Truth Decay and its implications for the judiciary: an Australian perspective

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Introduction – truth and the courts

1 Truth, as a subject of philosophical discourse, is one that has gripped thinkers from at least the time of classical antiquity. It is a value and concept which is at the heart of judicial systems. Witnesses must swear to tell "the truth, the whole truth, and nothing but the truth".[2] As Lord Denning MR put it in *Harmony Shipping Co SA v Davies*,[3] "the primary duty of the courts is to ascertain the truth by the best evidence available".

2 Truth is closely associated with honesty. Drawing upon rules of professional ethical responsibility in New South Wales but which have their analogues in other common law jurisdictions, lawyers, in the discharge of their duty to the court and to the administration of justice, must not engage in conduct that is dishonest,[4] and must not knowingly or recklessly mislead the court[5] nor make

[1] Chief Justice Bell acknowledges the considerable assistance he has obtained in the preparation of this paper from various research associates, Mr Sam Cass, Ms Meghan Malone and Mr John Lidbetter. The comments of Justices Peter Garling and Sarah McNaughton on an earlier draft of this paper are also acknowledged.

[2] *Evidence Act 1995* (NSW) (**Evidence Act**), s 21, sch 1.
[3] [1979] 3 All ER 177 at 181; [1979] 1 WLR 1380 at 1385.
[4] For barristers, see *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) (**Barristers Rules**), r 8(a); for solicitors, see *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) (**Solicitors Rules**), rr 4.1.2, 5.

false or misleading statements to an opponent.[6] Lawyers must not advise witnesses to provide false or misleading evidence, or coach witnesses about which answers they should provide to certain questions.[7] Lawyers must refuse to take further part in cases where their client has lied to the court, falsified documents, or suppressed material evidence for which there was a duty to disclose.[8] Prosecutors must "fairly assist the court to arrive at the truth".[9] Lawyers are also obliged to assist investigative and inquisitorial tribunals fairly to arrive at the truth.[10]

3 Within the Australian judicial system, a transformative consumer protection statute first passed in the 1970s and extended at State levels and applicable to trade and commerce generally as well as to corporate activity proscribes conduct that is misleading or deceptive, or likely to mislead or deceive.[11] Critically for present purposes, the statute is not directed solely towards intentionally deceptive conduct but operates at an objective level. It is a most important piece of normative legislation which has, as its conceptual underpinning, that misleading or deceptive conduct, whether intentional or not, will not be tolerated. It has resulted in Australian courts being placed in a role of peculiar responsibility for policing conduct that objectively deviates from factually accurate positions. It is enforceable in civil suits, and is routinely invoked.

4 Putting aside this particular legislative regime and returning to the topic more generally, equivalence between truth and the objectives of a mature judicial system is not absolute or coterminous, and there may be a difference or a degree of difference in this regard between the adversarial system of justice in the common law tradition and judiciaries in the civilian tradition with their focus of inquisitorial justice. While it is the case that, in the eyes of the public, a primary function of a contested trial – if not *the* primary function – is to

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[5] For barristers, see *Barristers Rules*, r 24; for solicitors, see *Solicitors Rules*, r 19.1.
[6] For barristers, see, *Barristers Rules*, r 49; for solicitors, see, *Solicitors* Rules, r 22.1.
[7] For barristers, see, *Barristers Rules*, r 69; for solicitors, see, *Solicitors Rules*, r 24.1.
[8] For barristers, see, *Barristers Rules*, r 79; for solicitors, see, *Solicitors Rules*, r 20.1.
[9] For barristers, see, *Barristers* Rules, r 83; for solicitors, see, *Solicitors Rules*, r 29.1.
[10] For barristers, see, *Barristers Rules*, r 97; for solicitors, see *Solicitors Rules*, r 29.13.
[11] *Trade Practices Act 1974* (Cth), now the Australian Consumer Law.

conduct a search for truth through the mechanism of the adversarial system,[12] in reality, of course, this is an oversimplification of the role of a court. In the adversarial tradition, the objective of the judicial function is not necessarily to find the truth *in all cases* or *at all costs*. The fact-finding objective is balanced against other equally important considerations, often derived from exclusionary rules of evidence, some of which exist to serve policy objectives extraneous to the "pursuit of truth" or at least which are conscious of the imperfections of human nature and human memory.

5 The Hon James Spigelman AC KC, a former Chief Justice of New South Wales, recognised that at times "the untrammelled search for truth may impinge upon other public values":[13]

> "… the task of fact finding for the courts is to identify the truth, subject to the principles of a fair trial and to specific rules of law and discretions designed to protect other public values which, on occasions, are entitled to recognition in a way which constrains the fact finding process."

He gave as examples exclusionary rules of evidence and rules of practice and procedure that result in potentially relevant evidence not being taken into account or received by the tribunal of fact.[14] These included:

- restrictions on the admissibility of fresh evidence on appeal;
- the exclusion of involuntary or unknowing confessions;
- restrictions on the use of tendency or coincidence evidence;
- the exclusion of hearsay evidence;
- the exclusion of lay opinion evidence; and

[12] So much is reflected in Lord Eldon's sentiment that "'Truth is best discovered by powerful statements on both sides of the question": *Ex parte Lloyd* (1822) Mont 70 at 72, reported as a note to Ex parte Elsee (1832) Mont 69.
[13] "Truth and the Law" [2011] *Bar News (Winter)* 99 at 102. See also Michael S. Moore, "The Plain Truth about Legal Truth" (2003) 26(1) *Harvard Journal of Law & Public Policy* 23. As an illustration, consider *La Rocca v R* [2023] NSWCCA 45, in which the conduct of law enforcement agencies resulting in a permanent stay of proceedings, frustrating any "pursuit of truth".
[14] Ibid at 103.

- the exclusion of evidence after balancing prejudice and probative value.

6 A similar view had been expressed by Professor Twining who observed that "the pursuit of truth as a *means* to justice under the law commands a high, but not necessarily an overriding, priority as a social value."[15] Knight Bruce VC in *Pearse v Pearse* [1846] 63 ER 950 at 957 put the matter thus:

> "The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them … Truth, like all other good things, may be loved unwisely — may be pursued too keenly — may cost too much."

7 Further, to the extent that the judicial process involves a pursuit of truth, the particular *kind* of truths ventilated in courtrooms tend to be highly specific to the parties to the dispute. While high-profile litigation may touch upon social issues about which there is intense factual disagreement,[16] the role of a judge rarely involves reaching conclusions about wide-ranging truths of application to the community as a whole. Rather, a judge's typical role is only to find the facts necessary to resolve the particular dispute between the parties. In Sir Owen Dixon's formulation:[17]

> "The courts in their way seek truth only upon some narrow or restricted question defined in advance by the law, a question which is submitted to them because it supplies the standard of decision between the parties."

8 And findings of fact by reference either to the civil or criminal standard equally recognise that "finding" absolute and objective truth is at best elusive and at worst impossible. Courts, of necessity, operate by reference to the balance of

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[15] William Twining, *Rethinking Evidence: Exploratory Essays* (Northwestern University Press, 1994) 72–4, quoted in Gageler (n 18) below.
[16] Consider, eg, *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3 and *Kassam v Hazzard; Henry v Hazzard* [2021] NSWCA 299 (which involved various actions taken by governments to mitigate the risks posed by unvaccinated persons during the COVID-19 pandemic).
[17] O Dixon, "Jesting Pilate", in S Crennan and W Gummow (eds), *Jesting Pilate: and other papers and addresses by the Rt Hon Sir Owen Dixon*, (3rd ed, Federation Press, 2019) at 75.

probability and beyond reasonable doubt standards in civil and criminal cases respectively.

9 Chief Justice Gageler has recently reflected on the historical and philosophical interrelationship between the concept of truth within the common law system and the concept of justice according to the rule of law in his wonderfully entitled article "*Truth and justice, and sheep*".[18] With elegant simplicity, his Honour noted that:[19]

> "The rule of law postulates the existence of a legal rule and postulates imposition of a legal sanction for breach of that legal rule. The link between the rule and the sanction is the fact of breach. Whether or not there is a breach of the rule is a question of fact. … *maintenance of the rule of law is dependent on the ability of our system to generate reliable findings of fact*. … our legal system needs to be able to determine with integrity in respect of a past event, the occurrence of which is contested and the occurrence of which is uncertain, that the event either happened or did not happen, or more accurately is either proved to have happened or not proved to have happened." (Emphasis added.)

His Honour argued that:

> "our concept of justice is reliant on our concept of truth. Second, our concept of truth is not absolute but a matter of degree. Third, truth for us is relative. True or untrue is proven or unproven, and proven or unproven is ultimately believed or not believed with the requisite degree of intensity."[20]

I have reservations about the statement that "truth for us is relative" unless by that expression the Chief Justice was simply making the point that courts do not deal with absolute truths but in probabilities. So much may be accepted but concepts such as "my truth" or a particular person's "truth" are often morally problematic, self-serving and often defiant. Words and phrases such as "misspoke", "alternative facts" and "fake news" also evidence the vice of relativism in this area. One might also observe that the rhetorical power of the concept of "truth" is subject to cynical and strategic appropriation, as seen, for example, in the establishment of "*Truth Social*" as a media platform whose

[18] (2018) 46 *Australian Bar Review* 205.
[19] Ibid at 207.
[20] Ibid at 208.

claim is to "encourage[] an open, free, and honest global conversation without discriminating on the basis of political ideology".[21]

10 Accepting the complexity of the matter, with all its philosophical nuances including those brought out so deftly by Justice Goddard in his paper "*Ascertaining facts in an uncertain world: the role of the courts*", it may nevertheless be said, in my opinion, that there is an extremely close connection between the concepts of truth, justice, and honesty. Any suggestion, therefore, of "truth decay" is one that should be of deep concern to judges, to all those involved in the administration of the law and justice, and indeed to all those with an interest in civil society.

11 Before turning to the scourge of "truth decay", it may also be observed that the association of courts and judges with the ascertainment of "truth" may be seen in the appointment of current and former judicial officers to conduct public commissions of inquiry into what are often matters of high controversy or scandal. Although these are not judicial bodies, they co-opt the characteristics and processes of the judiciary, together with personal and institutional reputations for impartial robust ascertainment of the facts. Royal Commissions, for example, are independent from government, have coercive evidence-gathering powers, and are required in Australia to adhere to judicial norms of procedural fairness and natural justice. They are also typically staffed by a small army of solicitors and counsel. This is done for the precise reason that the qualities inherent in the legal profession and the judicial method are well suited to a forensic and impartial pursuit of truth – and therefore endow the inquiry with public legitimacy.[22]

12 This 'borrowing' of institutional legitimacy makes commissions and inquiries very versatile for the executive branch. In some cases, it allows commissions and inquiries to effectively wade into territory with contentious party-political

[21] See, *Truth Social* <https://truthsocial.com/>.

[22] See generally Kenneth Hayne, "On Royal Commissions" (Speech, Centre for Comparative Constitutional Studies Conference, Melbourne, 26 July 2019); Jonathan Tjandra, "From Fact Finding To Truth-Telling: An Analysis Of The Changing Functions Of Commonwealth Royal Commissions" (2022) *UNSW Law Journal* 45(1) 341.

implications, while maintaining balance and impartiality. It may also provide an appropriate vehicle for revealing 'truths' of a broader, more systemic nature than could be revealed in a conventional legal dispute (as seen in, for example, the Australian Royal Commission into Institutional Responses to Child Sexual Abuse, or the recent Special Commission of Inquiry into LGBTIQ Hate Crimes conducted in New South Wales).

"Truth decay"

13 In their book, *Truth Decay: An Initial Exploration of the Diminishing Role of Facts and Analysis in American Public Life* (**Truth Decay**),[23] Jennifer Kavanagh and Michael D. Rich focus on trends in public discourse in the United States. The extent of this phenomenon may vary from country to country but it is one that must be taken extremely seriously. The authors outline four trends that they argue characterise "truth decay" in the United States over the past two decades:

> "1. Increasing disagreement about facts and analytical interpretations of facts and data;
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> 2. a blurring of the line between opinion and fact;
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> 3. the increasing relative volume, and resulting influence, of opinion and personal experience over fact; and
>
> 4. declining trust in formerly respected sources of factual information."[24]

14 An immediate example of this last trend (and one which post-dates publication of *Truth Decay*) may be seen in the fact that, notwithstanding that myriad courts in the United States have categorically rejected the claim that the 2020 Presidential election was "rigged" or "stolen", it is frequently reported that up to 30 million Americans accept this claim. Implicit in that reported statistic is that a significant percentage of the population is either ignorant of the rulings of multiple courts or simply do not accept such rulings. Neither explanation is comforting.

[23] (RAND Corporation, 2018).
[24] Ibid at xi-xii.

15 As a general and trite observation, any decline in trust of judicial institutions is a matter of note and concern. To the extent that the courts are viewed as "source[s] of factual information", the fourth trend pointed out by Kavanagh and Rich in relation to declining trust focuses the mind and provokes thought about how such a trend may be resisted and reversed.

16 In Australia, during the Australian Law Reform Commission's recent review of judicial impartiality and the law on bias, the Commission conducted a survey which indicated that, in 2020, trust in Australian courts had actually increased over the past 10 years, and was higher than trust in federal parliament, business and industry, and the news media (second only to university research centres among the bodies surveyed).[25] Evidently, notwithstanding the frequent and at times unwarranted public attacks on the judiciary, there is a "large reservoir of respect for the fairness of the Courts".[26] There is, however, no room for complacency and, as explained below, courts have real vulnerability to the pernicious effects and reach of "truth decay".

17 Kavanagh and Rich identify four drivers, or potential causes of "truth decay":

- "Characteristics of cognitive processing such as cognitive bias";
- "Changes in the information system", including the rise of social media, the transformation of the media market and the wide dissemination of disinformation and misleading or biased information;
- "Competing demands on the educational system that limit its ability to keep pace with changes in the information system"; and
- "Political, sociodemographic, and economic polarization".[27]

18 They then go on to argue that the consequences of "truth decay" are enormous and include "the erosion of civil discourse", "political paralysis",

[25] Australian Law Reform Commission, "Without Fear or Favour: Judicial Impartiality and the Law on Bias" (December 2021, Final Report, No 138) at 146.
[26] Robert Beech-Jones, "The Dogs Bark but the Caravan Rolls On: Extra Judicial Responses to Criticism" (Speech, Conference of South Australian magistrates, Adelaide, 8 May 2017) at 12.
[27] *Truth Decay* at xiii-xiv.

