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# JUDGES, LAWYERS, AND LITIGATION:

# DO THEY, SHOULD THEY,

# USE AI?

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## Contents

*Overview*

Introduction

1. Artificial Intelligence (**AI**) is having a moment.

2. Almost each day, there are news reports about a fresh use for AI in solving a problem or speeding a solution. The business of law is not immune to this, but there is a significant gap between these ideas and the necessary knowledge that lawyers should have about AI systems, their uses, and their implications. In this paper we aim to examine that gap in the context of employment law.

*The AI knowledge gap*

3. By now, many members of the Employment Law Bar Association (**ELBA**) will know that employers are already using AI systems, but they may not know either the extent of, or constraints on, that use. This is an issue, because that use is already extensive: AI systems are being used to manage undertakings, including to select, manage and fire staff, in both the public and private sector.[1]

4. This is not the limit of AI's relevance to the work of ELBA members. They may be less aware that, in an analogous way, judges are being encouraged to use, and are using, AI systems in the administration and delivery of justice. When this is happening, how, or even why, is more obscure. There have been only a few public statements by judges as to this.[2]

5. Moreover, many employment lawyers will have been encouraged to use some form of AI, not just in relation to discovery, but in their everyday work, including in the process of litigation. Yet they may not know to what extent this is lawful and within regulatory rules, or the extent to which they must declare their use. They may not even have thought about such issues when for instance just "trying out" Microsoft Copilot.

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[1] There are many companies offering broad HR systems, see e.g. XEC Recruitment | The UK's Leading AI Recruitment Agency and AI in HR: How AI Is Transforming the Future of HR.

[2] Discussed further in Part C in the sub-section By Judges.

6. So, our first aim in writing this paper is to encourage a much closer scrutiny of these issues by both ELBA members and employment judges (at all levels), and even by lay users of the employment law system, and to provide the key resources for that scrutiny. Our second is to try to provide a framework for that scrutiny.

*Five basic issues with AI in the justice system*

7. There are five reasons why we think that this is important and that those engaged with employment law should know more about the implications of AI.

8. *First*, how an AI system produces a result is often never fully explainable, may be the product of systems which are biased,[3] is rarely fully observable or transparent, and may use the work product of others who have not consented to its use in an AI tool.[4] So whenever AI systems are in use there are forensic questions about all these points that lawyers and judges need to address.

9. *Secondly*, the AI tools currently on offer are only the beginning; what the future may hold is startling. For example, we know through our contacts in the industry, that businesses are looking to produce tools that can create possible versions of an opponent's skeleton argument (before exchange) and produce potential versions of the judgment which a judge might hand down so that lawyers can craft their submissions accordingly. Only a moment's reflection is necessary before coming to the conclusion that there are profound ethical and regulatory issues in such a brave new world.

10. *Thirdly*, within the UK, there is neither legislation,[5] nor regulation,[6] nor case-law,[7] that *specifically* controls the usage of AI systems, by lawyers, litigants or judges. Meanwhile, the rest of the world is thinking through and developing context

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[3] See Review into bias in algorithmic decision-making Centre for Data Ethic and Innovation, November 2020.

[4] See for instance, Artificial intelligence: Development, risks and regulation, James Tobin, House of Lords Library, 18 July 2023.

[5] See Appendix 1, the United Kingdom which sets out the very limited contexts within which legislation defines AI. In those cases, and in some contexts, there is a reference to AI in legislation; none of it applies directly to employment law.

[6] See previous fn.

[7] While there have been first instance cases in the Employment Tribunal concerned with AI, a search or "artificial intelligence" on Lexis, of both the Industrial Case Reports and the Industrial Relations Law Reports, produced a nil return as at 4.11.2024.

specific smart regulation that can be a boost for business and government whilst protecting people and enabling beneficial innovation. Action in the UK is some considerable distance behind.

11. That is not to say that nothing has happened here, only that the UK so far has taken only the softest of actions, relying on existing rules and regulators, and leaving litigants to use existing data, equality and human rights law to challenge improper practices themselves.

12. *Fourthly*, it has been realised for some time that there is a particular issue about judicial use of AI systems. [8] While there are signs of the beginning of a general discussion about AI and the judicial system, there is not yet a serious *public* debate about the general use of AI systems by judges. What discussion there is so far, for example, the "Artificial Intelligence (AI): Guidance for Judicial Office Holders"[9] (**AI Judicial Guidance**) and speeches by Lord Justice Birss[10] and Sir Geoffrey Voss,[11] is just the beginning of such a discussion.

13. *Lastly*, as AI systems are changing the way justice is being done, there is the potential for an immediate power imbalance between those that use AI systems and those who are then affected by that usage. Little has been said about this in the UK so far, but a judicial system which allows for such an imbalance is likely in the long run to undermine confidence in the rule of law.

### The big questions

14. So, we think that there are some big questions that need to be thought through very carefully, and soon. These include, at least, the following general questions –

- Where AI is concerned is it a case of "anything goes", so that everything can be tried in the name of saving costs or broader efficiencies?

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[8] For a relatively early contribution see Reiling, A.D., 2020. Courts and artificial intelligence. In *IJCA* (Vol. 11, p. 1).

[9] "Artificial Intelligence (AI): Guidance for Judicial Office Holders: 12 December 2023", Courts and Tribunals Judiciary.

[10] Deputy Head of Civil Justice, "Future Visions of Justice" given on the 18 March 2024 at KCL.

[11] Master of the Rolls, see e.g. his lecture "Future of the Courts" given on the 15 May 2024 at UCL.

- Or do these kinds of activity need much more active control?

- If so, how and by whom?

- Are the judiciary ready to deal with AI and the issues that will arise?

- If not, what training and support is necessary?

- How should the parties to litigation, in which AI systems are being used, be informed about such use, and seek reassurance about their appropriateness?

- In short, what is an appropriate use of AI by lawyers, litigants and judges, and what role should each play in policing such use?

15. At a minimum, we think that it is necessary to discuss urgently –

- The extent to which the current existing legal regime is *capable* of addressing the use of AI systems in the course of litigation, and

- Whether more or different legal controls are *necessary*.

16. There are indeed other important questions, such as whether AI systems could, or should, make judicial decisions,[12] standing - as it were - in the place of judges, but important though those questions are, they are not the focus of this paper.[13]

17. Though we believe that we must look very closely at the constraints that should be considered for AI, we should not be taken as being antithetical to its use. We are in no sense technophobes; we have worked in this field for some six years[14] and seen that <u>well-used</u> AI can secure great benefits. We certainly believe that under proper

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[12] Such possibilities are much touted for resolving issues such as tax compliance or road traffic infringements, and perhaps these will be important in other areas of civil, criminal or regulatory law.

[13] See for instance <u>The Future for Dispute Resolution: Horizon Scanning</u>, Sir Geoffrey Vos MR, at para 42. The Telegraph also reported on 17 October 2024 that Sir Geoffrey Vos had spoken at the Legal Geek law technology event in London recently where he returned to this theme.

[14] We started the <u>AI Law Consultancy </u>in 2018 and have since worked with the Centre for Data Ethics and Innovation, the Council of Europe, the UK government, European and UK Regulators, the United Nations and the TUC, as well as with think tanks, individuals and business.

controls AI systems have much to offer the world of work and the process of judging disputes about that world.

18. We know that well-used AI systems could greatly help in the work place without causing harm and equally could help in the drive for speedier and cheaper justice, without impairing due process. There may even be some areas where AI could deliver decision making which is more accurate and has a lower risk of discrimination.

19. We hope that at least a discussion about these issues *now* will make judges, lawyers and litigants more aware of the extent of current controls (and the gaps in such controls) and will enable them to moderate any practices that they have engaged in already that are of doubtful legality, while not being hindered in those uses which are useful.

### Structure of this paper

20. We have divided this paper into Parts as follows -

21. We recommend reading Part A Artificial Intelligence first so as to be clear as to what this paper is discussing. Those who prefer to have a more detailed introduction to the basics, should proceed to Part B The components of Artificial Intelligence, while those readers with a firm grasp of the components of AI could move straight to Part C Artificial Intelligence in the litigation process and associated risks, before continuing to the rest of this paper.

Conclusions and recommendations

22. Our paper concludes by calling for urgent discussion and debate on the appropriate use of AI in the legal system. It stresses the importance of establishing clear guidelines and regulatory frameworks to ensure that AI is used responsibly and ethically in the administration of justice. To this end, we make specific recommendations for possible next steps aimed at the judiciary, regulators, professional bodies and chambers, and these are set out in Part G: Next steps

23. Because definitions matter when discussing what is a legitimate use of AI, it is a particular problem, that in contrast to the picture internationally, there is still no single and universal legal definition of AI in the UK.[15]

24. There are some rather loose descriptions at play in the UK, which we need to examine, for instance, the AI Judicial Guidance[16], which is the only publicly available guidance from, and to the judiciary, describes AI as –

> Computer systems able to perform tasks normally requiring human intelligence.

25. While this might suffice for general conversation, it is very vague.[17] It is too broad; it would encompass something as simple as a programme in a computer to automatically open Word or Excel or order data in Excel, and that is not what AI is at all. It also neither up to date nor consistent with currently accepted international discourse about AI.

26. In contemporary discourse about ethics and the regulation of AI systems, the focus is on something much more complex and *more removed from acts of human intelligence*.[18] Our view is that an analogy with human intelligence is no longer

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[15] We are particularly aware of the significance of this point from our discussions with non-lawyers on the Special Advisory Committee which supported our work in drafting the TUC's Artificial Intelligence (Regulation and Employment Rights) Bill. It has also been noted in Artificial intelligence: Development, risks and regulation, James Tobin, House of Lords Library, 18 July 2023.

[16] See para 7 above.

[17] This is not to say that all judges are unaware of the complexity of AI e.g. compare the definition in the AI Judicial Guidance with Lord Sales' much fuller description of artificial intelligence in Judicial Review Methodology in the Automated State Presentation for the Conference on Automation in Public Governance – Theory, Practice and Problems presented for the Conference on Automation in Public Governance – Theory, Practice and Problems Prato, Italy, September 2024.

[18] In contemporary discourse about ethics and regulation of AI systems, the concern is with something much more complex and more removed from acts of human intelligence. The UK Government's 2023 policy paper called A pro-innovation approach to AI regulation defined AI, AI systems or AI technologies as "products and services that are 'adaptable' and 'autonomous'". The adaptability of AI refers to AI systems, after being trained, often developing the ability to perform new ways of finding patterns and connections in data that are not directly envisioned by their human programmers. The autonomy of AI refers to some AI systems that can make decisions

appropriate and we recommend that it should not be used as AI will soon move beyond the limits of human intelligence.

27. So, a first step both for this paper and indeed for the UK, is to define what is an AI system more precisely. Our recommendation is that any definition should align as closely as possible with international efforts because for regulation to be effective, developers and deployers will need confidence that their tools can be used globally without too much avoidable friction from shifts in regulatory regimes.

28. The definition that this paper will use is that adopted by the Council of Europe, which itself was the product of international work at the highest level by the Organisation of Economic Co-operation and Development (**OECD**)[19] –

> … a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.  Different artificial intelligence systems vary in their levels of autonomy and adaptiveness after deployment.

29. We explain how this came to be adopted by the Council of Europe and why it is better in Appendix 1.

### Different types of AI

30. It is also important to understand that the public discourse about AI has radically shifted in the last 12 months or so. It is normal now to see terms like "General Purpose AI" being referred to in the press. This speaks of a new language – which is understood by few – that perhaps adds to the mystique around AI. But, in truth, these terms do no more than describe the tasks that AI is to achieve.

31. Here are some AI neologisms that are frequently used and which we recommend that judges and lawyers become familiar with –

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without the intent or ongoing control of a human: see Artificial intelligence (AI) glossary, Devyani Gajjar, UK Parliament, 23 January 2024.

[19] See Appendix 1.

| a. | GPAI | General purpose AI system that can be used in and adapted to a wide range of applications for which it was not intentionally and specifically designed. |
| b. | Foundation Model | AI neural network trained on broad data at scale that can be adapted to a wide range of tasks. |
| c. | Frontier Model | A newer version of a foundation model (the term is somewhat contested). |
| d. | Generative AI | A type of AI system that can create a wide variety of data, such as images, videos, audio, text, and 3D models. |
| e. | Chat GPT | Chat Generative Pre-Trained Transformer, developed by Open AI. It processes natural human language and generates responses. |
| f. | Copilot | Described by Wikipedia as "… a generative artificial intelligence chatbot developed by Microsoft. Based on the GPT-4 series of large language models, it was launched in 2023 as Microsoft's primary replacement for the discontinued Cortana.  It is now ubiquitously available on all up-to-date Microsoft Office programmes including Word and Excel. |

32. A useful guide to these types of terms has also been prepared  by the Ada Lovelace Institute on its webpage "Resource: What is a foundation model?"

*Part B: The components of Artificial Intelligence*

33. We next turn to the components of AI systems since understanding these matters are key to thinking through issues relating to the regulation of AI.

Training data

34. AI is powered by data. AI is programmed to learn, reason, and solve problems based on *training data sets*. Data sets are used by an AI created algorithm both at the initial training stage and as further iterations of relevant data are made. The content of the training data set at any time will therefore be a reason for the output of the AI system. The data set may be of any size, but it is common now for these training data sets to be huge, encompassing more data than a human could ever retain in many lifetimes. Moreover, the training data set is rarely static; in almost all systems now the data set will be constantly adding new data, which sometimes may be the result of the work that the AI system has done already. There can therefore be a feedback loop to the training data.

35. The use of data is already fairly heavily regulated under the UK GDPR and the Data Protection Act 2018[20] (**DPA 2018**). The UK has also committed to its own AI Safety Institute[21] and the establishment of a new Regulatory Innovation Office announced on the 8 October 2024.

36. Training sets can be inaccurate, biases or belong to someone else meaning it is a critical part of thinking though how AI should be regulated (beyond the DPA 2018 and UK GDPR) and what is appropriate or not appropriate in terms of use cases.

37. Indeed, a key issue with AI is the extent to which the training data set is skewed in some way in relation to the protected characteristics.[22] It may have too much or too

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[20] This point was partially noted by Sir Geoffrey Vos MR in a short speech to the Irish Law Society "AI and the GDPR" on the 9 October 2024, when he discussed the effect of Article 22 of the GDPR on AI developments.

[21] For an overview of its remit see Introducing the Ai Safety Institute.

[22] See e.g. Allen, R. and Masters, D., 2020, March. Artificial Intelligence: the right to protection from discrimination caused by algorithms, machine learning and automated decision-making in *ERA Forum* (Vol. 20, No. 4, pp. 585-598). Berlin/Heidelberg: Springer Berlin Heidelberg.

little. For instance, criminal statistics for stop and search may have too much data about black and minority ethnic persons,[23] facial recognition training sets may be skewed to or from the faces most common in a region,[24] perhaps lacking enough faces from black and African people[25] or women.

38. There are though issues that come with size. Using a very large set of training data can enable more complex outputs to be made but it is an error to presume automatically that the size of the data set renders it relevant to the problem in hand. A data set for instance based on the use of English as a language in India may make mistakes when applied to the use of Geordie English in Newcastle in the UK.

39. Some commentators suggest that this should be addressed by adding so-called "synthetic data" or tweaking the way the AI works to "compensate" for the biases. The equality issues when these "debiasing" techniques are used are subtle and as we have explained elsewhere may introduce breaches of equality law.[26]

### Algorithms

40. AI involves creating *algorithms* to enable machines to perform what may (or may not) appear to be cognitive functions that seem to mimic those which humans – including lawyers and judges - undertake. It is likely to enable those algorithms to have been altered as the machine "learns" from the work that it undertakes. In other words, AI creates itself and sometimes that process is so complex it is beyond human comprehension.[27] A lack of transparency and explainability is another theme of this paper.

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[23] See e.g. Vomfell, L., Stewart, N. Officer bias, over-patrolling and ethnic disparities in stop and search. *Nat Hum Behav* 5, 566–575 (2021). https://doi.org/10.1038/s41562-020-01029-w

[24] See e.g. Grother, P., Ngan, M. and Hanaoka, K., 2019. Face recognition vendor test (fvrt): Part 3, demographic effects. Gaithersburg, MD: National Institute of Standards and Technology.

[25] See e.g. Gentzel M. Biased Face Recognition Technology Used by Government: A Problem for Liberal Democracy. Philos Technol. 2021;34(4):1639-1663. doi: 10.1007/s13347-021-00478-z. Epub 2021 Sep 25. PMID: 34603941; PMCID: PMC8475322.

[26] See Allen, R. and Masters, D. The impact of the proposals within "Data: A new direction" on discrimination under the Equality Act 2010 published on 5 November 2021 by The Legal Education Foundation.

[27] The Legal Education Foundation had published an open opinion written by us under the title *"In the matter of automated data processing in government decision making"* on 7 September 2019; this addresses these points in some detail.

## Machine learning

41. AI systems often depend on *machine learning* through processes such as neural networks and deep learning. These enable AI systems to analyse training data, recognise patterns, and make decisions, in a way which has been described as mimicking (or supposedly surpassing) the human brain's functioning. As we shall discuss below this means, for instance, that AI systems can be asked to consider one piece of legal work – say an Opinion, or a Chronology or a Cast List – and then work on another set of documents to produce a similar output. Though when an AI system does so, it would be wrong to say that it understands what it is doing in a way that a human would.

