

22 August 2025

The Hon Justice Gething
Supreme Court of Western Australia
Level 11, David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000

By email: associate.justice.gething@justice.wa.gov.au

Dear Justice Gething

MANAGEMENT OF DIGITAL EVIDENCE IN CRIMINAL CASES

Thank you for your letter dated 11 July 2025 inviting feedback on the second draft of the System Brief and Courtroom Brief developed by The Project Team for the Court Initiative.

The Society acknowledges that the second draft documents incorporate many of the submissions set out in the Society's letter dated 24 October 2024, including the ability to view, search, and download items; providing both the accused and jurors with tablet access; ensuring the platform is compatible with both Microsoft and Apple systems; the functionality of annotation and the provision of a unique identifier for items. Each of these matters will assist all parties to navigate the material in electronic format.

The Society's Criminal Law and Courts Committees have reviewed the updated draft documents and raise the following issues for the Project Team's consideration:

Access to the electronic brief by accused persons in custody

1. Paragraph 6.14 suggests that lawyers can show audio-visual recordings on their laptops to clients who are in custody. Practitioners note that prison authorities do not allow practitioners to take electronic equipment, including phones, laptops and modems which permit a WiFi connection to the internet, into prisons.
2. Similarly at paragraph 10.8, the principle that 'an accused person in custody should have the same online access as an accused on bail' is sound however, in practice, this cannot occur because an accused person in custody will not have the same access to online materials as an accused person on bail because prison authorities will not permit access to online material. An unrepresented accused in custody would potentially be disadvantaged if their copies of the brief are served in hard copy and the trial is to be conducted electronically.
3. The Society submits it is essential for the Briefs to address how accused persons in custody and unrepresented persons will have equal access to digital evidence. The Society is concerned about the lack of detail on this issue in the current format. Substantial investment in resourcing and infrastructure will be required to ensure equitable access to digital evidence for all accused persons. The decision of *The State of Western Australia and KWLD* [2025] WADC 47 is a recent example of the difficulties

Level 4, 160 St Georges Terrace, Perth WA 6000
Phone: (08) 9324 8600 | **Fax:** (08) 9324 8699
Email: info@lawsocietywa.asn.au | **Website:** lawsocietywa.asn.au

Please address all correspondence to The Law Society of Western Australia PO Box Z5345, Perth WA 6831

in the management of electronic material relating to a self-represented accused in prison.

The Jury Room

4. With respect to Part 9, the Society submits the prosecution and defence should be able to view the material accessible in the Jury Room, to ensure that no prejudice to the accused occurs as a result of jurors having access to material that should have been excluded from the Jury Room.
5. If jurors are given individual iPads (or similar devices) to operate during trials, there is real potential for them to be distracted by the device rather than paying attention to the evidence. Jurors in current criminal trials have access to notetaking material which is far less distracting than a device. The Society submits Court staff (at direction of the judge) should be permitted to be able to lock down the juror's iPads whilst the jury are in court, so that jurors pay attention to the evidence and do not spend time browsing the brief or causing disruption to request assistance with technical issues, rather than listening to the evidence. The Society further suggests it would be appropriate for jurors to make individual annotations to electronic evidence in the physical jury room and during deliberations.

Access to sensitive material

6. With respect to Part 11, the Society agrees that separate arrangements for sensitive material are necessary and appropriate. There may also be some materials, including child exploitation material and information bearing a national security risk, which is too sensitive to be on an online platform. The Society submits there needs to be an offline mechanism to index (at varying levels), details of relevant material that is not accessible online. The level of description of such material will vary according to the nature of the evidence. In some cases, it will be appropriate to describe the offline information in precise terms. In other cases, it may be necessary to simply record "there is also offline material relevant to this case" and in some cases even a reference to offline material may not be appropriate.

The Society welcomes the opportunity to meet with The Project Team to discuss the System Brief and Courtroom Brief and to participate in future consultations.

If you have any questions or wish to discuss the above, please contact Susie Moir, Director, Advocacy and Professional Development by email to smoir@lawsocietywa.asn.au or telephone on 9324 8600.

Yours sincerely



Gary Mack
President