Law Council
OF AUSTRALIA

Guidance Note: Use of Generative Artificial Intelligence in Commission cases

Fair Work Commission

20 April 2026

Telephone +61 2 6246 3788
Email mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612
Level 1, MODE3, 24 Lonsdale Street,
Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

Contents

Acknowledgements 1

Introduction 2

Guidance Note 3

- Summary 3
- Requirement 1 4
- Requirement 2 5
  - Technology-neutral option 6
  - Additional declarations 6
- Requirement 3 7
- Reasons for requirements—limitations of GenAI 7
- Personal and confidential information 7
- Additional obligations for legal practitioners and paid agents—hyperlinking cases 8
- Structure of the Guidance Note 9

Example GenAI section for Commission forms 10

About the Law Council of Australia 11

Acknowledgements

The Law Council of Australia thanks:

- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Queensland Law Society;
- the Law Society of South Australia;
- the Victorian Bar;
- the Law Institute of Victoria; and
- the Industrial Law Committee of the Law Council's Federal Dispute Resolution Section

for their contribution to the preparation of this submission.

Introduction

1. The Law Council of Australia thanks the Fair Work Commission (the **Commission**) for the opportunity to contribute to the consultation on the exposure draft of the Guidance Note: *Use of generative artificial intelligence in Commission cases* (the **Guidance Note**).

2. As noted in our 2025 submission on the use of artificial intelligence (**AI**) in the Federal Court of Australia,[1] the advancement of AI, particularly generative artificial intelligence (**GenAI**), continues to be rapid. There are innumerable opportunities and benefits that AI brings to the community and the legal system, including the potential to facilitate access to justice, enhanced efficiencies and cost savings.

3. However, there are a range of risks associated with AI use in legal practice, including:

   - risks to the integrity of submissions caused by hallucinated case references and inaccuracies;
   - risks to the integrity of evidence caused by the use of AI in the preparation of affidavits and witness statements, which may not use the witness's own words, and therefore may present a misleading account of the witness's evidence;
   - risks of breach of client confidentiality and waiver of privilege if documents or case facts are uploaded to, or shared with, AI tools, particularly open-source tools;
   - risks of breach of the implied *Harman* undertaking[2] if discovered documents and other materials produced under compulsion are uploaded to, or shared with, AI tools, particularly open-source tools; and
   - risks of infringement of copyright if AI tools engage in unlicensed access to, or use or reproduction of, published works or other copyright material in response to a user's prompt.

4. The Law Council further acknowledges reports that use of GenAI, particularly by self-represented litigants, has resulted in unprecedented growth in the workload of the Commission (and courts and tribunals in other jurisdictions), and the corresponding impact on the administration of justice.[3]

5. Accordingly, the Law Council supports the policy objective underpinning the Guidance Note and the Commission's approach which appears to address the risks outlined above. The Law Council recognises that, given the widespread and growing use of AI (including GenAI) by legal practitioners, clients, and self-represented litigants alike, a broadly framed prohibition on the use of AI would be neither practical nor proportionate, and would risk hindering innovation and access to justice.[4]

---

1 Law Council of Australia, *Artificial intelligence use in the Federal Court of Australia* (Submission, 13 June 2025) 6 [3].
2 *Harman v Home Office* [1983] 1 AC 280.
3 See, for example, Janek Drevikovsky, 'Federal Court's new AI headache' *Australian Financial Review* (5 April 2026); David Marin-Guzman, 'How Chat GPT industrialised the unfair dismissal market', *Australian Financial Review* (20 February 2026).
4 Law Council submission, above n1 [8].

6. The following feedback is primarily directed at suggestions for further refinement and clarification within the Guidance Note and, to the extent possible, to minimise inconsistencies between jurisdictions. To support implementation of the Guidance Note, the Commission may wish to consider exercising increased discretion during the period immediately following its publication, as users acquaint themselves with the new requirements—particularly for parties without the benefit of legal support.

