The Chief Justice
New South Wales

GENERATIVE AI PRACTICE NOTE AND JUDICIAL GUIDELINES

The Chief Justice has today issued Practice Note SC Gen 23 – Use of Generative Artificial Intelligence (**Gen AI**). This Practice Note has been drafted following a detailed review of practice notes issued in other jurisdictions and after extensive consultation with the New South Wales Bar Association and the Law Society of New South Wales. It will commence on 3 February 2025 to coincide with the opening of the 2025 Law Term.

Associated amendments to the Uniform Civil Procedure Rules will also come into force at that time.

In the interests of transparency, the Chief Justice has also today issued Guidelines for New South Wales judges in relation to the use of Gen AI which have been developed in conjunction with other heads of jurisdiction within New South Wales.

Copies of the Practice Note and Guidelines are attached.

Members of the profession are invited to attend a briefing by the Chief Justice and Principal Registrar on the new Practice Note in the Banco Court on Monday 2 December 2024 at 4.30pm.

The briefing will also be livestreamed on the Court's YouTube channel which can be accessed via the Supreme Court's website.

To facilitate the briefing, if any practitioners have particular questions of the Chief Justice in relation to the Practice Note, they should be forwarded to his Researcher, Ms Meghan Malone, via email at Meghan.Malone@courts.nsw.gov.au with a view to them being addressed at the briefing.

21 November 2024

The Chief Justice
New South Wales

SUPREME COURT PRACTICE NOTE SC GEN 23

Use of Generative Artificial Intelligence (Gen AI)

Commencement

1. This Practice Note was issued on 21 November 2024, commences on 3 February 2025 and will apply to all proceedings from that date.

Introduction

2. Generative AI (**Gen AI**) is a form of artificial intelligence that is capable of creating new content, including text, images or sounds, based on patterns and data acquired from a body of training material. That training material may include information obtained from "scraping" publicly and privately available text sources to produce large language models.

3. Gen AI may take the form of generic large language model programs such as Chat-GPT, Claude, Grok, Llama, Google Bard, Co-Pilot, AI Media or Read AI or more bespoke programs specifically directed to lawyers such as Lexis Advance AI, ChatGPT for Law, Westlaw Precision, AI Lawyer, Luminance and CoCounsel Core. These examples are not intended to be exhaustive. Such programs may use "chatbots" and prompt requests and refined requests from the users of such programs.

4. This Practice Note applies to both closed-source and open-source large language model Gen AI.

5. Gen AI is capable of being used to assist legal practitioners and unrepresented parties with various tasks, including drafting documents and summarising information. This Practice Note is directed to the circumstances where such use is acceptable.

6. For the avoidance of doubt, for the purposes of this Practice Note:

(a) Gen AI does not include technology or functionality which:

(i) merely corrects spelling or grammar, provides transcription, assists with formatting and otherwise does not generate substantive content;

(ii) generates chronologies from original source documents;

(b) nothing in this Practice Note is intended to preclude or apply to the use of:

(i) search engines such as Google which produce a list of websites that match search criteria but which do not produce an apparently personalised textual answer in response to a specific prompt;

(ii) dedicated legal research software which uses AI or machine learning to conduct searches across material comprising legislation or subordinate legislation, judgments of courts or tribunals, and/or books or articles written for a legal audience.

7. Legal practitioners and unrepresented parties should be aware of limits, risks and shortcomings of any particular Gen AI program which they use. These may include:

(a) the scope for "hallucinations", that is, the generation of apparently plausible, authoritative and coherent responses but which are in fact inaccurate or fictitious. Examples include false citations and fabricated legislative, case or other secondary references;

(b) the dependence of Gen AI on the quality and reach of underlying data sets, including the possibility that that underlying database(s) may include misinformation or selective or incomplete data, data that is not up to date or data that is not relevant in New South Wales or Australia;

(c) the scope for biased or inaccurate output including by reason of the nature or limitations of the underlying data sets;

(d) the fact that any search requests via a chatbot or interactions or prompts within a Gen AI program may, unless disabled, be automatically added to the large language model database, remembered and used to respond to queries from other users;

(e) the lack of adequate safeguards, to preserve the confidentiality, privacy or legal professional privilege that may attach to information or otherwise sensitive material submitted to a public Gen AI chatbot; and

(f) the fact that data contained in a Gen AI data set or database may have been obtained in breach of copyright.

8. Legal practitioners and unrepresented parties should also be aware that data entered into Gen AI programs may be used to train the large language model, potentially making confidential information available to others.