"alienation and disengagement of individuals from political and civic institutions" and "policy uncertainty at the national level".[28]

19 Although discussions of "truth decay" have been predominantly focused on the United States, in September last year, Australian Defence Force Chief, General Angus Campbell, drew attention to the potential for technology, and especially generative "artificial intelligence" (**GenAI**), to exacerbate truth decay in Australia. General Campbell said the following:

> "As these technologies quickly mature, there may soon come a time when it is impossible for the average person to distinguish fact from fiction, and although a tech counter response can be anticipated, the first impression is often the most powerful …
>
> This tech future may accelerate truth decay, greatly challenging the quality of what we call public 'common sense', seriously damaging public confidence in elected officials and undermining the trust that binds us."[29]

20 It is sobering to reflect that Kavanagh and Rich's thought-provoking book preceded by some four to five years the public and widespread emergence of Gen AI, at least as a readily available tool to members of the public including the legal profession.

21 This is a topic to which I shall return in the second half of this paper but it may be observed here that in at least one Australian case, the rise of GenAI has led to concerns about the authenticity of documents tendered on sentence,[30] and sooner or later (but most likely sooner), "deepfakes" will inevitably pose huge challenges for courts determining matters which turn on photographic or audiovisual evidence.[31] The broader point to be made about "deep fakes" is

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[28] Ibid at xvi.

[29] A Greene, "Defence force chief Angus Campbell warns deepfakes and AI will drive era of 'truth decay'" *ABC News* (online) (15 September 2023) <https://www.abc.net.au/news/2023-09-15/angus-campbell-warns-about-deepfakes-artificial-intelligence/102860418>; D Hurst, "Democracies face 'truth decay' as AI blurs fact and fiction, warns head of Australia's military" *The Guardian* (online) (14 September 2023) <https://www.theguardian.com/australia-news/2023/sep/14/democracies-face-truth-decay-as-ai-blurs-fact-and-fiction-warns-head-of-australias-military>.

[30] *DPP v Khan* [2024] ACTSC 19 at [39]ff (Mossop J). This decision is referred to at greater length later in this paper.

[31] See Riana Pfefferkorn, "'Deepfakes' in the Courtroom" (2020) 29(2) *Boston University Public Interest Law Journal* 245; Ellie Dudley, "'The camera does lie': Concerns over AI in NSW Courts" *The Australian* (online, January 21 2024) <https://www.theaustralian.com.au/business/legal-affairs/the-camera-does-lie-concerns-over-ai-in-nsw-courts/news-story/b4c2ec40cb611c00f278803e7f8cb4a1>.

that their use in society at large by criminal syndicates and in fraudulent activity more generally will itself be likely to generate a wave of work for the judiciary in their endeavours to separate true fact from fiction. The scope for malicious disinformation is enormous and will test the skill of courts throughout the world.

22 At a macro level, judicial inability to cope with this phenomenon may undermine respect for and reliance upon the courts and the role they play as arbiters (however imperfect) of the truth in our societies.

Vulnerability to truth decay

23 There are at least five reasons why courts are particularly vulnerable to "truth decay" before one even reaches the challenges presented by GenAI.

24 *First,* the judiciary is more dependent than perhaps any other public institution on the confidence of the public and of other arms of government.[32] As is often noted, the judiciary "has no influence over either sword or the purse",[33] and therefore *respect* for the work of the courts in a very practical sense is central to ensuring the efficacy of that work. As the fourth Chief Justice of New South Wales, Sir James Martin, put it so eloquently in *In re "The Evening News" Newspaper* almost 150 years ago:

> "A Supreme Court like this … is the appointed and recognised tribunal for the maintenance of the collective authority of the entire community. …. Without armed guards, or any ostentatious display - with nothing but its common law attendant, the sheriff, and its humble officials the court-keepers and tipstaffs, *it derives its force from the knowledge that it has the whole power of the community at its back. This is a power unseen, but efficacious and irresistible, and on its maintenance depends the security of the public.*"[34] (Emphasis added.)

[32] See generally A R Blackshield, 'The Legitimacy and Authority of Judges' (1987) 10 UNSW Law Journal 155.
[33] Alexander Hamilton, "Federalist No 78" in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (New American Library, 1961) at 465.
[34] (1880) 1 LR (NSW) 211 at 237.

25 *Second,* although empirical evidence suggests that most members of the public have little understanding of what courts and judges do,[35] their decisions are capable of provoking intense and emotive public responses. What understanding the public does have tends to be derived from courtroom dramas, word of mouth, and the handful of sensational cases that make national news each year. In a speech given several years ago, my predecessor, the Hon Tom Bathurst AC KC, observed that, because so few members of the public read the reasons that judges write – and even fewer can assess the technical validity of those reasons – confidence in the judiciary relies on the public making a "leap of faith".[36]

26 *Third,* and as a result, judges are almost entirely reliant on news media – with its own set of commercial and professional incentives – to translate and explain their decisions to the public.[37] While technological advancements theoretically facilitate direct access to judicial decisions at a scale never seen in the past,[38] the professional media (increasingly complemented by social media) retain a critical role as "intermediaries between the legal system and the people it serves."[39]

27 *Fourth,* despite limited public understanding of the judicial function, courts hold a prominent place in the public imagination, and their decisions frequently involve matters that engage the interest and passions of the public. Decisions involving, for example, crime and punishment, the care and custody of children, migration and asylum, and sexual assault and harassment are capable of evoking visceral emotive reactions, and lend themselves to sensationalism. They also tend to involve issues and factual scenarios that are – at least on their face – relatively easy to understand, and about which members of the public may have preconceived views.

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[35] Ingrid Nielsen and Russell Smyth, "What the Australian Public Knows About the High Court" (2019) 47(1) *Federal Law Review* 31.
[36] T F Bathurst, "Trust in the judiciary" (2021) 14(4) *TJR* 263 at 264.
[37] See generally Matthew Groves, "Judges and the Media" in Gabrielly Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021) 259.
[38] See Marilyn Warren, "Open Justice in the Technological Age" (2014) 40 *Monash University Law Review* 45.
[39] Beverley McLachlin, "The Relationship Between the Courts and the Media" (Speech, Supreme Court of Canada, January 31 2012).

28 *Fifth,* judges are limited in their ability to publicly defend themselves, their decisions and their institutions from erroneous or ill-informed (whether deliberately or otherwise) public attacks.[40] Particularly in the common law tradition, judges have historically not been active participants in public debate. While this norm has partially diminished over time, there remains – and rightly – a reticence on behalf of judges to engage in public discussion about contentious contemporary issues.

29 The cumulative effect of at least the first, second and fifth of these factors is that members of the public have little ability independently to scrutinise or verify assertions made by others – and particularly by public figures – about the judiciary and its work, both in a general sense and in the context of particular decisions.

30 Unfounded or inaccurate criticism of courts has important consequences in and of itself: it may lead to a loss of public confidence in courts and judges, which compromises the effectiveness of the courts. However, an arguably more concerning risk is that ill-informed perceptions of the judiciary, in turn, may shape the development of public policy on issues of law and justice – or, in the worst case, may be actively encouraged and eventually invoked to justify a weakening of the administration of justice including judicial independence.

31 I do not suggest that the courts should not be subject to legitimate, reasoned criticism. The powers exercised by judges in the name of the community have significant human consequences. Like all democratic institutions, courts must be subject to scrutiny and made publicly accountable to the communities which they serve. It was this fundamental importance of open justice which

[40] See eg Michael Kirby, "Attacks on Judges: A Universal Phenomenon" (1998) 72 *Australian Law Journal* 599; Patrick A Keane, "The Idea of the Professional Judge: The Challenges of Communication" (2015) 12 *Judicial Review* 301; Beech-Jones (n 26).

led Jeremy Bentham to describe “publicity” – rather poetically – as “the very soul of justice” and “the surest of all guards against improbity”.[41]

32 Yet in order to serve the purpose of promoting democratic accountability, criticism of the judiciary must be based on an accurate understanding of the work of the courts, be rational and measured in balance, and not treat the exceptional as the typical. My concern is not with the ‘disinfectant’ of open justice nor with reasoned public criticism of judicial outcomes, but with a particular brand of populist, ill-informed or exaggerated criticism of courts and judges that is liable dangerously to undermine confidence in the judiciary.

33 There is also the fact that the ubiquity of social media and informational tools such as google is increasingly prompting concern about the integrity of the fact-finding process in jury trials.[42] Modern jurors have in their mobile phones and other devices access to a vast volume of information which is not evidence in a case (and which may or may not be accurate) but which, notwithstanding judicial directions not to do so, they will be tempted to draw upon to discharge their responsibilities. This is an increasing problem, corrupting the role traditionally played by jurors in the determination of the facts. A recent amendment to the *Juries Act 1967* (ACT) has created, by s 42BA, a criminal offence for a juror to make an inquiry including by conducting internet research for the purposes of any matter relating to the trial in which the juror is participating.

34 Courts have already been affected by elements or manifestations of “truth decay” in ways additional to the example I have given by reference to the 2020 US Presidential Election. That is to say, public commentary on judges and courts has been increasingly coloured by emotive or anecdotal attacks,

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[41] Jeremy Bentham, *The Works of Jeremy Bentham* (John Bowring ed) (Simpkin, Marshall, 1843) at 316.

[42] See Amy Dale and Francisco Silva, “Future Proofing the Jury System” (March 2023) *Law Society Journal* at 40.

factual inaccuracies and a lack of engagement with the reality of how judicial decisions are made.[43]

35 Another symptom may be seen in the rise of "pseudolegal" movements, such as the "sovereign citizen" movement which rejects many of the premises upon which the authority of courts is founded. Such movements have ballooned since the COVID-19 pandemic[44] and the ubiquitous nature of social media has increased the number of "citizen journalists" who can and do comment freely on courts and the judiciary[45] but often without a sound understanding of the legal issues in dispute or the underlying facts.

An illustrative example: criminal justice and sentencing

36 It is helpful at this point to consider an illustration of "truth decay" that will be familiar to any lawyer who has opened a newspaper in recent decades.

37 One area of judicial activity which has long attracted emotionally charged public incomprehension, perhaps more than any other, is the work of sentencing judges. At its core, this lack of comprehension stems from factual misapprehensions about crime, a lack of understanding of what judges do, and, often, a very shallow engagement by the media with the sentencing process.

38 The tendency for public perceptions of crime and criminal justice to be out of step with reality has been observed in a number of developed countries.[46] Indeed, it is one of the key examples relied upon by Kavanagh and Rich in

[43] See, K Mack, S Anleu and J Tutton, "The Judiciary and the Public: Judicial Perceptions" (2018) 39 *Adelaide Law Review* 1, in which the authors draw on a range of interviews with and surveys of judicial officers. Judicial officers consistently reflected on often aggressive and ill-informed public commentary they received.
[44] See, eg, H Hobbs, S Young and J McIntyre, "The Internationalisation of Pseudolaw: The Growth of Sovereign Citizen Arguments in Australia and Aotearoa New Zealand" (2023) 47(1) *University of New South Wales Law Journal* (forthcoming) at 3 and D Baldino and K Lucas, "Anti-government Rage: Understanding, Identifying and Responding to the Sovereign Citizen Movement in Australia" (2019) 14(3) *Journal of Policing, Intelligence and Counter-Terrorism* 245.
[45] See, eg, Warren (n 38).
[46] See eg Brent Davis and Kym Dossetor, "(Mis)perceptions of crime in Australia" (Trends and Issues in Crime and Criminal Justice: Research Paper No 396, Australian Institute of Criminology, July 2010) and the sources cited therein.

their foundational book on "truth decay". They cite evidence indicating that, until around the year 2000, public attitudes about the prevalence of crime in the United States corresponded closely with the reality – which was that violent crime rates had steadily decreased since 1993. However, after around 2000:[47]

> "… an increasing number of respondents reported that they perceived more crime in the United States than in the previous year, despite clear evidence to the contrary. In other words, an increasing number of respondents question existing data on trends in crime even as data collection and documentation methods become more advanced."

39 Similar findings have been made in the Australian context. Since the early 2000s, a growing body of evidence has demonstrated a substantial mismatch between public perceptions of criminal offending and the data collected by government agencies.[48] In particular, "a substantial proportion of the population incorrectly believe crime rates are increasing [even] when, in fact, they are stable or declining."[49] Tellingly, respondents tend to be more concerned about an increase in crime rates at the state or territory level than at the local level, and often do not perceive an increase in criminal offending in their *own* neighbourhood.[50]

40 The concern about these beliefs is not so much that they are often inconsistent with empirical evidence. It is that, increasingly, the public debate about criminal offending does not appear to be *concerned* with empirical evidence. Public perceptions of crime and criminal justice are primarily driven by anecdotal reasoning, emotive and incomplete media coverage, and a

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[47] *Truth Decay* at 25.

[48] See eg Don Weatherburn and David Indermaur, "Public perceptions of crime trends in New South Wales and Western Australia" (2004) 80 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 1; Brent Davis and Kym Dossetor, "(Mis)perceptions of crime in Australia" (Trends and Issues in Crime and Criminal Justice: Research Paper No 396, Australian Institute of Criminology, July 2010); Lynne Roberts and David Indermaur, "What Australians think about crime and justice: results from the 2007 Survey of Social Attitudes" (Research and Public Policy Series No 101, Australian Institute of Criminology, July 2010); Kate Warner et al, "Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study" (Trends and Issues in Crime and Criminal Justice: Research Paper No 407, Australian Institute of Criminology, February 2011) at 3.

[49] Brent Davis and Kym Dossetor, "(Mis)perceptions of crime in Australia" (Trends and Issues in Crime and Criminal Justice: Research Paper No 396, Australian Institute of Criminology, July 2010) at 1.

[50] Ibid at 2.

strong selection bias favouring particularly gruesome, shocking or unusual offending.

41 The paradox underlying this trend is that, in the age of "big data", the collection, analysis and accessibility of data about criminal offending is more advanced than ever before. Clearly, the issue is not that the relevant evidence is not readily available. This reflects the essence of "truth decay": a culture of public discourse driven by emotion, anecdote and tribalism rather than fact.

42 Of course, it is unrealistic to expect that the public and the media will take a sudden interest in the thousands of unexceptional cases of criminal offending when they could, instead, read and write about shocking crimes involving tragic, unprovoked violence, mysterious disappearances, or organised crime groups. The front pages of newspapers will never be occupied solely by comprehensive dashboards of statistics. It is in our nature to be drawn to stories of individual human intrigue. Yet there is no reason why stories of human intrigue cannot be counterbalanced against, or placed in the perspective of, accepted evidence about broader trends in criminal justice and public safety.