Guidance Note

Summary

7. The Guidance Note is applicable both to self-represented litigants and legal practitioners (or paid agents) and sets out three requirements applicable when GenAI is used in the preparation of a document for use in the Commission. These requirements stipulate that, where GenAI is used in the preparation of documents for use before the Commission:

   - It must state in the document that GenAI was used (**Requirement 1**).[5]
   - The document must be checked to ensure that all details are correct, and information is relevant to the case. This includes checking that references to facts, evidence and case law are correct and appropriately attributed (**Requirement 2**).[6]
   - For witness statements or declarations, the witness/declarant must check the document is correct and declare it is true and based on their own knowledge (**Requirement 3**).[7]

8. In addition, the Guidance Note highlights the risk of providing personal or confidential information to GenAI tools and provides an explanation about the limitations of GenAI. It further notes additional obligations for legal practitioners and paid agents with respect to the use of GenAI at paragraphs [38]–[39]—specifically a requirement to hyperlink cases.

9. It is anticipated that these requirements will be given effect in the *Fair Work Commission Rules 2024* and "Use of GenAI" sections added to relevant Commission forms and template documents.

---

5 Fair Work Commission, *Guidance Note: Use of Generative Artificial Intelligence in Commission cases* (Exposure Draft, 24 March 2026) 1 [7].
6 Ibid [8].
7 Ibid [9].

Requirement 1

10. Requirement 1 requires a statement in a document that it was produced using GenAI. The Law Council considers it to be reasonable and appropriate to put the Commission, and other parties, on notice that GenAI has been used in the preparation of a document.

11. We note that, at paragraph 40 of the Guidance Note, GenAI is defined as:

> ***generative artificial intelligence (GenAI)*** *is an AI tool that uses models to learn patterns from existing data and to generate new text, images, audio and other material in response to a user's prompts.*
>
> *ChatGPT, Claude, CoPilot and Gemini are examples of GenAI.*
>
> *'GenAI' does not include:*
>
> - *e-discovery software or predictive analytics software, or*
> - *a search engine or dedicated legal research software that identifies existing content in response to a user's search query…*
>
> ***use GenAI*** *does not include using GenAI only to check spelling or grammar in a document or to format a document.*

12. Given the ubiquitous nature of GenAI and the broad definition in the Guidance Note of what constitutes using AI in the production of a document,[8] there may be circumstances where GenAI could be inadvertently used and not declared. For example, this could arise due to the increasing prevalence of embedded AI writing assistants or predictive and autocomplete text (which would satisfy the proposed definition of "GenAI" and "use GenAI" in the Guidance Note).

13. To mitigate these concerns, Requirement 1 could alternatively be couched in terms of "the use of GenAI to author all or part of the document" or adoption of the language of paragraph 6 of the *Supreme Court of NSW Practice Note SC GEN 23—Use of Generative Artificial Intelligence* in relation to the definition of GenAI. That practice note states:

> *6. 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*

[8] Ibid [6]–[8], [23] and [26].

> *subordinate legislation, judgments of courts or tribunals, and/or books or articles written for a legal audience.*[9]

14. We note that paragraph 6(b) above would be consistent with the sources considered authoritative at paragraph 28 of the Guidance Note.

15. The Law Council also notes that the language of paragraph 6 of the *Supreme Court of NSW Practice Note SC GEN 23* provides further guidance on the acceptable use of search engines that the Commission may wish to adopt. Search engines are increasingly providing an AI-generated snapshot or summary that synthesises information in response to a query, rather than merely identifying existing content and sources of information. In practical terms, these AI-generated search engine summaries are often presented as the first answer to a query and may therefore be treated by users as an authoritative source of truth. They should fall within the Commission's definition of GenAI, and its use declared.

16. In terms of exclusions from the definition of "use GenAI", the Commission may wish to consider expanding the definition to also capture transcription and translation services and provide further information on what is meant by "predicative analytics software".

