may be used by business or government when designing, developing, integrating or using AI systems.[87] As the principles are voluntary, there is no requirement that government or businesses must consider or comply with the principles in respect of any proposed use or development of AI.

5. What are the current or planned regulations on the general use of AI or machine learning systems?

As noted above, the Australian Government is currently developing a voluntary AI Safety Standard and considering what guardrails and safeguards may be further needed for the design, development, deployment and use of AI in 'high-risk' contexts. In addition, there are existing legal regimes (eg, privacy) that have an impact on the use of AI.

In September 2023, the Australian eSafety Commissioner registered an industry code[88] (the 'Search Code'), under the Online Safety Act 2021 (Cth) (OSA). From 12 March 2024, the Search Code has imposed mandatory online safety obligations on providers of search engines (such as Google and Bing), including express contemplation of how GenAI is integrated into such services. The Search Code requires applicable services to take steps to reduce end-user risk concerning materials generated by AI, including by researching detection technologies capable of assisting end-users to identify deepfake images on the service, ensuring that AI-generated results do not contain child sexual exploitation material and ensuring that end users are aware when they are interacting with GenAI features. A wider statutory review of the OSA is also currently underway to ensure that the harms of GenAI are accounted for in legislation.[89]

---

86 'The Bletchley Declaration by Countries Attending the AI Safety Summit' (Policy Paper, November 2023).

87 *AI Ethics Principles* (Department of Industry, Science, Energy and Resources), www.industry.gov.au/data-and-publications/building-australias-artificial-intelligence-capability/ai-ethics-framework/ai-ethics-principles accessed 15 May 2024.

88 'Internet Search Engine Services Online Safety Code (Class 1A and Class 1B Material)' (*onlinesafety.org.au*, September 2023), https://onlinesafety.org.au/wp-content/uploads/2023/09/230912_6_Seach-Schedule_REGISTERED-120923.pdf accessed 16 May 2024.

89 *Terms of Reference – Statutory Review of the Online Safety Act* (Department of Infrastructure, Transport, Regional Development, Communications and the Arts, February 2024), www.infrastructure.gov.au/sites/default/files/documents/tor-statutory-review-online-safety-act-2021-8Feb.pdf accessed 30 May 2024.

The Australian Government has agreed to implement a number of proposals from the Privacy Act Review Report[90] that touch on the development, deployment and use of AI. For example, entities subject to the Privacy Act 1988 (Cth) that collect, use or disclose personal information for the purposes of substantially automated decision making with legal or similarly significant effects on an individual, will be subject to mandated transparency requirements,[91] as well as meeting explainability principles.[92] Furthermore, entities that use facial recognition technology and other uses of biometric information with AI systems will be required to conduct enhanced risk assessments as part of privacy impact assessments[93] (among other matters).

Other reform processes include developing a regulatory framework for automated vehicles,[94] and consultation on the implications of AI on intellectual property law.[95]

A number of government and organisational bodies are also producing guidance to assist government and industry. The Australian Signals Directorate has released guidance for organisations on threats related to AI systems (such as data poisoning, input manipulation attacks and model stealing), prompts to consider and steps to engage with AI while managing risk,[96] and guidelines for secure AI systems development.[97] The Digital Platform Regulators Forum (composed of the ACCC, ACMA, eSafety Commissioner and OAIC) has developed guidance on harms and threats of algorithms in digital platform technologies, particularly when used in content moderation, recommender systems and targeted advertising[98] and on large language models.[99] The eSafety Commissioner has also released a position statement on GenAI.[100]

---

90 *Government Response – Privacy Act Review Report* (Attorney-General's Department, 2023), www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF accessed 30 May 2024. The next step for the 'agreed' proposals is for them to be implemented in draft legislation.

91 *Government Response – Privacy Act Review Report* (Attorney-General's Department, 2023), Proposal 19.1.

92 *Government Response – Privacy Act Review Report* (Attorney-General's Department, 2023), Proposal 19.3.

93 *Government Response – Privacy Act Review Report* (Attorney-General's Department, 2023), Proposal 13.2.