43 This complaint about the way in which sentencing decisions are conveyed to the public is not a novel one. My three predecessors, over a 25 year period, have each expressed similar concerns.

44 In 1997, in delivering the Sir Earle Page Memorial Oration, Gleeson CJ said:[51]

> "It always has been the case that … some individual cases have received a lot of publicity. However, what constituted widespread publicity even 30 years ago was very different from what constitutes widespread publicity today. It has been said that the public attitude to war in the USA underwent a great change when American families sat down each night to watch television news programmes depicting casualties with unprecedented visual and emotional impact. *To an extent, a similar phenomenon may account for the fact that modern citizens have become convinced that they are living in the middle of a crime wave. Night after night they see, on their TV screens, victims, or relatives of victims, of violent crime, telling their stories, and being asked*

[51] A M Gleeson AC, "Who do judges think they are?" (1998) 22(1) *Crim LJ* 10 at 15.

> *whether they are satisfied with the sentences imposed on convicted offenders. Talk-back radio programmes are filled with people expressing feelings of insecurity and demanding ever-increasing severity of penalties. To all of this, politicians respond by competing with one another to be seen to be tough on crime.* This phenomenon is not peculiar to New South Wales, or to Australia. The same thing is happening in America, England and New Zealand." (Emphasis added.)

45 Eight years later, on the occasion of the opening of the law term in 2005, Spigelman CJ spoke of misperceptions of crime and criminal justice, saying:[52]

> "Over recent years, I have been increasingly concerned that public confidence in the administration of justice and public respect for the judiciary is diminished by reason of ignorance about what judges actually do, particularly, in terms of criminal sentences that are imposed. Sentencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do. The public attitude to the way that judges impose sentences determines, to a substantial extent, the state of public confidence in the administration of justice.
>
> Plainly there are occasions when a particular sentence attracts criticism and that criticism is reasonably based. What concerns me is that such cases appear to be widely regarded as typical, when they are not."

46 His Honour's belief about the harm of excessive or sensationalised crime reporting was evidently long-held, and one that included his Honour's post-judicial experience as Chairman of the Australian national broadcaster.[53]

47 Finally, just over a decade ago, at the opening of law term in 2014, Bathurst CJ said of the "law and order debate" that:[54]

> "This so-called debate invariably raises similar themes. The judiciary is publicly condemned for being out of touch with public opinion. Governments of the day proclaim their commitment to being tough on crime, and proposals for new offences, or mandatory minimum sentences, are suggested. It is a cycle that is familiar to all of us."

48 More recent data confirms that sentencing remains the judicial function in which the public has the least trust. Although, as I have already observed, the

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[52] James Spigelman, "The Power of Twelve: A New Way to Sentence for Serious Crime" (2005) 86 Australian Law Reform Commission Reform Journal 51.
[53] Matthew Knott, "On his way out, ABC chairman James Spigelman delivers home truths about the broadcaster" *Sydney Morning Herald* (online, 17 March 2017).
[54] TF Bathurst, "Community confidence in the justice system: the role of public opinion" (Speech, Opening of NSW Law Term Address, Sydney, 3 February 2014).

Australian Law Reform Commission's 2021 survey indicated that overall trust in Australian courts has increased over the last ten years, the same survey also showed that over 40% of respondents had "very little confidence" or "no confidence" in the ability of judges to "give appropriate sentences to those who have committed crimes".[55] Similarly, surveys indicate that, when asked to assess general sentencing patterns, between 70 and 80% of the public reply that sentences are too lenient.[56]

49 Yet in a study conducted in Victoria between 2013 and 2015 among jurors who had returned a guilty verdict – the members of the public with perhaps the most intimate understanding of the facts of a criminal offence – some 62% suggested a sentence *more* lenient than that ultimately imposed by the judge.[57] These results were broadly consistent with the results of a previous study conducted in Tasmania in which 90% of jurors considered the sentence imposed by the judge to be appropriate.[58]

50 This discrepancy reveals the lie in the tired and misconceived yet stubbornly popular view that courts are "soft on crime" or that sentencing outcomes are out of step with community expectations. It indicates that perceptions of *general trends* in judicial outcomes are starkly at odds with the views of community members who are given complete and objective information about a *particular judicial decision*.

51 Of course, in the modern information ecosystem, the public is generally *not* given complete and objective information about judicial decisions and the way they are made. This difficulty is made more intractable in the age of the online "attention economy", characterised as it is by a breakneck digital news cycle, the decentralisation of news media to a variety of online forums, the subtle

[55] Australian Law Reform Commission, "Without Fear or Favour: Judicial Impartiality and the Law on Bias" (December 2021, Final Report, No 138) at 148.
[56] Warner et al (n 48) at 181.
[57] Ibid at 186. In some cases, this discrepancy may be partially explained by the presence of prior relevant convictions (which are taken into account by sentencing judges but are not in evidence at trial). However, even where the defendant had no relevant prior convictions, 57% of jurors recommended a sentence more lenient than was imposed by the sentencing judge.
[58] Warner et al (n 48). In this study, participants were invited to hear the submissions on sentence before completing the survey.

effects of online algorithmic curation, and the inexorable rolling commentary of "X" (formerly Twitter). Faced with powerful incentives to make news short, engaging and "shareable", it seems that the inherent complexity involved in judicial decision-making is rarely conveyed in public debate.

Limited insulation against truth decay

52 It has been said that "discussions of judicial legitimacy in Australia have a prophylactic, rather than a defensive tenor"[59] and several features of courts and the judicial system provide some form and degree of insulation from the corrosive effects of "truth decay".

53 In the common law tradition, judicial method itself involves an analytical, socratic approach that necessarily prioritises fact and reasoned analysis and requires the balanced consideration of arguments in favour of and against a position before a final conclusion is reached. Extensive rights of appeal are also directed to the correction of both factual and legal error. Judges are also expected to retain at all times their independence and impartiality such that their conclusions are not "subjective or personal to [him or her] but … the consequence of [his or her] best endeavour to apply an external standard".[60] It should be acknowledged that this statement was made many decades before more recent scholarship relating to considerations of subconscious bias.

54 Courts are also to some degree shielded from "truth decay" by the sometimes painstaking strictures of courtroom procedure, the ethical rules to which reference has already been made and the rules of evidence. For example, the opinion rule draws a strong distinction between evidence of facts and opinions and only allows for the admissibility of opinions in certain narrow circumstances, including where those opinions are given by experts with

[59] J Gleeson, "Advancing judicial legitimacy: The stakes and the means" (2023) 15(1) *Journal of the Judicial Commission of New South Wales* 1 at 4 citing M Gordon, "The integrity of court: political culture and a culture of politics" (2020) 44(3) *Melbourne University Law Review* 863.
[60] Sir O Dixon, "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468 at 471.

specialised training or experience.[61] The stringent requirements of procedural fairness upheld in Australian courts, principally the fair hearing rule and the rule against bias, also have important work to do in ensuring that the courts remain a respected source of factual and legal information,[62] the outcome of whose determinations have not been distorted by procedural irregularity.

55 Another aspect of the topic is the way in which the law and the judiciary may be enlisted in support of public efforts to mitigate the harms of misinformation. So much is illustrated by recent public debate about the regulation of online discourse, sparked by the release in Australia of the draft consultation *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023.* Another example may be seen in proposals for "truth in political advertising" laws at the federal level within Australia. While these proposals typically involve a non-judicial body having primary responsibility for enforcing restrictions (such as the Australian Communications and Media Authority or the Australian Electoral Commission), some form of appeal or judicial review will inevitably lie to the courts. These proposals may raise difficult questions about the institutional competence of courts when adjudicating disputes about truth and dishonesty in the political arena.

56 I have already referred to the statutory proscription on misleading or deceptive conduct in trade or commerce and the consequent role that imbues Australian courts with as arbiters of the truth insofar as they are tasked with responsibility for making authoritative rulings on what is misleading or deceptive conduct.

Maintenance of public confidence in the work of the courts

57 Maintaining public confidence in the work of the courts is another antidote to "truth decay". The efficacy of judicial institutions inevitably depends on the confidence of the public, and of other branches of government. Among public

[61] *Evidence Act*, ss 76, 78 and 79.
[62] Robert French, "Procedural Fairness – Indispensable to Justice?" (Speech, Sir Anthony Mason Lecture, University of Melbourne Law School, 7 October 2010) at 1.

institutions, the judiciary "is … the most dependent upon habitual conformity to its decisions on the part of the community and the other branches of government. That habit of conformity only exists because the public have a certain attitude towards judicial power, and those who exercise it; an attitude we describe as confidence." [63]

58 When this "habit of conformity" disintegrates, the consequences can be calamitous. Al Gore knew this in 2000 when, in the wake of the 5-4 majority decision of the United States Supreme Court in *Bush v Gore,*[64] he ordered his supporters, "don't trash the Supreme Court".[65] The outcome was largely accepted without violence or social unrest. A year and a half later, on this side of the Pacific, Chief Justice Murray Gleeson would remark:[66]

> "Doubts about the electoral process were resolved by recourse to law, and the nation accepted the result. Dissatisfaction with the outcome on the part of about half of the voters, and criticism of the decision of the court, co-existed with peaceful acceptance of the consequences of that decision."

59 There is an obvious contrast with what occurred in the United States with regard to the Presidential election some 20 years later, to which I have already referred. This also corresponds to current reported low levels of public confidence in the United States Supreme Court. At the same time, there have been vicious attacks on judges of lower courts who have been described as "tyrannical and unhinged", a "fully biased Trump Hater", a "radical left judge" and a "so-called judge". Such comments, of which these are a minute selection, and the relative silence in terms of the defence of the judges attacked, can only result in the corrosion of respect for the judiciary as a whole.

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[63] Murray Gleeson, "Public confidence in the judiciary" (Speech, Judicial Conference of Australia Colloquium, 27 April 2002, Launceston). See also Alexander Bickel, *The Least Dangerous Branch: The Supreme Court and the Idea of Progress* (Yale University Press, 1962) at 258: "Broad and sustained application of the [US Supreme] Court's law, when challenged, is a function of its rightness, not merely of its pronouncements".

[64] 531 US 98 (2000).

[65] Stephen Breyer, *The authority of the court and the peril of politics* (2021, Harvard University Press) at 28.

[66] Gleeson, "Public confidence in the judiciary" (n 63).

60 There is some irony in that the branch of government which was described as the "least dangerous" by one of the architects of Western democracy, Alexander Hamilton,[67] is often treated by modern populist movements across the world as if it were the *most* dangerous branch. This irony is perhaps best explained by Professor Sadurski of the University of Sydney, in a recent book surveying illiberal populism and constitutional turmoil in democratic countries including Hungary, Poland, Turkey, Slovakia, Israel, and the United States. He writes:[68]

> "… the same factors that render judges and courts the least dangerous branch at the same time make them the most defenseless in the face of executive assault. … After being elected, populist rulers almost invariably take on the courts, often with fervor and unusual animus."

61 Sadurski offers two related reasons why attacks on independent judiciaries occupy such a prominent place in the ideological agendas of populist movements. First, they offer the most feasible *alternative* legitimacy to popularly elected leaders, by providing a channel for citizens airing their grievances against governments.[69] Second, the existence of *any* independent check on the "will of the people" is incompatible with populist ideology;[70] therefore, in the eyes of the populists, members of the judiciary become anti-democratic "elites". To this may be added the practical reality that populist leaders tend to be elected on grand platforms of anti-establishment social or institutional reform – proposals of the kind that are likely to engage the close scrutiny of constitutional courts, particularly where they touch on civil liberties or involve attempts to alter the structure or powers of state entities and or compromise judicial independence.

62 My references to events in the United States should not be taken to suggest that Australia has been immune from attacks on its judiciary in ways which highlight how confidence in the courts as independent and competent arbiters of "truth" can be eroded.

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[67] Alexander Hamilton, "Federalist No 78" in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (New American Library, 1961) 465.
[68] Wojciech Sadurski, *A Pandemic of Populists* (Cambridge University Press, 2022) at 106.
[69] Ibid at 108.
[70] Ibid at 109.

63 Concerns about a mounting hostility towards the Australian judiciary by media and public figures first began to be expressed in earnest by leaders of the legal profession towards the end of the 20th century.[71] From 1992 on, the focal point for this criticism became a series of decisions of the High Court including *Mabo v Queensland (No 2)* (**Mabo (No 2)**),[72] *Wik Peoples v State of Queensland*,[73] and a number of decisions concerning implied constitutional rights which are now well-established features of the Australian constitutional apparatus.[74] *Mabo (No 2)* was, at the time, particularly controversial as it exploded the legal myth of *terra nullius* by recognising the truth that the lands of Australia were not "practically unoccupied" in 1788 at the time of white settlement.

64 Much ink has been spilt about the sustained and vehement response to these decisions by public figures and the media especially in the 1990s.[75] The febrile media environment at the time had many of the characteristics of "truth decay"; it was described as an instance in Australian public life when "facts were swallowed by opinions".[76] As one academic noted at the time:[77]

> "The strident criticism of the Court left many with the impression that the judgments were not supported by extensive and careful legal reasoning.' This helped create an environment in which misinformation could thrive."

65 The tenor of this debate was conveyed by Kirby J in a speech delivered in 1998:[78]

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[71] See eg Sir Anthony Mason, "Judicial Independence and the Separation of Powers - Some Problems Old and New" (1990) 13(2) *UNSW Law Journal* 173 at 180–181; Michael Kirby, "Judges under Attack" [1994] NZLJ 365 at 366; Sir Gerard Brennan, "The State of the Judicature", (1998) 72 *Australian Law Journal* 33; Michael Kirby, "Attacks on Judges: A Universal Phenomenon" (n 40).
[72] (1992) 175 CLR 1.
[73] (1996) 187 CLR 1.
[74] See eg *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 89 CLR 520; *Dietrich v The Queen* (1992) 177 CLR 292.
[75] See generally Tanya Josev, *The Campaign Against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017), chapters 4 and 5, and the sources referred to therein.
[76] Patrick Keyzer, "What the Courts and the Media Can Do to Improve the Standard of Media Reporting of the Work of the Courts" (1999) 1 *UTS Law Review* 150 at 151.
[77] Ibid.
[78] Kirby, "Attacks on Judges: A Universal Phenomenon" (n 40) at 600.

