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Dear Dr Popple,

## **FAIR WORK COMMISSION GUIDANCE NOTE - USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN COMMISSION CASES**

Thank you for the opportunity to contribute to the Law Council's submission to the Fair Work Commission (**the Commission**) regarding its exposure draft of the proposed Guidance Note, *Use of Generative Artificial Intelligence in Commission cases* (**Guidance Note**) and the President's statement regarding the Guidance Note (**the Statement**). The Law Society's Employment Law Committee contributed to this submission.

The Law Society supports an AI framework for courts and tribunals based on overarching principles consistent with a solicitor's existing obligations to the relevant Court/Tribunal, and complete with specific disclosure rules to ensure the integrity of evidentiary material. We make the following comments in respect of the Statement, the Guidance Note, and the 'Example GenAI section for Commission forms'.

### **1. The Statement**

In the Statement, Justice Hatcher identifies "unprecedented growth in (the Commission's) workload, particularly in lodgments of unfair dismissal applications and applications for the Commission to deal with general protections disputes". He notes that this growth has been driven by GenAI which "can give potential litigants unrealistically optimistic predictions of their prospects of success and likely compensation" and "encourage unmeritorious applications to the Commission".

Legal practitioners are uniquely qualified to assist the Commission with this problem by assessing the merits of an application and advising on its prospects and available remedies. We suggest that the problems identified in the Statement only strengthen the submission, made by the Law Society and Law Council on previous occasions, that s 596 of the *Fair Work Act 2009* (Cth) is unduly restrictive and should be amended so that parties do not need permission to obtain legal assistance prior to a hearing or for a lawyer to appear for them. We continue to support the Law Council's ongoing advocacy to the Government on this matter.

To assist self-represented litigants in likely compensation outcomes, we suggest the Commission return to publishing conciliation and arbitration outcomes in its Annual Reports, as it did prior to FY 2018-2019. The relevant publications provided granular data in relation to unfair dismissal and general protection conciliation and

arbitration outcomes, including the outcomes/orders made and the monetary payment/compensation granted.<sup>1</sup> This data is routinely cited in conciliations conducted by Commission staff, but has ceased to be publicly available. We suggest such de-identified information would provide potential applicants to the Commission a more realistic sense of outcomes in these types of matters.

## 2. Guidance Note

### *General Comment on the structure of the Guidance Note*

At the current time, the Guidance Note is structured in a way which sets out Requirements 1, 2 and 3 at paragraphs [7]-[12]. Information on how to comply with each of the three requirements is addressed later in the document, such as in paragraphs [23]-[25] for Requirement 1. We suggest that it may be more logical for the reader of the Guidance Note if the information on how to comply directly follows on from each requirement i.e., Current paragraph [7] of the Guidance Note would be followed by current paragraphs [23]-[25].

### *Definitions in the Guidance Note*

We note that while the Guidance Note contains definitions at [40], we suggest that for the purposes of a layperson accessing the document (e.g., an unrepresented litigant) it may be helpful to incorporate some of the definitions within the body of the Guidance Note itself. This is particularly relevant for the definition of GenAI, given this is the focus of the Guidance Note.

At present, the definition appropriately excludes the following:

- e-discovery software or predictive analytics software; and
- a search engine or dedicated legal research software that identifies existing content in response to a user's search query.

We suggest that for a general audience, it may be helpful to explain concepts such as 'predictive analytics software' in simpler terms. In this respect, we suggest that language of the kind found in paragraph 6 of the *Supreme Court of NSW Practice Note SC GEN 23 - Use of Generative Artificial Intelligence (Gen AI)* (**SC GEN 23**) may be appropriate:

For the avoidance of doubt, for the purposes of this Practice Note, Gen AI does not include technology or functionality which merely corrects spelling or grammar, provides transcription or translation, assists with formatting and otherwise does not generate substantive content, and nothing in this Practice Note is intended to preclude or apply to the use of:

- (a) 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;
- (b) 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.

We suggest that it is also particularly important for the Guidance Note to highlight that transcription and translation services are excluded from the definition of GenAI.

### *Requirement 1*

Requirement 1 is set out in the following terms:

If you use GenAI in preparing any document that is to be lodged in a Commission case, you must **state in the document that GenAI was used** in preparing the document.

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<sup>1</sup> See, for example, the Commission, [Annual Report 2018-19](#), lodged 26 September 2019, Appendix D.

We consider this to be appropriate as it will put the Commission member hearing the matter on notice that GenAI has been used. This will alert them to what the NSW Supreme Court has described in its *Guidelines for NSW Judges in respect of the Use of Generative AI* as 'red flags' which may indicate the 'unsafe, inappropriate or improper use of Gen AI', including:

- 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 a 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.<sup>2</sup>

We suggest, however, that given the large number of unrepresented litigants in the Commission and the clear expansive use of Gen AI in Commission proceedings, similar caution must be exercised where a document is filed that does not acknowledge the use of GenAI. This is because it could signify that there may be instances where GenAI is being used but not disclosed in compliance with the Guidance Note.

### *Requirement 2*

Requirement 2 is set out as follows:

If you use GenAI in preparing any document that is to be lodged in a Commission case, you must **check** the document and make any necessary changes so that all details in the document are **correct and relevant** to the case. You must also **state in the document** that you have done this.

In checking the document you must ensure that:

- all references to facts or evidence in the document are correct and the facts or evidence exist
- all cases, legislation, textbooks and articles referred to in the document exist and stand for the legal positions attributed to them, and
- all extracts or quotes in the document are correct and are attributed to the right source.

Legal practitioners have ethical and professional obligations to ensure that material put before a Court or Tribunal, including case references, exist, are accurate and relevant to proceedings. As such, Requirement 2 should not pose any significant challenge or burden to their work.