94 *Automated vehicles* (Department of Infrastructure, Transport, Regional Development, Communication and the Arts, 21 February 2024), www.infrastructure.gov.au/infrastructure-transport-vehicles/transport-strategy-policy/office-future-transport-technology/automated-vehicles accessed 30 May 2024.

95 *Copyright and AI reference group to be established* (Attorney-General's Department, 5 December 2023), https://ministers.ag.gov.au/media-centre/copyright-and-ai-reference-group-be-established-05-12-2023 accessed 30 May 2024.

96 'Engaging with Artificial Intelligence (AI)' (Australian Cyber Security Centre, Australian Signals Directorate, 24 January 2024), www.cyber.gov.au/resources-business-and-government/governance-and-user-education/governance/engaging-with-artificial-intelligence accessed 30 May 2024.

97 'Guidelines for secure AI system development' (UK National Cyber Security Centre (NCSC) and the US Cybersecurity and Infrastructure Security Agency (CISA), 27 November 2023), www.cyber.gov.au/about-us/view-all-content/advice-and-guidance/guidelines-secure-ai-system-development accessed 30 May 2024.

98 'Literature summary: Harms and risks of algorithms' (Digital Platforms Regulators Forum, 29 June 2023).

99 'Examination of technology: Large Language Models' (Digital Platforms Regulators Forum, 25 October 2023).

100 'Tech Trends Position Statement – Generative AI' (eSafety Commission, 15 August 2023), www.esafety.gov.au/sites/default/files/2023-08/Generative%20AI%20-%20Position%20Statement%20-%20August%202023%20.pdf accessed 30 May 2024.

Other Australian initiatives[101] have previously been conducted to contribute to the discussion on the future of Australia's regulatory approach on AI. Notably, this includes the AHRC project on Human Rights and Technology (the 'Project'). The Project was a three-year project, which involved research, public consultation and the publication of papers on proposed legal and policy areas for reform, including an initial Issues Paper,[102] a White Paper on AI Governance and Leadership,[103] a Discussion Paper[104] and a Technical Paper on algorithmic bias.[105] On 27 May 2021, the AHRC's Final Report for this Project was published.[106] The Final Report focused on ensuring that there is effective accountability in those circumstances where AI may be used to make decisions that have a legal or similarly significant effect on individuals ('AI-informed decision-making'), whether those decisions are made by government or non-government entities.

The AHRC made recommendations for the creation of a new AI safety commissioner to support regulators, policymakers, government and business to develop and apply policy, law and other standards.[107] The AHRC also recommended introducing new legislation for regulating AI, particularly regarding AI-informed decision-making. The Final Report also called for a moratorium on the use of this technology in AI-informed decision-making until such legislation is enacted.[108] While these recommendations of the AHRC were submitted to the government, to date they have not been adopted.

---

101 We note that we have not referred to all completed or ongoing Australian inquiries and initiatives which have been conducted, including those that have contributed to the conversation regarding how Australia may adopt further standards and guidelines to inform government and business use of AI. In particular, we note that Standards Australia has published a report on how Australia may actively contribute to the development of, and implement, International Standards that enable 'Responsible AI'. Australia has taken an active role in the international committee on AI, ISO/IEC JTC 1/SC 42, which is involved in the development of international AI standards. According to the report, Australia intends to directly adopt some International Standards to promote international consistency of AI Standards. See *Standards Australia, Final Report – An Artificial Intelligence Standards Roadmap: Making Australia's voice heard*, www.standards.org.au/getmedia/ede81912-55a2-4d8e-849f-9844993c3b9d/R_1515-An- Artificial-Intelligence-Standards-Roadmap-soft.pdf.aspx accessed 1 June 2021.

102 *Human Rights and Technology Issues Paper* (Australian Human Rights Commission, July 2018), https://humanrights.gov.au/sites/default/files/document/publication/AHRC-Human-Rights-Tech-IP.pdf accessed 30 May 2024.