> "… politicians in both Federal and State Parliaments appeared to compete with each other to attack the Court and especially the majority judges. Few indeed demonstrated any familiarity with what the judges had written.
>
> …
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> The derogatory comments of politicians soon became the springboard for academic and media castigation. Recent High Court decisions, the Court and the justices were labelled 'bogus', 'pusillanimous and evasive', guilty of 'plunging Australia into the abyss', a 'pathetic ... self-appointed [group of] Kings and Queens', a group of 'basket-weavers' … purveyors of 'intellectual dishonesty', unaware of 'its place', 'adventurous', needing a 'good behaviour bond', needing, on the contrary, a sentence to 'life on the streets', an 'unfaithful servant of the Constitution', 'undermining democracy', a body 'packed with feral judges', [and] 'a professional labor cartel'."

66 Attacks on the judiciary are, of course, not limited to any one side of the ideological spectrum. In 2011, the decision of the High Court in *M70/2011 v Minister for Immigration and Citizenship* – better known as the *Malaysian Declaration Case* – attracted the ire of members of the federal executive.[79] The Chief Justice was said by an unnamed cabinet member to have "zero credibility",[80] and the decision was criticised as a "missed opportunity … to send a very strong message of deterrence to people smugglers".[81] As was said by Justice Philip McMurdo at the time, in his capacity as President of the Judicial Conference of Australia:[82]

> "To suggest that a court has missed an opportunity to achieve a certain policy outcome is a completely misguided comment about what courts do. They do not look for opportunities to further matters of policy whether that be government policy or otherwise."

67 More recently, criticism of Australian judges by the executive returned to sharp focus in 2017, when three federal Ministers launched verbal attacks at the Victorian Court of Appeal relating to an appeal against sentence for terrorism charges. After oral argument was heard on the appeal – but before

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[79] See Robert French, "A Voice for Judges: 30 Years on Truth to Power in a Post Truth Era" (Speech, Australian Judicial Officers Association, Sydney, 16 June 2023).

[80] George Brandis, "Julia Gillard attack offensive and her defender lame", *The Australian* (online, 9 September 2011) <https://www.theaustralian.com.au/business/legal-affairs/julia-gillard-attack-offensive-and-her-defender-lame/news-story/4e66638f7ce0678ebbc473d11e183ad3>.

[81] Jeremy Thompson, "'Rewriting of Act' puts offshore deals in doubt" *ABC* (online, 1 September 2011) <https://www.abc.net.au/news/2011-09-01/gillard-says-ruling-puts-offshore-processing-in-doubt/2866956>.

[82] Judicial Conference of Australia, "The Prime Minister's criticism of the High Court" (media release, September 2011).

the decision was delivered – a front-page story in *The Australian* quoted the three Ministers as variously saying that Victorian judges were "hard-left activist judges" who were "divorced from reality" and conducting "ideological experiments."[83] The President of the Judicial Conference of Australia, Justice Beech-Jones, released a statement condemning these remarks as a "threat to the rule of law" and having "no evidentiary foundation".[84] The Ministers narrowly avoided being charged with contempt of court after issuing a full apology.[85]

68 Six months later, the Law Council of Australia and the Law Institute of Victoria released similar public statements after another Minister criticised the "jokes of sentences being handed down" by Victorian courts for violent offending.[86] These instances illustrate the growing importance of representative professional bodies in protecting the independence and reputation of the judiciary and the legal profession.

69 "Truth decay" in the context of the work of the courts will only be hastened by attacks on independent judiciaries and judges. It is incumbent on courts and the legal profession more broadly to develop strategies for maintaining confidence in their vital work and resisting, or at least mitigating, the erosion of rational, fact-based public discourse. Extensive civic education about the role and importance of an independent judiciary is critical. That is the focus of the Supreme Court of New South Wales' current bicentenary celebrations, but much more than that is required.

70 The vulnerability of the courts to misrepresentation and unfounded criticism raises age-old questions about the role of the judiciary in public debate. In particular, it raises questions about what body or office is best placed to defend the courts against inaccurate or unfair criticism, and whether – or in

[83] Judicial Conference of Australia, "Grossly Improper and Unfair Attack on Victorian Judiciary" (media release, 13 June 2017).
[84] Ibid.
[85] Supreme Court of Victoria, "Announcement of the Court of Appeal in Terrorism Matters" (media release, 23 June 2017).
[86] Law Council of Australia, "Vital the rule of law is upheld despite warring words" (Media Release, 15 January 2018).

what circumstances – courts should publicly "correct the record".[87] Much has changed since the days of what were known as the Kilmuir Rules – which were, in fact, not rules at all, but a letter written in 1955 by the UK Lord Chancellor to the Director-General of the BBC, in which Viscount Kilmuir said that "as a general rule it is undesirable for judges to broadcast on the wireless or appear on television".[88]

71 It is now accepted that judges may be contributors to public discussion, provided that they are always careful not to attract controversy or undermine the independence of their office. Within these overriding constraints, the freedom of judges to contribute to public discussion is reflected in, for example, the United Nations *Basic Principles on Independence of the Judiciary*[89] and the Australasian Institute of Judicial Administration's *Guide to Judicial Conduct.*[90] Yet the prevailing tendency remains for judges to be reticent to engage in public commentary. As was said by Sir Anthony Mason 35 years ago, "Judicial reticence has much to commend it … Judges are not renowned for their sense of public relations."[91]

72 The more specific question which arises in the context of the present discussion is this: against the background of an erosion of reasoned, factual public discourse, what role do judges and courts have to play in responding to or correcting inaccurate, ill-informed public criticism of their work? In the age of digital platforms, on which misinformation can spread at lightning speed

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[87] For two thoughtful explorations of this topic, see Keith Mason, "A Time to Keep Silence, and a Time to Speak" (Speech, NSW Bar Association, 12 May 2000), and Margaret McMurdo, "Should Judges Speak Out?" (Speech, Judicial Conference of Australia, Uluru, April 2001).

[88] See also Groves (n 37) at 260. Joshua Rozenberg QC, "The Embattled Judge" in Jeremy Copper (ed), *Being a Judge in the Modern World* (Oxford University Press, 2017) 49 at 59.

[89] Adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders (6 September 1985), clause 8 of which provides:

> "In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."

[90] Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2023), clause 5.7.

[91] Sir Anthony Mason (n 71) at 181.

unless swiftly countered, should the judiciary take a more muscular approach to defending itself from unfair criticism?

73 These questions should be considered against a background of shifting political norms involving the role of the Attorney-General as the traditional 'defender' of the judiciary. The increasingly belligerent criticism of judges towards the end of the 20th century also coincided with a well-observed contraction of the willingness of many Attorneys-General to defend the judiciary in the political arena and in the public domain.[92] In a speech delivered in 1989, Sir Anthony Mason, after referring to the tradition of Attorneys-General representing the interests of the judiciary, said:[93]

> "But the old framework has been largely dismantled: The Judiciary, in common with other institutions, is not immune from criticism; nor should it be. But somebody must defend the Judiciary. Attorneys-General are today more conscious of the advantages of political expedience. A politician does not win votes by defending judges or public servants. *An Attorney-General no longer feels that he needs to defend the judges or their decisions in the face of every critic. The critics will include his own political colleagues. In recent years members of Parliament and media personalities have been prepared to criticise judges and judicial decisions to a greater extent than formerly.* Many politicians - I speak of the Australian variety - do not understand judicial independence and its value." (Emphasis added.)

74 Modern judges can no longer expect that an Attorney-General will leap to the defence of courts, particularly where doing so would involve criticising their cabinet colleagues. As has been remarked by Justice Margaret McMurdo:[94]

> "This defence from criticism by Attorneys-General is not always forthcoming; when it is, it is appreciated, but it is no longer expected."

75 Over past decades, courts have developed a number of strategies to pre-empt and respond to ill-informed public commentary. First, from the 1990s, courts around Australia began to appoint "Public Information Officers" (now often known simply as media managers or media liaison officers), tasked with

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[92] Groves (n 37) at 262ff; Beech-Jones (n 26) at 14ff; Margaret McMurdo, "Should Judges Speak Out?" (Speech, Judicial Conference of Australia, Uluru, April 2001) at 3; L J King, "The Attorney-General, Politics and the Judiciary" (2000) 74 *Australian Law Journal* 444; Daryl Williams, "The Role of the Attorney-General" (2002) 13 *Public Law Review* 1252

[93] Sir Anthony Mason (n 71) at 181.

[94] Margaret McMurdo, "Should Judges Speak Out?" (Speech, Judicial Conference of Australia, Uluru, April 2001) at 5.

publicly communicating the work of the courts to the journalistic profession and facilitating requests for information.[95] It has since become routine for courts to issue judgment summaries in cases of particular public interest or complexity, with the primary purpose of assisting journalists to report accurately under the deadline-driven, time-poor conditions of modern journalism. And in the past decade, Courts have begun to "us[e] the internet to speak directly to the public"[96] by live-streaming certain court proceedings online and posting judgments and judgment summaries on social media accounts. On the whole I believe live-streaming of cases of public importance to be valuable and a natural extension of the commitment to open justice. Such streaming will demonstrate to the public the nature of judicial work and, in the delivery of judgment, the natural sifting of evidence and systematic, structured and careful working through of arguments. Care must, however, be taken where possible to avoid the sensationalisation of solemn hearings. That will not always be in the Court's hands.

76 In Australia, perhaps the most significant development has been the emerging role of the Australian Judicial Officers Association (**AJOA**), together with other legal professional bodies, as the primary defenders of the judiciary. It has been noted that the inception of the AJOA in 1993 (then the Judicial Conference of Australia) coincided with public debate about the proper body to defend the judiciary from attacks,[97] and the AJOA now "fills the role that many Attorneys-General used to perform but no longer do."[98]

77 There may also be occasions when a reply by the court itself is warranted. So much is acknowledged in rule 5.7.2 of the *Guide to Judicial Conduct* issued by the Australian Council of Chief Justices, which states:

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[95] See Jane Johnston, "A History of Public Information Officers in Australian Courts: 25 Years of Assisting Public Perceptions and Understanding of the Administration of Justice (1993–2018)" (Research Paper, Australian Institute of Judicial Administration, April 2019). This development was pioneered by the Family Court in 1983, and began to be adopted in other courts a decade later: at 1.
[96] Warren (n 38) at 57.
[97] See Robert French, "Seeing Visions and Dreaming Dreams" (Speech, JCA Colloquium, Canberra, 7 October 2016) at 3.
[98] Beech-Jones (n 26) at 16.

> "On occasions decisions of a court may attract unfair, inaccurate or ill-informed comment. Many judges consider that, according to the circumstances, the court should respond to unjust criticism or inaccurate statements, particularly when they might unfairly reflect upon the competence, integrity or independence of the judiciary. Any such response should be dealt with by the Chief Justice or other head of the jurisdiction."

78 The question of when it will be necessary, or indeed helpful, for a head of jurisdiction to issue a public statement to 'correct the record' is a delicate one. The guiding considerations should always be whether the criticism has the capacity seriously to undermine public confidence in the court, and whether a public statement will in fact mitigate the damage or merely compound it. There is always a risk that by responding directly to unfounded criticism, the dominant effect will be merely to amplify that criticism. One must also be conscious of the likelihood that the statement will be conveyed to the public under sensationalist headlines such as "Court Hits Back at Minister".[99] As with many decisions that fall to judges, this is an area in which there are no hard and fast rules; a decision must be made on a realistic assessment of all the circumstances.

79 A statement by a head of jurisdiction is most likely to be the appropriate response where an unwarranted attack is mounted against the competence of a particular court, as opposed to the court system as a whole. In this context, it should be noted that attacks on the judiciary do not always take the form of criticism of particular decisions or perceived patterns in judicial outcomes. They may also take the form of unfounded criticism of a particular court's competence, including its accessibility to the public, the efficiency and expense of its processes, and the expertise of its judges.

80 Commentary of this kind was recently made in the New South Wales Legislative Assembly in support of a bill to establish a new Industrial Court. It was stated – incorrectly – that industrial law proceedings in the New South Wales Supreme Court generally took several years, required the cost of briefing Senior Counsel, and were determined by judges who often do not

[99] See Robert French, "A Voice for Judges: 30 Years on Truth to Power in a Post Truth Era" (Speech, Australian Judicial Officers Association, Sydney, 16 June 2023) at 5.

have a background in industrial law. The Court responded to these comments via a brief public statement published on its website, which addressed the factual errors in what had been said in Parliament.[100] I took the view that false statements about the work of my Court could not, and should not, go uncorrected.

81 As for steps that judges may take to encourage factual, reasoned debate about the courts and their decisions, attention should also be given to other ways in which courts and judges may proactively promote broader public engagement in, and respect for, the work of the courts. The presence of courts on social media platforms and the livestreaming of judicial proceedings, to which I have referred, are two elements of this broader effort. Not to be forgotten in the context of maintaining confidence in and respect for the legitimacy of our judicial system is the important role played by juries in criminal matters: the daily occurrence of hundreds of our citizens sitting in court, all day, day after day, participating in our system of justice including observing and being guided by our judges in close detail, and then being entrusted to judge their fellow citizens in matters as serious as murder.

82 I turn now to a more recent threat to the ascertainment of "truth" in the sense and to the extent that courts are involved in its ascertainment, although, as the current Master of the Rolls would caution, it is important not to take a reflex uniformly negative response to GenAI across the board.[101] There is

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[100] Supreme Court of New South Wales, "Statement on Behalf of the Supreme Court of New South Wales" (Media Statement, 30 November 2023).

[101] Sir Geoffrey Vos, "AI – Transforming the work of lawyers and judges" (Keynote Speech, AI Conference 2024: Transforming the Legal Landscape, Manchester, 9 March 2024) at 3. In this speech, Sir Geoffrey said:

> "… we all owe a duty to those we serve … to make constructive use of whatever technology is available if it helps to provide a better, quicker and more cost effective service to clients and the public, if you are a lawyer, and to provide a better, quicker and more cost effective dispute resolution process if you are a judge.
>
> … it is [also] an integral part of the adoption of new technologies that we need to do all we can to protect the very same citizens and businesses from their adverse effects. That means that, where appropriate, we need to promote effective regulation, rule-making, data protection, the protection of confidential material, and the minimisation of cyber-crime and cyber-fakes…

real potential for its valuable application, albeit real caution is required in its embrace. Others have been rather more alarmist about algorithmic justice, raising existential questions about the future of law and the legal profession.[102] Their views are worthy of the greatest respect and reflection.

Generative AI and truth decay

83 The vulnerability of courts to "truth decay" is perhaps most graphically illustrated by the emergence and rise in the use of GenAI within the legal system.

