Associate to Justice Mitchell

Supreme Court of Western Australia

By email: associate.justice.mitchell@justice.wa.gov.au

04 October 2025

Dear Associate to Justice Mitchell,

Submission on Generative AI Consultation

We are aware that the deadline for submissions to the Supreme Court of Western Australia's consultation on a proposed AI Practice Direction (March 2025) has passed. We respectfully request that the Court nonetheless accept this late submission.

The timing arises because MiAI Law could not publicly disclose the detail of its methodology until a provisional patent application was filed. That filing was made on 18 August 2025 (Application No. 10202502330S, Intellectual Property Office of Singapore). Only once the application was lodged were we able explain fully the architecture and approach that distinguish our contribution.

Please find enclosed our submission, which:

1.   Surveys the baseline understanding of generative AI across Australian jurisdictions, including practice notes and guidelines in New South Wales,

Queensland, Victoria and the Federal Court of Australia, as well as consultations in South Australia.

2. Addresses the consultation questions posed by the WA Supreme Court.

3. Outlines what can be done differently, demonstrating how AI systems can be designed to reflect law's discipline rather than probability.

4. Endorses the Law Council of Australia's submission to the Federal Court of Australia (16 June 2025), which we commend as equally relevant to Western Australia.

5. Notes for completeness that MiAI Law has already adopted this architectural approach, and that it is the subject of the above provisional patent filing. This is mentioned solely to establish provenance.

We commend the Court for its leadership in initiating this consultation and respectfully submit this material for its consideration in developing an AI Practice Direction.

Yours faithfully,

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Submission to the Supreme Court of Western Australia

By MiAI Law Pty Ltd

Prepared by: Laina Chan, Barrister & CEO, MiAI Law Pty Ltd

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I. Introduction

1. This submission responds to the Supreme Court of Western Australia's Consultation Note on a proposed AI Practice Direction (2025). We commend the Court for its leadership in initiating consultation on this important issue. This submission sets out the national baseline on generative AI use in courts, answers the consultation questions posed, and explains what can be done differently. It endorses the Law Council of Australia's balanced approach while adding the perspective that architecture and methodology matter: AI can be designed to reflect law's discipline, not just probability.

II. National Baseline Understanding

2. Across jurisdictions, courts have converged on a baseline understanding of generative AI:

    a. LLMs are probabilistic text generators that predict the next word.

    b. They do not reason in a human or legal sense.

    c. They are prone to hallucinations (non-existent cases).

    d. Their processes are opaque (no audit trail).

    e. They conflate fact, inference, and opinion.

    f. Human verification of all citations is essential.

A. New South Wales

3. On 21 November 2024, the NSW Supreme Court issued Practice Note SC Gen 23 – Use of Generative AI, effective from 3 February 2025: see https://supremecourt.nsw.gov.au/documents/Practice-and-Procedure/Practice-Notes/general/current/PN_SC_Gen_23.pdf.

4. The Court also issued Guidelines for New South Wales Judges in Respect of Use of Generative AI: https://supremecourt.nsw.gov.au/documents/About-the-Court/policies/Guidelines_Gen_AI.pdf.

5. These emphasise similar principles to Queensland: that generative AI tools are not intelligent in the human sense, operate by predicting words, should not be used to draft reasons, and outputs must always be verified.

B. Queensland

6. Queensland has addressed both judicial and practitioner use:

    a. Guidelines for Judicial Officers on the Use of Generative AI (2025): https://www.courts.qld.gov.au/__data/assets/pdf_file/0009/879714/the-use-of-generative-ai-guidelines-for-judicial-officers.pdf.

    b. Key paragraphs include:

        i. [7] "Despite the name, Generative AI chatbots are not actually intelligent in the ordinary human sense. Nor is the way in which

they provide answers analogous to the human reasoning process."

    ii.   [7](a) "Generative AI chatbots are built on LLMs. LLMs analyse a large amount of training text to predict the probability of the next best word in a sentence given the context. Just as Google offers to autocomplete your search, LLMs autocomplete repeatedly to form words, sentences, and paragraphs of text."

    iii. [25] "AI tools should not be used for decision-making nor used to develop or prepare reasons for decision. The development and expression of judicial reasoning must be done by the judicial officer themselves."

7.   Practice Direction No 5 of 2025 – Accuracy of References in Submissions: see https://www.courts.qld.gov.au/__data/assets/pdf_file/0010/882064/sc-pd-5-pf-2025.pdf. This directs practitioners that they are personally responsible for ensuring the accuracy of all citations.

C.   Victoria

8.   Supreme Court of Victoria – Guidelines for Litigants: Responsible Use of AI in Litigation (2024) (see https://www.supremecourt.vic.gov.au/sites/default/files/2024-05/AI%20Guidelines%20SCV.pdf.

9. These apply to practitioners and self-represented litigants, requiring disclosure of AI use and verification of citations.