## Large Language Models

42. In recent years the capacity of publicly available AI systems to deal with language has increased hugely. These are called Large Language Models (**LLM**). ChatGPT or CoPilot are the ubiquitous examples of an LLM but there are also an increasing number of others, such as[28] –

| LLM | Developer | Multimodal?[29] | Access |
|-----|-----------|-----------------|--------|
| GPT | OpenAI | Yes | Chatbot and API[30] |
| Gemini | Google | Yes | Chatbot and API |
| Gemma | Google | No | Open |
| Llama | Meta | No | Chatbot and open |

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[28] See the suggestions as to the most significant, interesting, and popular LLMs made by Harry Guinness in his blog The best large language models (LLMs) in 2024, August 5, 2024.

[29] A "multimodal" LLM is one which can be accessed through and generating information into multiple formats, such as text, images, and audio.

[30] An API is Application Programming Interface. It stands for the rules and protocols which allow software applications to communicate with each other.

| LLM | Developer | Multimodal?[29] | Access |
|---|---|---|---|
| Claude | Anthropic | Yes | Chatbot and API |
| Command | Cohere | No | API |
| Falcon | Technology Innovation Institute | No | Open |
| DBRX | Databricks and Mosaic | No | Open |
| Mixtral 8x7B and 8x22B | Mistral AI | No | Open source |
| Phi-3 | Microsoft | No | Open |
| Grok | xAI | No | Chatbot and open |

43. They have been trained on simply massive amounts of text data that can generate natural language responses to a wide range of inputs. These systems may have attempted to contain a very large proportion of all the English language text on the internet in order to mimic human intelligence. It is LLMs that are prone to "hallucinations".

44. One recent study from Stanford University[31], which examined the use of LLMs in legal research, is sobering reading –

> …  In one highly-publicized case, a New York lawyer **faced sanctions** for citing ChatGPT-invented fictional cases in a legal brief; **many similar cases** have since been reported. And our **previous study** of general-purpose chatbots found that they hallucinated between 58% and 82% of the time on legal queries, highlighting the risks of incorporating AI into legal practice. In his **2023 annual report on the judiciary**, Chief Justice Roberts took note and warned lawyers of hallucinations …

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[31] "Law, Regulation, and Policy: AI on Trial: Legal Models Hallucinate in 1 out of 6 (or more) Benchmarking Queries", 23 May 2024, Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning, Daniel E. Ho.

> In a new [preprint study](#) by [Stanford RegLab](#) and [HAI](#) researchers, we put the claims of two providers, LexisNexis (creator of Lexis+ AI) and Thomson Reuters (creator of Westlaw AI-Assisted Research and Ask Practical Law AI)), to the test. We show that their tools do reduce errors compared to general-purpose AI models like GPT-4. That is a substantial improvement, and we document instances where these tools provide sound and detailed legal research. But even these bespoke legal AI tools still hallucinate an alarming amount of the time: the Lexis+ AI and Ask Practical Law AI systems produced incorrect information more than 17% of the time, while Westlaw's AI-Assisted Research hallucinated more than 34% of the time.

45. The workings of LLMs raise profound questions beyond accuracy. For instance, distinguished academics at the Oxford University Internet Institute have asked *"Do large language models have a legal duty to tell the truth?"*[32] noting that –

> Careless speech is a new type of harm created by large language models (LLM) that poses cumulative, long-term risks to science, education, and shared social truth in democratic societies. LLMs produce responses that are plausible, helpful, and confident, but that contain factual inaccuracies, misleading references, and biased information. These subtle mistruths are poised to cumulatively degrade and homogenise knowledge over time.[33]

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[32] Wachter, S., Mittelstadt, B. and Russell, C., 2024. Do large language models have a legal duty to tell the truth?. *Royal Society Open Science*, *11*(8), p.240197.  Available at
SSRN: https://ssrn.com/abstract=4771884 or http://dx.doi.org/10.2139/ssrn.4771884

[33] The full abstract for this paper states: "Careless speech is a new type of harm created by large language models (LLM) that poses cumulative, long-term risks to science, education, and shared social truth in democratic societies. LLMs produce responses that are plausible, helpful, and confident, but that contain factual inaccuracies, misleading references, and biased information. These subtle mistruths are poised to cumulatively degrade and homogenise knowledge over time. This article examines the existence and feasibility of a legal duty for LLM providers to create models that "tell the truth." We argue that LLM providers should be required to mitigate careless speech and better align their models with truth through open, democratic processes. We define careless speech against "ground truth" in LLMs and related risks including hallucinations, misinformation, and disinformation. We assess the existence of truth-related obligations in EU human rights law and the Artificial Intelligence Act, Digital Services Act, Product Liability Directive, and Artificial Intelligence Liability Directive. Current frameworks contain limited, sector-specific truth duties. Drawing on duties in science and academia, education, archives and libraries, and a German case in which Google was held liable for defamation caused by autocomplete, we propose a pathway to create a legal truth duty for providers of narrow- and general-purpose LLMs."

46. Other AI systems in use in legal contexts do not use LLMs but are trained on the much smaller specialist sets of text, such as a data base of cases or textbooks. These are called "Small Language Models" (**SLM**). The risks here may be lower providing that the data is carefully maintained and curated. SLMs are not without problems but they can be more appropriate for certain uses of AI.

### Trust, risk, and fairness

47. Unfortunately, to gain even the most basic information about training sets, the algorithms used in an AI system and the machine learning process, is often very difficult for legal reasons and may be impossible in practical terms.[34] So businesses and developers often talk about concepts of *trust* and its counterpart *risk*. The concept of trust is often intertwined in the discourse by those making and selling these machines with an idea of *fairness.*

48. Much has been written about these terms and there is a growing consensus about them (though not yet universal unanimity). Whether they will prove to be adequate guardrails in practice to the discriminatory or inaccurate use of AI is something only time will tell and even then, is dependent on AI being properly audited and monitored.

49. Judges and litigators must recognise that the silent premise to this debate is that since knowing definitively whether an AI tool is inaccurate or non-discriminatory is too hard, it should be accepted that trustworthiness and fairness are suitable alternatives.

50. It will be immediately evident to any lawyer that these concepts and this approach would be contested in any other context. It would never be an answer in litigation in other contexts to simply say "*Trust me: my decision was fair and not discriminatory*"; So, why should this be so when an AI system is being used?

51. There is though, a further reason for caution when these arguments are in play. We have written and lectured extensively on the idea that fairness and non-

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[34] See e.g. the discussion in the Opinion of Advocate General Richard De La Tour delivered on 12 September 2024 in Case C-203/22 CK, considering the question of trade or business secrecy as an objection to disclosure, as discussed in the judgment of the CJEU in Case C-634/21, OQ v Land Hessen, intervener SCHUFA Holding AG.

discrimination are not the same and that the US concept of discrimination is not identical to that in Europe.[35]  When thinking through regulation in the UK, we must ensure that we are not seduced by notions of trust and fairness such that we lose sight of the hard edge of equality enshrined in the Equality Act 2010.

## Automated decision making

52. Many AI systems make decisions. The work these systems undertake is described as *Automated Decision Making* (**ADM)**. In contrast to the decisions taken by humans, it is often not practicable to interrogate the reasons that an AI system makes a particular choice meaning it lacks observability and transparency. Even if the basic algorithm, the training data and input data are all known, the way that the AI systems operate on the input data in comparison to the training data set will be the result of many millions of operations by the system in looking for patterns.  So, ADM is less capable of being examined than human decision making and therefore less susceptible to scrutiny under the rule of law. In the context of litigation, this feature of AI is highly important.

53. Lawyers of all kinds reading these paragraphs may ask why they should be concerned about this, thinking perhaps that these are esoteric concerns.  This is a question we seek to answer in the next Part in which we show how common these uses are.

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[35] See e.g. Zuiderveen Borgesius, F., 2018. Discrimination, artificial intelligence, and algorithmic decision-making. *Council of Europe, Directorate General of Democracy*, p.42,and Allen, R. and Masters, D., 2021, The impact of the proposals within "Data: A new direction" on discrimination under the Equality Act 2010 by the published on 5 November 2021 by The Legal Education Foundation.

*Part C: Artificial Intelligence in the litigation process*

## The UK's AI market

54. There is a large, and growing increase in the use of AI in both the private and the public sector, and this is one reason for writing this paper. It has been estimated that the UK's AI market is valued at around $16 - $21 billion,[36] and that it is the third largest market in the world after US and China.[37]

55. Figures published by the Department for Science, Innovation & Technology (**DSIT**) as long ago as January 2022 have shown how significant this use of AI is in the UK[38] –

> - Around 15% of all businesses have adopted at least one AI technology, which translates to 432,000 companies.
> - Around 2% of businesses are currently piloting AI and 10% plan to adopt at least one AI technology in the future, equating to 62,000 and 292,000 businesses respectively.
> - As businesses grow, they are more likely to adopt AI; 68% of large companies, 34% of medium sized companies and 15% of small companies have adopted at least one AI technology; the latter make up the majority of the UK business landscape and hence drive the UK average result of a 15% adoption rate.
> - AI solutions for data management and analysis are most prevalent, with 9% of UK firms having adopted them, followed by natural language processing and generation (8%), machine learning (7%), AI hardware (5%), computer vision and image processing and generation (5%).
> - The IT and telecommunications (29.5%) and legal (29.2%) sectors currently have the highest rate of adoption, while the sectors with the lowest adoption rates are hospitality (11.9%), health (11.5%), and retail (11.5%).

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[36] See UK Artificial Intelligence (AI) Statistics And Trends In 2024, Forbes, 1 October 2024, and see https://www.trade.gov/market-intelligence/united-kingdom-artificial-intelligence-market-2023

[37] See U.S. Department of Commerce, International Trade Administration, Market Intelligence, Information and Communication Technology United Kingdom; for further analysis of the size of the contribution of AI to the UK economy see The 'Artificial intelligence sector study 2022' published by the Office for Artificial Intelligence and the Department for Science, Innovation and Technology.

[38] See DSIT Research and analysis, AI activity in UK businesses: Executive Summary, 12 January 2022.

### AI use by employers

56. Whilst the main focus of this process is AI and the litigation process, we cannot ignore that AI is being used in the workplace and that members of ELBA will in the future be frequently litigating cases where the use of AI in the business is part of the factual matrix.

57. This is because there is no doubt that in the UK, just as in the rest of the world, there is a substantial use of AI systems in employment, and an ever-increasing number of companies offering AI solutions for employers to use in human resource related decisions. The use of AI systems for worker management is a worldwide phenomenon, well described by the European Commission, in its 2021 proposal for a Platform Workers Directive[39] (**PWD**) to provide protection for workers in the gig economy [40] -

> Digital labour platforms use automated systems to match supply and demand for work. Albeit in different ways, digital platforms use them to assign tasks, to monitor, evaluate and take decisions for the people working through them. Such practices are often referred to as "algorithmic management". While algorithmic management is used in a growing number of ways in the wider labour market, it is clearly inherent to digital labour platforms' business model. It creates efficiencies in the matching of supply and demand but has also a significant impact on working conditions in platform work. Algorithmic management also conceals the existence of subordination and control by the digital labour platform on the persons performing the work. The potential for gender bias and discrimination in algorithmic management could also amplify gender inequalities. Understanding how algorithms influence or determine certain decisions (such as the access to future task opportunities or bonuses, the imposition of sanctions or the possible suspension or restriction of accounts) is paramount, given the implications for the income and working conditions of people working through digital labour platforms. Currently, however, there is insufficient transparency regarding such automated

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[39] See the European Commission's 2021 Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work COM(2021) 762 final, where it noted just how prevalent "Algorithmic Management" was. The aim of the Platform Workers Directive is to provide new protections for those working in the "gig economy" but it would be a mistake to think that AI management is only occurring there.

[40] The final text of this proposed Directive is now all but agreed see here.

> monitoring and decision-making systems and people lack efficient access to remedies in the face of decisions taken or supported by such systems.

58. The recitals to the PWD[41] set out how the EU sees the impact of these new technologies in the workplace, for instance –

> 4. Digitalisation is changing the world of work, improving productivity and enhancing flexibility, while also carrying some risks for employment and working conditions. Algorithm-based technologies, including automated monitoring systems and automated decision-making systems, have enabled the emergence and growth of digital labour platforms. New forms of digital interaction and new technologies in the world of work, if regulated and implemented properly, can create opportunities for access to decent and quality jobs for people who traditionally lacked such access. However, if unregulated, they can also result in technology-enabled surveillance, increase power imbalances and opacity about decision-making, and entail risks for decent working conditions, for the health and safety at work, for equal treatment and for the right to privacy.
>
> …
>
> 8. Automated monitoring systems and automated decision-making systems powered by algorithms increasingly replace functions that managers usually perform in businesses, such as allocating tasks, pricing individual assignments, determining working schedules, giving instructions, evaluating the work performed, providing incentives or applying adverse treatment. …. Persons performing platform work subject to such algorithmic management often do not have access to information on how the algorithms work, which personal data are used or how the behaviour of those persons affects decisions taken by automated systems. … Moreover, persons performing platform work often do not know the reasons for decisions taken or supported by automated systems and are not able to obtain an explanation for those decisions, to discuss those decisions with a human contact person, to contest those decisions or to seek rectification or, where relevant, redress.

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[41] At the time of writing this paper the Directive has political agreement but is not yet quite finalised.

59. It is already well known[42] that AI systems are being used in the UK in relation to –

- Job advertising;
- Recruitment processing;
- Task and shift allocation;
- Performance and health monitoring;
- Identity verification;
- Appraisal and pay/bonus setting;
- Disciplinary action;
- Redundancy selection; and
- Dismissal.

### A new issue for worker employer relations

60. This kind of use of AI has significant consequences for the work that ELBA members will do, both in their forensic role but also in terms of the challenges to established employment law concepts. The first point should be obvious, but the latter is more subtle. It involves reconsidering the common law concept of a contract of employment. This concept is based on a relationship between two contracting parties that has at its heart *mutual* trust and confidence.[43] But it is nonsense to even ask: "*How can a machine express mutuality in trust and confidence?*"

61. A change from humans to machines as the managers of employees fundamentally alters the nature of what it means to be an employee or worker. An AI system which to a significant degree dehumanises such a relationship is something quite different. It was difficult not to smile when we read recently that a magic law firm is exploring the use of virtual reality technology to train associates in soft skills.[44] Sometimes businesses think that it is a progressive step to emphasise the extent to which a human is taken "out of the loop" but sometimes the reverse happens.

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[42] See for instance Technology managing people - The worker experience TUC 2020; and see also Artificial intelligence and employment law, 11 August 2023, Patrick Briône, Sam Day, House of Commons Library Briefing, Number CBP 9817.

[43] We analysed this interface between the modern experience and the traditional concept of a contract of employment in our paper Allen, R. and Masters, D., 2021, February. Technology Managing People: the legal implications, in *A report for the Trades Union Congress by the AI Law Consultancy*, see in particular [1.35] – [1.45].

[44] The Lawyer, 28 October 2024.

62. Regardless of what employers see as the benefits to AI, the TUC found in a poll of workers' views conducted in April 2024[45] that such uses were highly resented –

- 77% oppose AI being used to make hiring decisions;
- 71% oppose AI being used in performance management and bonus decisions;
- 86% oppose AI being used to make firing decisions; and
- 69% think employers should consult their staff before introducing new technologies in the workplace.

### AI use by law firms and litigators in the UK

63. AI is being used by non-contentious lawyers and by litigators in the preparation of their cases.

64. Many law firms boast about AI usage both internally and externally on their client's behalf,[46] and bespoke firms offer AI generated legal products for relatively mundane repetitive tasks such as drafting contracts.[47] As part of its campaign to get lawyers to buy into its new product Lexis+ AI™, LexisNexis announced the publication of a recently conducted survey which said that the *"… number of lawyers using generative AI tools on a monthly basis has more than doubled in the last six months"*.[48]

65. Even more recently the New Law Journal noted research from LexisNexis that AI is expected to revolutionise the economic model within law firms, –

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[45] See The AI Bill Project April 2024.

[46] See e.g. Osborne Clarke, Succeeding with AI, Clifford Chance, Clifford Chance expands use of generative AI with deployment of Copilot for Microsoft 365 and Viva Suite for its global workforce, or Linklaters, Client Services Artificial Intelligence.

[47] See e.g. Luminance | Legal-Grade AI , Leap AI, or Robin AI (no relation!). Many barristers at Cloisters, including Robin Allen KC and Dee Masters, are also involved in FromCounsel which recently announced a joint AI venture with Leya.

[48] See Lawyers cross into the new era of generative AI, LexisNexis, February 2024.

> AI is also having a material effect on pricing structures—39% of private practice lawyers expect their firm to adjust billing practices due to AI, up from 18% in January 2024. However, only 17% think AI will end the billable hour model, while 40% believe it will remain and 42% are uncertain about its impact. [49]

66. The full width of uses of AI systems which employment lawyers are undertaking is beyond this paper and there does not appear to be any reliable survey evidence of the whole of the profession. However, some idea of what commercial companies think that they should be doing can be gathered from the online flyer for a demonstration of the power of Lexis+ AI™[50] This says that the product will help lawyers[51] –

> - Draft Documents Faster - Instantly produce legal arguments, contract clauses, and client communications from a simple user prompt.
> - Conversationally Search - Collaborate with Lexis+ AI like a trusted colleague who intelligently and conversationally responds to your requests and refines answers.
> - Summarise The Law - Get the legal summary you need in seconds without clicking into a single search result.
> - Analyse Documents - Upload your documents to extract and summarise key insights in moments.