General prohibition

9. Information subject to non-publication or suppression orders, the implied (*Harman*) undertaking not to use information produced under compulsion for any purposes extraneous to the proceedings without the leave of the Court, material produced on subpoena, or any material that is the subject of a statutory prohibition upon publication must **not** be entered into any Gen AI program.

Affidavits, witness statements or other evidentiary material

10. Gen AI must **not** be used in generating the content of affidavits, witness statements, character references or other material that is intended to reflect the deponent or witness' evidence and/or opinion, or other material tendered in evidence or used in cross examination.

11. Affidavits, witness statements, character references should contain and reflect a person's own knowledge, not AI-generated content.

12. Gen AI must not be used for the purpose of altering, embellishing, strengthening or diluting or otherwise rephrasing a witness's evidence when expressed in written form.

13. An affidavit, witness statement or character reference must contain a disclosure that Gen AI was **not** used in generating:

    (a) its content (including by way of altering, embellishing, strengthening or diluting or rephrasing a witness's evidence); or

    (b) subject to leave having been obtained in accordance with paragraph 15 below, the content of any annexure or exhibit *prepared by the deponent* of the affidavit or witness statement or character reference for the purposes of his or her evidence.

14. For the avoidance of doubt, the deponent of the affidavit, witness statement or character reference is not required to make the disclosure referred to in paragraph [13(b)] where the annexure or exhibit has not been prepared or created for the purposes of the proceedings.

15. In exceptional cases, leave may be sought to use Gen AI for the preparation or generation of any annexure or exhibit to an affidavit, witness statement or character reference. Any application for leave must identify:

    (a) the proposed use of Gen AI;

(b) the Gen AI program that will be used (including the relevant version);

(c) whether it is a closed-source or open-source program and or contains privacy and or confidentiality settings; and

(d) the benefit to be derived from the proposed use of Gen AI in the preparation of the annexure or exhibit.

Written submissions and summaries of argument

16. Where Gen AI has been used in the preparation of written submissions or summaries or skeletons of argument, the author must verify in the body of the submissions, summaries or skeleton, that all citations, legal and academic authority and case law and legislative references:

(a) exist,

(b) are accurate, and

(c) are relevant to the proceedings,

and make similar verification in relation to references to evidence in written submissions or summaries or skeletons of argument to evidence (whether the evidence be contained in affidavits or transcript).

17. Such verification must not be carried out by using a Gen AI tool or program.

18. Any use of Gen AI to prepare written submissions or summaries or skeletons of argument does not qualify or absolve the author(s) of any professional or ethical obligations to the Court or the administration of justice.

Expert Reports

19. Expert reports are required to state the opinion or opinions of the expert, and his or her reasoning process.

20. Subject to paragraph 23 below, Gen AI must not be used to draft or prepare the content of an expert report (or any part of an expert report) without prior leave of the Court.

21. Any application for leave must identify:

(a) the proposed use of Gen AI;

(b) the Gen AI program (including the version) that will be used and whether it is a closed-source or open-source program or contains privacy and or confidentiality settings;

(c) the benefit to be derived from the proposed use of Gen AI in the preparation of the expert report;

(d) any documents which it is proposed to submit to the Gen AI program for the purposes of generating any aspect of the expert report.

22. If an expert witness obtains prior leave to use Gen AI for any purpose in preparing an expert report for the Court, the expert witness must:

(a) disclose in the report what part(s) of it was prepared using Gen AI or drawing upon Gen AI produced material and the Gen AI program, (and version) that was used;

(b) keep records and identify in an annexure to the report a record of how the Gen AI tool or program was used (for example any prompts used, any default values used, and any variables set), except where the Court grants leave to dispense with this requirement (for example, where the Court determines this to be voluminous or unnecessary); and

(c) if the use of Gen AI is regulated or addressed by any relevant code of practice or principles that bind or apply to the expert, identify that fact and annex to the report a copy of the relevant code(s) or principle(s).

Examples of the above use of Gen AI may include experts using software that uses Gen AI to analyse sound, graphic or video data, or to interrogate very large data sets, or to conduct statistical analysis.

23. In the case of experts' reports in professional negligence claims filed and served under rule 31.36 of the Uniform Civil Procedure Rules 2005 and expert reports referred to in a pre-filing statement within the meaning of section 315 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) to be relied on for the purposes of court proceedings for the recovery of work injury damages, leave to rely on any report that was prepared using Gen AI or drawing upon Gen AI produced material must be sought at the first directions hearing of the matter.

24. Legal practitioners and unrepresented parties must draw the requirements of this Practice Note to the attention of experts when instructing them.