D. South Australia

10. Chief Justice of South Australia – Survey on Generative AI use (May 2025): see https://www.courts.sa.gov.au/2025/05/30/a-statement-from-the-honourable-chris-kourakis-chief-justice-of-south-australia-launching-a-survey-about-use-of-generative-ai-in-the-south-australian-courts/.

E. Federal Court of Australia

11. Notice to the Profession (29 April 2025) – AI use: see https://www.fedcourt.gov.au/law-and-practice/practice-documents/notice-to-profession/29-april-2025.

F. ACT, NT, TAS

12. As at July 2025, no AI-specific practice notes have been issued by the ACT, NT or Tasmanian Supreme Courts. (see ACT: https://www.courts.act.gov.au/supreme/law-and-practice/practice-notes-and-directions-and-notices-to-practitioners; NT https://supremecourt.nt.gov.au/lawyers/practice-directions; and TAS https://www.supremecourt.tas.gov.au/publications/directions/)

III. Response to Consultation Questions

A. Q1. Current and Future Uses of Generative AI

13. Currently, generative AI is used in legal practice for tasks such as summarising documents, drafting correspondence, and exploratory legal research. Future uses may include structured legal research systems that provide audit-ready, verifiable reports grounded in primary sources, and tools that improve access to justice by supporting smaller firms and self-represented litigants.

B. Q2. Should there be a formal AI Practice Direction?

14. Yes. A Practice Direction, like NSW's SC Gen 23 or QLD's PD 5/2025, provides clarity and enforceability. Guidelines alone are insufficient. WA should adopt a Practice Direction to ensure consistency and accountability.

C. Q3. Who should it apply to?

15. It should apply to legal practitioners, who have professional duties of candour and accuracy, and to self-represented litigants where disclosure is practical. Judicial officers may require separate guidance, as in NSW and QLD.

D. Q4. Disclosure of AI Use

16. Disclosure should be mandatory whenever AI has contributed substantively to documents filed with the Court and not been the subject of

human verification. This differs slightly with approaches in NSW and VIC. Disclosure obligations in this context increase transparency and accountability.

E.   Q5. Prohibited Uses

17.   Generative AI should not be used in affidavits, witness statements, expert reports, or any document purporting to be first-hand evidence. It is however appropriate to use AI to assist in the location of and summary of relevant documents in the preparation of the documentary evidence and bundles. This is a modification of the prohibitions already adopted in NSW.

F.   Q6. Safeguards

18.   Practitioners must verify citations, ensure jurisdictional accuracy, and maintain confidentiality of privileged material.

19.   If using an AI tool, steps must be taken to ensure that any data uploaded to the cloud is encrypted both at rest and in transit. In addition, contractual arrangements should be in place with the service provider that the data will never be accessed by the service provider or used for any training purposes. If offered, the encryption key should be dynamic and within the control of the user. The risk with this is that if the encryption key is lost then the data is also lost. The service provider will not be able to access the data either. We note that even when the data is encrypted both at rest and in transit, the data is unlocked and decrypted is during a user session.

20.   Further, data has to be sent to LLM providers like OpenAI and Google.

Gemini (Google)

21.   Under Google's Gemini API Additional Terms, the treatment of prompts and outputs depends on whether the service is used in a paid or unpaid capacity. For unpaid/free-tier use, Google may use submitted prompts and generated responses to improve its products and services, including for model training and evaluation, and such content may be reviewed by human reviewers. For paid services (via billing or Google Cloud), Google does not use prompts or outputs to train its base models; data is processed under the Google Data Processing Addendum. Google may retain prompts and outputs for up to 55 days for abuse monitoring and policy enforcement, but not for training.

OpenAI

22.   OpenAI draws a similar distinction. For consumer services (such as ChatGPT Free and Plus), user interactions may be used to improve models unless a user opts out. By contrast, for business offerings (including the API, ChatGPT Enterprise, and ChatGPT Business), OpenAI states that prompts and outputs are not used to train its base models unless the customer has expressly opted in. Data submitted through the API is processed under OpenAI's Data Processing Addendum, with retention limited to operational needs such as abuse monitoring and policy enforcement.

23.   Courts should consider requiring certification that verification has been undertaken, similar to QLD PD 5/2025.

G.   Q7. Steps Practitioners Should Take to Verify AI-Assisted Work

24.   Practitioners must always check authorities against authorised reports, read the full judgments, and ensure references are accurate. Verification is non-negotiable. AI tools should assist but never replace professional responsibility.

IV.   What Can Be Done Differently

25.   The baseline characterisation of AI is correct for public chatbots such as ChatGPT. But AI can be built differently. Architecture and methodology matter. A legal AI system can:

    a.   Retrieve only primary sources (judgments and legislation).

    b.   Adopt structured legal method (IRAC: Issue, Rule, Application, Conclusion).

    c.   Produce audit-ready outputs (pinpoint citations linked to source law).

    d.   Employ guardrails (responding "I don't know" when unsupported).

    e.   Use agentic workflows (multi-step reasoning, discarding irrelevant material).

