AI use in courts not sustainable: judge

ELIZABETH PIKE

The nation's top judge says the Australian judiciary has entered an "unsustainable phase" amid the rise of artificial intelligence use in litigation, in which judges have become "human filters" for arguments generated by machines.

In an extraordinary assessment of the role of AI in the nation's courts, Chief Justice Stephen Gageler issued a warning against the technology in his address to the Australian Legal Convention in Canberra on Friday.

Chief Justice Gageler identified AI as one of the greatest risks to "public confidence" in the judicial system despite efforts to curb the practice, amid reports of lawyers using generative tools to submit fake case citations.

"Increasing examples of AI being found to be used inappropriately by litigants in person and legal practitioners suggest ... that we have entered an unsustainable phase in the prevalence of the use of AI in litigation," he said. "Members of the Australian Judicature are acting as human filters and human adjudicators of competing machine-generated or machine-enhanced arguments."

Chief Justice Gageler suggested judges and magistrates were increasingly overseeing cases that were produced by AI, leading to questions about the "extent of human involvement" in the judicial system.

In making his argument, he cited the recent case of May v Costaras in the NSW Court of Appeal, where a party self-represented and openly admitted to using generative AI in her oral submissions.

The judge found the case presented a dilemma where the respondent was "unable to discern" the legal relevance or accuracy of what the AI had produced.

"Inexorably, it will become both meaningful and important to answer questions the asking of which would have been inconceivable 10 years ago," Chief Justice Gageler said.

"What is the point of a human judge? Why and how much do we value the humanity of the law? Does, and if so, to what extent does maintaining the humanity of the law necessitate the exercise of human judgment?

"These are existential issues. The need for the Australian Judicature to grapple with them is arising as the pace of development of AI is outstripping human capacity to assess and perhaps even to comprehend its potential risks and rewards."

Known for telling the judiciary to "stick" to the law in a speech last year in response to the growing trend of activism from the bench, Chief Justice Gageler did point out a silver lining. The experienced justice said although there were many reasons to "proceed with caution" on AI, the technology could be used to improve access to fair representation.

"The apparent efficiency of AI holds the potential for its use to contribute significantly to the functioning of courts and tribunals, especially within a system of civil justice that aspires to be just, quick and cheap," he added.

Queensland has taken the step to issue AI Practice Directions, advising lawyers they will face repercussions for AI use if it does not align with their professional obligations.

Chief Justice Gageler said the 2300-strong judiciary had "no option" but to engage with the technology until its merit is made clear.

In his address, he also touched on the importance of maintaining the fight for First Nations justice and dealing with the "small but growing" number of sovereign citizens in the court system.