84 GenAI is a type of AI that is trained using high volumes of existing data to generate new data, such as text, images and audio in response to human inputs. Large language models (LLMs) are a sub-type of GenAI that are specifically designed to comprehend and generate human text.[103] The most well-known example of a GenAI LLM program is of course ChatGPT, an AI powered chatbot developed by OpenAI which is now so effective that it can comfortably produce sentences that are indistinguishable from those written by a person. Other examples of GenAI include DALL-E, which relies on human prompts to synthesise new images, and various text-to-audio programs which are able to use text inputs to generate lifelike speech outputs in any language or voice.

85 The utility and risks of GenAI programs like ChatGPT in a legal context have recently been the subject of much discussion. It is widely agreed that GenAI does not currently have the capacity to altogether replace lawyers.[104] It is also

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> But none of that means that we should forsake new technologies and the benefits they bring … [T]he simple fact is that we would not be properly serving either the interests of justice or access to justice if we did not embrace the use of new technologies for the benefit of those we serve."

[102] See, for example, D Hunter "The Death of the Legal Profession and the Future of Law" (2020) 43(4*) UNSWLJ* 1199; also Endicott and Yeung, "The Death of Law? Computationally Personalised Norms and the Rule of Law" (2022) 72 *University of Toronto Law Journal* 373.

[103] See, eg, F J Garcia-Penalvo, A Vazquez-Ingelmo, "What Do We Mean by GenAI? A Systematic Mapping of the Evolution, Trends, and Techniques Involved in Generative AI" (2023) 8(4) *International Journal of Interactive Multimedia and Artificial Intelligence* 7.

[104] See, eg J Greene, "Will ChatGPT make lawyers obsolete? (Hint: be afraid)" *Reuters* (online, 10 December 2022) <https://www.reuters.com/legal/transactional/will-chatgpt-make-lawyers-obsolete-hint-be-afraid-2022-12-09/> and L Croft, "ChatGPT not likely to wholly replace lawyers (yet)"

unlikely that GenAI could presently manage the roles of legal support staff like paralegals.[105] In fact, argument has been made that irrespective of technological development, GenAI could never replace lawyers entirely on the basis that there are enormous computational challenges involved in modelling the kind of moral decision-making by human agents which is associated with legal practice.[106]

86 Nonetheless, GenAI programs, and ChatGPT in particular, have been presented as tools with enormous implications for improving the efficiency of legal practice in several respects.[107] ChatGPT recently scored in the 90th percentile on the U.S. Bar Exam. [108] Meanwhile, a trained specialist legal AI (not a general purpose Gen AI) scored 74% on the English Solicitors Qualifying Exam and in so doing, demonstrated functioning legal knowledge in line with the Solicitors Regulation Authority's expectations of junior solicitors.[109]

87 Master of the Rolls, Sir Geoffrey Vos, recently asked ChatGPT how it could assist a lawyer in Manchester and it responded by saying that it could:[110]

> "help with (i) legal research, (ii) drafting legal documents and contracts, (iii) factual and legal analysis of cases, (iv) continuing legal education, (v) drafting letters to clients, (vi) writing memos, briefs and opinions, (vii) discussing ethical considerations, (viii) translating, (ix) giving guidance on LawTech, and (x) practice management."

LawyersWeekly (online, 2 February 2023) <https://www.lawyersweekly.com.au/newlaw/36571-chatgpt-not-likely-to-wholly-replace-lawyers-yet>.

[105] See, eg, "Will AI replace paralegals?" *Thomson Reuters* (online, 2 October 2023) <https://legal.thomsonreuters.com/blog/will-ai-replace-paralegals/>.

[106] W Bradley Wendel, "The Promise and Limitations of Artificial Intelligence in the Practice of Law" (2019) 72 *Oklahoma Law Review* 21 at 26-27.

[107] S Givoni, "ChatGPT: the future of legal assistance? An interview with Patrick Fair" (2023) 25(9) *Internet Law Bulletin* 123.

[108] S Wilkins, "How GPT-4 Mastered the Entire Bar Exam, and Why That Matters" *Legaltech News* (online, 17 March 2023) <https://www.law.com/legaltechnews/2023/03/17/how-gpt-4-mastered-the-entire-bar-exam-and-why-that-matters/?kw=How%20GPT-4%20Mastered%20the%20Entire%20Bar%20Exam%2C%20and%20Why%20That%20Matters&slreturn=20240211000017>.

[109] N Rose, "Lawrence the 'AI paralegal' passes SQE with flying colours" *LegalFutures* (24 November 2023) <https://www.legalfutures.co.uk/latest-news/lawrence-the-ai-paralegal-passes-sqe-with-flying-colours>.

[110] Sir Geoffrey Vos (n 101) at 4.

88 Sir Geoffrey also went on to note that ChatGPT could be used to predict case outcomes that could be compared with the prospects advice given by a human lawyer.[111]Other GenAI programs may also offer much to the law. A new program based on DALL-E called Forensic Sketch AI-rtist can be used to develop "hyper-realistic" sketches of criminal suspects based on descriptions provided by witnesses.[112] Use of GenAI will transform forensic science, and its consequential use, particularly in the context of criminal law. Its advantages include speed, cost and increased accuracy but judges will often in a contested situation need to understand how the sophisticated technology relied upon operates to the extent that questions of admissibility may arise.

89 There is no doubt that GenAI may be hugely valuable in certain tasks, what Professor Tania Sourdin has described as "supportive technology" or "supportive AI".[113] Notwithstanding its undoubted potential advantages, one of my real concerns with the advent of GenAI is the extent to which it will "deskill" lawyers (including judges) and undermine or erode the development and maintenance of their analytical abilities and capacity for the critical testing of legal and factual propositions. The combination of cost, efficiency and laziness may generate disproportionate or even overwhelming reliance on GenAI in the judicial and wider legal system in a way that not only exposes it to abuse but more fundamentally has the capacity to alter the high regard in which judges, and their judgments, are currently generally held by the broader community to the extent that their decisions may be viewed as little more than another output or result of GenAI.

90 There are several ways in which the use of GenAI programs may contribute to the phenomenon of "truth decay". First, it has been well documented that GenAI is prone to generating incorrect or false information. This is obviously a matter of serious concern. These errors are sometimes a consequence of a

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[111] Ibid at 5.
[112] M Taylor, "AI Software Can Create Suspect Sketches" *Forensic: On the Scene and in the Lab* (online, 8 February 2023) <https://www.forensicmag.com/594323-AI-Software-Can-Create-Suspect-Sketches/>.
[113] T Sourdin "Judge v Robot? Artificial intelligence and judicial decision-making" (2018) 41 *UNSWLJ* 1114; *Judges, Technology and Artificial Intelligence* (Elgar, 2021).

"garbage in, garbage out" problem whereby outputs merely reflect false information contained in the dataset upon which AI is trained.[114] That also highlights the dependency on users of the underlying data sets upon or by reference to which a GenAI program operates. It also highlights the huge power enjoyed by those that control and can manipulate the underlying datasets. While it may be expected that the problem of GenAI "hallucination" discussed further below may be seen by some as a "teething problem" and one that may to a certain extent be expected to be addressed as GenAI becomes more refined, the more fundamental point remains and is one that has profound implications for the efficacy in terms of "truth" and "accuracy" of GenAI.

91 Error riddled AI outputs may also be a product of the program being trained on outdated information. For instance, the free version of ChatGPT, ChatGPT 3.5, only draws on information available up until January 2022 which means that, in a legal context, developments in the law that have occurred since that time are not reflected in ChatGPT's outputs. Equally, GenAI may also only be trained on a dataset from a particular geographic area. ChatGPT draws predominantly from American data so is more likely to make errors in providing legal information in other jurisdictions.[115]

92 In a similar vein, the outputs of GenAI programs may reflect biases in the dataset upon which they are trained that are inconsistent with modern societal attitudes. For example, when asked to produce an image of a CEO, DALL-E generates predominantly images of white men while use of the prompt "nurse" generates only images of women.[116] Sir Geoffrey encountered this issue when he asked DALL-E to create an image of lawyers alarmed by AI and the

[114] F Bell et al, *AI Decision-Making and the Courts: A guide for Judges, Tribunal Members and Court Administrators* (Australian Institute of Judicial Administration Inc, December 2023) at 15.
[115] See, eg, UK Courts and Tribunals, *Artificial Intelligence (AI) – Guidance for Judicial Office Holders* (12 Decembe 2023) at 2 <https://www.judiciary.uk/wp-content/uploads/2023/12/AI-Judicial-Guidance.pdf> (**UK Judicial Guideline on AI**).
[116] N Tiku, "AI can now create any image in seconds, bringing wonder and danger" *The Washington Post* (28 September 2022) <https://www.washingtonpost.com/technology/interactive/2022/artificial-intelligence-images-dall-e/>.

output was an image which portrayed only men.[117] GenAI may also be affected by regressive bias whereby older, but more frequently replicated, information within the dataset is relied upon.[118]

93 GenAI programs additionally produce "hallucinated" outputs. Hallucinated outputs are those outputs which contain information that has been falsified by the AI program but which is presented as if it were a fact. ChatGPT may produce hallucinations in a number of situations, including where it does not understand the prompt it has been given or where there are gaps in its dataset. ChatGPT's hallucination rate is estimated to be around 3% which is low when compared with some other GenAI chatbots. For instance, the Claude 2 system offered by a company called Anthropic has been reported as having an hallucination rate of around 8%,[119] although the quality of the underlying technology is being continually refined and updated so that statistics and information more generally in this sphere may become rapidly out of currency.

94 ChatGPT's Terms and Conditions provide users with a comprehensive warning about the possibilities of errors in its outputs, particularly those errors which are a product of hallucination:[120]

> "…Given the probabilistic nature of machine learning, use of source Services may, in some situations, result in Output that does not accurately reflect real people, places, or facts.
>
> When you use our Services you understand and agree:
>
> - Output may not always be accurate. You should not rely on Output from our Services as a sole source of truth or factual information, or as a substitute for professional advice.

[117] Sir Geoffrey Vos (n 101) at 10.
[118] G Smith et al, "ChatGPT in law: unlocking new opportunities while managing the risks" *AllensLinklaters* (online, 15 February 2023) <https://www.allens.com.au/insights-news/insights/2023/02/ChatGPT-in-law/>.
[119] C Metz, "Chatbots May 'Hallucinate' More Often Than Many Realize" *New York Times* (online, 6 November 2023) <https://www.nytimes.com/2023/11/06/technology/chatbots-hallucination-rates.html#:~:text=When%20summarizing%20facts%2C%20ChatGPT%20technology,system's%20rate%20was%2027%20percent.&text=Cade%20Metz%20has%20been%20watching%20chatbots%20hallucinate%20since%202017>.
[120] OpenAI, *Terms and Conditions* <https://chataigpt.org/terms-and-conditions/>.

- You must evaluate Output for accuracy and appropriateness for your use case, including using human review as appropriate, before using or sharing Output from the Services.

- You must not use any Output relating to a person for any purpose that could have a legal or material impact on that person, such as making credit, educational, employment, housing, insurance, legal, medical, or other important decisions about them…"

95 Associate Professor Blayne Haggart recently wrote the following in *The Conversation* in relation to GenAI hallucinations and their relationship with truth:[121]

> "ChatGPT, and other machine-learning, large language models may seem sophisticated, but they're basically just complex autocomplete machines. Only instead of suggesting the next word in an email, they produce the most statistically likely words in much longer packages.
>
> The justification for these outputs can never be truth. Its truth is the truth of the correlation, that the word "sentence" should always complete the phrase "We finish each other's…" because it is the most common occurrence, not because it is expressing anything that has been observed.
>
> Because ChatGPT's truth is only a statistical truth, output produced by this program cannot ever be trusted in the same way that we trust a reporter or an academic's output. It cannot be verified because it has been constructed to create output in a different way than what we usually think of as being "scientific"."
>
> You can't check ChatGPT's sources because the source is the statistical fact most of the time, a set of words tend to follow each other."

One particular vice of GenAI is the plausibility of its output and the language employed, that is to say, propositions are expressed with great confidence and clarity of language, features which it has in common with the most accomplished of fraudsters.

Use by lawyers

96 It has been suggested that, as AI continues to develop and improve, in some instances and subject to local rules of professional ethics, use of AI by lawyers will not be optional. Large firms already have their own proprietary

[121] B Haggart, "Unlike with academics and reporters, you can't check when ChatGPT's telling the truth" *The Conversation* (online, 31 January 2023) <https://theconversation.com/unlike-with-academics-and-reporters-you-cant-check-when-chatgpts-telling-the-truth-198463>.

GenAI systems which are used internally. Clients may not wish to pay for what they could produce themselves using AI or for what could be done more efficiently by lawyers using AI. In fact, Sir Geoffrey Vos has suggested that there may be future professional negligence cases which will concern the liability of persons, including lawyers, for *non-use* of AI![122] However, as highlighted by a number of cases internationally in which ChatGPT has been relied upon by lawyers in the preparation of litigation, the issues with GenAI highlighted above are matters of serious concern.

97 In the highly publicised[123] case of *Mata v Avianca Inc*,[124] a Southern District of New York District Court decision which involved a claim by Mr Mata for damages after a metal serving cart struck his knee during a flight operated by Avianca, submissions were filed which included "non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT".[125] After judicial orders called the existence of the fake opinions into question, the two lawyers responsible for drafting and approving the submissions used ChatGPT to generate copies of the provably fake cases which they then filed.