103 *Artificial Intelligence: governance and leadership – White Paper* (Australian Human Rights Commission, 2019), https://humanrights.gov.au/sites/default/files/document/publication/ahrc_wef_white_paper_online_version_final.pdf accessed 30 May 2024.

104 *Human Rights and Technology – Discussion Paper* (Australian Human Rights Commission, December 2019), https://humanrights.gov.au/our-work/technology-and-human-rights/publications/discussion-paper-human-rights-and-technology accessed 30 May 2024.

105 *Using artificial intelligence to make decisions: Addressing the problem of algorithmic bias – Technical Paper* (Australian Human Rights Commission, 2020), https://humanrights.gov.au/sites/default/files/document/publication/ahrc_technical_paper_algorithmic_bias_2020.pdf accessed 30 May 2024.

106 *Human Rights and Technology – Final Report* (Australian Human Rights Commission, 2021), https://humanrights.gov.au/our-work/technology-and-human-rights/publications/final-report-human-rights-and-technology accessed 30 May 2024.

107 *Human Rights and Technology – Final Report* (Australian Human Rights Commission, 2021), Recommendation 22.

108 *Human Rights and Technology – Final Report* (Australian Human Rights Commission, 2021), Recommendations 19, 20.

6. Is free data access an issue in relation with AI?

Free data access is an issue in the use of AI tools in the provision of legal services in Australia. The success of an AI tool will be determined by the size and diversity of the sample data which is used to train that tool. For ML-based tools, such training can be based on vendor supervised 'out-of-the-box' capability, unsupervised learning over the course of a customer's use of the tool, or supervised learning facilitated by the customer. In contrast, the performance of GenAI tools is based on a broader training and capability that is the sum of many parts, including the tool's underlying LLM and to what extent additional enhancements/training has been provided by way of prompt engineering, Retrieval Augmented Generation (RAG) and/or LLM fine-tuning. Regardless of the AI tool, training data is an essential input for success. There are a number of factors that contribute to free data access challenges in Australia; generally, these factors apply across the spectrum of different categories of AI tools discussed in Question 2. These include:

- *Use of confidential or protected data*: as is the case in other jurisdictions, the data used to teach AI tools in a legal practice is often confidential or subject to other usage restrictions. This means, in a transactional context for example, that the AI tools may be restricted from applying learning obtained from one matter to another matter, as the previous learning was informed by confidential information. These restrictions inhibit the progressive learning, and therefore potential, of these tools.

- *Security settings and data structure of adjacent systems*: the systems that are used to store data and to which AI tools may be applied often have inbuilt security features which can further restrict the usability of that stored data. For example, the security settings and permissions set by a data room or document management system will apply to stored documents and can act to limit how the data contained within those documents can be used (for example clauses contained within those documents may be unable to be extracted). Alternatively, systems may store unstructured data. In a knowledge management context, for example, if documents contain only unstructured or imprecise data, or if back-end data is locked down, the AI tool will be unable to conduct searches and function properly (or at the very least with GenAI tools, unable to improve its results by grounding LLMs with legal organisational know-how through effective RAG).

- *Limited public data*: Australia has very limited freely available, public legal data and this restricts the potential for supervised learning of AI tools in legal practice. For example, information that is filed with courts through court registries or with regulators is not made publicly

available and free to search in Australia. This is a distinction which can be drawn between Australia and other jurisdictions, such as the United States, who have implemented a public company filing and search system (EDGAR). Whether for transactional or litigious matters, the inability to harvest public legal data poses a limitation on the potential of future AI tools which could otherwise be greatly enhanced using this data if it was made freely available.

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to the use of AI in the provision of legal services?

Prior to the arrival of GenAI, a number of court decisions in Australia had endorsed the use of non-GenAI in legal proceedings to assist with discovery processes and document review.