26.   Such an approach moves AI from plausibility to proof.

## V.	Method Provenance

27.	MiAI Law has adopted this architectural approach — constraining retrieval to primary sources, embedding structured legal reasoning, and ensuring outputs are audit-ready. These methods are the subject of Provisional Patent Application No. 10202502330S filed with the Intellectual Property Office of Singapore on 18 August 2025. This is noted solely to establish provenance.

## VI.	Alignment with the Law Council of Australia

28.	This submission endorses the Law Council of Australia's submission to the Federal Court of Australia dated 16 June 2025. Although made in the Federal Court context, those positions are equally relevant to Western Australia. We adopt the Law Council's positions that:

   a.	A Practice Note should be issued to provide authoritative guidance.

   b.	Risks must be balanced with benefits.

   c.	Blanket prohibitions are undesirable.

   d.	Disclosure obligations are important.

   e.	The profession should continue to be consulted on draft guidance.

29. We add only that the Court should acknowledge that AI architecture and methodology matter, and that structured systems can meet the standards of legal method.

VII. Conclusion

30. The WA Supreme Court has the opportunity to build on the leadership of NSW and QLD by issuing a Practice Direction consistent with the national baseline. At the same time, WA can signal that more is possible: AI can be constrained to primary sources, structured by legal method, and audited at every step. The future of legal AI is not plausibility. It is proof.

References

1.	WA Supreme Court – Consultation Note on AI Practice Direction (2025): https://www.supremecourt.wa.gov.au/_files/AI_practice_direction.pdf

2.	NSW Supreme Court Practice Note SC Gen 23 – Use of Generative AI (21 Nov 2024): https://supremecourt.nsw.gov.au/documents/Practice-and-Procedure/Practice-Notes/general/current/PN_SC_Gen_23.pdf

3.	NSW Supreme Court – Guidelines for New South Wales Judges in Respect of Use of Generative AI: https://supremecourt.nsw.gov.au/documents/About-the-Court/policies/Guidelines_Gen_AI.pdf

4.	Queensland Courts – Guidelines for Judicial Officers on the Use of Generative AI: https://www.courts.qld.gov.au/__data/assets/pdf_file/0009/879714/the-use-of-generative-ai-guidelines-for-judicial-officers.pdf

5.	Queensland Supreme Court – Practice Direction No 5 of 2025 (Accuracy of References in Submissions): https://www.courts.qld.gov.au/__data/assets/pdf_file/0010/882064/sc-pd-5-pf-2025.pdf.

6.	Supreme Court of Victoria – Guidelines for Litigants: Responsible Use of AI in Litigation (2024): https://www.supremecourt.vic.gov.au/sites/default/files/2024-05/AI%20Guidelines%20SCV.pdf

7.	Supreme Court of South Australia – Chief Justice's survey on use of generative AI (30 May 2025): https://www.courts.sa.gov.au/2025/05/30/a-statement-from-the-honourable-chris-kourakis-chief-justice-of-south-australia-launching-a-survey-about-use-of-generative-ai-in-the-south-australian-courts/

8. Federal Court of Australia – Notice to the Profession on AI Use (29 Apr 2025): https://www.fedcourt.gov.au/law-and-practice/practice-documents/notice-to-profession/29-april-2025

9. ACT Supreme Court – Practice Notes and Directions page: https://www.courts.act.gov.au/supreme/law-and-practice/practice-notes-and-directions-and-notices-to-practitioners

10. NT Supreme Court – Practice Directions & Guidelines page: https://supremecourt.nt.gov.au/lawyers/practice-directions

11. Tas Supreme Court – Practice Directions page: https://www.supremecourt.tas.gov.au/publications/directions/

12. Tasmanian Government – Guidance for the use of artificial intelligence in Tasmanian Government (not court-specific): https://www.dpac.tas.gov.au/__data/assets/pdf_file/0024/420468/FINAL-AI-OPP-1.1.pdf

13. Law Council of Australia – Submission on AI Use in the Federal Court of Australia (16 Jun 2025): https://lawcouncil.au/resources/submissions/artificial-intelligence-use-in-the-federal-court-of-australia

Google (Gemini)

14. Gemini API Additional Terms of Service: https://ai.google.dev/gemini-api/terms

15. Google Cloud Gemini Data Governance: https://cloud.google.com/gemini/docs/discover/data-governance

16. 3emini API Usage Policies: https://ai.google.dev/gemini-api/docs/usage-policies

OpenAI

17. Data Usage for Consumer and Business Services FAQ: https://help.openai.com/en/articles/7039943-data-usage-for-consumer-services-faq

18. Data Processing Addendum: https://openai.com/policies/data-processing-addendum

19. Platform Documentation – Your Data: https://platform.openai.com/docs/guides/your-data

20. Usage Policies: https://openai.com/policies/usage-policies