98 Judge Castel described one of the fake decisions filed as showing "stylistic and reasoning flaws that do not generally appear in decisions issued by United States Courts of Appeals". His Honour went on to characterise its legal analysis as "gibberish". A number of other features also alerted Judge Castel to the fact that the decision may have been falsified. They included that the procedural history outlined in the fake opinion bordered "on nonsensical", the presence of often unpaired quotation marks, the lack of a conclusion to the judgment, the fact that the docket number in fact corresponded with another

[122] Sir Geoffrey Vos (n 101) at 7, 9.
[123] See, eg, M Novak, "Lawyer Uses ChatGPT in Federal Court and it Goes Horribly Wrong" *Forbes* (online, 27 May 2023) <https://www.forbes.com/sites/mattnovak/2023/05/27/lawyer-uses-chatgpt-in-federal-court-and-it-goes-horribly-wrong/?sh=7565cf383494> and D Carrick and S Kesteven, "This US lawyers used ChatGPT to research a legal brief with embarrassing results. We could all learn from his error" *ABC News* (24 June 2023) <https://www.abc.net.au/news/2023-06-24/us-lawyer-uses-chatgpt-to-research-case-with-embarrassing-result/102490068>.
[124] 22-cv-1461 (PKC).
[125] Ibid at 1.

decision of the Court and the inclusion of internal citations and quotes that were themselves non-existent.[126]

99 One of the offending lawyers testified that the error occurred because he was "operating under the false perception that [ChatGPT] could not possibly be fabricating cases on its own".[127] A record of the lawyer's prompts to ChatGPT and its responses was made available to the Court. The first prompt entered was: "argue that the statute of limitations is tolled by bankruptcy of defendant pursuant to Montreal Convention". After ChatGPT responded with broad descriptions of the Montreal Convention, statutes of limitations and federal bankruptcy principles, the lawyer asked ChatGPT to "provide case law", "show … specific holdings in federal cases", "show … more cases" and "give … some cases where [the] Montreal Convention allowed tolling of the statute of limitations due to bankruptcy". The chatbot complied with these requests by making up the cases.[128] The offending lawyer also adduced records of a later chat with ChatGPT in which he had asked whether the cases provided were "real" or "fake" to which it replied that it had supplied him with "real" authorities.[129]

100 In discussing the consequences of the law firm's use of ChatGPT in this manner, Judge Castel acknowledged that lawyers obtain the assistance of a variety of sources in the preparation of submissions and there was "nothing inherently improper about using a reliable artificial intelligence tool for assistance". However, his Honour went on to highlight the relationship between GenAI use by lawyers and "truth decay" in courts by reasoning as follows:[130]

> "Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavours. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the

[126] Ibid at 5-6.
[127] Ibid at 2.
[128] Ibid at 8.
[129] Ibid at 10.
[130] Ibid at 1.

> reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity."

101 Ultimately, Judge Castel found that the two lawyers who were primarily involved in the preparation of the submissions and their law firm were jointly and severally liable for a breach of Rule 11 of the *Federal Rules of Civil Procedure* which provides that:

> "**(a) Signature.** Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name…
>
> **(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – a attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> …
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."

Sanctions were imposed as a result of the breach of Rule 11. Those sanctions included, among other things, orders that the lawyers were to provide copies of the fake opinions they had filed in the proceedings, together with Judge Castel's opinion and orders, to each of the judges named as the authors of the fake opinions. The lawyers and their firm were also ordered to pay a $5,000 USD penalty.[131]

102 Although this decision illustrates the corrosive effect that GenAI use by lawyers in the preparation of litigation *may* have in terms of producing reliable, trust-worthy outputs, it also demonstrates that the rules of procedure with which lawyers must comply may be an important safeguard against "truth decay". Apart from defamation, malicious prosecution, false imprisonment, trespass to the person, death and personal injury proceedings, pleadings in the Supreme and District Courts of New South Wales, for example, must be

[131] Ibid at 17.

verified by an affidavit.[132] This may discourage lawyers from relying on ChatGPT in the preparation of pleadings without confirming that some or all of the outputs produced are supported evidentially or are or can be verified by the person taking responsibility for the pleading. Similarly, in the Federal Court of Australia, pleadings must be accompanied by a certificate signed by the lawyer that any factual and legal material available to the lawyer provides a proper basis for each allegation, denial and non-admission in the pleadings.[133] Reliance on the fact that GenAI was used would not be likely to be accepted as a satisfactory explanation to justify a departure from this requirement.

103 In appeal proceedings, submissions must be signed by the barrister or solicitor who prepared them.[134] Assumption of professional responsibility in this way will be an important means of dissuading lawyers from uncritically using ChatGPT or any other GenAI product to generate material filed in proceedings. Adverse costs sanctions against practitioners supply an additional means of institutional protection.

104 Where, like in *Mata v Avianca,* ChatGPT generated material is filed in court which includes fictitious cases, my own view is that very strong sanctions should be imposed and an answer or purported explanation that it was what was produced by ChatGPT should not be accepted as satisfactory.

105 In the Canadian context, the case of *Zheng v Chen*,[135] which was decided in the British Columbian Supreme Court earlier this year, bears a strong resemblance to that of *Mata v Avianca, Inc.* It concerned the insertion by counsel of two cases into a notice of motion which were discovered to have been invented by ChatGPT.

106 In reaching his conclusions as to the sanctions to be imposed upon the offending lawyer, Masuhara J noted the “express warning” on the ChatGPT

[132] Uniform Civil Procedure Rules 2005 (NSW), rr 14.22-14.24.
[133] Federal Court Rules 2011 (Cth), r 16.01.
[134] Ibid rr 51.12, 51.13, 51.36 and 51.45.
[135] [2024] B.C.J. No. 305.

website that its outputs could be inaccurate and that ChatGPT should not be used as a substitute for professional advice.[136] His Honour also had reference to a notice sent out by the Canadian Law Society in July 2023 regarding the risks of generative AI which read:[137]

> "With the rapid deployment and use of technologies like ChatGPT, there has been a growing level of AI-generated materials being used in court proceedings. Counsel are reminded that the ethical obligation to ensure the accuracy of materials submitted to the court remains with you. Where materials are generated using technologies such as ChatGPT, it would be prudent to advise the court accordingly…"

Further guidance was then issued to the profession in November 2023 which urged lawyers to "review" content generated using AI "carefully and ensure its accuracy".[138]

107 Although special costs orders were not made against the offending lawyer,[139] she was ordered to review all of her files and advise the court and opposing counsel if any materials filed or handed up in any other case contained case citations or summaries which were obtained using generative AI tools.[140] Masuhara J also held that it would be "prudent" to "advise the court and the opposing parties when any materials [submitted] to the court include content generated by AI tools such as ChatGPT."[141]

108 In a "Final Comment", his Honour said the following:[142]

> "As this case has unfortunately made clear, generative AI is still no substitute for the professional expertise that the justice system requires of lawyers. Competence in the selection and use of any technology tools, including those powered by AI, is critical. The integrity of the justice system requires no less."

109 *Zheng v Chen* thus highlights the utility of professional ethical obligations to regulate to some extent at least the use of GenAI in relation to litigation. It

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[136] Ibid at [36].
[137] Ibid at [34].
[138] Ibid at [35].
[139] Ibid at [32].
[140] Ibid at [44].
[141] Ibid at [45].
[142] Ibid at [46].

may be that lawyers and experts should be required expressly to state the extent to which they have relied on GenAI in the preparation of materials for trial, and to formally certify that they have personally checked all references which have been thrown up by the use of such technology. It should be a breach of the obligation borne by solicitors and barristers not to mislead the court to file documentation in proceedings which includes hallucinated or error-riddled information generated by ChatGPT.[143]

110 Guidelines have also been issued by the legal profession which outline how AI may be used in a manner consistent with a lawyer's ethical and professional obligations. The Professional Support Unit of the NSW Law Society released in the *Law Society Journal* in November 2023 a "guide to responsible use of artificial intelligence".[144] It highlighted a number of the Solicitors' Conduct Rules that may be breached where solicitors have inappropriately used AI. They include rule 4, which concerns a solicitors' duties of competence, integrity and honesty, rule 17, which concerns a solicitors' independence, and rule 37, which pertains to the expectations of a solicitor who is charged with supervising the legal practice of others. The following guidance is provided to solicitors in respect of best practice uses of AI in legal practice:[145]

> "When a solicitor uses generative AI to assist in their legal practice, they should employ the same level of care and caution as they would to any legal assistant or paralegal. Solicitors must exercise independent forensic judgment, based on their own training, experience and research, and review and edit any 'product' to be confident it is reliable and correct…
>
> Clients are entitled to expect that any work done by a solicitor is the solicitor's own work, reflecting the solicitor's experience, knowledge, application and judgment. AI must, therefore, be used responsibly to supplement (rather than substitute) the legal services on offer…

[143] See, eg, *Barristers Rules*, r 64 which prevents barristers from alleging any matter of fact in any court document, submission or address unless the barrister believes on reasonable grounds that the factual material available provides a proper basis to do so.
[144] Professional Support Unit, "A solicitor's guide to responsible use of artificial intelligence" *Law Society Journal* (online, 14 November 2023) <https://lsj.com.au/articles/a-solicitors-guide-to-responsible-use-of-artificial-intelligence/>.
[145] Ibid.

> Practitioners should neither avoid generative AI completely nor embrace it without first understanding its limitations and giving critical thought to maintaining their professional obligations while using it…"

111 Last year, the NSW Bar Association released a Guideline, *Issues Arising from the Use of AI Language Models (including ChatGPT) in Legal Practice*, which aims to provide "guidance for barristers in relation to the consideration of use of AI language models, including ChatGPT, in their practice."[146] The Guideline draws attention to several of the *Barristers Rules* that may be infringed by uses of ChatGPT or another GenAI product including rules 4, 8, 11, 13, 23, 24, 35 and 42. The Bar Association described those rules as cumulatively reflecting the expectations of the community that barristers, as specialist advocates, will "apply their own skill and exercise their own independent judgment when performing work for a client" and "exercise reasonable care and skill".[147]

112 The Guideline provides the following advice to barristers about the use of AI:[148]

> "The high level of independence barristers should apply to their work is easily eroded by reliance on the use of GPTs.
>
> Although the design intent underlying language models is that they provide accurate information … that will not always be the case. Further, because language models are continuing to evolve … the responses barristers receive from one time to the next in relation to the same prompt might be substantially different.
>
> …As a minimum first step, a barrister should always verify the accuracy, reliability and currency of AI-generated information to ensure it is consistent with their own legal knowledge and research before relying on it for any purpose. It will generally be prudent for a barrister to keep a record of the prompts they have used …, the choices they have made, and the results generated by the AI tool. A barrister should also ensure that any use of an AI tool is consistent with its terms of service. A barrister should record these terms and the explicit decision they have made to use a particular tool."

With reference to the decision of *Mata v Avianca*, the Guideline goes on to suggest that where it is not possible to check answers provided using

[146] New South Wales Bar Association, *Issues Arising from the Use of AI Language Models (including ChatGPT) in Legal Practice* (12 July 2023) (**NSWBA Guideline**) at 1.
[147] Ibid at 2.
[148] Ibid at 2.

ChatGPT, "the barrister should avoid any reliance on those answers as a matter of prudence, professionalism and in the proper discharge of their responsibilities under the Barristers Rules".[149]

113 The Bar Association also included the following in the Guideline:[150]

> "A barrister should be transparent with clients about their use of AI tools and their use to assist in legal representation. This should include disclosing to the client the nature of the AI tool the barrister proposes using and acknowledging the known limitations of the use of AI in legal practice. A barrister should always remain entirely accountable for any legal work based on AI-generated information."

114 Thus far, the NZ and UK judiciaries, seemingly in response to the decision in *Mata v Avianca* and the public attention it received, have produced guidelines on AI use in courts and the steps that judicial officers may take to ensure that AI is not misused in the judicial system. However, those guidelines have not yet recommended the disclosure of GenAI use in all cases.

115 New Zealand led the way. On 7 December 2023, the New Zealand judiciary issued the *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals: Lawyers* (**NZ Lawyers Guidelines**).[151] These Guidelines emphasise the fundamental ethical and professional obligations of all legal professionals in NZ and stipulate at the outset that "Any use of GenAI chatbots in the context of court and tribunal proceedings must be consistent with the observance of lawyers' obligations".[152] Before using GenAI applications, the Guidelines encourage lawyers to "have a basic understanding of their capabilities and limitations". In particular, it is set out that "even if the output looks convincing, it may not be factually correct" and highlights that existing GenAI applications have limited familiarity with NZ law

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[149] Ibid at 3.
[150] Ibid.
[151] <https://www.courtsofnz.govt.nz/assets/6-Going-to-Court/practice-directions/practice-guidelines/all-benches/20231207-GenAI-Guidelines-Lawyers.pdf>. At the same time, *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals: Judges, Judicial Officers, Tribunal Members and Judicial Support Staff* (7 December 2023) (**NZ Judicial Guidelines on AI**) were released.
[152] *NZ Lawyers Guidelines* at 1.

and procedure.[153] The Guidelines go on to say the following in relation to the "accountability and accuracy" of GenAI:

> "GenAI chatbots may:
>
> ● Make up fictitious cases, citations or quotes, or refer to legislation, articles or legal texts that do not exist;
>
> ● Provide incorrect or misleading information on the law or how it might apply;
>
> ● Make factual errors; and
>
> ● Confirm that information is accurate if asked, even when it is not."

116 In addition to warning lawyers about potential biases in the outputs produced by GenAI, the Guidelines mandate that all outputs generated by GenAI should be checked by an appropriately qualified person for accuracy before they are referred to in court or tribunal proceedings.[154] Nevertheless, the Guidelines provide that where all procedures set out in the Guidelines are complied with, it will not be necessary to disclose use of a GenAI chatbot, unless asked directly by a court or tribunal.[155]

117 On 12 December 2023, Lady Chief Justice Carr, alongside the Master of the Rolls, the Senior President of Tribunals and the Deputy Head of Civil Justice, issued the *Artificial Intelligence (AI) – Judicial Guidance* (**UK Judicial Guideline on AI**). It provides the following in respect of potential uses of GenAI by legal practitioners:[156]

> "Some kinds of AI tools have been used by legal professionals for a significant time without difficulty…
>
> All legal representatives are responsible for the material they put before the court/tribunal and have a professional obligation to ensure it is accurate and appropriate. Provided AI is used responsibly, there is no reason why a legal representative ought to refer to its use, but this is dependent upon context.
>
> Until the legal profession becomes familiar with these new technologies, however, it may be necessary at times to remind individual lawyers of their obligations and confirm that they have independently verified the accuracy of

[153] Ibid at 2.
[154] Ibid at 4.
[155] Ibid.
[156] *UK Judicial Guideline on AI* at 5.

any research or case citations that have been generated with the assistance of an AI chatbot."

Use by self-represented litigants

118 The use of GenAI to prepare litigation, including by conducting legal research and drafting submissions, is not restricted to lawyers and law firms. Rather, GenAI programs may be even more heavily relied upon by self-represented litigants. This is because programs like ChatGPT *may* be able to promote access to justice in that they may allow those who are not otherwise able to access legal representation to, for instance, identify if they have a claim, become familiar with legal processes and complete court documentation. In this respect, GenAI has obvious benefits for the efficiency and fairness of the justice system. However, GenAI's lack of a "truth filter" may have the same insidious effect on the justice system when used by self-represented litigants as when used by legal representatives.

119 This issue emerged in a recent decision of the Federal Circuit and Family Court of Australia[157] in which an interlocutory application to restrain legal practitioners from acting for the Respondent in the proceedings was refused. The Applicant, a self-represented litigant, filed 24 authorities and corresponding summaries which she said were examples of cases where MinterEllison had been restrained from acting for their clients. Some of those cases did not exist, others had citations which corresponded with cases that had different names than those provided by the Applicant and others were not as the Applicant had described them.