An example includes a decision from the Supreme Court of Victoria in 2016, *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1)*.[109] In this case, a construction firm (the plaintiff) commenced proceedings against an insurer in an insurance claim relating to the design and construction of a natural gas pipeline. The plaintiff identified at least 1.4 million documents that required review to determine discoverability. It was identified that a manual review process for these documents would take over 23,000 hours. The parties could not agree how to conduct discovery and the court was required to make an interlocutory decision. In his decision, Vickery J endorsed the use of technology-assisted review (TAR) in managing discovery and identified that a manual review process risked undermining the overarching purposes of the Civil Procedure Act[110] and was unlikely to be either cost effective or proportionate.[111]

Subsequently, TAR was explicitly endorsed in Victorian Supreme Court practice notes for cases involving large volumes of documents.[112] This is also now the case in many other jurisdictions in Australia where the use of technology, including in civil procedure processes such as document discovery, has been endorsed as facilitating and improving the efficiency of litigation and supporting other overarching purposes of civil procedure such as cost-effectiveness.[113]

---

109 *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1)* [2016] VSC 734.

110 Civil Procedure Act 2010 (Vic), which provides a legal framework for achieving the just, efficient, timely and cost-efficient resolution of issues in dispute (s 7(1)).

111 *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1)* [2016] VSC 734 at [7].

112 Supreme Court of Victoria, Practice Note SC Gen 5, *Technology in Civil Litigation*, p 6.

113 See, eg in the Federal Court (Technology and the Court Practice Note (GPN-TECH)), in New South Wales (Practice Note SC Gen 7: Supreme Court – Use of technology), Queensland (Practice Direction Number 10 of 2011: Supreme Court of Queensland Use of technology for the efficient management of documents in litigation), the Australian Capital Territory (Supreme Court of the Australian Capital Territory Practice Direction No 3 of 2018 – Court Technology) and Tasmania (Supreme Court of Tasmania – Practice Direction No 6 of 2019).

More recent court decisions have also continued to endorse the use of TAR in document discovery and review processes. In 2020, in the Federal Court of Australia, Justice Beech in *ViiV Healthcare Company v Gilead Sciences Pty Ltd (No 2)*[114] considered how the use of a TAR method which used predictive coding with continuous active learning technology could assist in relieving the burden of discovery which may imposed on a party to that proceeding. In separate proceedings, judges have also made orders regarding proposed document management protocols which have included the use of TAR,[115] as well acknowledging the ability of TAR to contribute towards time- and cost-efficient and effective discovery processes.[116] In some cases, courts have also been inclined to reject arguments that seek to resist discovery on the basis of the assistance that can now be provided by TAR or predictive coding.[117]

While the problem of GenAI hallucinated content, such as fake case citations, being incorporated into filed court documentation has been spotlighted over the past year in US,[118] UK[119] and Canadian[120] cases, similar cases have not occurred to date in Australia.

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally provided by lawyers?

There is currently no legal profession-specific regulation planned for AI. The focus remains on developing a more generally applicable framework and standards for AI systems in Australia.

9. What is the role of the national bar organisations or other official professional institutions?

There is a wide range of activity being undertaken by national bar organisations and other professional institutions in Australia in relation to AI and its adoption by the legal industry. This includes:

- The contributions being made by these organisations towards public debate on the issues presented by AI, including submissions made to government and other inquiries. As an example, the Law Council of Australia has provided submissions to various inquiries, including

114 *ViiV Healthcare Company v Gilead Sciences Pty Ltd (No 2)* [2020] FCA 1455.

115 *Parbery v QNI Metals Pty Ltd* [2018] QSC 83.

116 *Crawford v Australia and New Zealand Banking Group Ltd* [2021] VSC 578.

117 *Jenkins Sh v Australia Council for the Arts* [2024] FCA 309 at [11], referring to an interlocutory decision of Registrar Edwards.

118 *Mata v Avianca Inc* 22-cv-1461 (PKC).

119 *Harber v Revenue and Customs Commissioners* [2023] UKFTT 1007 (TC).