67. It is as if LexisNexis thinks that its AI systems can already provide almost comprehensive assistance with the tasks of a litigator. We have some doubts about that but predict in the *near term* that AI will mostly help lawyers in the way that a paralegal at the start of their career might – producing helpful first drafts or performing of a lot of the time consuming but ultimately less sophisticated legal tasks that need doing in a busy practice, for example, combing 1000's of documents for particular points or patterns. Nonetheless, even to that extent this is very significant.

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[49] See Four out of five adopt AI, 174 NLJ 8087, p5 (1) 27 September 2024

[50] Leap Legal offers similar services, see AI Solutions.

[51] See Book your Lexis+ AI™ demo now

68. Our assessment of the pattern of adoption of AI systems, based on discussions with colleagues and our knowledge of the practice of employment law, is that it is happening in waves as follows -

| Wave 1 (happening now) |
| --- |
| • Producing chronologies. |
| • Producing basic opening skeleton arguments. |
| • Drafting basic court orders. |
| • Ordering information (e.g. producing a list of all documents referred to across statements). |
| • Creating bundles where email chains appear once and in chronological order (rather than endlessly). |
| • Identifying missing information. |
| • Legal research. |
| • Producing schedules of loss. |
| • Disclosure exercises. |

| Wave 2 (maybe happening now/likely future activity) |
| --- |
| • Identifying all evidence that links to a particular factual dispute and identifying whether it is helpful/unhelpful to a party's case. |
| • "Marking up" trial bundles e.g. identifying which witnesses refer to what documents and in relation to what matters, identifying key documents/evidence. |
| • Ordering evidence e.g. repetitive medical records to produce a master chronology. |
| • Assessing merits of a claim/defence. |
| • Legal research (highly-personalised). |
| • Producing schedules of loss (detailed and highly personalised with little human guidance). |
| • Drafting witness statements.[52] |

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[52] There are AI tools which purport to take statements from witnesses in an impartial and nuanced way. For example, the Bar Council offers Talk to Spot which uses AI to tease out of the victims of bullying and harassment what has happened to them. We discuss the propriety of using AI in the drafting of witness statements further below in Part D under the heading What is truth?

| |
|---|
| • Cross-examination plans (from scratch or identifying missed points/disputes). |
| • Producing possible versions of your opponent's skeleton argument (i.e. before you have exchanged) using a database of previous skeleton arguments/closing submissions (query: will there soon be a "market" in our skeleton arguments which firms/barristers will harvest to use in AI?). |
| • Producing possible versions of the judgment which the judge might hand down (using their previous judgments). |
| • On retirement, well-known silks will offer up all materials (such as opinions etc.) drafted over a career to monetise their work via AI tools based on their work. |
| • Witness training (PowerPoint and Teams can already be used to critique and provide real time feedback on presentation skills and speaking style). |

69. The tasks set out in the second table may already be happening and it seems certain to us that sooner or later – subject to developing controls – that they will be.

| **Wave 3 (could happen in the future)** |
|---|
| While hearings in the Supreme Court (and sometimes the Court of Appeal) are live streamed and therefore would be fully accessible to an AI assistant, generally speaking, it is a contempt of court and/or a criminal offence for a party (or observer) to record court proceedings, including remote hearings at first instance.[53] However, one possible future is that the rules are modified to permit the parties to record proceedings in order to use AI to "assess" the trial as it progresses. This leads to the potential for well-resourced clients to – |
| • Assess the performance of the barristers with a view to mid-trial modifications in style. |
| • Measure the engagement / emotional response of the judge (generally or in relation to particular topics).[54] |
| • Measure the performance of witnesses. |
| • Flag relevant case law to counsel as submissions are made or the Judge raises queries. |

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[53] There is useful analysis from the Bar Council at "Recordings of Court Hearings and Conferences", June 2022.

[54] Emotion recognition technology (sometimes called "Affective Computing") is popular in the AI world including in the workplace; such technology professes to measure and assess human engagements (boredom, excitement, interest, engagement etc).

> - Note case management directions.
>
> In short, the junior counsel or even instructing solicitors attending court might be replaced by AI.

70. The full implications of each of these use-cases for the parties, the public at large, and the justice system, requires much discussion. Some may be thought to be anodyne, but others raise difficult questions about the balance between the need to reduce costs and speed the resolution of disputes, with issues such as equality of arms and open justice. We discuss these issues further in Part D: Risks arising from using Artificial Intelligence in the litigation process and Part E: Managing risks: The developing international and national regulatory framework for AI.

### By the not-for profit sector to help Litigants in Person

71. There is another potentially significant aspect to the use of AI systems in the litigation process. It could revolutionise the experience of people who would otherwise have no access to lawyers. For example, there is an app called Reclamo which has been developed in the US to allow migrant workers to sue their employers for unpaid wages.

### By judges

72. We are sure that some tech-savvy time–pressed judges and tribunal members will already be wondering whether Copilot or ChatGPT can make their lives easier. Any judge using an up-to-date version of Word to take notes or write judgments or orders will have Copilot on the top ribbon and when "cutting and pasting" a user will be prompted to use it. At present, there is no UK survey of which we are aware as to the extent that this is happening, however from conversations that we have had we estimate that the judicial use of AI systems in the UK is not negligible. We certainly think that either the Ministry of Justice, the Judicial Office, or either or both of the new House of Commons Justice Select Committee and the House of Lords Justice and Home Affairs Committee should conduct a survey.

73. As well as our "trade" knowledge of this, there is some publicly available evidence from which to infer this is happening and that the use of AI systems by the judiciary is only set to grow.

74. *First*, UNESCO has recently announced the result of a worldwide survey of the extent to which judiciaries were using AI.[55] It summarised its findings as follows –

> The survey shows that 93% of respondents are familiar with AI technologies, such as ChatGPT, Google Bard, and Bing Chat. 44% are actively using them for tasks including summarizing texts, writing emails, drafting legal documents and conducting legal research. This high level of engagement demonstrates the growing reliance on AI in judicial systems globally.

75. The full survey revealed a patchwork use of AI in judicial processes across the world. Unfortunately, it lacked any specific assessment of the percentages that apply in the UK, but there seems to be no reason to suppose that the position is much different.

76. *Secondly*, the Law Society Gazette reported Lord Justice Birss as saying[56] -

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[55] UNESCO Global Judges' Initiative: survey on the use of AI systems by judicial operators, Gutiérrez, Juan David, UNESCO 2024, CI/DIT/2024/JI/01 Rev.

[56] See Solicitor condemns judges for staying silent on 'woeful' reforms, Bianca Castro and John Hyde, Law Society Gazette, 14 September 2023. The Guardian also carried the story, see Court of appeal judge praises 'jolly useful' ChatGPT after asking it for legal summary, Hibaq Farah, 15 September 2023; this article provided examples from other countries where judges had used AI systems in their work.

> I asked [ChatGPT] to give me a summary of an area of law I was writing a judgment about. I thought I would try it. I asked can you give me a summary of this area of law, and [it] gave me a paragraph. I know what the answer is because I was about to write a paragraph that said that, but it did it for me and I put it in my judgment. It's there and it's jolly useful. I'm taking full personal responsibility for what I put in my judgment, I am not trying to give the responsibility to somebody else. All it did was a task which I was about to do and which I knew the answer and could recognise an answer as being acceptable.

77. *Thirdly*, the President of the Supreme Court, Lord Reed of Allermuir, in a speech given in November last year,[57] explained that AI is being trialled although expressed a more cautious approach saying that –

> AI is currently being trialled by my court to produce transcripts of oral hearings, which will be of assistance to the judges, and also to lawyers, the media and members of the public[113]…The transcripts currently contain too many errors to be publishable, but they should improve over time.
>
> *Footnote -*
> [113] This is also being done in Spain. The transcripts currently contain too many errors to be publishable, but they should improve over time.

78. *Fourthly*, on the 12 December 2023, senior judiciary in England and Wales, issued the AI Judicial Guidance[58] which not only did not rule out its use, but gave it some encouragement, after discussing a range of risks and precautionary measures. Thus, it specifically stated that judges might get AI to perform "Potentially useful tasks" such as –

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[57] See Oral Hearings in the United Kingdom Courts: Past, Present and Future, Lord Reed of Allermuir, Speech to the Legal Training and Research Institute of Japan, 29 November 2023.

[58] Issued collectively by Lady Carr, CJ, Sir Geoffrey Vos, MR, Sir Kenneth Lindblom, the Senior President of Tribunals, and Lord Justice Colin Birss, Deputy Head of Civil Justice, on the 12 December 2023.

- AI tools are capable of summarising large bodies of text. As with any summary, care needs to be taken to ensure the summary is accurate.

- AI tools can be used in writing presentations, e.g. to provide suggestions for topics to cover.

- Administrative tasks like composing emails and memoranda can be performed by AI.

### AI use by the Employment Tribunal service

79. It is worth thinking what this means for the Employment Tribunal system.  We can foresee many ways in which AI could play a role during the litigation process itself and as a means of dispute resolution.[59]

| Wave 1 (right now) |
| --- |
| • Summarising evidence heard in the Tribunal at the end of each day/the trial. |
| • Summarising the case for a "write up" within a case management preliminary hearing. |
| • Helping to finding common dates of availability by estimating trial hearing lists ahead of a preliminary hearing so the parties attend well prepared in terms of witness availability but also proposed directions. |
| • Constructing complex case management timetables around parties' availability (maybe provisionally ahead of a preliminary hearing). |
| • Producing chronologies. |
| • Identifying what areas need to be addressed in evidence/during cross-examination during a trial (could be useful where a party if a LIP to ensure that the trial is fair). |

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[59] This is a hot topic right now. There is presently a project funded by ELA and headed by Sarah Fraser Butlin KC and Professor Catherine Barnard which is examining issues of employment dispute resolution.

- Drafting basic orders.

- Creating summaries of the relevant areas of law.

| **Next wave (possible future when technology improves)** |
|---|
| • Identifying all evidence that goes to particular areas of factual dispute. |
| • Identifying if any issues have not been addressed during cross-examination (maybe very useful with LIPs to ensure that the trial is fair). |
| • Reminding the judge of recent decisions in an area of law relevant to a case before them. |
| • Drafting correspondence to the parties. |
| • Predicting which cases are most likely to settle (useful for managing resources). |
| • Predicting which ADR track is likely to be most effective. |
| • Predicting how long a trial is really going to take including how much deliberation time will be needed. |
| • Providing judges with "real time" prompts as to relevant case law or guidance as submissions/applications are being made. |
| • Writing up (hopefully) uncontroversial aspects of a judgment for example which individuals gave evidence and when during a trial. |
| • AI agents[60] act on behalf of the court service as a whole to answer basic questions e.g. when it the recent letter sent on behalf of the claimant likely to be read? Has it been read yet? Has there been an update on whether a judge has been allocated to a floating case? They might even be used to make administrative decisions like varying case management directions. |

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[60] "What are AI agents?", MIT Technology Review, Melissa Heikkila 5 July 2024: "The grand vision for AI agents is a system that can execute a vast range of tasks, much like a human assistant. In the future, it could help you book your vacation, but it will also remember if you prefer swanky hotels, so it will only suggest hotels that have

- Data sharing across the breath of government in so far as relevant to the particular legal dispute e.g. a judge ordering compensation at the end of a case could have real time access to the claimant's benefits record.[61]

- "Real time" translations of non-English witnesses and / or documents.

80. There are even AI tools which promise to facilitate mediations by allowing parties to move beyond apparent impasse albeit alongside a human mediator.[62] While we struggle to imagine that this would assist entrenched parties, we don't rule out that AI could help manage expectations, for example, by providing a realistic view on quantum.

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four stars or more and then go ahead and book the one you pick from the range of options it offers you. It will then also suggest flights that work best with your calendar, and plan the itinerary for your trip according to your preferences. It might make a list of things to pack based on that plan and the weather forecast. It might even send your itinerary to any friends it knows live in your destination and invite them along. In the workplace, it could analyze your to-do list and execute tasks from it, such as sending calendar invites, memos, or emails. One vision for agents is that they are multimodal, meaning they can process language, audio, and video. For example, in Google's Astra demo, users could point a smartphone camera at things and ask the agent questions. The agent could respond to text, audio, and video inputs. These agents could also make processes smoother for businesses and public organizations, says David Barber, the director of the University College London Centre for Artificial Intelligence. For example, an AI agent might be able to function as a more sophisticated customer service bot. The current generation of language-model-based assistants can only generate the next likely word in a sentence. But an AI agent would have the ability to act on natural-language commands autonomously and process customer service tasks without supervision. For example, the agent would be able to analyze customer complaint emails and then know to check the customer's reference number, access databases such as customer relationship management and delivery systems to see whether the complaint is legitimate, and process it according to the company's policies, Barber says"

[61] Using AI to share data across state infrastructure is a current government focus. For example, the NHS has a contract with the AI company Palantir worth £330 million for 5 years to allow medical records to be shared. See "Europe risks 'ruin' unless it adapts to AO, claims Palantir boss", The Times, 5 November 2024.

[62] Harvard Law School, "AI Mediation: Using AI to help mediate disputes", 17 June 2024.

*Part D:  Risks arising from using Artificial Intelligence in the litigation process*

<span style="color:red">Basic justice risks</span>

81. These possible uses for AI in litigation, whether by judges or lawyers, or the parties more generally, give rise to significant issues. We have set out in the table below the kinds of issues we think might arise, though we emphasise our summary of potential problems is unlikely to be comprehensive.

| a. | **Equality before the law**[63]<br><br>Some AI tools have been shown to discriminate because the training set used has been insufficiently representative or the machine learning process has led to the system learning a discriminatory correlation.[64] |
|---|---|

| b. | **Duty to give reasons**[65]<br><br>There is a very real question mark as to whether judges can comply adequately with the duty to give reasons if elements of their decision-making have been supported by AI. This is because, at present, AI can rarely adequately explain itself. |
|---|---|

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[63] See Article 7 of the Universal Declaration of Human Rights, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." and repeated in many subsequent instruments.

[64] There is a famous example of Amazon developing, and then abandoning, an AI recruitment tool that showed bias against women.

[65] See e.g. *R v Knightsbridge Crown Court, Ex parte International Sporting Club (London) Ltd* [1982] QB 304, per Griffiths LJ at pp.314-315, "It is the function of professional judges to give reasons for their decisions and the decisions to which they are a party. This court would look askance at the refusal by a judge to give his reasons for a decision particularly if requested to do so by one of the parties…" or specifically in the context of employment law Rule 62 of the ET rules of Procedure 2013, in schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 No. 1237, as amended and see *Meek v City of Birmingham District Council* (18 February 1987) [1987] EWCA Civ 9  [1987] IRLR 250.

| c. | **Accuracy** |
|---|---|
| | Generative AI may look impressive, but it is not always accurate. LLMs in particular are prone to "hallucinations" where information is fabricated (see para 44 above). This was an issue in a recent case in the US where it became apparent during the litigation that one of the experts had used Copilot leading to errors.[66] The full judgment is worth reading and reveals a damning judicial assessment of the unthinking use of generative AI in litigation. |

| d. | **Power imbalance/equality of arms**[67] |
|---|---|
| | AI has the potential to put well-resourced parties at a massive advantage. It is not too fanciful to imagine a future – if no controls are introduced – in which large law firms could harvest judgments and / or skeleton arguments in order to allow their clients to produce a judgment from a particular judge or an opponent's approach towards settlement or have "real time" analysis of a trial. |

| e. | **Fairness** |
|---|---|
| | Procedural fairness is obviously the cornerstone of the Employment Tribunal process. If AI is to be used to undertake tasks ordinarily performed by a judge such as summarising evidence, how is that to be conducted in a way which has sufficient checks and balances so as to maximise accuracy? Even something as simple as summarising evidence could be skewed in favour of one particular party if the AI tool was not trained so as to be even-handed. |

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[66] This case came to our attention by via the Civil Litigation Brief produced by Gordon Exall.

[67] For example, the "overriding objective" requires the Tribunal to deal with cases justly and fairly which includes ensuring that the parties are on an equal footing.

| | |
|---|---|
| f. | **Data protection / confidentiality (lawyers)**<br><br>The judiciary benefits from wide powers and exceptions in the Data Protection Act 2018.[68] However, the position is less "generous" for lawyers.<br><br>There are also various data protection provisions which allow the processing of data in the context of legal proceedings (including prospective legal proceedings) but lawyers do not have *carte blanche*[69] and there are likely to be interesting legal arguments in the future about whether lawyers are permitted to process the personal data of clients (or former clients or other people's clients) when using AI tools.<br><br>For example, is it lawful to use a chronology in Case X to generate a chronology in unconnected Case Y? What legal basis would be relied upon within the DPA 2018? How would rules like the principles of data minimisation, transparency, fairness and accuracy translate to the use of AI by lawyers?[70] The answer to these questions is likely to be use case specific.<br><br>There is also a broader issue about the confidentiality of client data and the permitted uses when lawyers store it on systems and use it within AI tools. |

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[68] For example, the UK GDPR as supplemented by the DPA 2019 and section 117, section 34 (Schedule 1), section 14 (Schedule 2), section 7 (Schedule 8), section 5 (Schedule 11).

[69] For example, the UK GDPR as supplemented by the DPA 2018 and section 33 (Schedule 1), section 5 (Schedule 2), section 6 (Schedule 8), section 6 (Schedule 10) etc.

