

## Submission to the Victorian Law Reform Commission Consultation Paper

### Artificial Intelligence in Victoria's Courts and Tribunals

#### Introduction

The Victorian Legal Services Board (**the Board**) and the Victorian Legal Services Commissioner (**the Commissioner**) are the independent statutory authorities responsible for regulating the legal profession in Victoria in accordance with the *Legal Profession Uniform Law (the Uniform Law)*.<sup>1</sup> Both authorities are accountable to the Victorian Parliament. The Board and the Commissioner effectively operate as one body, the Victorian Legal Services Board + Commissioner (**VLSB+C**).

VLSB+C thanks the Victorian Law Reform Commission (**VLRC**) for the opportunity to provide feedback on its artificial intelligence (**AI**) in Victoria's courts and tribunals consultation paper (**the Consultation Paper**). AI's transformative effect on the legal profession has been the subject of significant commentary over the past two years, and we consider that it has equal potential to transform the broader justice system.

An understanding of (and ability to use) AI is an important technical competency that all lawyers should develop. There are potentially significant benefits that can flow to lawyers from using AI as a means of improving the quality and efficiency of legal service delivery and thereby increasing access to justice. For the same reasons, we support this review and its exploration of the benefits of using AI in Victoria's courts and tribunals. However, we are also keen to ensure that the use of AI by lawyers is safe and appropriate. We are guiding lawyers to educate themselves about AI as we are concerned to ensure that wherever AI is used by lawyers or elsewhere in the justice system, it is used with strong safeguards that support public trust and confidence in the rule of law.

The following submission responds to various Discussion Questions in the Consultation Paper, grouped into the following themes:

- Defining AI Technologies (Discussion Questions **1** and **9(b)**)
- Principles for AI Use (Discussion Question **11**)
- Risks of AI Use by Lawyers and in Courts (Discussion Questions **3(b)** and **30**)
- Professional Obligations of Lawyers (Discussion Questions **21**, **23**, **25**, and **26**), and
- Education and Professional Development (Discussion Questions **39** and **40**).

#### Overview of the Uniform Law Framework

The Uniform Law constitutes a common 'uniform' framework for legal regulation across Victoria, New South Wales and Western Australia. It forms Schedule 1 to the *Legal Profession Uniform Law Application Act 2014 (Vic)* (**the Application Act**) and is implemented in Victoria through that Act.

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<sup>1</sup> As set out in schedule 1 to the *Legal Profession Uniform Law Application Act 2014 (Vic)*.

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Although the VLSB+C operates effectively as one body, the Board and Commissioner each have separate regulatory roles.

The Board is responsible for a broad range of regulatory functions, including making decisions about lawyers' practising certificates, overseeing law practices' trust accounts, overseeing external interventions into law practices, administering the Public Purpose Fund<sup>2</sup> and the Fidelity Fund,<sup>3</sup> and making applications for the removal of lawyers' names from the Supreme Court roll (where necessary). Through the Public Purpose Fund, the Board also supports increased access to justice and improvements to the broader justice system, by funding a range of legal organisations and conducting annual granting programs.

The Commissioner is responsible for receiving, managing and resolving complaints about the conduct of lawyers (which can extend to a lawyer's conduct outside of legal practice) made by members of the community, or by the Commissioner's own motion. The Commissioner has investigative and prosecutorial powers and investigations she undertakes can result in a variety of disciplinary actions. The Commissioner also has an important role in educating the community and the legal profession on issues relevant to the regulation and delivery of legal services.

### Defining AI Technologies

*This section includes information in response to Discussion Questions 1 (whether courts and tribunals should adopt a definition of AI) and 9(b) (whether regulatory responses should be technologically neutral)*

In responding to Discussion Question 1, VLSB+C notes that many contemporary definitions of 'artificial intelligence' struggle to establish a bright line between newer machine learning (ML) technologies – including the transformer-based 'large language models' and 'foundation models' which have captured attention since the arrival of ChatGPT – and more well-established technologies which are now considered unremarkable.<sup>4</sup> This creates challenges for developing a definition which has clear boundaries and which is also immediately intelligible to the community, without needing to understand any underlying technical distinctions.