However, self-represented litigants may not be able to meet the requirement to state that 'all cases, legislation, textbooks and articles referred to in the document ... stand for the legal positions attributed to them' (emphasis added). We suggest it is unrealistic to expect that a layperson is apprised of the legal position for which a case stands. This is particularly the case for litigants who may not have English language skills or may live with a disability or other form of disadvantage. It is possible such a requirement could prove an obstacle to access to justice for these groups.

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<sup>2</sup> Supreme Court of NSW, [Guidelines for NSW Judges in respect of the Use of Generative AI](#), 21 November 2024.

If the requirement is retained that all applicants must verify the legal positions of cases and legislation, we suggest that it would be necessary in the Guidance Note to contain a link to avenues for obtaining legal advice, such as the information provided by the Commission on its 'Where to find legal help' page.<sup>3</sup>

We further suggest that Requirement 2 includes a statement that the applicant has determined that the remedy they are seeking is available under the particular application. This could be accompanied by links to the relevant Commission webpage/ bench book, that sets out the remedies for various types of application. This would assist in ensuring that applicants are not seeking unavailable remedies (e.g., damages for non-economic loss in an unfair dismissal application).<sup>4</sup>

For completeness, we consider it would also be appropriate to require a statement that the applicant has read and understood the Guidance Note.

### *Requirement 3*

Requirement 3 is set out in the following terms:

If the document is your witness statement or declaration then you must **check** the document and make any necessary changes so that the statement or declaration is based on your **own knowledge** and is **true** to the best of your knowledge.

You must also **declare in the document** that the statement or declaration is based on your own knowledge and is true to the best of your knowledge.

The Law Society supports the principle that affidavits, witness statements, declarations or other materials that are intended to reflect the deponent or witness' evidence and/or opinion should contain and reflect a person's own knowledge, not Gen AI-generated content. We therefore support specific guidance addressing this issue within the draft Guidance Note.

The approach taken in the draft Guidance Note differs significantly from SC GEN 23, which prohibits the use of Gen AI to generate material that is intended to reflect the evidence and/or opinion of a deponent of an affidavit or witness statement, or other material tendered in evidence or used in cross examination. A positive obligation is placed on the deponent to make a disclosure that Gen AI was not used in the creation of the material. In exceptional prescribed circumstances, leave may be sought to use Gen AI for the preparation or generation of an annexure or exhibit to an affidavit, witness statement or character reference.

While it may be appropriate for GenAI to assist in preparing the 'form' of a witness statement or declaration, we suggest that the use of GenAI to produce the content in the document itself may give rise to significant ethical issues, given the need for witness statements to reflect the words and language of the witness. We suggest it would be appropriate for this distinction to be clarified in the Guidance Note.

As a matter of practical reality, however, we recognise that as GenAI becomes more ubiquitous, it is possible that some unrepresented litigants may turn to using GenAI to prepare witness statements, even if this is prohibited by the practice directions of the particular court/tribunal. If the Commission is minded to allow the use of GenAI for the purposes of preparing witness statements, we consider the disclosure in Requirement 3 to be sound.

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<sup>3</sup> The Fair Work Commission, 'Where to find legal help', webpage: <https://www.fwc.gov.au/apply-or-lodge/legal-help-and-representation/where-find-legal-help>.

<sup>4</sup> See also comment above regarding publication of conciliation and arbitration outcomes in the Commission's Annual Reports to assist with realistic expectations around compensation.

We also suggest for readability that it would be preferable for current paragraph [10] in the Guidance Note to be placed after current paragraph [11] i.e., the consequences of non-compliance with Requirement 3 such as adverse costs orders should be set out first.

#### *Personal information*

Paragraphs [33] to [37] of the Guidance Note deal with the need to be aware of exposing any personal or confidential information when using GenAI to prepare documents for a Commission matter.

In addition to the issues mentioned, we suggest that it is important to emphasise in this section that prompts and responses created in GenAI, even if used to create a brief for a lawyer, may not attract legal professional privilege and therefore may be discoverable by the opposing side in a matter. Discoverable prompts, responses and work product may be used to discredit an applicant's case and/or justify an order for costs.

#### *Additional Obligations of Legal Practitioner and Paid Agents*

Paragraph [39] of the Guidance Note is set out as follows:

In addition to complying with requirements 1 and 2, a legal practitioner or paid agent who uses GenAI in preparing any document that is to be lodged in a Commission case, must include in the document hyperlinks to all case law referred to in the document.

We suggest that this standard should apply to legal practitioners, paid agents and unrepresented litigants. We consider that it is not overly onerous for unrepresented litigants to provide hyperlinks to cases (as is required of legal practitioners). If they are to verify a case exists, we suggest it follows that they can link to it. The use of Gen AI will assist with this process in any case.

As a point of practice, however, we note that medium neutral links may not be available for some of the older decisions in the reported journals. An exception should be provided for such materials.

### **3. Example GenAI section for Commission forms**

In our view, the form is appropriate. However, if our suggestions on requirement 2 are included, the second declaration should be amended as follows:

I have checked that all cases, legislation, textbooks and articles referred to in this application exist ~~and stand for the legal positions attributed to them~~ and have provided hyperlinks to this material where available.

As above, we also support the following additional declarations:

I confirm to the best of my knowledge that the remedy I am seeking is available for this application.

I confirm that I have read and understood the contents of the *Guidance Note: Use of Generative Artificial Intelligence*.

Thank you for the opportunity to comment. Questions at first instance may be directed to Sophie Bathurst, A/g Head of Commercial and Advisory Law Reform, at (02) 9926 0285 or [Sophie.Bathurst@lawsociety.com.au](mailto:Sophie.Bathurst@lawsociety.com.au).

Yours sincerely,



**Ronan MacSweeney**  
President