[70] UK GDPR, article 5 for example.

| | |
|---|---|
| h. | **Transparency**<br><br>Since AI can be unfair, inaccurate and unlawful if not used properly, transparency is important. Unless the judge discloses such use, how is a party, or their lawyers, or an appeal court or indeed fellow members of a tribunal to know that such a use of AI has occurred?<br><br>These questions raise various practical issues:<br><br>• Should there be an obligation of disclosure of such or similar uses?<br>• Is that a general obligation or does it depend on how the AI is used?<br>• Would it be a procedural or more substantive error of law to fail to make such a disclosure?<br>• What should happen if such an error became patent e.g. Is a retrial necessary or should there be an order for the judge to reconsider the case? Should the judge be recused from further involvement? |

### What is truth?

82. Jurists since at least the time of Sir Francis Bacon, the first Queen's Counsel, have asked the question "what is truth?",[71] but now with AI systems at work in law, this will need to be revisited yet again. The new question is *"To what extent is a witness giving truthful evidence if it has been generated in part or in whole by an AI system?"* We cannot wholly answer that question, but we can frame how we see it should be approached in the context of current rules.

83. The key guidance on the content of witness statements in the Employment Tribunal in England and Wales is the Presidential Guidance – General Case Management of 2018. In Scotland a somewhat different approach is taken: see Practice Direction in connection with the Use Of Witness Statements in Employment Tribunal Cases to be Heard In Scotland of 2022. In neither guidance is there any discussion of evidence being given as a result of the use of AI; we think that there should be, and, to an extent, this is the position under the Civil Procedure Rules (**CPR**).

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[71] See "Of Truth" the first essay in the final edition of Sir Francis Bacon's "*The essayes or counsels, civill and morall*" (1625).

84. The prescribed attestation to witness statements offered to stand as evidence in chief in proceeding to which the CPR applies is set out in paragraph 2.2 of Practice Direction 22 – Statements of Truth as follows –

> The form of the statement of truth verifying a witness statement should be as follows (and provided in the language of the witness statement):
>
> 'I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.'

85. A similar attestation is usually required in Employment Tribunal proceedings. Yet how can a witness give this attestation if the witness statement is to any significant extent the product of an AI system, where for instance, the system has created a first draft or provided the chronology or filleted a year's worth of emails? Secondary questions arise such as: What should they have done, or have been advised to have done, to check the utility of the AI system, the relevance and accuracy of its output?

86. The relevant Practice Direction for the Business and Property Courts[72] would seem to preclude any AI generated content in a witness statement.

87. It says –

> **3.2** A trial witness statement must set out only matters of fact of which the witness *has personal knowledge* that are relevant to the case, **…**
>
> (Paragraph 18.1 of Practice Direction 32 requires a trial witness statement to be *in the witness's own word*s, if practicable, and to be drafted in the witness's own language and in the first person;..)

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[72] See PRACTICE DIRECTION 57AC – TRIAL WITNESS STATEMENTS IN THE BUSINESS AND PROPERTY COURTS

**3.4** Trial witness statements should be prepared in accordance with –
(1) the Statement of Best Practice contained in the Appendix to this Practice
Direction, …

## 4. Confirmation of compliance

4.1 A trial witness statement must be verified by a statement of truth as
required by rule 22.1(b) and paragraph 20.2 of Practice Direction 32 and, unless
the court otherwise orders, must also include the following confirmation,
signed by the witness:

"I understand that the purpose of this witness statement is to set out matters of
fact of *which I have personal knowledge*.
I understand that it is not my function to argue the case, either generally or on
particular points, or to take the court through the documents in the case.

*This witness statement sets out only my personal knowledge and recollection, in my
own word*s.

On points that I understand to be important in the case, I have stated honestly
(a) how well I recall matters and (b) whether my memory has been refreshed
by considering documents, if so how and when.

*I have not been asked or encouraged by anyone to include in this statement anything
that is not my own account, to the best of my ability and recollection, of events I
witnessed or matters of which I have personal knowledge.*" …

Appendix
(Statement of Best Practice in relation to Trial Witness Statements)

…

2. Principles

…

2.3 Factual witnesses give evidence at trials to provide the court with testimony
 *as to matters of which they have personal knowledge*, including their recollection
 of matters they witnessed personally, where such testimony is relevant to
 issues of fact to be determined at trial, and:

> (1) *a matter will have been witnessed personally by a witness only if it was experienced by one of their primary senses* (sight, hearing, smell, touch or taste), or if it was a matter internal to their mind (for example, what they thought about something at some time in the past or why they took some past decision or action),
>
> (2) for the avoidance of doubt, factual witness testimony may include evidence of things said to a witness, since the witness can testify to the statement made to them, if (a) the fact that the statement was made to the witness is itself relevant to an issue to be determined at trial or (b) the truth of what was said to the witness is relevant to such an issue and the statement made to the witness is to be relied on as hearsay evidence.
>
> 2.4 The duty of factual witnesses is to give the court an honest account of matters known personally to them (including, if relevant to the issues in the case, what they recall as to matters witnessed personally by them or what they would or would not have done or thought if the facts, or their understanding of them, had been different). It is improper to put pressure of any kind on a witness to give anything other than their own account, to the best of their ability and recollection, of the matters about which the witness is asked to give evidence.
>
> (Italics added for emphasis)

88. This might signpost the right way forward for the Employment Tribunal system, but if so then it has significant implication for the use of some of the products we have discussed above.

### AI generated "evidence"

89. Whilst a full discussion is outside the remit of this paper, it is worth noting also that the litigation process must adapt to account for AI as evidence in itself. Specifically, it is likely that cases in the Employment Tribunal will soon involve AI generated evidence, for example, the output from an AI tool which predicts whether an employee has been fraudulent, and which has been relied upon as part of a dismissal process. We have personal experience of this kind of evidence in Employment Tribunal litigation. Although the case was settled, we had to confront questions as to the capacity of the Tribunal to assess this evidence, and what needed to be done to assist it in this role.

90. There is also a risk of evidence being fabricated using AI. In 2021, the Centre for Security and Emerging Technology (**CSET**) at Georgetown University, presciently published a paper entitled "AI for Judges – a framework".[73] It had an interesting and thoughtful analysis of judicial engagement with AI in the US at that time and offered up a framework which it was suggested would enable judges to get across these issues effectively and consistently.

91. One point it addressed is the issue of AI as evidence, helpfully framing that issue in these terms –

> Both artificial intelligence and the interpretation of AI outputs are complex. Courts will have to determine the appropriate means to verify AI outputs. This might involve expert testimony, or it might be done through technical means, such as watermarks embedded in an image at the time it is created. Courts will need to determine who is qualified to testify on the accuracy of an AI application. On this question alone, there are many options including: the software engineer, the design engineer, the data engineer, and the company CEO. Courts will need to determine whether the "custodian of records," without more background, is in fact the competent individual to authenticate evidence derived from AI.

How should these risks be approached?

92. We next consider the developing international regulatory framework before looking more closely at what controls are available in the UK and their adequacy, before reaching some conclusions as to what should happen now.

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[73] See AI for Judges - A Framework, Baker J., Hobart L., Mittelsteadt M., CSET, December 2021.

*Part E: Managing risks: The developing international and national regulatory framework for AI*

93. Having examined the risks, we now turn to what is being done so far to manage them. When seeking to answer the questions raised in this paper, in the context of litigators preparing to enforce or defend employment rights, or a judge deciding to resolve them, the best place to start is to understand what is happening internationally.

94. This needs to be considered from both the point of view of political initiatives, and the consequential legislative steps. We start with the political initiatives.

### Political initiatives

*The Hiroshima Summit and Code of Conduct*

95. That the current rapid increase in use of AI systems requires new specific regulation has been ever more clearly articulated in the last two years. There is little that addresses AI in litigation directly but many of the ideas within the broader regulatory debate will be important, nevertheless. For instance, the communique from the G7 Leaders (including (then) Prime Minister Sunak) at the conclusion of the Hiroshima Summit in May 2023 declared[74] –

> We are determined to work together and with others to…advance international discussions on inclusive artificial intelligence (AI) governance and interoperability to achieve our common vision and goal of trustworthy AI, in line with our shared democratic values.

96. And the work of that summit led to the Hiroshima Process International Code of Conduct for Organizations Developing Advanced AI Systems (the **Code**) which articulated eleven action points –

---

[74] See G7 Hiroshima Leaders' Communiqué, 20 May 2023.

1 Take appropriate measures throughout the development of advanced AI systems, including prior to and throughout their deployment and placement on the market, to identify, evaluate, and mitigate risks across the AI lifecycle.

2 Identify and mitigate vulnerabilities, and, where appropriate, incidents and patterns of misuse, after deployment including placement on the market.

3 Publicly report advanced AI systems' capabilities, limitations and domains of appropriate and inappropriate use, to support ensuring sufficient transparency, thereby contributing to increase accountability.

4 Work towards responsible information sharing and reporting of incidents among organizations developing advanced AI systems including with industry, governments, civil society, and academia.

5 Develop, implement and disclose AI governance and risk management policies, grounded in a risk-based approach – including privacy policies, and mitigation measures.

6 Invest in and implement robust security controls, including physical security, cybersecurity and insider threat safeguards across the AI lifecycle.

7 Develop and deploy reliable content authentication and provenance mechanisms, where technically feasible, such as watermarking or other techniques to enable users to identify AI-generated content

8 Prioritize research to mitigate societal, safety and security risks and prioritize investment in effective mitigation measures.

9 Prioritize the development of advanced AI systems to address the world's greatest challenges, notably but not limited to the climate crisis, global health and education.

10 Advance the development of and, where appropriate, adoption of international technical standards

11 Implement appropriate data input measures and protections for personal data and intellectual property.

97. When first writing this paper, we considered auditing what was known about the steps taken in the UK against this 11-point Code. Yet it soon became clear that since

so many of these steps have not been taken (or at least not obviously been taken) by those providers of AI solutions to employment or judicial problems, that this was unnecessary. The real conclusion is to note that this has not happened despite the risks outlined in this paper. We therefore firmly recommend that the two Parliamentary justice committees review the state of regulation of the use of AI in the justice system against these 11 points.

### *The Bletchley Park AI Safety Summit*

98. The Code further developed what had to be done by governments subscribing to the action points. This vision was then further articulated in the Declaration at the conclusion of the AI Safety Summit hosted by the UK at Bletchley Park in November 2023, which, after noting the many potential opportunities to use AI for good in employment and other spheres of life, added[75] –

> …AI also poses significant risks, including in those domains of daily life. To that end, we welcome relevant international efforts to examine and address the potential impact of AI systems in existing fora and other relevant initiatives, and the recognition that the protection of human rights, transparency and explainability, fairness, accountability, regulation, safety, appropriate human oversight, ethics, bias mitigation, privacy and data protection needs to be addressed. We also note the potential for unforeseen risks stemming from the capability to manipulate content or generate deceptive content. All of these issues are critically important and we affirm the necessity and urgency of addressing them.

99. In our view, judges and litigators surely need to note the import of this assessment: when AI systems are in use, the protection of human rights, transparency and explainability, fairness, accountability, regulation, safety, appropriate human oversight, ethics, bias mitigation, privacy and data protection, is critically important and urgently necessary.

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[75] See The Bletchley Declaration by Countries Attending the AI Safety Summit, 1-2 November 2023.

*The AI Seoul Summit*

100.  These themes were reprised early this year in May 2024 at the Seoul Summit jointly hosted by the UK and Korea.[76] The AI Seoul Summit started with a commitment from 16 of the world's largest tech companies to a suite of safety standards for AI.[77]

101.  There is an issue as to whether such regulation should be by the largest companies agreeing some rules for safety among themselves or whether this is the domain of governments and official regulators.[78] This is not a binary question.

102.  The key point is that very large tech companies are seeking to meet these standards in a way which may alter or forestall moves by governments. This is obviously good in theory, but it is an open question whether in the judicial process it should be assumed that companies will take appropriate steps without governments requiring them to do so.

103.  As we shall see many countries have acted or are in the process of acting, but the UK is not in the forefront of these.

104.  In parallel with these political initiatives, there have been steps taken to make general AI specific legislation and this we discuss next.

National initiatives (beyond the UK)

105.  At the national and international level there are many current initiatives concerned with AI system regulation. We need list only some of the most important and relevant to this paper.

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[76] See Seoul Declaration for safe, innovative and inclusive AI by participants attending the Leaders' Session: AI Seoul Summit, 21 May 2024 and see also Ardi Janjeva, Seungjoo Lee and Hyunjin Lee, "AI Seoul Summit Stocktake: Reflections and Projections," CETaS Expert Analysis, Alan Turing Institute, (June 2024).

[77]: see Historic first as companies spanning North America, Asia, Europe and Middle East agree safety commitments on development of AI

[78] It does though raise questions about the inter-relationship between existing topic specific regulators (generically described as the vertical regulators) such as the Care Quality Commission or the Financial Conduct Authority and the need for a process specific regulator like the Information Commissioner or Equality and Human Rights Commission (generically described as the horizontal regulators).

*President Biden's executive order*

106.  President Biden issued an [Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence](#) on the 30 October 2023. It recognises that "*Responsible AI use has the potential to help solve urgent challenges while making our world more prosperous, productive, innovative, and secure*" whilst also explaining that "*At the same time, irresponsible use could exacerbate societal harms such as fraud, discrimination, bias, and disinformation; displace and disempower workers; stifle competition; and pose risks to national security*". It proposes eight guiding principles and priorities.

107.  The following detail of those principles is important to the overarching themes of this paper as follows -

> "Artificial Intelligence must be safe and secure.  Meeting this goal requires robust, reliable, repeatable, and standardized evaluations of AI systems, as well as policies, institutions, and, as appropriate, other mechanisms to test, understand, and mitigate risks from these systems before they are put to use … Testing and evaluations, including post-deployment performance monitoring, will help ensure that AI systems function as intended, are resilient against misuse or dangerous modifications, are ethically developed and operated in a secure manner."
>
> "Promoting responsible innovation, competition, and collaboration will allow the United States to lead in AI and unlock the technology's potential to solve some of society's most difficult challenges.  This effort requires investments in AI-related education, training, development, research, and capacity, while simultaneously tackling novel intellectual property (IP) questions and other problems to protect inventors and creators".
>
> "In the workplace itself, AI should not be deployed in ways that undermine rights, worsen job quality, encourage undue worker surveillance, lessen market competition, introduce new health and safety risks, or cause harmful labor-force disruptions.  The critical next steps in AI development should be built on the views of workers, labor unions, educators, and employers to support responsible uses of AI that improve workers' lives, positively augment human work, and help all people safely enjoy the gains and opportunities from technological innovation."

> "My Administration cannot — and will not — tolerate the use of AI to disadvantage those who are already too often denied equal opportunity and justice.  From hiring to housing to healthcare, we have seen what happens when AI use deepens discrimination and bias, rather than improving quality of life.  Artificial Intelligence systems deployed irresponsibly have reproduced and intensified existing inequities, caused new types of harmful discrimination, and exacerbated online and physical harms".
>
> "Use of new technologies, such as AI, does not excuse organizations from their legal obligations, and hard-won consumer protections are more important than ever in moments of technological change.  The Federal Government will enforce existing consumer protection laws and principles and enact appropriate safeguards against fraud, unintended bias, discrimination, infringements on privacy, and other harms from AI.  Such protections are especially important in critical fields like healthcare, financial services, education, housing, law, and transportation, where mistakes by or misuse of AI could harm patients, cost consumers or small businesses, or jeopardize safety or rights.

### *China*

108.    There is also a question as to the extent to which the public should have to accept these changes in the way courts work. China, which has been working on its own Artificial Intelligence Law (currently out for consultation)[79] has draft provisions specifically aimed at what is summarily called "Judicial AI" which allows withdraw from judicial processes which are based on AI[80] –

> Judicial AI development, provision, and use activities shall adhere to the principles of security and legality, fairness and impartiality, assistance in trials, transparency and credibility, and public order and moral decency. Where AI is used to assist judicial work, AI-based decisions may only be used as a reference for judicial work; users shall have the right to withdraw from interaction with AI products and services at any time.

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[79] See https://cset.georgetown.edu/publication/china-ai-law-draft/

[80] See op. cit. Article 70.

*France*

109.    Among other EU states,[81] France has already acted and expressly banned applications which act on datasets of specific judges in order to predict future decisions.[82]

*Australia*

110.    In December 2023, the Australasian Institute of Judicial Administration published a 66 page long revised edition of AI guidance called <u>AI Decision-Making and the Courts: a guide for Judges, Tribunal Members and Court Administrators</u>.

111.    In addition to explaining key terms associated with AI and the risks when it is used, there is a thoughtful analysis of the extent to which AI is compatible with "Judicial Values" which it defines to mean "*open justice, accountability and independence, impartiality and equality before the law, procedural fairness and efficiency*" (page 43).  It raises a series of profound questions about whether AI should be used in the court system ending with the following list of queries –

> THINGS TO CONSIDER – Overarching questions about AI in courts and tribunals
>
> - Why is AI being used?
> - What problem does it solve?
> - Is the use of AI authorised in the context in which it is deployed?
> - In what contexts is AI being used, and is its use in those contexts appropriate? Does the context involve high stakes, vulnerable people, novel situations, or high levels of emotion?
> - How is AI being used? How can system requirements (through a procurement process) better fulfil its purposes and meet the needs of courts and tribunals, including in relation to core judicial values? How will the

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[81] Other countries such as Poland are developing local legislation.

[82] "<u>Judge Dread: AI and Judicial Integrity</u>" published by the United Nations Office on Drugs and Crime.