In light of the challenge of developing a useful and readily understood definition of AI – a challenge exacerbated by the pace of change in this area – we suggest that, in considering how to most effectively regulate AI tools in courts and tribunals, it may be useful to direct any regulatory response towards the particular *concerns and/or risks* that the use of AI technologies raise in the context of the courts, including:

- the risk of 'hallucinations'
- the 'black box' nature of ML models
- the significant risks of using statistical models which haven't been properly validated, and

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<sup>2</sup> See part 9 of the Application Act.

<sup>3</sup> See part 8 of the Application Act, and part 4.5 of the Uniform Law.

<sup>4</sup> This tendency to discount established technologies has been described as the 'AI effect' — see, e.g. Edward Moore Geist, 'It's Already Too Late to Stop the AI Arms Race—We Must Manage It Instead' (2016) 72 (5) *Bulletin of the Atomic Scientists* 318, at page 318, <https://doi.org/10.1080/00963402.2016.1216672>.

- the novel potential capability of a sufficiently powerful ML model to ‘infer’ identity, or sensitive characteristics,<sup>5</sup> from previously anonymous or non-sensitive data.

Addressing a regulatory response to particular issues enlivened by the use of particular AI products, instead of attempting to develop a definition which covers current and potentially future AI technologies, would have the further advantage of making the response broadly technology-neutral.

### Principles for AI Use

*This section includes information in response to Discussion Question 11 (whether the eight proposed principles to guide the use of AI in Victorian courts are appropriate)*

The Consultation Paper identifies public trust as a key principle of justice and suggests eight proposed principles that “will provide a foundation for maintaining public trust in the courts”. Overall, the VLSB+C considers the eight principles to be a good reflection of the essential conditions for the fair and appropriate use of AI in courts and tribunals, and for maintaining public trust in the justice system. However, we make the following additional suggestions regarding Principles 1, 4, and 7:

- **Principle 1: impartiality and fairness** – As currently conceived, this principle only requires courts and tribunals to understand the risk of bias with proposed AI technology. We recommend that it should also expressly require courts and tribunals, and court and tribunal users, to take reasonable steps to *mitigate* any identified bias.
- **Principle 4: contestability and procedural fairness** – We strongly agree that 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. However, AI’s inherent complexity and opacity means that, in practice, it may be exceptionally difficult for an individual to effectively make such a challenge. We therefore suggest that this principle also refer to the importance of not requiring a party affected by an AI decision to prove the decision was incorrect. The unfairness of an affected individual being put in a position of not being able to properly argue against an AI decision that should never have been made is amply demonstrated by the procedural failures of the Robodebt scheme.
- **Principle 7: efficiency** – This principle focusses on the need for AI systems adopted by courts and tribunals to contribute to the overall efficiency of the justice system. We suggest strengthening it by expressly noting that the purpose of improved efficiencies should be to support access to justice and the *improved* and *increased* provision of court and tribunal services – not merely to save costs, which may not necessarily benefit the users of courts and tribunals.

More generally, we note that there is a risk that the eight identified principles could each be ‘met’ through thin, technical compliance (i.e. a ‘box-ticking’ exercise), and still result in a system which would overall be contrary to community expectations and undermine public trust and confidence in our system of justice and the rule of law. We therefore propose an additional, overarching principle of **maintaining public trust and confidence** in the

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<sup>5</sup> E.g. sexual orientation or voting intention.

judicial system, which makes it clear that any use of AI by courts and tribunals should not undermine that public trust and confidence but rather support and, if possible, increase that trust.

### Risks of AI Use by Lawyers and in Courts

*This section includes information in response to Discussion Questions **3(b)** (what are the most significant benefits and risks of the use of AI by legal professionals?) and **30** (should courts and tribunals disclose when and how they use AI?)*

The VLSB+C considers there to be significant potential benefits for AI to facilitate faster resolution of low-risk, straightforward disputes (e.g. in residential tenancies, fencing, consumer law and some employment matters), thereby increasing timely and cost-effective access to justice. Implementing AI systems within Victorian courts and tribunals is also an opportunity to reconsider how we approach dispute resolution, and to right-size resolution mechanisms to better address the needs of consumers. AI technologies have significant potential to expand access to dispute resolution to a broader range of consumers, and in doing so address concerns about a lack of access to justice for the “missing middle”. We also see the potential for workload reduction for lawyers (and therefore improvements to their wellbeing and work quality), particularly where AI facilitates more efficient court processes and scheduling and a reduction in time spent on time-consuming but necessary legal work (e.g. the creation of chronologies).