Requirement 2

17. Requirement 2 requires documents produced with GenAI to be checked for accuracy and relevance. We note compliance with Requirement 2 would assist to mitigate potential risks, even with the apparent benign use of AI. For example, in *Mertz & Mertz (No 3)* [2025] FedCFamC1A 222, it was reported that GenAI had been used to alphabetise a list of authorities and place cases under headings, but it was later discovered that fictitious cases had been inserted into the material filed with the Court. While this use of AI would fall out of the scope of Requirement 1, it would likely be captured by Requirement 2.

18. The Law Council notes that 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, we would not anticipate that Requirement 2 would pose any significant challenge or burden to their work.

19. However, many self-represented litigants may not be in a position to confidently state that "all cases, legislation, textbooks and articles referred to in the document … *stand for the legal positions attributed to them*' (emphasis added).[10] It is possible such a requirement could prove an obstacle for many self-represented litigants, even if they do try to provide accurate and relevant information to the Commission.

---

[9] Supreme Court of NSW, Practice Note SC GEN 23 - Use of Generative Artificial Intelligence (Gen AI) (28 January 2025), 2 [6].

[10] Commission Guidance Note, above n5 [27].

20. Legal practitioners are uniquely qualified to assist with this challenge, as well as assessing the merits of an application and advising on its prospects and available remedies, in addition to the problems identified in the President's Statement.[11]

21. We propose that the Commission consider including additional or stronger reference to seeking legal advice in the Guidance Note, such as a link to the Commission's "*Where to find legal help*" webpage,[12] or by providing further practical guidance on how to comply with Requirement 2, such as a short checklist or brief worked examples.

Technology-neutral option

22. The Law Council acknowledges the purpose of the Guidance Note and Example GenAI section for Commission forms and templates is to address the particular issues arising from the use of GenAI. However, we have received feedback that the Commission may wish to consider adopting a technology-neutral approach to Requirement 2 (and Requirement 3): i.e. there should be an obligation to check documents and attest to their accuracy and relevance regardless of whether GenAI was used in the production of the document. This could be supplemented with an additional warning to take additional care when checking documents where GenAI is used.

Additional declarations

23. The Commission may wish to consider expanding the declaration in relation to Requirement 2 to include 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 and/or bench book, that sets out the remedies for various types of application. This could assist in ensuring that applicants are not seeking unavailable remedies (e.g., damages for non-economic loss in an unfair dismissal application).

24. This option could be further supported by the Commission returning to publishing conciliation and arbitration outcomes in its Annual Reports, as it did prior to the 2018–2019 financial year. The relevant publications provided granular data in relation to unfair dismissal and general protection conciliation and arbitration outcomes, including the orders made and the compensation granted. 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 and may help to offset the unreasonable expectations arising from GenAI.

25. For completeness, the Commission may also wish to consider requiring a statement that the applicant has read and understood the Guidance Note as part of Requirement 2.

---

[11] See Justice Hatcher, *Exposure draft of the Commission's Guidance Note: User of Generative Artificial Intelligence in Commission cases – opportunity to comment* (President's Statement, 24 March 2026) 2 [7]—[10].

[12] 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.

Requirement 3

26. While the Commission discourages the use of GenAI in the production of witness statements or declarations, Requirement 3 requires an individual to check the accuracy of a witness statement or declaration generated with the assistance of GenAI, the correction of any errors, and a declaration that the content is true and based on the declarant's own knowledge.

27. The Law Council strongly supports the general discouragement from using GenAI in the production of witness statements and declarations, and acknowledges that, as a matter of practical reality, self-represented litigants may continue to turn to GenAI for assistance in the preparation of witness statements and as such the proposed requirements are appropriate.

28. We recommend strengthening the text of this requirement to emphasise the need for witness statements and declarations to reflect the words and language of the individual, and that GenAI should not be used to embellish, strengthen, infer, expand or otherwise refine a statement in a way that alters its factual substance, degree of certainty or apparent recollection. This would emphasise the importance of preserving the witness's own evidence over permitting GenAI to reshape it into a more polished but materially different account.