> system be checked, tested and evaluated to ensure it meets those requirements?
>
> - Who is consulted about the deployment of AI systems? Are all stakeholders including users and litigants included in decision-making about whether and how AI will be used?
>
> - Will the use of AI impact on public confidence in the judiciary? Will the use of AI in courtrooms and tribunals be accepted by the public?

112. It does not offer practical ways forward, but it is a very impressive framing of the challenges ahead.

*Singapore*

113. Singapore is one of the countries that seems to have thought hardest about the practical control of AI systems in the judicial process. From 1 October 2024, "[The Guide on the Use of Generative Artificial Intelligence Tools by Court Users](#)" comes into force in the court system in Singapore including their employment tribunals. While it expressly states that generative AI can be used to prepare "Court Documents",[83] this is only if the following generic steps have been followed –

> (1) As a Court User, you are fully responsible for the content in all your Court Documents.
>
> (a) If you choose to use Generative AI tools to help you to prepare Court Documents, you should assess whether the output produced by the Generative AI tool is suitable to be used in your specific case.
>
> (b) In particular, you should ensure that any AI-generated output used in your Court Documents: is accurate; is relevant; and does not infringe intellectual property rights (e.g., copyright).
>
> (c) For the avoidance of doubt, Generative AI tools should not be used to generate any evidence that you wish to rely upon in Court. For example, you cannot use Generative AI to ask for evidence to be created, fabricated, embellished, strengthened or diluted. Asking a Generative AI tool to generate a first-cut draft of an affidavit/statement can be done (provided

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[83] "Court Documents" includes text, images, sounds, videos, data and any other material that is filed in or submitted to Court, such as written submissions, skeletal arguments, pleadings, affidavits and opening statements.

that this Guide is complied with), but it is not acceptable to ask a Generative AI to fabricate or tamper with evidence.

(2) Please note that existing requirements for you to produce case law, legislation, textbooks and articles which you have referred to continue to apply. Existing requirements that Court Documents should not contain inappropriate content also continue to apply. Nothing in this Guide overrides those existing requirements.

114.     There are also obligations in relation to accuracy –

**Ensuring accuracy**

(3) To ensure accuracy in the Court Documents you submit, you should do the following:

(a) Fact-check and proof-read any AI-generated content that you use.
(b) Edit and adapt AI-generated content to suit your situation.
(c) Verify that any references to case law, legislation, textbooks or articles provided as AI-generated content actually exist and stand for the legal positions that are attributed to them. If the AI-generated content includes extracts or quotes, you must verify that these are extracted/quoted accurately and attributed to the correct source.
(d) When checking the materials referred to in (c) above, you should use a source that is known to have accurate content. For Self-Represented Persons, this includes the eLitigation GD Viewer https://www.judiciary.gov.sg/judgments/judgments-case-summaries) for case law and Singapore Statutes Online (https://sso.agc.gov.sg/) for legislation. (e) Please note that it is not sufficient verification for you to ask a Generative AI tool for confirmation that the materials exist or contain the content that the AI generated content says it does. To be clear, you cannot use one Generative AI tool to confirm the content generated from another Generative AI tool.

(4) You must be prepared to identify the specific portions of the Court Documents which used AI-generated content and explain to the Court how you have verified the output produced by a Generative AI tool. The Court may ask you to explain this if there are any doubts about any of your Court Documents or a lack of compliance with this Guide.

115.   Further Singapore has imposed auditing obligations to record the steps taken when using AI -

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**What you may be required to do if you use Generative AI output in your Court Documents**

(8) If the Court has grounds to believe that you have used AI-generated output in your Court Documents, you may be asked to do the following:
  (a) inform the Court whether or not you used Generative AI tools in the preparation of your Court Documents. Such tools include but are not limited to Generative AI chatbots;
  (b) declare to the Court that your Court Documents are in compliance with this Guide; and
  (c) you may be required to do so by the making and filing of an affidavit.

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116.   It seems to us that there is much to be said for this approach; it is likely that the EU will require something very similar though it may go further still as we discuss below in Part E at The EU AI Act. Comparison with the approach taken in Singapore should be part of the review of existing regulation and guidance which we have called for.

### International initiatives

#### *OECD*

117.   Meanwhile the OECD, which has its own observatory on AI, has made and continues to make a significant contribution to thought about appropriate regulation, and so has the International Labour Organisation. Both have provided pointers as to the way the issues in this paper should be addressed, as does the United Nations Educational, Scientific and Cultural Organization (**UNESCO**) which published a consultation paper on AI Regulation this summer that discusses *"emerging Approaches Across the World."*[84]

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[84] See Consultation Paper on AI Regulation – Emerging Approaches Across the World, 16 August 2024, UNESCO, CI/DIT/2024/CP/01. The paper is very well drafted to bring out the emerging issues with regulation of AI. It explains its purpose at p. 49 as follows "The policy brief does not endorse a specific AI regulatory approach. Instead, it explains nine emerging regulatory approaches and provides specific cases from different countries to

118.    It has been recognised internationally that the approach of judges to AI is a particularly important and difficult topic. In 2023, UNESCO published a Global Toolkit on AI and the Rule of Law for the Judiciary explaining many of the problems that judges may face and providing a programme of structured learning.[85] The difficulties arise, not just because of the possibility that judicial independence could be undermined, but also because, without special training, there is a fundamental question as to the capacity of the judiciary to deal with AI appropriately.

### *The Council of Europe's Framework Convention*

119.    On 5 September 2024, the Council of Europe's Framework Convention on Artificial Intelligence was opened for signature, emphasising the need for AI to be brought under the rule of law.[86]  The UK was one of the initial signatories to this Convention[87] so it is significant that it stated explicitly that –

> … this Convention is intended to address specific challenges which arise throughout the lifecycle of artificial intelligence systems and encourage the consideration of the wider risks and impacts related to these technologies including, but not limited to … socio-economic aspects, such as employment and labour...

120.    The Convention itself is relatively brief. It requires that when AI systems are deployed they protect human rights (Article 4), ensure that there are measures in

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illustrate each approach. These nine AI regulatory approaches are not exclusive and can be combined in one or more pieces of legislation: 1) Principles-Based Approach; 2) Standards-Based Approach; 3) Agile and Experimentalist Approach; 4) Facilitating and Enabling Approach; 5) Adapting Existing  Laws Approach;  6) Access to Information and Transparency Mandates Approach; 7) Risk-Based Approach; 8) Rights-Based Approach; and 9) Liability Approach." The consultation is now closed.

[85] See Global Toolkit on AI and the Rule of Law for the Judiciary, Stankovich, Miriam, Feldfeber, Ivana, Quiroga, Yasmín, Ciolfi Felice, Marianela, Marivate, Vukosi  UNESCO 2023, CI/DIT/2023/AIRoL/01.

[86] See in particular Articles 1.2 and 5, op. cit. supra.  The Council also contemporaneously published a very useful Explanatory Report.

[87] It was immediately signed by the UK, the US and the European Union among other countries: see https://pace.coe.int/en/news/9574/le-president-de-l-apce-se-felicite-de-l-ouverture-a-la-signature-d-une-nouvelle-convention-sur-l-ia-et-les-droits-de-l-homme.

place to ensure "*respect for judicial independence and access to justice*" (Article 5), human dignity and individual autonomy (Article 7), transparency (Article 8), accountability (Article 9), equality (Article 10), privacy (Article 11), reliability (Article 13) and safety (Article 13) along with risk and impact management frameworks (Article 16).

### The EU AI Act

121.    The EU was already discussing draft legislation in a very extensive dialogue between the European Institutions, Council, Parliament and the Commission.  The EU AI Act was effectively agreed at the beginning of 2024, finally became law on 1 August 2024.[88] This was just a day before the US Senate Committee on Commerce, Science, and Transportation agreed, on a bipartisan basis, a slate of ten legislative measures on key AI issues.[89]

122.    The EU AI Act is a major document but its structure is important to understand when considering the themes in this paper.

123.    Article 1 sets out the purpose of the EU AI Act  which is to improve the functioning of the internal market and promote the uptake of human-centric and trustworthy artificial intelligence  while ensuring a high level of protection of health, safety, fundamental rights enshrined in the Charter, including democracy, the rule of law and environmental protection, against the harmful effects of AI systems in the Union and supporting innovation.

124.    Article 5 introduces various "red lines" when it comes to the use of AI. These really are essential reading for anybody concerned with the way in which AI is being used more generally within society. But for our purposes, it is worth noting the AI is banned insofar as it is used to assess an individual's personality traits or characteristics or to infer emotions within the workplace or in education. There are obviously parallels between this type of technology and some of the ways in which

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[88] Though it will not be before the 2 August 2026 that most of its provisions will be fully implemented.  The Prohibitions, definitions, and provisions related to AI literacy apply from 2 February 2025 and governance and obligations for general purpose AI apply from 2 August 2025, while obligations for high-risk AI systems embedded in regulated products apply from 2 August 2027.

[89] See https://www.dlapiper.com/en/insights/publications/ai-outlook/2024/major-ai-legislation-advances-in-senate-key-points.

AI could be used within litigation (see <u>Part C: Artificial Intelligence in the litigation process and associated risks</u>).

125.  An activity which is deemed "high risk" under Article 6 will be permitted but it means that there are very stringent controls put in place (which are explained later in this paper, see <u>The regulation of "high-risk" activities</u>).

*EU regulation of specific "high-risk" activities*

126.  A system will be high-risk in various circumstances including in a judicial context [90] –

> AI systems intended to be used by a judicial authority or on their behalf to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts, or to be used in a similar way in alternative dispute resolution.

127.  It does not seem to have been widely realised in the UK that the EU has taken such a strict approach to the use of AI systems in the administration of justice, nor why this is so. We think that it would be advantageous to explore here and explain at least some of the reasoning behind this classification.

128.  A good starting point is Recital 61 to the EU AI Act which explains[91] –

> Certain AI systems intended for the administration of justice and democratic processes should be classified as high-risk, considering their potentially significant impact on democracy, the rule of law, individual freedoms as well as the right to an effective remedy and to a fair trial. In particular, to address the risks of potential biases, errors and opacity, it is appropriate to qualify as high-risk AI systems intended to be used by a judicial authority or on its behalf to assist judicial authorities in researching and interpreting facts and the law and in applying the law to a concrete set of facts.

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[90] See paragraph 8(a) of Annex III to, the <u>EU AI Act</u> which defines as "high risk" for the purposes of Article 6(2).

[91] Paragraph breaks have been added to aid understanding of the component parts of this Recital.

> AI systems intended to be used by alternative dispute resolution bodies for those purposes should also be considered to be high-risk when the outcomes of the alternative dispute resolution proceedings produce legal effects for the parties.
>
> The use of AI tools can support the decision-making power of judges or judicial independence, but should not replace it: the final decision-making must remain a human-driven activity.
>
> The classification of AI systems as high-risk should not, however, extend to AI systems intended for purely ancillary administrative activities that do not affect the actual administration of justice in individual cases, such as anonymisation or pseudonymisation of judicial decisions, documents or data, communication between personnel, administrative tasks.

129. It is important for the members of ELBA to know that this concern in the EU is not limited to judicial administration; the EU AI Act also characterises as "high risk" the use of AI systems for all the main themes of employment[92] –

> Employment, workers' management and access to self-employment:
>
> (a) AI systems intended to be used for the recruitment or selection of natural persons, in particular to place targeted job advertisements, to analyse and filter job applications, and to evaluate candidates;
>
> (b) AI systems intended to be used to make decisions affecting terms of work-related relationships, the promotion or termination of work-related contractual relationships, to allocate tasks based on individual behaviour or personal traits or characteristics or to monitor and evaluate the performance and behaviour of persons in such relationships.

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[92] See paragraph 4 of Annex III to, the EU AI Act which defines as "high risk" for the purposes of Article 6(2).

130.　The European Commission explained the rationale for these provisions on the need to protect the fundamental rights of workers consistently with the European Charter on Fundamental Rights.[93]

*The regulation of "high-risk" activities*

131.　When AI is high-risk, it is subject to very stringent controls under Chapter III of the EU AI Act; these we have noted further in Appendix 2. The European Commission has usefully summarised these as follows[94] –

> Before placing a high-risk AI system on the EU market or otherwise putting it into service, providers must subject it to a conformity assessment. This will allow them to demonstrate that their system complies with the mandatory requirements for trustworthy AI (e.g. data quality, documentation and traceability, transparency, human oversight, accuracy, cybersecurity and robustness). This assessment has to be repeated if the system or its purpose are substantially modified.
>
> AI systems that serve as safety components of products covered by sectorial Union legislation will always be deemed high-risk when subject to third-party conformity assessment under that sectorial legislation. Moreover, all biometric systems, regardless of their application, will require third-party conformity assessment.
>
> Providers of high-risk AI systems will also have to implement quality and risk management systems to ensure their compliance with the new requirements and minimise risks for users and affected persons, even after a product is placed on the market.
>
> High-risk AI systems that are deployed by public authorities or entities acting on their behalf will have to be registered in a public EU database, unless those systems are used for law enforcement and migration. The latter will have to be registered in a non-public part of the database that will be only accessible to relevant supervisory authorities.

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[93] See Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act)and amending Certain Union Legislative Acts Com/2021/206 Final, at [3.5].

[94] See Artificial Intelligence – Questions and Answers, European Commission, 1 August 2024.

> To ensure compliance throughout the lifecycle of the AI system, market surveillance authorities will conduct regular audits and facilitate post-market monitoring and will allow providers to voluntarily report any serious incidents or breaches of fundamental rights obligations that come to their attention. In exceptional cases, authorities may grant exemptions for specific high-risk AI systems to be placed on the market.
>
> In case of a breach, the requirements will allow national authorities to have access to the information needed to investigate whether the use of the AI system complied with the law.

132. Readers will immediately appreciate that designating an activity as high risk has very real and meaningful consequences with extensive "guardrails" being required.

133. Further work on these controls is ongoing by the Commission which is tasked with preparing a Code of Practice to supplement the EU AI Act particularly in relation to general purpose AI systems, with which we are also engaged.[95]

134. What is happening elsewhere provides a point of reference for what is occurring in the UK. As we shall show while there is a recognition politically that regulation is needed, what is happening in the UK does not compare particularly well.

### The picture in the UK

#### *Parliamentary initiatives*

135. In stark contrast to the EU, not much has really happened since the House of Commons Science, Innovation and Technology Committee: The governance of

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[95] See Article 56. The authors will participate in the working group set up by the Commission's AI Office for drafting the first Code to address Gen AI.

artificial intelligence: interim report.[96] The last Report of this committee in the previous Parliament stated[97] -

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33. The next Government should stand ready to introduce new AI-specific legislation, should an approach based on regulatory activity, existing legislation and voluntary commitments by leading developers prove insufficient to address current and potential future harms associated with the technology.

34. The Government should in its response to this Report provide further consideration of the criteria on which a decision to legislate will be triggered, including which model performance indicators, training requirements such as compute power or other factors will be considered.

35. The next Government should commit to laying before Parliament quarterly reviews of the efficacy of its current approach to AI regulation, including a summary of technological developments related to its stated criteria for triggering a decision to legislate, and an assessment whether these criteria have been met.

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136. Yet the UK is still some way away from any legislation, whether having general effect or specifically concerned with the field of employment law, let alone general legislation controlling the use of AI systems in judicial activity.[98]

137. It is not even clear to what extent this new government thinks that new AI specific regulation is necessary or appropriate.[99] An AI Act was promised in the King's Speech, [100] though whether that really will be concerned to match some or

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[96] Ninth Report of Session 2022–23, HC 1769

[97] See the last report of this Committee under the previous administration, Governance of artificial intelligence (AI) Third Report of Session 2023–24, 28 May 2024, HC 38, at [33] – [35]

[98] We discuss below the extent of the judicial guidance on using AI systems.

[99] On the 17 October 2024, Lord Holmes asked the Minister of State, Department for Science, Innovation and Technology "…whether the [government planned] plan to regulate artificial intelligence and, if so, which uses they intend to regulate." No specific answer to this was given in the House of Lords. See Hansard House of Lords vol 840, 17 October 2024.

[100] In the King's Speech on the 17 July 2024, it was said merely that "My Government is committed to making work pay and will legislate to introduce a new deal for working people to ban exploitative practices and enhance

all of the international developments discussed above or merely to contain provisions to encourage this emerging technology[101] is not clear. There has been no suggestion that it will engage directly with the use of AI systems in the judicial process. Rachel Reeves announced in her recent budget that the government was committed to AI-initiatives and reviewing the barriers businesses face when adopting both established and novel technologies but there was little detail.[102] In short, the details are awaited, but what they might be is unclear.

138.    There are though reasons to believe that there could be a Parliamentary consensus that it should contain regulatory provisions. For instance the House of Commons Science, Innovation and Technology Committee, in its Third Report of Session 2023–24.[103] Governance of artificial intelligence (AI) identified 12 main challenges that regulation should meet, which it identified as[104] –

> 1: The Bias Challenge
> 2: The Privacy Challenge
> 3: The Misrepresentation Challenge
> 4: The Access to Data Challenge
> 5: The Access to Compute Challenge
> 6: The Black Box Challenge
> 7: The Open-Source Challenge
> 8: The Intellectual Property and Copyright Challenge
> 9: The Liability Challenge
> 10: The Employment Challenge
> 11: The International Coordination Challenge
> 12: The Existential Challenge

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employment rights [Employment Rights Bill]. It will seek to establish the appropriate legislation to place requirements on those working to develop the most powerful artificial intelligence models.", see p. 7.