120 When asked by Judge Riley to provide the correct citations, the Applicant had explained that she had been provided with the list of cases by another person, was rushing so had not had time to verify them and "did not know what ChatGPT was".[158]

[157] *Finch v Heat Group Pty Ltd* [2024] FedCFamC2G 161.
[158] Ibid at [137].

121 Similar issues arose in the UK First-Tier Tribunal Tax Chamber when a self-represented litigant sought to appeal against a penalty imposed on her as a consequence of her failure to notify the Commissioner of Revenue of her liability to capital gains tax.[159] The Applicant had provided the Tribunal with the names, dates and summaries of nine other Tribunal decisions in which she claimed that an applicant had been successful in showing that a reasonable excuse existed for failing to notify.

122 In addition to the Applicant's concession that it was "possible" the document had been created using AI and the fact that none of the judgments could be found using legal databases, the Tribunal took a number of factors into account in making a finding of fact that the cases were generated by "an AI system such as ChatGPT".[160] First, the Tribunal referred to a 2023 Risk Outlook Report of the Solicitors' Regulation Authority which explored the increasing use of AI in UK law firms and which notes that:[161]

> "AI language models such as ChatGPT … work by anticipating the text that should follow the input they are given, but do not have a concept of 'reality'. The result is known as 'hallucination', where a system produces highly plausible but incorrect results."

123 Secondly, the Tribunal pointed to several aspects of the cases referred to by the Applicant which made them "plausible but incorrect", including that the case names and citations were similar to those of leading cases in the field but not correct and in the cases cited by the Applicant, the outcomes had been reversed. For example, *Christine Perrin* was used instead of *David Perrin*, the latter being a case in which the Applicant was unsuccessful and *Smith v HMRC* (2021) was relied upon instead of *Smith v HMRC* [2018], a case in which the Applicant was not successful. The Tribunal noted that the summaries of the cases provided by the Applicant picked up on language

[159] *Harber v The Commissioners for His Majesty's Revenue and Customs* [2023] UKFTT 01007 (TC) (**Harber**).
[160] Ibid at [21].
[161] Solicitors Regulation Authority, "Risk Outlook report: The use of artificial intelligence in the legal market" (online, 20 November 2023) <https://www.sra.org.uk/sra/research-publications/artificial-intelligence-legal-market/>.

often used in the published key words or headnotes to genuine Tribunal decisions.

124 Thirdly, there were a number of notable errors in the summaries of the cases which the Applicant sought to rely upon. For instance, a number of the summaries used American spellings of words and frequently repeated identical phrases.

125 The Tribunal found that the Applicant was not aware that the cases were fabricated and "did not know how to locate or check case law authorities".[162] However, it also acknowledged the role that GenAI, by falsifying authorities, may play in perverting the course of justice. The Tribunal considered, with reference the decision of Judge Castel in *Mata v Avianca* that the Applicant's conduct generated considerable harm to the courts and legal profession, and particularly to respect for the doctrine of precedent on the basis that the Tribunal's decisions are "persuasive authorities" which later Tribunals would be expected to follow.[163]

126 In another case heard in the Northern Ireland Chancery Division, a self-represented litigant filed final submissions which included a series of answers provided to questions put by him to ChatGPT which criticised counsel, solicitors and judges.[164] He submitted that those submissions could be safely relied upon by the Court because ChatGPT "does not have personal opinions, beliefs or feelings".[165] However, as noted by Simpson J, ChatGPT did not recognise or correct the misuse by the litigant of the phrase "cast dispersions", rather than "cast aspersions".[166]

127 In an even more recent decision of the Supreme Court of Queensland, *Youssef v Eckersley & Anor* [2024] QSC 35, delivered on 15 March 2024, a self-represented litigant prepared his submissions with the assistance of Chat

[162] *Harber* at [22].
[163] Ibid at [24].
[164] *Satander UK PLC v Thomas Anthony Carlin* [2023] NICh 5
[165] Ibid at [34].
[166] Ibid.

GPT. Wilson J noted that "the plaintiff vouched for the accuracy of his submissions, however, stated that this platform assisted in their organisational structure and added a flourish to his submissions."

128 Another emerging issue that courts may need to be attuned to in relation to uses of GenAI by self-represented litigants is the growth of AI start-ups that seek to exploit a need on the part of self-represented litigants for guidance in navigating legal proceedings. Although it appears that such services have not yet emerged in Australia, American company, DoNotPay has risen to prominence by offering a "robot lawyer" service to those seeking to "fight corporations" and "beat bureaucracy" without having to pay for legal representation. The service was originally marketed as useful in bringing small legal proceedings such as disputing parking fines.[167] DoNotPay charges users a fee and operates on a smartphone by listening to the arguments in court, collating data from legislation and legal precedent and then formulating advice for the litigant about what to say and do in the courtroom which it provides to the litigant in real time through headphones.[168]

129 Although it is unclear the extent to which the program suffers from the same hallucination and error issues as ChatGPT, proceedings have been brought against DoNotPay by a small Illinois law firm. The firm accused DoNotPay of engaging in the unlicensed practice of law and of causing "irreparable harm" to those in need of legal services. The suit was recently dismissed on the basis that the law firm lacked standing to bring the claim.[169] However, other lawsuits against DoNotPay are being brought, including one by a Californian man who claims that he received poor outcomes when using the company's

[167] "Your AI Consumer Champion" *DoNotPay* <https://donotpay.com/>.
[168] K McDonough, "'World's first robot lawyer' hit with lawsuit for practising without a license" *Law Society Journal Online* (online, 16 March 2023) <https://lsj.com.au/articles/worlds-first-robot-lawyer-hit-with-lawsuit-for-practising-without-a-license/>.
[169] *MillerKing LLC v DoNotPay Inc.* 3:23-CV-863-NJR (per Rosenstengel CJ).

service. There are also other reports of unrepresented persons being misled by DoNotPay's robot lawyer service.[170]

130 Unlike solicitors and barristers who use GenAI in a manner which results in falsifiable information being put before the Court, self-represented litigants are not subject to the same professional conduct rules. This generates complexity for courts in ensuring that GenAI use by self-represented litigants promotes efficiency in and access to the justice system, rather than leaving it vulnerable to fabrication and distortion.

131 The *UK Judicial Guideline on AI* provides that:[171]

> "AI chatbots are now being used by unrepresented litigants. They may be the only source of advice or assistance some litigants receive. Litigants rarely have the skills independently to verify legal information provided by AI chatbots and may not be aware that they are prone to error. If it appears an AI chatbot may have been used to prepare submissions or other documents, it is appropriate to inquire about this, and ask what checks for accuracy have been undertaken (if any)."

132 The Guideline also offers the following list of "Indications that work may have been produced by AI":[172]

> "● references to cases that do not sound familiar, or have unfamiliar citations (sometimes from the US)
>
> ● parties citing different bodies of case law in relation to the same legal issues
>
> ● submissions that do not accord with your general understanding of the law in the area
>
> ● submissions that use American spelling or refer to overseas cases, and
>
> ● content that (superficially at least) appears to be highly persuasive and well written, but on closer inspection contains obvious substantive errors."

133 Alternatively, guidance and information directed to unrepresented litigants may be issued by courts with a view to assisting them in navigating

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[170] S Merken, "'Robot lawyer' DoNotPay beats lawsuit by Illinois law firm' *Reuters* (online, 18 November 2023) <https://www.reuters.com/legal/legalindustry/robot-lawyer-donotpay-beats-lawsuit-by-illinois-law-firm-2023-11-17/>.
[171] *UK Judicial Guideline on AI* at 5.
[172] Ibid at 6.

appropriate uses of GenAI in court proceedings. This course of action has been taken in NZ where a dedicated *Guideline for Non-Lawyers on the Use of Gen AI in courts*[173] has been issued.

134 That Guideline instructs non-lawyers that GenAI chatbots may help by "identifying and explaining laws and legal principles that might be relevant to a situation" and in drafting "basic legal documents" or "helping … organise the facts into a clearer structure or suggesting suitable headings".[174] However, it also warns that GenAI programs have limited training in New Zealand law and court procedure, cannot "understand the unique fact situation in a specific case", "understand culture and emotional needs", "understand the broader Aoteraroa New Zealand social and legal context", "predict the chance of success or the outcome of a case", "be trusted to always provide legal or other information that is relevant, accurate, complete, up-to-date and unbiased" or "reach logical conclusions, even when given relevant facts."[175] As such, the Guideline encourages non-lawyers to seek legal assistance and to thoroughly check any material generated by GenAI chatbots on the basis that such programs have a propensity to produce "fake material" which "can look as though it has been taken from a real source even when it has not".[176]

135 Nonetheless, as with uses of GenAI by lawyers, the Guideline provides that disclosure "by default" of GenAI chatbot use is not necessary "unless asked by the court or tribunal". Rather, it suggests that where non-lawyers have appropriately checked the accuracy of information in accordance with the Guideline, the risks of GenAI use will have been sufficiently mitigated such that disclosure will not be necessary.[177]

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[173] (7 December 2023) <https://www.courtsofnz.govt.nz/assets/6-Going-to-Court/practice-directions/practice-guidelines/all-benches/20231207-GenAI-Guidelines-Non-Lawyers.pdf>.
[174] Ibid at 1.
[175] Ibid.
[176] Ibid at 4.
[177] Ibid.

Use by judges

136 Use of GenAI by judges themselves also has the potential to compromise the judicial method which has thus far guarded the courts from the worst of the effects of "truth decay". When ChatGPT is asked, "Should ChatGPT be used by judges?", it responds:

> "Using ChatGPT in legal decision-making raises ethical and accuracy concerns due to potential biases, lack of accountability, and the model's limitations. It's essential to carefully assess its implications before considering such applications."

Nevertheless, there are now at least three reported cases internationally of judges using ChatGPT in the drafting of judgments.[178]

137 The first reported case of use of ChatGPT by a judge was in Cartagena, Colombia. Judge Juan Manuel Padilla included a conversation with ChatGPT in his judgment which concerned the entitlement of an autistic child to have his medical treatment entirely compensated by insurance.[179] Judge Padilla asked ChatGPT the following four questions which he recorded in his judgment:

> "1. Is an autistic child exempt from co-payments for therapy?
>
> 2. Should tutela [constitutional] actions in these cases be granted?
>
> 3. Is requiring a co-payment in these cases a barrier to access to health services?
>
> 4. Has the jurisprudence of the constitutional court made favourable decisions in similar cases?"

138 The answers provided by ChatGPT have been described as "poorly justified" and lacking "nuance" with the chatbot citing a law only tangentially relevant to the case on one occasion and then failing to cite specific Constitutional Court

[178] A Smith, A Moloney and A Asher-Schapiro, "Are AI chatbots in courts putting justice at risk?" *Context* (online, 4 May 2023) <https://www.context.news/ai/are-ai-chatbots-in-courts-putting-justice-at-risk>.

[179] The judgment can be accessed at the following link: <https://forogpp.files.wordpress.com/2023/01/sentencia-tutela-segunda-instancia-rad.-13001410500420220045901.pdf>.

cases on another. Although the judge recorded in his reasons that the answers provided by ChatGPT would be "corroborated", nothing in the text of the judgment confirms that the answers provided by ChatGPT were verified elsewhere before the judge relied upon them in reaching his conclusions.[180] In respect of his reasons for using ChatGPT, the judge outlined that "including these AI-produced texts is in no way to replace the judge's decision. What we are really looking for is to optimise the time spent drafting judgments after corroborating the information provided by AI."[181]

139 ChatGPT was also used last year in the Punjab and Haryana High Court to collate relevant legal principles applicable to the bail plea of an accused charged with rioting, criminal intimidation, murder, and criminal conspiracy.[182] When asked by Justice Chitkara: "What is the jurisprudence on bail when the assailants assaulted with cruelty", ChatGPT responded in the following way:

> "in general, if the assailants have been charged with a violent crime that involves cruelty, such as murder, aggravated assault, or torture, they may be considered a danger to the community and a flight risk. In such cases, the judge may be less inclined to grant bail or may set the bail amount very high to ensure that the defendant appears in court and does not pose a risk to the public safety. The severity of the assault, the defendant's criminal history, and the strength of the evidence against them are all factors that a judge will consider when deciding whether to grant bail. It is important to note that the presumption of innocence is a fundamental principle of the justice system, and all defendants are entitled to bail unless there are compelling reasons to deny it …"

Ultimately, in dismissing the bail petition, Justice Chitkara made clear that "any reference to ChatGPT and any observation made is neither an expression of opinion on the merits of the case nor shall the trial Court advert

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[180] J D Gutierrez, "ChatGPT in Colombian Courts: Why we need to have a conversation about the digital literacy of the judiciary" *Verfassungsblog: On Matters Constitutional* (online, 23 February 2023) <https://verfassungsblog.de/colombian-chatgpt/>.

[181] L Croft, "Use of ChatGPT in courts should be 'approached with great caution'" *Lawyers Weekly* (online, 13 February 2023) <https://www.lawyersweekly.com.au/the-bar/36657-use-of-chatgpt-in-courts-should-be-approached-with-great-caution>.

[182] J Sandhu, 'In a first, Punjab and Haryan HC turns to ChatGPT for view on bail in murder case" *Indian Express* (online, 28 March 2023) <https://indianexpress.com/article/cities/chandigarh/in-a-first-hc-turns-to-chatgpt-for-view-on-bail-in-murder-case-8522544/>.

to these comments; this reference is only intended to present a broader picture on bail jurisprudence, where cruelty is a factor".[183]

140 In a third case, which received less media attention, Bolivian Constitutional Court judges consulted ChatGPT during an online hearing which concerned three journalists accused of posting photos of a victim of violence without her permission in circumstances where the journalists argued they had obtained the victim's consent. The judges asked ChatGPT whether there was any "legitimate public interest" in journalists posting photos of a "woman showing parts of her body" without her consent to which ChatGPT responded that it was a "violation of the person's privacy and dignity". Orders were ultimately made for the photos to be removed and although the Court said that ChatGPT only assisted by "clarifying certain concepts", the journalists' representative described the use of ChatGPT in the hearing as "arbitrary".[184]

141 In September 2023, Lord Justice Birss reported to a Law Society conference that he had tried to use ChatGPT to provide a summary of an area of law and referred to it as "jolly useful" and as having "real potential".[185] His Honour went on to say:[186]

> "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 as being acceptable."