However, the technologies underpinning modern AI are highly complicated, and very difficult for a non-specialist to understand. Lawyers are therefore at a disadvantage when judging the capabilities of an AI tool they might be using, or assessing the credibility of technology providers’ claims as to their reliability. VLSB+C’s view is that currently there is a significant risk that the *limitations* of AI products – including products which are being marketed to lawyers as specialised legal tools – are not currently being adequately communicated. Where these representations are overly-optimistic (but not appreciated by a non-specialist) a lawyer could be misled into over-relying on an AI product, potentially resulting in poorer quality submissions, delay in resolving matters, or loss of forensic strategic opportunities for their client.

Given that non-specialist judicial officers and tribunal members may face the same difficulty understanding the limitations of an AI tool and appreciating the circumstances in which it may not be reliable, we suggest it is important for the courts and tribunals to both access specialist advice on the nature and limitation of any AI tool they consider implementing, and to be transparent about when they use AI. Transparency will ensure that affected parties are aware of its use and their ability to contest a decision, thereby supporting public trust and confidence in the justice system. It is also important for courts and tribunals to put in place mechanisms to ensure that AI-generated predictions or analyses are not given inappropriate weight, and are properly validated.

### Professional Obligations of Lawyers

*This section includes information in response to Discussion Questions **21** (is there a need to strengthen professional obligations to manage risks relating to AI?), **23** (should court guidelines require the disclosure of AI*

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use?), **25** (what is the role of VLSB+C in regulating the use of AI?), and **26** (are there other guidelines, etc. that should be considered by VLRC?)

The Uniform Law framework imposes various obligations on Victorian lawyers, which are set out in both the Uniform Law itself, and in Uniform Rules made under Part 9.2 of the Uniform Law. Most relevant of the Uniform Rules are the solicitors' conduct rules<sup>6</sup> and the barristers' conduct rules.<sup>7</sup> In recognition of the legal profession's traditional role in setting its own standards of professional conduct, the Uniform Law confers the power to develop conduct rules for solicitors and barristers on the Law Council of Australia (LCA) and the Australian Barristers' Association (ABA), respectively.<sup>8</sup> As a result, making any change to the obligations set out in the conduct rules requires the agreement and leadership of those peak professional associations.

As currently drafted, both the solicitors' conduct rules and the barristers' conduct rules are broad and duties-based. They are generally neutral as to specific circumstances in which a lawyer's professional obligations could be breached. This approach ensures a technology-neutral interpretation of the rules.

In our view, the current conduct rules for both solicitors and barristers already accommodate AI-related risks and misconduct, as a result of their broad and technology-neutral application. While each set of rules could certainly be improved, we do not believe any changes are needed to specifically address lawyers' use of AI. However, further work can and must occur to ensure that lawyers understand how the conduct rules apply to the use of AI (and other technology) in the course of legal practice.

One of the VLSB+C's core functions is to improve legal practice and ethics, including by ensuring that lawyers understand and comply with their professional and ethical obligations. We have explained what we expect from lawyers using AI technology in their work in our *Risk Outlook 2024*,<sup>9</sup> and in the collaborative statement on the ethical use of AI that we recently published (in conjunction with our regulatory partners in NSW and WA).<sup>10</sup> That statement sets out how key conduct rules for solicitors and barristers apply to the use of AI, and it is intended to be a living document that is updated over time.

We also note the guidelines produced by the Victorian Supreme and County Courts,<sup>11</sup> which we think are measured and helpful. Those guidelines encourage disclosure of the use of AI (as we do in our collaborative statement), and we think this is a preferable option to creating additional compliance requirements for mandatory disclosure. However, there will be different considerations for self-represented litigants, and the best solution may be to issue separate guidance for those litigants (potentially creating a separate requirement to disclose), and to actively support those litigants to comply with the court's expectations. This will assist the court and opposing

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<sup>6</sup> *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW).