[101] Under the previous government the Ministry of Justice set up and then outsourced LawtechUK an initiative dedicated to driving digital transformation in the legal sector. As of April 2023, LawtechUK is managed by CodeBase and Legal Geek, on behalf of the MoJ. Its aim is to help to develop a culture of innovation within the legal services sector, increase understanding of Lawtech's benefits for all legal service providers, help grow the legal sector's economic contribution, and support the development of technology to increase access to legal services and aim to reduce unmet legal need.

[102] "Policy paper: Cross-government Review of Technology Adoption for Growth, Innovation and Productivity: Terms of Reference", 30 October 2024.

[103] Op. cit. supra.

[104] And discussed and made proposals as to how they should be met.

139. Each of these challenges should be considered significant by both judges and litigators as well as the tech industry.

## UK Government policy prescriptions

140. It should be said also that the last UK government did recognise the urgent need for deeper thought about these issues when setting out a series of policy prescriptions for its own work and for others in the Responsible AI Toolkit. [105] Though the closest it got to general *regulation* was to set out five principles in its White Paper "A pro-innovation approach to AI regulation" in March 2023 updated 3 August 2023, and expressing the view that it expected regulators to apply them when considering AI systems. These are to promote [106] -

> … safety; security and robustness; appropriate transparency and explainability; fairness; accountability and governance; and contestability and redress.

141. While there is much to be said for these principles, the extent to which a regulator can apply them depends on its *vires* as set out in the legislative provisions establishing it. A regulator for a specific industry cannot enhance the scope of its oversight powers just because the government said it should. If it acted on such a change, when such action was not consistent with the legislation by which it was constituted, its actions would be liable to judicial review.

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[105] See for instance the Responsible AI Toolkit DSIT, 25 March 2024, updated 28 August 2024; this included the Responsible AI in Recruitment guide, but see also Use of artificial intelligence in government National Audit Office, 16 March 2024, SESSION 2023-24, HC 612. The latter paper doubts the extent to which this guidance is well understood. The authors were commissioned by the Ada Lovelace Institute to review the extent to which governmental bodies had developed a publicly available strategy for foundation AI, see 'Next generation' artificial intelligence concepts and the public sphere' published in July 2023 as Appendix 2 to the evidence review ' Foundation models in the public sector', Jones E., Ada Lovelace, 12 October 2023. This identified a very large number of public bodies then had no public consideration of the emerging concepts of General Purpose Artificial Intelligence, Generative AI, Large Language Models, Foundation Models, Artificial General Intelligence, or Frontier Models, see section D.

[106] The White Paper was out for consultation and the last Government's response was published on the 6 February 2024 as "A pro-innovation approach to AI regulation: government response", Command Paper: CP 1019. The Response

142.    The enunciation of these principles in the White Paper begs the question whether existing UK regulatory guidance can meet the requirements set out in the political statements noted above or indeed whether they can go as far as establishing a regulatory framework that is consistent with the legislative measures described above. These are difficult issues, which must be expressly resolved as we have tried to do in the draft Bill we wrote for the TUC.

143.    A key question therefore is to what extent these principles are relevant to the judicial determination of employment cases.  Should judges test their own reliance on AI systems against these principles?  In terms of good governance there are plenty of reasons to answer this question with a "yes", though whether they will and whether a court of appeal would correct a judge who failed to do so, are altogether moot questions. Indeed, both may depend on the extent to which a party to litigation can find out to what use has a judge made of an AI system.

144.    So, while we recognise of course the worthy aim of the last government was to seek to change the perspective of regulators with these principles it must be asked "what about the judiciary?".  They were not mentioned in the discussion, and they are not regulated as for instance is the Care Sector by the Care Quality Commission; the control on their work is self-imposed by the judges themselves at first instance and on appeal.  It is therefore significant that this White Paper lacked a reference to the courts and judiciary, but we do not see why the judiciary should be content with any lesser standard than that set by the principles. Moreover, those who appear before them are entitled to have a similar expectation.

*Horizontal regulators*

145.    The UK has two horizontal regulators, that is to say regulators whose remit covers all areas, who have a direct concern with the use of AI systems.  These are the Equality and Human Rights Commission (**EHRC**) and the Information Commissioner's Office (**ICO**). Both[107] are engaged with these issues and have given some guidance on the use of AI systems as they effect respectively UK Equality Law and UK data protection law.

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[107] It should also be noted that they work closely with some other regulators in The Digital Regulation Cooperation Forum.

*The Equality and Human Rights Commission*

146.   The EHRC have published three guides relating to the use of AI in public services in recent years[108] -

- [Artificial intelligence: meeting the Public Sector Equality Duty (PSED)](#)
- [Artificial intelligence: checklist for public bodies in England](#)
- [Artificial intelligence case studies: Good practice by local authorities](#)

147.   These guides demonstrate an understanding of a key issue with AI systems – that they can be discriminatory.  They start from the premise that there is a risk that AI systems could breach equality law whether as a result of a biased training data set or for other reasons. They then proceed to give advice as to how the use of an AI system should be made transparent to the relevant public and the possible steps to avoid discrimination. They encourage public bodies to think about AI from the start, considering each of the protected characteristics under the Equality Act 2010. They note that discrimination can occur up the value chain, that is to say in the work of those who develop systems which are bought in by public bodies.

148.   Some aspects of the checklist are worth highlighting for their direct relevance to the work of judiciaries when using AI systems in their work –

> 1) Collect equality evidence: assess existing available information, look at external research, talk to staff, service users, equality groups and community groups, identify and address any data gaps;
>
> 2) Review how the AI could affect people with different protected characteristics either positively or negatively;
>
> 3) Assess the potential and actual impact by looking at the equality evidence and asking: does the proposed or existing AI cause, or could it cause, discrimination? does the proposed or existing AI help to eliminate discrimination? does the proposed or existing AI contribute to advancing equality of opportunity? does the proposed or existing AI affect good relations?;

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[108] The last of which was published very recently on the 12 September 2024.

4) Use the results of the equality impact assessment when developing the new AI-related proposal or reviewing existing services (even if the AI was developed outside of your organisation);

5) Keep records of decisions and how you considered the Public Sector Equality Duty (for example, minutes of meetings);

6) Publish the results of the assessment to support transparency;

7) Train staff and make sure they understand their responsibilities; and

8) Continue to monitor the actual impact of the AI-related policy or service, reviewing and amending it as necessary.

149. We will return to some of these themes later in the paper when we propose guard rails for the judiciary and lawyers within the litigation process, see Part F: Guard rails: AI, the judiciary and lawyers in the UK.

*The Information Commissioner's Office (ICO)*

150. It is known that the ICO is about to publish some more detailed advice on the use of AI systems in the workplace though to our knowledge it has not yet made any recommendations as to how the judiciary or litigators might use such AI systems and if they do, the data protection implications beyond generic guidance about how the UK GPDR and DPA 2018 governs data use in the UK.[109] This is an area which should be considered in the future as it is likely to be a growth area with profound implications for society.

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[109] For example, "What do we need to consider if personal information is processed by a court for law enforcement purposes?".

*AI Guidance to litigators from vertical law regulators*

151. There are four regulators concerned with the three branches of the legal profession. The overarching regulator is the Legal Services Board (**LSB**) set up under section 2 of the Legal Services Act 2007 (**the LSA 2007**). The Bar Standards Board (**BSB**), the Solicitors' Regulatory Authority (**SRA**) and CILEX Regulation for legal executives, all operate under the permissions granted by the LSB.

*Legal Services Board*

152. Pursuant to its statutory remit, the LSB's primary focus is on access to legal services. On 23 April 2024 the LSB issued guidance pursuant to section 162 of the LSA 2007 "on promoting technology and innovation to improve access to legal services".  The LSB stated that its desired outcomes from this statutory guidance was to ensure that regulation by bodies such as the BSB and the SRA enabled the use of technology and innovation to support improved access to legal services and to address unmet need, that it balanced the benefits and risks, and the opportunities and costs, of technology and innovation in the interests of the public and consumers, and that it actively fostered a regulatory environment that is open to technology providers and innovators.[110]

153. This statutory guidance made two recommendations to the subordinate law regulatory bodies that - though worded in a slightly clunky way - were designed to encourage a cautious use of AI (but made no reference to controls) –

> 23. Regulators could consider:
>
> b.… (i) the impact of the use of technology and innovation on vulnerable groups and those who may otherwise be negatively impacted because of their protected characteristics, and (ii) what steps may be necessary for legal service providers to take to ensure consumers are aware of how technology, such as artificial intelligence, has been deployed in the provision of a legal service …
>
> f. being aware of, and using, where relevant, wider available guidance relating to current and emerging risks related to the use of technology, for example: on

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[110] See the announcement issued by the LSB about the guidance: LSB issues guidance to regulators to spur innovation and widen access to legal services

cyber threats and data protection regulations, as well as the use of artificial intelligence …

154.   This guidance is hardly likely to make any significant difference to the way litigators act when AI systems are being used.  There is a role for the LSB to provide much better advice than this though whether it has the capacity to do so at present is not clear.

*The Bar Standards Board*

155.   The BSB has not done much on this issue.[111]  It published a blog on the 8 October 2023 entitled "ChatGPT in the Courts: Safely and Effectively Navigating AI in Legal Practice".  The blog compared the outcome in a New York case with that in the UK.  It ended up with advice as follows –

> The following considerations are a useful starting point for integrating technology and AI into professional practice:
>
> Training in Legaltech: Continuing education in legaltech and AI could help barristers set a plan for technology adoption, evaluate new technologies and incorporate them into legal practice. It may be helpful to reflect strategically, for example as part of a CPD plan, on what legal technology skills may be necessary to harness the benefits of these technologies while appropriately mitigating the risks.
>
> Getting to Know New Technologies: When adopting new AI technologies, each tool will perform differently, and its predictive power may vary when applied in new contexts. Taking the time to understand the strengths, weaknesses, and the scope of application of each tool will help increase the value of its outputs in any particular case.
>
> For example, a large international law firm recently shared how it implemented a bespoke tool built on the GPT chatbot, facilitated by a dedicated innovation team over a months-long trial period before extending to

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[111] It did respond to consultations from government: see https://www.barstandardsboard.org.uk/asset/AB2450E6-507B-4E70-BB9A3F9D19D6BFA3/

the full staff.[112] Depending on the tool and its anticipated uses, such an intensive implementation may not be necessary, but close attention to the nuances of the technology and how it will be used in practice will mitigate risks and help ensure its outputs are as useful as possible.

Applying AI Outputs Critically: AI outputs are potentially an aid to conducting legal analysis, not a substitute. On each occasion, it is important to verify, review, interpret, and contextualise AI outputs to confirm accuracy and adapt them to the needs of each client. While AI can expedite processes, barristers ultimately hold core duties to act in the best interests of the court and clients.

*Solicitors Regulation Authority*

156.    The SRA has produced various practical guides about the use of AI by solicitors. Most significantly, in November 2023, it published a "Risk Outlook report: The use of artificial intelligence in the legal market" (20 November 2023) which highlights problems such as inaccuracy, confidentiality, privacy and regulatory divergence between the EU and UK. It makes proposals as to how to manage the risks such as remembering to check AI outputs and document the use of AI. However, these proposals are high-level and leave the fine detail to be worked out by law firms and solicitors.

*CILEx Regulation Guidance from the legal professional bodies*

157.    At the time of writing, the CILEx website was not easily searchable, however, we were able to identify that a webinar has been held in July 2024 to raise awareness of the arrival AI technologies, the implications for regulation and for the legal sector which included input from the Head of Brand and PR from LexisNexis.

**UK AI guidance to litigators from professional bodies**

158.    The two main professional bodies, the Bar Council of England and Wales and The Law Society, also provide guidance which may influence the acts of litigators,

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[112] The blog here referenced https://www.allenovery.com/en-gb/global/news-and-insights/news/ao-announces-exclusive-launch-partnership-with-harvey

but they are not binding rules with disciplinary consequences. Their impact is therefore likely to be minimal and, in any event, as set out below their contribution so far is limited.

*The Bar Council of England and Wales*

159.   At the beginning of 2024, the Bar Council of England and Wales issued guidance on Considerations when using ChatGPT and generative artificial intelligence software based on large language models.[113]   Its stated aim is important but limited: "*To provide barristers with a summary of considerations if using ChatGPT or any other generative AI software based on large language models (LLMs).*" It is also careful to state that though in using the word "guidance" in the title that "*This is not "guidance" for the purposes of the* [Bar Standards Board] *Handbook I6.4.*" That is to say that compliance with this document does not by itself mean that there has been compliance with other regulatory rules for barristers.

160.   The guidance is useful as far as it goes but it has its limitations having a focus - as the title makes clear - on LLMs only whereas in our view guidance is necessary on the use of other forms of AI which are less general and do not rely so much on large training data sets. It also makes no or limited reference to the picture as it was developing in Europe which we have noted already is highly relevant to the use of AI in the judicial process.

161.   There is one excellent point that the Bar Council guidance makes which is worth expressly noting as a caution.  This concerns the almost subliminal message from the big tech companies that these new systems such as ChatGPT or CoPilot are semi-human. The guidance says –

> Key risks with LLMs…
>
> **Anthropomorphism**: The first key risk inherent in LLMs is that they are designed and marketed in such a way as to give the impression that the user is interacting with something that has human characteristics. One of the mechanisms by which this is sought to be achieved is by the use of anthropomorphic language to describe what is happening. Perhaps the most

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[113] The guidance was issued on the 30 January 2024 and developed by the Bar Council's IT Panel in consultation with the Bar Council's Regulatory Review Panel.

obvious example of this is the use, by OpenAI, of the word 'Chat' in the name of its LLM products (ChatGPT). As set out above, LLMs (at least at the current stage in their development) do not have human characteristics in any relevant sense.

162. We would add that "Copilot" appeals to a similar sentiment albeit by making the user feel that they are in control. However, as we have sought to explain in this paper, this control is sometimes illusionary insofar as AI performs tasks in a way that we do not understand and perhaps can never comprehend.

*The Law Society*

163. The Law Society has made a wealth of materials available to its members. "Generative AI: the essentials" which was most recently updated on 7 August 2024 outlines the risks, whilst also providing detailed practical guidance. For example, its "Checklist when considering generative AI use" is worth replicating here and informs some of the "guard rails" we propose later in this paper –

- define the purpose and use cases of the generative AI tool

- outline the desired outcome of using the generative AI tool

- follow professional obligations under the SRA Code of Conduct, SRA Standards and Regulations and SRA Principles

- adhere to wider policies related to IT, AI, confidentiality and data governance
- review the generative AI vendor's data management, security and standards

- establish rights over generative AI prompts, training data and outputs

- establish whether the generative AI tool is a closed system within your firm's boundaries or also operates as a training model for third parties
- discuss expectations regarding the use of generative AI tools for the delivery of legal services between you and the client

| |
|---|
| • consider what input data you are likely to use and whether it is appropriate to put it into the generative AI tool |
| • identify and manage the risks related to confidentiality, intellectual property, data protection, cybersecurity and ethics |
| • establish the liability and insurance coverage related to generative AI use and the use of outputs in your practice |
| • document inputs, outputs and any errors of the generative AI tool if this is not automatically collected and stored |
| • review generative AI outputs for accuracy and factual correctness, including mitigation of biases and factchecking |

164.  There is similarly thoughtful advice under the headings "Current regulatory landscape" and "Data protection and privacy" which is also essential reading. Due to its length we reproduce it at Appendix 3 below.

165.     This paper has – so far – been dedicated to showing how AI might be used by the judiciary and lawyers in the UK, the risks and the way in which organisations globally and locally have responded to those challenges. Now we move to sketch out what we consider to be the key "guard rails" that need to be discussed and debated in the UK when it comes to AI, the judiciary and lawyers in the UK.

Premise

166.     We think it is important to scrutinise Birss LJ's comments first set out above at para 76 that –

> I asked [ChatGPT] to give me a summary of an area of law I was writing a judgment about. I thought I would try it. I asked can you give me a summary of this area of law, and [it] gave me a paragraph. I know what the answer is because I was about to write a paragraph that said that, but it did it for me and I put it in my judgment. It's there and it's jolly useful. I'm taking full personal responsibility for what I put in my judgment, I am not trying to give the responsibility to somebody else. All it did was a task which I was about to do and which I knew the answer and could recognise an answer as being acceptable.

167.     It would seem that in this passage, Birss LJ is trying to both *encourage* further use of AI (by commenting that ChatGPT is "jolly useful") while providing assurance  by explaining that he was not doing anything inconsistent with a just disposal of his case (by commenting that he "knew the answer and could recognise an answer as being acceptable").

168.     No doubt this is because he felt he was merely using ChatGPT as a time-saving writing tool which could do a summary for him more quickly than he could. Yet there is a world of difference between an AI written summary where the judge has read all the papers and knows what such a summary should look like, and the situation where the judge has not read all the papers and lets the AI system do the summarising for them.  In the latter case the judge simply is not in a fit place to assess the accuracy and utility of the AI system's work.

169. It is easy to see how a less careful judge could use a similar AI system without adopting a similar level of self-criticism and re-assurance. But a serious concern is that *even* a careful judge may not follow (or know about) any of the cautionary steps that EU law would require in a similar context in a case heard in Europe (see The EU AI Act), or indeed that the UK has signed up to politically (see Political initiatives) or as proposed by the Law Society to its members (see The Law Society). For example, we have pointed out already the range of tasks which the EU AI Act requires for the safe use of high-risk AI systems as set out in Chapter III of the EU AI Act.