Reasons for requirements—limitations of GenAI

29. Paragraph 16 of the Guidance Note states:

> *When generating an output, GenAI may apply laws or cite cases from a different Australian jurisdiction or from overseas, or refer to laws that have since changed or cases that have since been overturned.*

30. The Commission may wish to expand this warning to explicitly refer to the risk of GenAI generating false material, by adding wording to the effect: "GenAI may also cite non-existent laws and cases, and mis-state existing laws and cases".

Personal and confidential information

31. The Law Council welcomes the inclusion of paragraphs 10 and 33–37 of the Guidance Note, highlighting the importance of not providing personal or confidential information to GenAI to prepare documents for a Commission matter as it may not keep the information secure.

32. The Commission may wish to expand the list of examples of confidential information that should not be uploaded to GenAI at paragraph 36 of the Guidance Note to include documents that have been provided to a party by the compulsory processes of the Commission, and are therefore subject to an implied undertaking.

33. We further recommend that the Guidance Note alert readers to the risk of breach of client confidentiality, and the risk of inadvertently waiving client legal privilege, if documents or case facts are uploaded to—or shared with—GenAI tools.

34. In addition, the Law Council recommends emphasising in this section that prompts and responses created in GenAI, even if used to create a brief for a lawyer, may not attract client legal 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 for legal practitioners and paid agents—hyperlinking cases

35. The President's Statement asks for comment on whether the Guidance Note should require that all parties who use GenAI include hyperlinks to case authorities that are referred to in materials that they file in the Commission.[13]

36. We have received feedback suggesting that Requirement 2 would negate the need for hyperlinking cases to evidence accuracy. Nevertheless, in light of the growing numbers of cases of AI hallucinations submitted by legal practitioners,[14] despite declarations as to their accuracy, the Law Council considers that the requirement to hyperlink cases for practitioners may be appropriate. We do, however, stress the importance of consistent approaches across jurisdictions to the greatest extent possible, and suggest that a deviation from standard approaches (which a hyperlinking requirement appears to be) must be appropriately justified.

37. There are circumstances where hyperlinking may not be available, such as where a case is unreported or is an international judgment. We acknowledge that a general caveat of including a hyperlink "where available" may unduly undermine the purpose of the obligation and instead suggest an alternative exception for such materials or exercise of discretion would be appropriate in these circumstances.

38. In relation to imposing the hyperlink requirement on self-represented parties, the Law Council has received mixed views. Some consider that the requirement to include case hyperlinks should extend to self-represented litigants, where these cases are reasonably publicly available. This approach would support greater engagement and understanding of the types of sources to be relied upon as well as assisting with transparency, verification and efficient access to authorities.

39. Conversely, the Law Council also received feedback that extending this requirement to self-represented litigants could be too onerous, particularly for vulnerable users. We are conscious of access to justice implications for users who may struggle with the requirement to hyperlink cases, and the potential serious consequences that could arise from non-compliance. This is particularly pertinent for self-represented parties facing intersectional disadvantage, such as people with a disability or for whom English is a second language. If the requirement to hyperlink cases extends to self-represented litigants, the Law Council urges the Commission to exercise appropriate discretion when considering the extent and consequences of non-compliance with this aspect of the Guidance Note where the non-hyperlinked case is not an hallucination.

---

[13] Justice Hatcher, *Exposure draft of the Commission's Guidance Note: User of Generative Artificial Intelligence in Commission cases – opportunity to comment* (President's Statement, 24 March 2026) 3 [14].

[14] See for example, Tesar and Szep (No 3) [2026] FedCFamC1F 21.

40. Further, if the Commission determines to extend the requirement to hyperlink to self-represented litigants, to assist them to comply with this requirement, the Commission should produce additional supporting materials. For example, in addition to the resources referenced at paragraph 28 of the Guidance Note, there could be reference to, and a guide to using, AustLII's or Jade's case citation tools (https://www.lawcite.org/ and https://jade.io/t/citator respectively) as a means by which self-represented litigants could identify the appropriate hyperlink for inclusion, as well as satisfy themselves that authorities located by GenAI are not the product of hallucinations.