25. Expert reports prepared between the date of issue of this Practice Note and the date of its commencement must identify which, if any, part or parts of the report has or have relied upon Gen AI in the preparation of its content.

Review

26. Due to the rapidly developing nature of Gen AI, this Practice Note will be periodically reviewed.

The Hon. A S Bell

Chief Justice of New South Wales
21 November 2024

GUIDELINES FOR NEW SOUTH WALES JUDGES IN RESPECT OF USE OF GENERATIVE AI

1. These Guidelines apply to all courts in New South Wales and have been developed after a process of consultation with Heads of Jurisdiction and review of recently published guidelines of other common law courts.

2. Generative AI (**Gen AI**) is a form of artificial intelligence that is capable of creating new content, including text, images or sounds, based on patterns and data acquired from a body of training material. That training material may include information obtained from "scraping" publicly and privately available text sources to produce large language models.

3. Gen AI may take the form of generic large language model programs such as Chat-GPT, Claude, Grok, Llama, Google Bard, Copilot, AI Media or Read AI or more bespoke programs specifically directed to lawyers such as Lexis Advance AI, ChatGPT for Law, Westlaw Precision, AI Lawyer, Luminance and CoCounsel Core. Such programs may use "chatbots" and prompt requests and refined requests from the users of such programs.

4. Judges in New South Wales should **not** use Gen AI in the formulation of reasons for judgment or the assessment or analysis of evidence preparatory to the delivery of reasons for judgment.

5. Gen AI should **not** be used for editing or proofing draft judgments, and no part of a draft judgment should be submitted to a Gen AI program.

6. If using Gen AI for secondary legal research purposes or any other purpose, judges should familiarise themselves with the limits and shortcomings of large language model Gen AI, including:

   - the scope for "hallucinations", that is, the generation of inaccurate, fictitious, false or non-existent citations and fabricated legislative, case or other secondary references;
   - the dependence of large language model Gen AI programs on the quality and reach of underlying data sets, including the possibility that underlying database(s) may include misinformation or selective or incomplete data or data that is not up to date or relevant in New South Wales and Australia;
   - the scope for biased or inaccurate output because of the nature or limitations of the underlying data sets;

- the fact that any search requests or interactions or prompts with a Gen AI chatbot may, unless disabled, be automatically added to the large language model database, remembered and used to respond to queries from other users;
- the potential inability or lack of adequate safeguards to preserve confidentiality or privacy of information or otherwise sensitive material submitted to a public AI chatbot;
- the fact that data contained in a data set upon which a Gen AI program draws may have been obtained in breach of copyright; and
- the risk of inadvertently providing, through requested "permissions", access to information on a judge's or judicial staff member's devices such as smartphones, ipad or other tablets.

7. The product of all Gen AI generated research, even if apparently polished and convincing, should be closely and carefully scrutinised and verified for accuracy, completeness, currency and suitability before making any use of it. Gen AI research should not be used as a substitute for personal research by traditional methods.

8. Judges should require that their associates, tipstaves or researchers disclose to the judge if and when they are using Gen AI for research purposes or any other related purpose, and associates, tipstaves or researchers should be separately required to verify any such output for accuracy, completeness, currency and suitability.

9. Judges may require litigants (including litigants in person) and legal representatives including counsel to disclose any use of Gen AI in respect of written submissions or other documents placed before the Court, and may also require an assurance that any such documents have been verified for accuracy, including an identification of the process of verification followed including, where applicable, for the purpose of ensuring compliance with Practice Note SC Gen 23.

10. Judges should be astute to identify any undisclosed use of Gen AI in court documents by litigants, including litigants in person, and legal practitioners.

11. 'Red flags' associated with content generated by Gen AI, and which may indicate the unsafe, inappropriate or improper use of Gen AI, and hence the need to make further inquiries with practitioners or litigants in person, include:

    - inaccurate or non-existent case or legislative citations;
    - incorrect, inaccurate, out of date or incomplete analysis and application of the law in relation to a legal proposition or set of facts;
    - case law references that are inapplicable or unsuited to the jurisdiction, both in terms of substantive and procedural law;

- case law references that are out of date and do not take account of relevant developments in the law;
- submissions that diverge from your general understanding of the applicable law or which contain obvious substantive errors;
- the use of non-specific, repetitive language; and
- use of language, expressions or spelling more closely associated with other jurisdictions.

12. Due to the rapidly evolving nature of Gen AI technology, these guidelines will be reviewed on a regular basis.

The Hon. A S Bell

Chief Justice of New South Wales
21 November 2024