170. In summary, these include -

- Adequate risk assessment and mitigation systems;
- High quality of the datasets feeding the system to minimise risks and discriminatory outcomes;
- Logging of activity to ensure traceability of results;
- Detailed documentation providing all information necessary on the system and its purpose for authorities to assess its compliance;
- Clear and adequate information to the deployer;
- Appropriate human oversight measures to minimise risk; and
- High level of robustness, security and accuracy.

171. Similar points can be made about when AI is used by solicitors or barristers or their clients. In short, these are high standards which require significant oversight, resources and sophistication. We believe that these standards should be systemised rather than left to the discretion of individuals. We can see that such an approach needs to be discussed more fully before a definitive answer to the right approach can be given. We hope that that the proposals we set out next in this paper will stimulate that discussion and that it will take place not merely amongst the judiciary but with the benefit of all concerned. It may also require some political consideration since this is a discussion about a kind of self-regulation for the legal profession.

172.    We start by noting that there is no general prohibition on the use of AI by Employment Judges any more than there is on any other judge. The mere fact that the very short AI Judicial Guidance has been issued demonstrates that this is so. Nor is there any prohibition on lawyers or the parties they represent. In this way, the UK is out of step with countries like China and France (see China and France above) but it is also out of sync with leading initiatives like the EU AI Act, which bans some forms of AI that could be used in the context of litigation (like emotion recognition technology) but has more generally deemed its use "high-risk" and therefore subject to  more stringent controls (see The EU AI Act above).

173.    Therefore, we think that the first point which requires urgent discussion in the UK is whether there are specific uses of AI in the litigation process which should simply be banned. There are some "obvious" use cases which should be considered for a complete ban such as using AI to predict judgments or assess the emotional temperament of a judge on the basis that it undermines the judicial process itself and creates an unacceptable power imbalance between the parties. There will also need to be a debate about whether AI should be used to make judicial decision at all (as we noted at the outset of this paper, this is outside the scope of this paper).

Transparency within the litigation process

174.    There is already an increased focus on transparency in the litigation process in relation to the generation of important documents. For example, under the CPR there are now rules which require witness statements to be in the own "language" of the witness and there must be transparency about the drafting process itself (see What is truth?).[114]

175.    This type of approach should be extended to use of AI by lawyers, parties and judges in litigation. That is, there should be clear rules and processes around when and how and what information should be disclosed when a judge or lawyers or parties use AI. The information will need to be sufficiently detailed that the parties can satisfy themselves that the litigation process has been fair (for example,

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[114] PD 57AC.

keeping records of all inputs and outputs). There will also need to be associated mechanisms and rules to allow parties to challenge the use of that AI insofar as they consider that it has impacted on the fairness or validity of the judicial process. It is likely that the Employment Tribunal (and Employment Appeal Tribunal) will need new bespoke rules to accommodate these types of processes.

176.    Transparency is not just limited to the outward facing parts of the litigation process such as what a judge or lawyer does with an AI tool. It must also be in relation to the training data, the machine learning process and where possible, the algorithms that are deployed as well as the output of any auditing.

177.    We appreciate that these are all onerous obligations. But, they are similar to the constraints imposed by Singapore and consistent with the EU AI Act; we consider that these are the prices to pay for using AI tools in the litigation process.

### Data tainting and leakage

178.    There will need to be mechanisms in place to ensure that data tainting and leakage does not occur when judges, lawyers and parties use AI.

179.    By way of example, if a judge were to use AI to create a chronology of the key events in a case based on the trial bundle and / or witness statements, they would need adequate training (including "prompt training" i.e. what instructions to give an AI tool like Copilot to ensure the best result) to ensure that the chronology was only based on the information in that particular matter. There would also have to be careful auditing of the AI tool used, its privacy settings and the broader IT settings, to ensure that data does not "leak" into the public domain (for example, used by an AI company to train its own AI tools) or "leak" between case files.

180.    These points are made powerfully by The Law Society in its guidance (also replicated in full at Appendix 3) -

> You should be cautious that generative AI companies may be able to see your input and output data.

As many generative AI companies are located outside of the UK, data may be transferred outside of UK borders and international data processing may occur.

Personal data may be knowingly or unknowingly included in the datasets that are used to train generative AI systems.

This could raise data protection concerns both regarding what personal data was used, as well as whether such personal data may be present in the outputs.

As generative AI tools are trained using large volumes of data, it may be possible that confidential or sensitive information is exposed.

Generally, it is advisable that you do not feed confidential information into generative AI tools, especially if you lack direct control and oversight over the tool's development and deployment.

If you are using a free, online generative AI service where you have no operational relationship with the vendor other than use, do not put any confidential data into the tool.

If you are procuring or working with a vendor to develop a personalised generative AI product for internal use contained solely within your firm's legal environment, you may wish to consider if and how you want to put confidential data into the tool, subject to the terms of use.

Caution should also be taken when using tools and features that are built on top of generative AI platforms.

Metadata and information such as document authorship, websites accessed, file names and downloads might be shared with the main technology providers, not only with the specific software and vendor you are using.

181.   We suggest the following additional practical steps for ELBA members to consider:

(a) Work with IT departments to ensure there is no scope for data leakage between members of chambers and / or your family if they share devices with you.

(b) Consider creating data silos e.g. change IT settings so that when you ask Copilot to undertake a task for you it is only looking at carefully selected data.

(c) Consider anonymising data e.g. if you use an AI tool which can interrogate all of your data on your system, should you be anonymising any personal data held in other cases first?

(d) Consider purging inaccurate data e.g. will that skeleton argument from your opponent which misrepresented the law "infect" the next skeleton argument you ask Copilot to create?

## Data protection/privacy obligations and lawyers

182.    How we as lawyers use data obtained from our clients or as part of our case load within AI tools is regulated by the DPA 2018 and the UK GDPR. It is easy to forget that data protection laws mean that *nothing can be done with personal data unless it is permitted*. Each lawyer must satisfy themselves that they are using personal data lawfully.

183.    This paper is not the place for a detailed exposition of the DPA 2018 (and it may yet be amended[115]), but as a starting point it should be noted that generally speaking personal data can only be processed within the context of litigation (where it is not manifestly public data) unless it is "necessary" to do so and always subject to the data protection principles such as transparency, fairness, accuracy and data minimisation.

184.    This raises important questions about the use of AI by lawyers as part of their trial preparation. For example, is it lawful to see the personal data in Case X to create a chronology in Case Y? Should the personal data in Case X be anonymised first?

185.    If a lawyer has a management role in chambers, the legal issues will need separate consideration. If you use AI to create a management-related document (e.g. an appraisal for your clerks), can you lawfully permit the tool to "learn" from the many appraisal documents in historic trial bundles?

186.    We also need to be thinking through privacy more generally. What are our clients (and others) reasonable expectations about privacy and data? How can we

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[115] For example, see the recent Data (Use and Access) Bill.

differentiate between data that is public – through the trial process – and what is truly confidential? Should we take a different approach to these categories of data when using AI?

187.    As lawyers we also need to be transparent about how we use data when we work with our clients from a client management perspective. We predict that in the future solicitors and lay clients will ask searching questions about how we use data. Do we use it in LLMs to generate work in other cases? What safeguards are in place? Our practices will depend on using data lawfully and ethically and being able to demonstrate this to our clients.

188.    All ELBA members should be thinking about this issue now and if necessary, amending Privacy Notices or the other ways in which they communicate with clients such as standardised terms and conditions.

### Human oversight measures

189.    There will also need to be human oversight at every stage where AI is used. For example, an AI tool which summarises the evidence at the end of each day of a trial for the Employment Judge would need to be accompanied by a requirement for the Judge (or parties) to validate that summary within a short period of time. Equally, if AI was used to summarise a case for the purposes of a case management preliminary hearing, one way of ensuring human oversight would  be for the AI tool to send the auto-generated content to the parties ahead of time so that oral submissions could be made at the hearing itself. This might even be extended to summaries of the law. It may be useful for the parties, and especially litigants in persons, to be provided with such a summary and it would allow for an opportunity to comment on any errors in the AI tool.

190.    In many ways it is easy to see that too much human oversight undermines the utility of the AI tool in the first place. However, provided that the use of the tool is lawful in the first place (see above), we consider that thoughtful human oversight measures should be feasible without undermining the utility of the tool.

### Auditing

191.    The cornerstone of judicial use of AI and its use by lawyers and parties must be auditing. The importance of auditing is confirmed time and time again by actors in this space including in the EU AI Act. For example, in the context of judicial AI, we envisage that a system would need to be put in place – both before a tool was rolled out and thereafter – to assess matters such as accuracy and the extent to which there is any bias in the system. In the context of the Employment Tribunal service, it would be particularly important to audit tools to ensure that they are even handed as between claimants, respondents, litigants in person and represented parties. Importantly, the results of the auditing process would need to be publicly available so that there could be societal confidence in the use of AI. This will require work from those responsible for the rules of procedure to make sure this is done effectively and appropriately.

### Validating your own work

192.    Since inaccuracy is a feature of generative AI (and also other forms of AI), practitioners and judges need to have clear policies and rules in place about how they will verify their own work output.  This may differ depending on the type of task AI is being used to undertake. For example, using AI to produce a chronology will likely save hours of time but it does not excuse barristers of their obligation to ensure that it is accurate. Having a clear practice about how accuracy will be verified before you find yourself in the middle of overwhelming trial preparation should be standard for all practitioners who use or intend to use AI. The judiciary will need their own set of guidelines and standards.

### Validating whether the work produced by opponents or parties has been AI generated

193.    Similarly, it may be very important to understand if your opponent or opposing party has used AI to generate a document. For example, if you suspect that AI has produced a witness statement, this may be relevant to credibility. Technological tools are likely to be sold in the near future which will allow well resourced parties to predict whether a document is "original" or has been generated using AI. In the

meantime, it is likely time to introduce rules which place obligations on the parties (especially if they are legally represented) to disclose how far AI has been used to generate documentation.

### Protecting work product

194. Barristers and solicitors may also start to buy technology that allows them to take pre-emptive steps to prevent their work being used in AI tools. For example, Adobe has created an app which is designed to help signal that work should not be included in a model's training database.[116] Barristers could also mark skeleton arguments etc with text along the lines that no consent is given to them being used in AI.

195. In the future, we predict that there will be more sophisticated ways of predicting whether AI has played a hand in the creation of documents. One recent development, for example, is AI text watermarking which allows people to identify whether their text is used in the output of AI models. A recent MIT article described one such tool as follows[117] -

> Large language models work by breaking down language into "tokens" and then predicting which token is most likely to follow the other. Tokens can be a single character, word, or part of a phrase, and each one gets a percentage score for how likely it is to be the appropriate next word in a sentence. The higher the percentage, the more likely the model is going to use it … SynthID introduces additional information at the point of generation by changing the probability that tokens will be generated … To detect the watermark and determine whether text has been generated by an AI tool, SynthID compares the expected probability scores for words in watermarked and unwatermarked text.

196. Without steps being taken to protect the work output of lawyers, there is a risk that other organisations will commercially exploit our work for use in their AI tools or otherwise use our work in ways which we may find distasteful. For example, it is not fanciful to imagine a market in our skeleton arguments whereby well-

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[116] MIT, Adobe wants to make it easier for artists to blacklist their work from AI scraping, October 2024.

[117] MIT, "Google DeepMind is making its AI text watermark open source", October 2024.

resourced parties predict what we might say (or advise) our clients as part of their preparation when they appear against us.  We need to start a discussion as to what is ethical and lawful in this regard.

### Guidance from regulators and professional bodies

197.    That is why we think that the regulators who operate in the legal field should issue urgent guidance on what are and are not appropriate uses of AI from a professional perspective. No doubt there will need to be careful consultation on any such initiatives which is why the process should start sooner rather than later.

### Training

198.    There is a lack (at least as far as we are aware) of any associated detailed training in the UK. There is in contrast to the steps taken, over a quarter of century ago, to train the judiciary when the Human Rights Act 1998 was passed. At that time there was an intensive course of training for all judges in relation to the jurisprudence of the European Court of Human Rights.[118]  This was accepted to be essential since the 1998 Act introduced a new way of thinking about problems which required new legal reasoning skills to be brought into play. The need for a lengthy period of learning for the judiciary and other actors was recognised from the start. Once the size of the training task was fully appreciated it was decided that the Act should not be brought into force for two years after it received Royal Assent.[119]

199.    Of course, care must be taken to avoid trite conclusions from such a comparison, but it is not entirely inapt.  The UNESCO research was clear that there was a serious problem in that judges were not adequately trained to engage with AI (see para 74 above). The UNESCO report was aware of the UK's Judicial Guidance and praised the UK for at least having taken this step.  However, we are

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[118] One of the authors of this paper was a member of the Home Office Task Force for the introduction of the Act; see further Croft, J., 2000.  Whitehall and the Human Rights Act 1998  Constitution Unit.

[119] Croft has noted that "The time required to complete the training programme for judges was the single most important factor in setting the commencement date for the Act. An initial estimate that this could be done by Spring 2000 proved optimistic and it was on the advice of the LCD that the commencement date was eased backwards to 2 October 2000." Ibid. at p. 48

not aware of any specific AI training being given in the UK. The UK does not seem to be in any better position on this issue of training than any other of the countries surveyed. No judge has said to us that they are aware for instance of the fact that the EU considers such activity to be potentially "high -risk". Training for judges on the uses of AI in their field of work is urgently required.

### Research into judicial use of AI

200.    The lack of public information about the use of AI within the judiciary is a serious omission that should swiftly be remedied. This kind of information is necessary not merely for social scientists and judicial administrators but to enable a proper debate about the necessary guardrails to be put in place in relation to AI systems when under scrutiny or being used in the judicial process. We should know this fully if the true benefits are to be accessed and pitfalls avoided.

### Required use of AI

201.    Finally, a novel perspective is to consider whether there should be the *required* use of AI in certain contexts on the basis that the benefits of AI outweigh the downsides.

202.    Interestingly, a related argument was run (unsuccessfully) in *Surridge v The Information Commission and the Cabinet Office* [2024] UKFTT 00597. The background to the case was a Freedom of Information Request made under the Freedom of Information Act 2000 (**FOIA**). The request had been refused because of the time/cost taken to supply the information. The Cabinet Office specifically said, for example, that over 3,500 emails were generated when it did a search for a particular key word relevant to the request leading it to estimate that it would take approximately 29 hours to comply (para 11). The Commissioners had accordingly concluded that the Cabinet Office had been right to refuse the request.

203.    An appeal was lodged in which the appellant argued that using AI would have made the process manageable. In other words, the appellant argued that the Cabinet Office should have used AI in order to ensure that it could fulfil its obligations under the FOIA. It is easy to see that similar arguments could be run

in the Employment Tribunal, for example, where claimants ask for extensive disclosure and the respondent refuses on the basis of proportionality.

204. In *Surridge*, the Cabinet Office applied to strike out the appeal on the basis that it had no reasonable prospect of success. That application was successful, a decision which was upheld on appeal by the General Regulatory Chamber, in which the Judge cited with approval another decision which stated that evidence from an AI tool about the adequacy of a search should be rejected since it was not sufficiently reliable saying -

> … there is no evidence before us as to the sources the AI tool considers when finalising its response nor is the methodology used by the AI tool explained. If comparisons are drawn to expert evidence, an expert would be required to explain their expertise, the sources that they rely upon and the methodology that they applied before weight was given to such expert evidence. In the circumstances we give little weight to the [AI tool] evidence that searches should have been conducted in the form set out within that evidence …

205. *Surridge* is an interesting decision because the strike out succeeded (and the appeal failed) because of the inability for a judge to interrogate whether the AI evidence was valid. However, it did not engage with the argument at the heart of the appeal – namely that if AI can do something quickly and cheaply – is there an **obligation to use it**?

206. Our view is that in the future as technology improves – it is possible that parties might be criticised for not using AI in certain contexts if they have the resources and ability to use it, and can answer the questions posed by the judgment in *Surridge*. For example, a claimant subject to an adverse costs award, might be able to reduce the costs ordered on the basis that a proportion of the costs were excessive since AI would have performed the job quickly and efficiently.