Structure of the Guidance Note

41. At paragraph 40, the Guidance Note sets out relevant definitions, including the Commission's definition of GenAI. We suggest that consideration be given to the definition of GenAI being more prominently situated at the outset of the document given the focus of the Guidance Note on this technology. This would be particularly of assistance to self-represented litigants engaging with the requirements of the Guidance Note.

42. The Guidance Note is currently structured in a way that sets out Requirements 1, 2 and 3 at paragraphs 7–9 respectively. 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. The Law Council suggests, particularly for self-represented litigants, it may be helpful if each Requirement is more fully restated at the beginning of each section on "How to comply" with the Requirement and that "Reasons for the requirements—limitations of GenAI" (paragraphs 13–22) move so they appear after these "How to comply" sections.

43. The Commission may also wish to consider structuring the document to more strongly highlight the consequences of non-compliance at the start of, and throughout, the Guidance Note. Alternatively, the Commission may wish to move current paragraph 11 detailing the consequences of non-compliance directly after the information on the requirements (paragraphs 7-9) and before current paragraph 10, which directs users not to provide personal or confidential information to GenAI tools.

44. To further emphasise to self-represented litigants that provision of GenAI hallucinations to the Commission may amount to a serious offence under section 137.1 of the *Criminal Code Act 1995 (*Cth*)* or section 678 of the *Fair Work Act 2009* (Cth), the Commission may wish to consider whether the power to order costs is likely to serve as a more effective means of ensuring compliance with the Guidance Note than the threat of prosecution. Although the potential for a cost order is mentioned at paragraphs 11 and 24 of the Guidance Note, the costs provisions contained in sections 375B, 376, 400A, 401, 546MB, 536MC, and 611 of the Fair Work Act could be given greater emphasis, including by reference to any decided authorities such as *Hoverd v M & J D Pty Ltd*[15] (should the respondent make an application for costs in that matter).

---

[15] *Hoverd v M & J D Pty Ltd* [2026] FWC 1013 referenced in David Marin-Guzman, 'Worker used 'egregious' AI hallucinations in unfair dismissal case', *Australian Financial Review* (online, 30 March 2026).

45. Conversely, the Law Council also received feedback proposing that an educative approach would be preferrable to threats of costs and criminal proceedings. The proposal included the development of additional resources and a preference to refer self-represented parties to the Workplace Advice Service for advice about the consequences of non-compliance.

46. Additional resources could include a short plain-English summary of the Guidance Note, publication of the Guidance Note in languages other than English, and for the Commission to develop a video about legal research and how to search for, and cite, legislation and case law in Commission proceedings, which could be added to the resources on the Fair Work Commission Online Learning Portal and social media.

Example GenAI section for Commission forms

47. Should the Commission be minded to adopt our feedback, we note that corresponding amendments will need to be made to the Example GenAI section for Commission forms.

48. The Commission may also wish to consider reiterating the risks associated with the use of GenAI as part of this section on Commission forms and include the warning that provision of false or misleading information to the Commission is a serious offence.

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice, and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its constituent bodies:

- the Australian Capital Territory Bar Association;
- the Law Society of the Australian Capital Territory;
- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Northern Territory Bar Association;
- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
- the Law Society of Tasmania;
- the Victorian Bar Incorporated;
- the Law Institute of Victoria;
- the Western Australian Bar Association;
- the Law Society of Western Australia; and
- Law Firms Australia.

Through these bodies, the Law Council represents more than 110,000 Australian lawyers.

The Law Council is governed by a board of 23 Directors: one from each of the constituent bodies, and six Executive members elected by Directors. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President. In 2026, the Law Council Executive comprises:

- Ms Tania Wolff, President
- Ms Elizabeth Shearer, President-elect
- Mr Lachlan Molesworth, Treasurer
- Ms Jennifer Ball, Executive Member
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple.

The Law Council's Secretariat is based in Canberra. Its website is www.lawcouncil.au.