

Article Information

Authors: Tim O'Callaghan, Travis Shueard, Sahar Al-Dulaimi

Service: Arbitration, Banking & Finance, Class Actions, Commercial Disputes, Commissions & Inquiries, Competition & Trade, Defamation, Dispute Resolution & Litigation, Employment & Labour, Intellectual Property, Intellectual Property & Technology, Intellectual Property Litigation, Privacy & Data Protection, Regulatory Compliance & Investigations

The Federal Court's New Practice Note on the Use of Generative Artificial Intelligence

In a recent Federal Court Practice Note, the Court has provided guidance on permissible and prohibited uses of GenAI in Federal Court proceedings, as well as duties in respect of this.

Background

In an era of increasing generative artificial intelligence (**GenAI**) usage, it is becoming increasingly unfeasible to completely prohibit it. Therefore, the priority becomes safely managing its use rather than entirely avoiding it.

The Federal Court has recently published the "[Use of Generative Artificial Intelligence Practice Note \(GPN-AI\)](#)" Practice Note, which provides guidance on the Court's expectations of all persons involved in proceedings in the Court, specifically as they concern GenAI.

Below is a summary and explanation of the Practice Note.

Everything you Need to Know as a Legal Practitioner Regarding AI Usage

The Court has recognised that the use of GenAI can facilitate dispute resolution by increasing efficiency of and reducing legal costs while also enhancing the quality of the administration of justice. It is necessary to declare any GenAI usage. However, there are circumstances in which its use is inappropriate.

Legal practitioners must have regard to their professional duties while using GenAI; importantly, its use must not hinder the administration of justice.

GenAI users must have a basic understanding of GenAI, including its capabilities, limitations and risks. They must also recognise that it may generate inaccurate results, plainly wrong information and entirely fictitious results, including case law. Such results, or inaccurate or false information must not be presented to the Court, in line with the duty to not mislead the Court or other parties.

Where a document filed with the Court requires the name of the person or lawyer who prepared it, any GenAI usage must be declared on such documents (by the responsible person). In doing so, the responsible person must confirm that:

1. facts stated in pleadings are based on what the party reasonably considers can be proved and claims for relief are based on proper legal principles;
2. legal authorities cited in submissions exist and support the proposition stated;
3. evidence cited in submissions exists, is or will be in the materials before the Court and is reasonably likely to be admissible;
4. statements about what the evidence proves are findings reasonably open for the Court to make;
5. chronologies are accurate; and
6. lists of documents conform with the *Federal Court Rules 2011* (Cth): Rules 20.17 (form of list), 20.14 (standard discovery) or 20.15 (non-standard discovery).

(the above is a non-exhaustive list)

When preparing documents which are intended to represent evidence or opinion evidence, lawyers, witnesses and other parties must be aware of their obligations if they use GenAI to assist in the preparation of such documents.

As for affidavits or witness statements, any usage of GenAI must be consistent with the requirements that a person represents any such documents prepared as reflecting their *own* recollection, knowledge and/or experience; this is particularly relevant in criminal law proceedings.

Expert opinions should only contain that expert's *own* opinion and process of reasoning; refer to the specific disclosure obligations under the [Expert Evidence Practice Note \(GPN-EXPT\)](#).

When you Need to Declare AI Usage

In addition to the circumstances the Practice Note sets out in which you must declare AI usage, the Court may also require a person to disclose the use of GenAI as it deems appropriate.

How and When AI Usage Needs to be Declared

Where disclosure is required or has been ordered by the Court, it must be within the body of the document in which GenAI was used, specifically at the start of the document. The person making it, being the person who used GenAI, must concisely inform the court of the following:

1. what GenAI was used;
2. how it was used;
3. for what purposes; and
4. where in the document it was used.

GenAI usage must be declared where it is used for any of the following purposes:

1. summarising or analysing information upon which a witness relies to make a statement of fact or express an opinion;
2. creating images, video recordings, sound recordings or other multimedia presented to the Court where such usage is deemed *necessary* for some purpose connected to the proceedings; or
3. any other manner that might reasonably be expected to impact admissibility of that evidence, or its use by the Court.

Confidentiality Issues

The Practice Note also highlights confidentiality issues where confidential information is provided to a generally accessible GenAI tool, as it may become available to others.

The law may sometimes prohibit the disclosure of information or limit ways in which it can be used by parties and their lawyers. This includes information that is:

1. subject of Court orders as to confidentiality, suppression or non-publication orders;
2. privileged;
3. subject of an implied obligation not to use the information for a purpose other than that the proceedings (in which information was obtained from another party or third person); or
4. otherwise confidential or private information.

Users must consider whether these restrictions apply to any information prior to inputting this information into a GenAI tool. Entry of information into a GenAI tool in a way that does not accord with the respective obligations must not occur.

Entering information into a ringfenced or confidential GenAI tool may still breach obligations if outputs from the tool are subsequently used for different purposes.

Consequences of Non-Compliance

Usage of GenAI in a manner which is non-compliant with the Practice Note or Court orders or directions may subject the user to adverse costs orders and issues in respect of compliance with legal and professional obligations.

Serious consequences may also result from entering information into GenAI tools, even if the information was not intended to be shared.

Practice Takeaways for Legal Practitioners

The Practice Note represents a significant step in addressing the integration of GenAI into legal practice. Rather than prohibiting its use outright, the Court has adopted a pragmatic approach that recognises GenAI's potential whilst establishing guardrails to protect the administration of justice.

With this said, legal practitioners must be conscious of their obligations to the Court under the Practice Note and more broadly.

For example, before filing a document prepared with GenAI assistance, practitioners should independently verify all facts, legal authorities, evidence references, and chronologies. GenAI is prone to “hallucinating” fake case law, legislation and inaccurate information.

It might also help to proactively develop standard procedures for declaring GenAI usage in documents, such as specifying what tool was used and how, for what purposes, and where in the document it was employed.

Before inputting any information into a GenAI tool, practitioners should consider whether that information is subject to court orders, privilege, implied undertakings, or other confidentiality obligations. Inputting that information might be an inadvertent breach of such obligations.

Importantly, GenAI must not be used in ways that compromise the authenticity of witness evidence or expert opinions. Affidavits and witness statements must represent the witness's own recollection, and expert reports must contain the expert's own opinion and reasoning. This is of course consistent with existing requirements.

Conclusion

As GenAI becomes increasingly embedded in legal practice, the Practice Note GPN-AI provides important guidance for practitioners navigating this evolving landscape. Adherence to these requirements will be essential to maintaining professional standards and avoiding adverse consequences in the Federal Court.

***Disclaimer:** This publication is for general information only and is not legal advice. You should seek specific legal advice for your own circumstances.*