*Part G: Next steps*

207.   Ultimately, we conclude that there needs to be an urgent discussion and debate on the appropriate use of AI in the legal system. To move forward we suggest that the following steps are taken –

| a. | We recommend that the UK government adopt a definition of AI so that debates about its regulation can proceed on a firm foundation. It is no longer appropriate to define AI by analogy with human intelligence; AI will move beyond the limits of human intelligence. Further, any definition must align as closely as possible with international efforts. For regulation to be effective, developers and deployers will need confidence that their tools can be used globally without too much unavoidable frictions from shifts in regulatory regimes. | Paras 26 - 27 |
|---|---|---|
| b. | Businesses and developers often promote AI as being trustworthy. Judges and lawyers need to appreciate that the silent premise here is that it is sometimes too hard to demonstrate that AI is accurate and / non-discriminatory. This is key when thinking through the appropriate uses of AI and the "guard rails" that are needed to avoid misuse. | Paras 47 to 49 |
| c. | It is likely that judges are using AI. We recommend that there be a survey into judicial use of AI by the Ministry of Justice, the Judicial Office, new House of Commons Justice Select Committee and / or the House of Lords Justice and Home Affairs Committees. Understanding this context will inform the debate about the regulation of AI. | Para 72 |
| d. | We recommend that the new House of Commons Justice Select Committee and / or the House of Lords Justice and Home Affairs Committees reviews the state of regulation of the use of AI in the UK in the justice system against: | Paras 95 to 144 |

| | | |
|---|---|---|
| | (a) The Hiroshima Process International Code of Conduct for Organisations Developing Advanced AI Systems (which is an eleven-action point plan was created after the G7 Leaders, including then Prime Minister Sunak met in May 2023 at the Hiroshima Summit);<br><br>(b) The approach taken under the EU AI Act and in Singapore to the use of AI in the justice system;<br><br>(c) The five principles established by the last government in its White Paper "A pro-innovation approach to AI regulations" published in March 2023; and<br><br>(d) The guidance by the Equality and Human Rights Commission on the Public Sector Equality Duty and the use of AI by public authorities which is of direct relevance to the work of the judiciary. | |
| e. | We recommend that the Legal Services Board provides clearer guidance on the appropriate uses of AI within the legal sector. | Paras 151 to 154 |
| f. | We recommend that there is an urgent public debate about whether there are use cases of AI in the litigation process which should be banned. | Para 173 |
| g. | We recommend that clear rules and processes around when and how and what information should be disclosed when a judge or lawyers or the parties use AI. There will also need to be associated mechanisms and rules to allow parties to challenge the use of that AI insofar as they consider that it has impacted on the fairness or validity of the judicial process. | Para 175 |
| h. | We recommend that mechanisms are put in place (if not yet done) within chambers, individual practices, law firms and the broader judicial infrastructure to ensure that data tainting and leakage does not occur when judges, lawyers and parties use AI. | Para 178 |

| i. | We recommend that urgent and significant thought is dedicated to assessing the privacy and data protection of AI tools in the hands of lawyers as well as parties by reference to possible use cases (e.g. producing chronologies, cast lists etc). This is because it is unlawful to process personal data unless there is a lawful basis under data protection legislation. Even then the data processing must be necessary and subject to the data protection principles. All ELBA members should be thinking about this issue now and if necessary, amending privacy notices or the other ways in which they communicate with clients such as standardised terms and conditions. | Paras 182 to 188 |
|---|---|---|
| j. | We recommend that organisations using AI - whether they be the judiciary or lawyers - have human oversight measures in place whenever AI is used. | Paras 189 to 190 |
| k. | We recommend that organisations using AI - whether they be the judiciary or lawyers – put careful auditing in place whenever AI is used. | Paras 191 to 192 |
| l. | We recommend that organisations using AI - whether they be the judiciary or lawyers – put clear policies and rules in place whenever AI is used to check its accuracy. | Para 192 |
| m. | We recommend that rules are put in place in the UK which requires parties, especially those that are legally represented, to disclose how far AI has been used to generate documentation. | Para 193 |
| n. | AI raises the prospect of the work of lawyers being commercially exploited without their knowledge or permission. We recommend that a debate starts immediately as to what is ethical and lawful in relation to AI tools that harvest and process the work of lawyers for commercial gain or to create a competitive advantage within the litigation process. | Paras 194 to 193 |

| o. | We recommend that regulators and professional bodies issue urgent guidance on what are and are not appropriate uses of AI from a professional perspective. | Para 197 |
|---|---|---|
| p. | We recommend that judges and lawyers receive urgent training on the use of AI and also become familiar with AI neologisms that are frequently used, such as GPAI, so that they can meaningfully engage with the debate concerning the use and regulation of AI. | Paras 31 & 198 to 199 |
| q. | We recommend that there is urgent research into the use of AI by the judiciary. | Para 200 |

208.    We hope to contribute further to the steps which we have outlined above and of course welcome engagement with, government, judges and lawyers, litigants and business developers about the issues we have raised in this paper.

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**6 November 2024**

*Appendix 1 – Defining what is Artificial Intelligence*

<span style="color:red">The United Kingdom</span>

1.  We have noted the definition used in the AI Judicial Guidance above at para 12. Although there are references to AI in several Acts and Statutory Instruments (including section 30 of the Online Safety Act 2023), the only places where there is, and has been, a specific definition are –

    *   Section 23A of the now repealed[120] Enterprise Act 2002 –

    > *"artificial intelligence" means* technology enabling the programming or training of a device or software to use or process external data (independent of any further input or programming) to carry out or undertake (with a view to achieving complex, specific tasks)—
    > (a) automated data analysis or automated decision making; or
    > (b) analogous processing and use of data or information;

    and now,

    *   Schedule 3 to the National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations SI 2021/1264 –

    > "artificial intelligence" means technology enabling the programming or training of a device or software to—
    > (i) perceive environments through the use of data;
    > (ii) interpret data using automated processing designed to approximate cognitive abilities; and
    > (iii) make recommendations, predictions or decisions; with a view to achieving a specific objective;

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[120] See National Security and Investment Act 2021 c. 25, Sch. 2 para. 3.

AI defined in the United States Code

2.  Compared with the definition used in the AI Judicial Guidance, the United States Code of the general and permanent laws of the United States (**the United States Code or USC**),[121] has a much better definition of an AI. It better reflects the point that any definition of AI needs to reflect a tool that can move beyond human intelligence.

3.  The USC provides the following definition –

> The term "artificial intelligence" means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to –
>
> (A) perceive real and virtual environments;
> (B) abstract such perceptions into models through analysis in an automated manner; and
> (C) use model inference to formulate options for information or action.

4.  This definition captures an important nuance. It is the difference between what are comprehensible acts of human intelligence (when supported by an explanation or reasons) and those mostly incomprehensible workings of artificial intelligence systems which are so significant and so concerning when uses of AI occur in the course of a judicial process.

AI defined in the European Union

5.  The USC definition is useful but the definition in Article 3(1) of the EU AI Act[122] is better. It defines an AI system as being –

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[121] 15 USC 9401(3).

[122] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU)

> … a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.

6. This definition is less concerned with AI as replicating human endeavour. It does not refer to "*human-defined objectives*". This reflects a growing understanding of the potential of AI systems to do things that humans could *never do* or have *never thought of doing*. This is why we prefer the AI Act definition.

7. It also highlights one of the many reasons why we believe that a careful debate about the role of AI in litigation is needed. So far AI replicates (or more accurately "mimics") human reasoning but in time, it will step beyond humanity.

### AI defined by the OECD

8. This EU AI Act definition was based on work undertaken by the Organisation for Economic Co-operation and Development (**OECD**). The OECD has recently added a further sentence[123] to the definition used in the EU AI Act[124] –

> Different artificial intelligence systems vary in their levels of autonomy and adaptiveness after deployment.

9. The added sentence makes that AI systems can be both *autonomous* and *adaptive*. There are many contexts in which this will be significant. Take, for example, the

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No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance).

[123] See Article 1 of the Updated OECD, Recommendation of the Council on Artificial Intelligence, Adopted 22/05/2019, amended 03/05/2024, OECD/LEGAL/0449.

[124] In the Artificial Intelligence (Regulation and Employment Rights) Bill which the authors wrote for the Trades Union Congress, published on the 18 April 2024, we used this extended definition.

employment relationship where the law presumes that a contract of employment is agreed by employee and employer based on an agreed mutual understanding. It should be obvious that in this context the use of an autonomous and adaptive AI system could have a capacity to change the relationship in ways which may not have been in the contemplation of the parties when the contract was agreed leading to the potential for claims including breach of contract.[125]

### AI defined by the Council of Europe

10. The OECD extended definition has been adopted by the Council of Europe in its [Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law](#) of the 5 September 2024.[126] This Convention has been signed by the US, the UK and the EU. The European Court of Human Rights would likely apply it on any reference from the UK concerning the European Convention on Human Rights, and while that has yet to happen, it would also be relevant to any case in which the Human Rights Act 1998 was concerned. This is another reason we consider it is the best current definition of AI when talking about how AI should be used and regulated in the UK.

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[125] To give a specific example, an employer that introduced algorithmic management in lieu of a human manager might well breach the contract of employment.

[126] See Article 2. The Convention has been signed by Andorra, Georgia, Iceland, Norway, the Republic of Moldova, San Marino, the United Kingdom, Israel, the United States of America, and the European Union. On signing the Convention for the UK, the Secretary of State, Rt. Hon. Shabana Mahmood MP committed to legislate in accordance with its terms saying "We must not let AI shape us - we must shape AI": see the government announcement "[UK signs first international treaty addressing risks of artificial intelligence](#)".

*Appendix 2 – EU AI ACT – Chapter III*

1. When AI is "high - risk" it is subject to very stringent controls under Chapter III of the EU AI Act, and these are noted here.

| Section 2: Requirements for High-Risk AI Systems | Section 4: Notifying Authorities and Notified Bodies |
|---|---|
| Article 8: Compliance with the Requirements<br>Article 9: Risk Management System<br>Article 10: Data and Data Governance<br>Article 11: Technical Documentation<br>Article 12: Record-Keeping<br>Article 13: Transparency and Provision of Information to Deployers<br>Article 14: Human Oversight<br>Article 15: Accuracy, Robustness and Cybersecurity<br><br>Section 3: Obligations of Providers and Deployers of High-Risk AI Systems and Other Parties<br><br>Article 16: Obligations of Providers of High-Risk AI Systems<br>Article 17: Quality Management System<br>Article 18: Documentation Keeping<br>Article 19: Automatically Generated Logs<br>Article 20: Corrective Actions and Duty of Information<br>Article 21: Cooperation with Competent Authorities<br>Article 22: Authorised Representatives of Providers of High-Risk AI Systems<br>Article 23: Obligations of Importers<br>Article 24: Obligations of Distributors | Article 28: Notifying Authorities<br>Article 29: Application of a Conformity Assessment Body for Notification<br>Article 30: Notification Procedure<br>Article 31: Requirements Relating to Notified Bodies<br>Article 32: Presumption of Conformity with Requirements Relating to Notified Bodies<br>Article 33: Subsidiaries of Notified Bodies and Subcontracting<br>Article 34: Operational Obligations of Notified Bodies<br>Article 35: Identification Numbers and Lists of Notified Bodies<br>Article 36: Changes to Notifications<br>Article 37: Challenge to the Competence of Notified Bodies<br>Article 38: Coordination of Notified Bodies<br>Article 39: Conformity Assessment Bodies of Third Countries<br><br>Section 5: Standards, Conformity Assessment, Certificates, Registration<br>Article 40: Harmonised Standards and Standardisation Deliverables |

| Article 25: Responsibilities Along the AI Value Chain<br>Article 26: Obligations of Deployers of High-Risk AI Systems<br>Article 27: Fundamental Rights Impact Assessment for High-Risk AI Systems | Article 41: Common Specifications<br>Article 42: Presumption of Conformity with Certain Requirements<br>Article 43: Conformity Assessment<br>Article 44: Certificates<br>Article 45: Information Obligations of Notified Bodies<br>Article 46: Derogation from Conformity Assessment Procedure<br>Article 47: EU Declaration of Conformity<br>Article 48: CE Marking<br>Article 49: Registration |

*Appendix 3 – Extracts from The Law Society guidance entitled "Generative AI: the essentials"*

1.    We reproduce here the thoughtful guidance from The Law Society under the heading "Current regulatory landscape".

| If you use generative AI tools as part of legal service provision, it is important that you maintain effective, professional quality control over their output and use. |
| --- |
| You should:<br>• carefully factcheck its products and authenticate the outputs.<br>• carry out due diligence (including supplier due diligence) on the AI tools you use and consider the often-limited warranties offered by providers and contained in the terms of use.<br>• make sure that appropriate staff protocols and guidance are provided around employees' use of such tools if they are permitted. |
| Where applicable to procurement, you should carefully negotiate key contractual terms of warranties, indemnities and limitations on liability with vendors. This includes any relevant source code agreements. |
| When assessing the market, it may be useful to examine vendor's attitudes to research and development of their tool to make sure future innovation is in line with your expectation and objectives. |
| Consider whether you need or will have long-term support from a vendor, as well as an exit plan should a generative AI tool be adopted but the vendor exits the market. |
| It is important that you comply with any existing internal policies throughout the process of generative AI planning, from considering the potential use of the tool, to possible procurement, risk management and decommissioning where relevant. |
| At present, there are no statutory obligations on generative AI technology companies to audit their output to ensure they are factually accurate. |
| Consequently, the use of these tools by legal professionals could result in the provision of incorrect or incomplete advice or information to clients. |
| Additional risk may also occur where automated decisions are made using generative AI outputs. |

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|---|
| As there is currently no AI- or generative AI-specific regulation in the UK, it is important you understand the capacities of the generative AI tool you plan to use. |
| Although you do not have to have full knowledge of the inner workings of a tool, consider the claims the provider is making and assess the evidence and benchmarks they use to demonstrate the tool's capabilities. |
| Currently, the SRA does not have specific guidance on generative AI related to use or disclosure of use for client care. |
| It is advisable that you and your clients decide on whether and how generative AI tools might be used in the provision of your legal advice and support. |
| While it is not a legal requirement to do so, clear communication on whether such tools are used prevents misunderstandings as to how information is produced and how decisions are made. |
| If a generative AI tool is used and the tool does not provide a history of use, it is advisable that you document all inputs, outputs and system errors to make sure the use of the tool can be monitored as appropriate. |
| If you have decided to use or procure a generative AI tool, make sure you regularly assess the tool's relevance and value addition to your practice. |
| When assessing the tool, it is important that a holistic view is taken across the tool's lifecycle. |
| All reviews should be outcome- and objective-led, with specific measurements taken to assess the tool's performance. |
| If your initial or updated requirements are no longer met, consider how you can transition away and extricate your organisation from the tool if necessary, including data removal and deletion within the generative AI system, as well as source code transfer if relevant. |
| While generative AI introduces new risks, existing risk management processes such as cybersecurity and insurance may already be in place to mitigate risk. |

2. The guidance under the heading "Data protection and privacy" is also essential reading.

You should be cautious that generative AI companies may be able to see your input and output data.

As many generative AI companies are located outside of the UK, data may be transferred outside of UK borders and international data processing may occur.

Personal data may be knowingly or unknowingly included in the datasets that are used to train generative AI systems.

This could raise data protection concerns both regarding what personal data was used, as well as whether such personal data may be present in the outputs.

As generative AI tools are trained using large volumes of data, it may be possible that confidential or sensitive information is exposed.

Generally, it is advisable that you do not feed confidential information into generative AI tools, especially if you lack direct control and oversight over the tool's development and deployment.

If you are using a free, online generative AI service where you have no operational relationship with the vendor other than use, do not put any confidential data into the tool.

If you are procuring or working with a vendor to develop a personalised generative AI product for internal use contained solely within your firm's legal environment, you may wish to consider if and how you want to put confidential data into the tool, subject to the terms of use.

Caution should also be taken when using tools and features that are built on top of generative AI platforms.

Metadata and information such as document authorship, websites accessed, file names and downloads might be shared with the main technology providers, not only with the specific software and vendor you are using.

*Appendix 4 : Information about the authors*

**ROBIN ALLEN KC & DEE MASTERS**

**CLOISTERS & AI LAW CONSULTANCY**

2018    Robin and Dee, working together started the debate in the UK on the way in which equality legislation enshrining the European principle of non-discrimination, could be deployed to challenge discriminatory technology and in particular algorithms. They have since advised government, international bodies, business and workers organisations, and published many papers, and spoken at numerous events.

2020    Equinet published "Regulating for an equal AI : A New Role for Equality Bodies: Meeting the new challenges to equality and non-discrimination from increased digitisation and the use of Artificial Intelligence".  This major Report, with an introduction by European Commissioner Helen Dalli, Commissioner for Equality, discussed the next steps in European regulation of AI systems.

2020    Robin and Dee published "Artificial Intelligence: the right to protection from discrimination caused by algorithms, machine learning and automated decision-making", ERA Forum, 20(4), 585-598 . According to Google Scholar this has been cited at least 38 times.

2020/1   Robin and Dee devised and delivered a training programme for the Council of Europe, in conjunction with the CDEI, for UK regulators on discrimination and AI under the Council of Europe HELP Program . It is understood that the programme has been rolled out to regulators in France and Spain.

2021      The Trades Union Congress (TUC) published a legal opinion by Robin and Dee called "Technology Managing People – the legal implications". A detailed blog concerning the report has also been published here. Their Report has been widely cited in the discussions about future regulation of AI systems in the workspace.

2021      Shortlisted by CogX2021 – the leading festival of all things AI and emerging technologies – for its Global Leadership Award

2021      The Legal Education Foundation published their open opinion called *"The impact of the proposals within "Data: A new direction" on discrimination under the Equality Act 2010"* which is available here

2022      Commissioned by the UN Special Rapporteur on the rights of persons with disabilities and the office of the UN High Commissioner for Human Rights in relation to the effects of AI, ML and ADM for persons with disabilities

The Special Rapporteur's thematic report was then presented to the UN Human Rights Committee on the 14 March 2022 and is available here

2022      Spoke at the workshops for CEN-CENELEC on technical standards in AI. A report after the event is here.

2022      Worked with Department for Communications Media and Sport and UK's Centre for Data Ethics and Innovation on legislative coherence issues, advising European Equality Bodies and private business

2023/4      Advised the Ada Lovelace Institute, the Equality and Human Rights Commission and also the UK government on various data matters and the mainstreaming of LLMs.

2023/4      Wrote draft legislation to regulate AI in the workplace for the TUC: see Artificial Intelligence (Regulation and Employment Rights) Bill

2024      Selected by the European Commission – European AI Office to contribute to the drafting of the the first General-Purpose AI Code of Practice, to supplement the EU AI Act.