<sup>7</sup> *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* (NSW).

<sup>8</sup> Uniform Law section 427(2)–(3).

<sup>9</sup> Victorian Legal Services Board + Commissioner, *Risk Outlook 2024* (6 June 2024), available from <https://lsbc.vic.gov.au/lawyers/risk-outlook/2024-risk-outlook>.

<sup>10</sup> Law Society of New South Wales, Legal Practice Board of Western Australia and Victorian Legal Services Board + Commissioner, *Statement on the use of artificial intelligence in Australian legal practice* (6 December 2024), available from <https://lsbc.vic.gov.au/news-updates/news/statement-use-artificial-intelligence-australian-legal-practice>.

<sup>11</sup> Referred to in paragraph 8.4 of the Consultation Paper.

counsel to better understand the basis upon which self-represented litigants are making their arguments, and areas where submissions and evidence need to be further examined.

### Education and Professional Development

*This section includes information in response to Discussion Questions 39 (how can education support the safe use of AI in courts and tribunals?) and 40 (are there opportunities to improve the current CPD system for legal professionals about AI?)*

As with conduct rules, the Uniform Law confers the power to develop Uniform Rules for continuing professional development (CPD) for Victorian solicitors and barristers on the LCA and ABA. The rules themselves<sup>12</sup> generally require Victorian lawyers to complete 10 points (or units) of CPD each year. Each point typically represents 1 hour of study (or an equivalent). Lawyers must complete at least 1 point each year from 4 different categories, which are broadly the same for barristers and solicitors:

1. ethics and professional responsibility,
2. practice management and business skills,
3. professional skills (or barristers' skills), and
4. substantive law.<sup>13</sup>

In November 2020, the VLSB+C published a report setting out the outcomes of an independent review we commissioned on Victorian lawyers' experiences of CPD. Among the most important conclusions drawn by the review was that the evidence shows adult learners are motivated by their own internal drivers. They are less likely to respond to external drivers – such as CPD requirements – unless they have opted-in to them (e.g. by choosing to seek an additional accreditation or professional membership).<sup>14</sup>

In our *Risk Outlook 2024*, we made it clear to the profession that AI use is an important technical competency that all lawyers should develop. Our view is that the current CPD arrangements can support lawyers to undertake education on this topic – learning how to use AI clearly fits within the CPD categories of professional skills and practice management – but will not be sufficient to ensure that lawyers are fully prepared for the reality of practising law with, and in the presence of, AI technologies.

Our view is that, independent of any existing CPD requirements, most parts of the profession will nevertheless be motivated to develop a proficiency with AI. This motivation is likely to be prompted by the need to continue to be able to practise in their areas of expertise effectively and competitively, as well as the benefit of reducing business costs and ameliorating workloads. However, in order to develop this proficiency, lawyers will require access to high-quality educational materials offered by competent and authoritative sources that are not conflicted by a commercial interest in particular AI products.

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<sup>12</sup> *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* (NSW); for barristers: *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* (NSW).

<sup>13</sup> There is currently a proposal to add a category of 'equality and wellbeing' to the barristers' CPD rules — details can be found [on the ABA's website](#).

<sup>14</sup> See our report *Getting the Point? Review of Continuing Professional Development for Victorian Lawyers* (November 2020), available on our website: <https://lsbc.vic.gov.au/resources/report-cpd-victoria>.



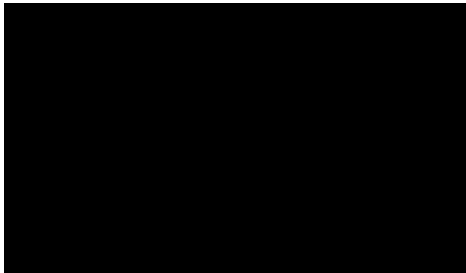
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## Conclusion

We thank the VLRC for the opportunity to provide a submission on the Consultation Paper, and hope our comments are helpful to the VLRC's review. [REDACTED]

Yours faithfully,



Fiona McLeay  
**Board CEO and Commissioner**