120 *Zhang v Chen* 2024 BCSC 285.

to the Department of Industry, Science and Resources' Discussion Paper on Safe and Responsible AI in Australia,[121] the AHRC's White Paper on AI governance and leadership,[122] the Department of Industry, Innovation and Science's Discussion Paper on Australia's AI Ethics Framework[123] and the Department of Industry, Innovation and Science's Discussion Paper regarding Australia's AI Action Plan.[124]

- The establishment of committees and working groups. For example, the New South Wales Law Society has established a specific taskforce, the Taskforce on AI and other tools and trends shaping the legal profession, to assist and provide expert advice, guidance, and output on the use of AI in the legal industry. The New South Wales Bar Association has established a specialist Media and Information Law and Technology Committee that monitors and maintains active participation in developments in matters such as artificial intelligence.[125]

- The publication of guidance and thought leadership relating to the use and adoption of AI in legal services. For example:

  – the Australasian Institute of Judicial Administration has released AI guidelines for judges, tribunal members and court administrators, which consider the use of Gen AI.[126] Australian courts have not yet provided either informal guidance/ guidelines nor mandatory practice notes on the responsible use of GenAI;

  – the New South Wales Bar Association has developed a guide for barristers in relation to GenAI and how the use of GenAI may impact on their legal practice, particularly in relation to

121 Submission to Department of Industry Science and Resources: 'Safe and responsible AI in Australia' (Law Council of Australia, 17 August 2023), https://consult.industry.gov.au/supporting-responsible-ai/submission/view/504 accessed 30 May 2024.

122 Submission to the Australian Human Rights Commission: 'Artificial Intelligence: Governance and Leadership' (Law Council of Australia, 18 March 2019), www.lawcouncil.asn.au/publicassets/38636f04-4a5b-e911-93fc-005056be13b5/3602%20-%20AHRC%20Artificial%20Intelligence%20Governance%20and%20Leadership.pdf accessed 30 May 2024.

123 Submission to the Department of Industry, Innovation and Science: 'Artificial Intelligence: Australia's Ethics Framework' (Law Council of Australia, 28 June 2019), www.lawcouncil.asn.au/publicassets/afebc52d-afa6-e911-93fe-005056be13b5/3639%20-%20AI%20ethics.pdf accessed 30 May 2024.

124 Submission to the Department of Industry, Innovation and Science: 'An AI Action Plan for All Australians: A Call for Views' (Law Council of Australia 17 December 2019), www.lawcouncil.asn.au/resources/submissions/an-ai-action-plan-for-all-australians-a-call-for-views accessed 30 May 2024.

125 Some state-based bar associations have established more general committees on the use of emerging technologies. eg the New South Wales Bar Association has established a specialist Media and Information Law and Technology Committee that monitors and maintains active participation in developments in matters including artificial intelligence.

126 *AI Decision-Making and the Courts – A guide for Judges, Tribunal Members and Court Administrators* (Australasian Institute for Judicial Administration and UNSW Faculty of Law and Justice, December 2023), https://aija.org.au/wp-content/uploads/2023/12/AIJA_AI-DecisionMakingReport_2023update.pdf accessed 30 May 2024.

their duties under the barristers' legal conduct rules in New South Wales;[127] and

– similarly, the Law Institute of Victoria and Law Society of New South Wales and have published articles on the responsible use of AI in legal practice, in line with solicitors' conduct rules.[128]

127 'Issues Arising from the Use of AI Language Models (including ChatGPT) in Legal Practice' (NSW Bar Association, 12 July 2023), https://inbrief.nswbar.asn.au/posts/9e292ee2fc90581f795ff1df0105692d/attachment/NSW%20Bar%20Association%20GPT%20AI%20Language%20Models%20Guidelines.pdf accessed 30 May 2024.

128 'A solicitor's guide to responsible use of artificial intelligence' *Law Society Journal Online* (14 November 2023), https://lsj.com.au/articles/a-solicitors-guide-to-responsible-use-of-artificial-intelligence; 'Young Lawyers: Artificial Intelligence in legal practice' (Law Institute of Victoria, October 2022), www.liv.asn.au/Web/Law_Institute_Journal_and_News/Web/LIJ/Year/2022/10October/Young_Lawyers__Artificial_Intelligence_in_legal_practice.aspx accessed 30 May 2024.