142 In China, there are evidently ongoing efforts to increase the use of AI judging, especially in areas where there are high caseloads and a limited need for highly individualised decision-making. In Hebei Province since July 2016, 178 local courts and reportedly nearly 3,000 judges in more than 150,000 cases have been using an AI-powered program called "Intelligent Trial 1.0". The

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[183] Ibid.
[184] A Smith, A Moloney and A Asher-Schapiro, "Are AI chatbots in courts putting justice at risk?" *Context* (online, 4 May 2023) <https://www.context.news/ai/are-ai-chatbots-in-courts-putting-justice-at-risk>.
[185] H Farah, "Court of appeal judge praises 'jolly useful' ChatGPT after asking it for legal summary" *The Guardian* (online, 15 September 2023) <https://www.theguardian.com/technology/2023/sep/15/court-of-appeal-judge-praises-jolly-useful-chatgpt-after-asking-it-for-legal-summary>.
[186] Ibid.

program can do things like provide judges with a summary of the circumstances of the parties to litigation and information about other litigation they are involved in. It can also display judgments of similar cases.[187] Efforts are now being made to develop AI which, by analysing millions of past decisions, can assist Chinese judges by suggesting a legal outcome or producing a decision-tree designed to match the fact pattern of the case at hand with the correct solution.[188]

143 Some have argued that use of GenAI by judges could promote public trust in the judiciary and combat "truth decay" by reducing the appearance of corruption, partiality or bias.[189] However, as already discussed, GenAI also has the potential to *introduce* bias, undermine the judiciary's independence and produce significant errors which will undermine confidence in the courts.[190] Despite this, neither the New Zealand or UK guidelines to judicial officers on GenAI discussed below entirely warn against uses of GenAI in the judgment production process. In Canada, the Federal Court issued *Interim Principles and Guidelines on the Court's Use of Artificial Intelligence* on 20 December 2023 which provided that "the Court will not use AI, and more specifically automated decision-making tools, in making its judgments and orders, without first engaging in public consultations. For greater certainty, this includes the Court's determination of the issues raised by the parties, as reflected in its Reasons for Judgment and its Reasons for Order, or any other decision made by the Court in a proceeding."[191]

144 The *NZ Judicial Guidelines on AI* issued on 7 December 2023 outline that "GenAI chatbots … have been developed to assist judges, judicial officers, tribunal members and judicial support staff who may wish to use such tools in the course of their work" but cautions that any such use "must be consistent

[187] Jiuzhang Research Institute, "Intelligent review system appears at the World Internet Conference" *Jiuzhang News* <https://mp.weixin.qq.com/s/oQJg1y5R3--SjHsSTu0phQ>.
[188] R E Stern, B L Liebman, M Roberts and A Z Wang, "Automating Fairness? Artificial Intelligence in the Chinese Court" 59 *Columbia Journal of Transnational Law* 515 at 519.
[189] Dr M Zalnieriute, "Technology and the Courts: Artificial Intelligence and Judicial Impartiality" (Submission, Australian Law Reform Commission Review of Judicial Impartiality, 4 June 2021) at 2.
[190] Ibid at 3-4.
[191] See, <https://www.fct-cf.gc.ca/en/pages/law-and-practice/artificial-intelligence>.

with the judiciary's overarching obligation to protect the integrity of the administration of justice and court/tribunal processes."[192]

145 Warnings to judicial officers about appropriate and inappropriate uses of GenAI are given, and were subsequently emulated by those offered by their UK equivalent referred to below. In particular, it is emphasised that GenAI should not be used for legal research and legal analysis. The *NZ Judicial Guidelines on AI* also stipulate that judicial officers do not need to declare the use of GenAI in judgment preparation. Later in the Guidelines, sample prompts for effectively using AI in judgment preparation are offered. For instance, "I am writing a speech on the development of common law in Aotearoa New Zealand; what are some potential headings or themes?" and "Draft an email to my clerk instructing them to research the law of consideration in Aotearoa New Zealand".[193]

146 The *UK Judicial Guideline on AI* cautions judges that GenAI tools have the potential to "make up fictitious cases, citations or quotes, or refer to legislation, articles or legal texts that do not exist", "provide incorrect misleading information regarding the law or how it might apply" and "make factual errors. The Guideline also warns judges that there are enormous privacy concerns associated with inputting information into GenAI chatbots which is not already in the public domain as this information may form part of the dataset which those chatbots utilise to answer the questions of future users. In relation to the best means of using GenAI, it provides the following:[194]

> "Judicial office holders are personally responsible for material which is produced in their name.
>
> Judges are not generally obliged to describe the research or preparatory work which may have been done in order to produce a judgment. Provided these guidelines are appropriately followed, there is no reason why generative AI could not be a potentially useful secondary tool.

[192] Zalnieriute (n 189) at 1.
[193] Ibid at 5.
[194] *UK Judicial Guideline on AI* at 5.

> If clerks, judicial assistants, or other staff are using AI tools in the course of their work for you, you should discuss it with them to ensure they are using such tools appropriately and taking steps to mitigate any risks …"

147 The Guideline goes on to recommend that AI may be "potentially useful" in "summarising large bodies of text", "writing presentations, e.g. to provide suggestions for topics to cover" and "administrative tasks like composing emails and memoranda". However, the Guideline is clear that all judges who use AI should understand what it does and does not do. Importantly, it sets out that AI use is "not recommended" for legal research or legal analysis.[195] Rather, it suggests that AI "may be best seen as a way of obtaining non-definitive confirmation of something, rather than providing immediately correct facts."[196]

148 A revised guide on GenAI and its potential implications for judicial decision-making has also been issued by the Australasian Institute of Judicial Administration (**AIJA**), in collaboration with UNSW's Faculty of Law and Justice. It offers a discussion of the various impacts that GenAI may have on key considerations for courts such as access to justice, open justice, procedural fairness, judicial accountability and judicial bias and impartiality.[197]

AI generated evidence[198]

149 Another way in which GenAI may mask or obscure what is true and false is where AI is used for the purposes of generating evidence which is then relied upon in proceedings. This is particularly problematic.

150 Already AI has been used by some art historians and conservators to verify the authenticity of works, although such evidence is yet to be adduced in court

[195] *NZ Judicial Guidelines on AI* at 6.
[196] Ibid at 3.
[197] L Bennett Moses, M Legg, J Silove and M Zalnieriute, *AI Decision-Making and the Courts: A guide for Judges, Tribunal Members and Court Administrators* (Research Report, Australasian Institute of Judicial Administration, December 2023), available at <https://aija.org.au/publications/ai-decision-making-and-the-courts-a-guide-for-judges-tribunal-members-and-court-administrators/>
[198] See, generally, D Seng and S Mason "Artificial Intelligence and Evidence" (2021) 33 SAcLJ 241.

proceedings.[199] Similarly, AI might be used by police to conduct facial comparisons between an image and a suspected offender.[200]

151 However, as has already been highlighted, applications like ChatGPT are able to generate text which in many cases, will be indistinguishable from that written by a human. It is thus possible for ChatGPT to be used to produce written statements or affidavits that are then adduced in proceedings under the false pretence of having been made by a witness or party to the proceedings.

152 This problem is illustrated by a recent highly publicised[201] decision of the ACT Supreme Court, *Director of Public Prosecutions (ACT) v Khan* [2024] ACTSC 19. In that case, Mossop J held that little weight could be given to a character reference supplied by an offender's brother in relation to the offender's subjective circumstances for the purposes of sentencing on the basis that, when read as a whole, the language of the reference was strongly suggestive of the document having been generated using a "large language model program, such as ChatGPT".[202]

153 In finding that the document had likely been generated by AI, his Honour first drew attention to the fact that the author introduced his relationship with the offender by stating that he had known his brother "personally and professionally for an extended period". Mossop J reasoned that:

> "[40] One would expect in a reference written by his brother that the reference would say that the author was his brother and would explain his association with the offender by reference to that fact, rather than by having known him "personally and professionally for an extended period"."

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[199] A Kushnir and M Schaumann, "Friend or foe? How artificial intelligence is challenging the law's approach to art" *LexisNexis* <https://www.lexisnexis.com.au/en/insights-and-analysis/practice-intelligence/2023/friend-or-foe-how-artificial-intelligence-is-challenging-the-laws-approach-to-art>.
[200] Lord Sales, "Artificial Intelligence and Evidence" (Speech, Seminars in Law and Technology, Singapore, 15 September 2021), referring to D K B Seng and S Mason, "Artificial Intelligence and Evidence" (2021) 33 *Singapore Academy of Law Special Issue on Law and Technology* 241.
[201] See, eg, C Caulfield, "Judge's ruling a warning to lawyers tempted by ChatGPT" *Lawyerly* (online, 28 February 2024) <https://www.lawyerly.com.au/judges-ruling-a-warning-for-lawyers-tempted-to-use-chatgpt-to-write-court-docs/>.
[202] *Director of Public Prosecutions (ACT) v Khan* [2024] ACTSC 19 at [39].

154 Secondly, while acknowledging that something may have been "lost in translation", his Honour highlighted a paragraph towards the end of the reference in which there was "non-specific repetitive praise" of the offender's "proactive attitude towards cleaning and strong aversion to disorder".[203]

155 Mossop J also noted that there was an absence of evidence as to how the reference had been produced. Counsel for the offender had been instructed that it may have been prepared "with the assistance of computer translation but not with a large language model".[204] Thus, in reaching his conclusion as to the weight that could be placed on the reference, Mossop J reasoned as follows:

> "[43] The absence of evidence as to how the reference was generated and the extent to which it was assisted by either computer-generated translation or a large language model means that it is difficult to assess the weight that can be given to it. In my view, it is clearly inappropriate that personal references used in sentencing proceedings are generated by, or with the assistance of, large language models as, if they are not objected to on that basis, it becomes difficult for the court to work out what, if any, weight can be placed upon the facts and opinions set out in them. It is also undesirable that they be written in another language and then translated using a computer-based translation, as the subtleties of the use of language, which will be significant in assessing the content of the reference, will not necessarily be accurately reflected in the automated translation. In my view, counsel appearing on a sentence should make appropriate enquiries and be in a position to inform the court as to whether or not any reference that is being tendered has been written or rewritten with the assistance of a large language model or any automated translation program.
>
> [44] In the present case, because there were a number of other references which did not have similar features and which were tendered without objection, it is possible to reach favourable conclusions about the offender's character without placing reliance upon the reference given by his brother, upon which I place little weight."

156 It is unclear from the judgment the extent to which the parties put on submissions or evidence about the possibility of the character reference having been generated by AI or the extent to which Mossop J took judicial notice of the characteristics of AI generated text.

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[203] Ibid at [41].
[204] Ibid at [39].

157 An obvious risk of GenAI relates to its potential and malign use to generate sophisticated "deepfakes". By using AI, it is possible to create a "deepfake", an image, video or piece of audio which makes real people appear to do and say things that were never done or said. For example, a company called Lyrebird allows anyone to imitate a person's voice to say anything at all. Its demo page provides the voices of Barack Obama and Donald Trump saying things they never actually said.[205] A TV show was released in the UK last year, *Deep Fake Neighbour Wars,* which used deepfake technology to produce comedy sketches where celebrity faces were superimposed on actors' bodies.[206]

158 Last year, the Federal Court of Australia was presented with Australia's first litigation concerning "deepfakes". Civil penalty proceedings were brought against a man who the eSafety Commissioner alleged posted "intimate images" of several Australian public figures on a website called MrDeepFakes.com. In a decision concerning the imposition of penalties for contempt of court as a result of Mr Rotondo's failure to remove the images, Derrington J said the following in relation to "deepfakes":[207]

> "Deepfakes are digitally manipulated forms of visual media in which one person's likeness is replaced convincingly with that of another so as to depict circumstances that never existed. Unfortunately, the material before the Court suggests that deepfakes are not especially difficult to create. Programs presently available on the internet enable the face of one person to be fixed to the body of another person with considerable precision to create a false or misleading image, the synthetic nature of which is difficult to detect…"

159 There have already been cases of deepfake evidence being adduced in proceedings internationally, including in UK family law proceedings where a deepfake audio recording of a purported phone call between the parties was introduced into evidence and later excluded.[208]

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[205] M Maras, "Determining authenticity of video evidence in the age of artificial intelligence and in the wake of Deepfake videos" (2019) 23(3) *International Journal of Evidence and Proof* 255.
[206] L Tolen, "Deepfakes: a new frontier in civil law?" (2023) 173(8024) *The New Law Journal* 21 at 21.
[207] *eSafety Commissioner v Rotondo (No 3)* [2023] FCA 1590 at [7].
[208] See B James, "Why you and the court should not accept audio or video evidence at face value: how deepfake can be used to manufacture very plausible evidence" [2020] *International Family Law*

160 Courts have always had to deal with forgeries but modern technology, in its sophistication and reach, magnifies that age-old challenge to courts charged with determining civil and criminal disputes. If AI technology reaches a point where courts are unable to discern if evidentiary material is genuine or not, the forensic future is bleak.[209]

161 The *UK Judicial Guidelines on AI* include the following statement about AI and deepfakes:[210]

> "AI tools are now being used to produce fake material, including text, images and video. Courts and tribunals have always had to handle forgeries, and allegations involving varying levels of sophistication. Judges should be aware of this new possibility and potential challenges posed by deepfake technology."

The *NZ Judicial Guidelines on AI* offer a similar warning that "GenAI can also fabricate convincing images, audio and other media, which parties could present as evidence."[211]

162 Some existing rules of evidence may prevent the potentially corrosive effects of AI produced evidence on the justice system. For instance, in criminal proceedings, evidence which is alleged to be a "deepfake" or the product of GenAI may be inadmissible where a judicial officer considers that the risk of "unfair prejudice" created by the potential origins of the evidence outweighs the probative value of the evidence.[212]

163 In some cases, there may be obvious signs that evidence is inauthentic and may have been generated by AI to which the parties and judicial officers will be attuned. Tell-tale signs that an image or video is a deepfake or has been generated by AI can include discolouration of images, problems with the blinking rate of people depicted in videos, issues with hand movements or

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Journal 43 at 43. See also M R Grossman, P W Grimm, D G Brown and M Xu, "The GPTJudge: Justice in a Generative AI World" (2023) 23(1) *Duke Law & Technology Review* 1 at 17.
[209] Maras (n 205).
[210] *UK Judicial Guidelines on AI* at 5.
[211] *NZ Judicial Guidelines on AI* at 4.
[212] *Evidence* Act, s 137.

obvious inconsistencies with aural texture and synch. Metadata programs may also be used to see what software was used to create or edit a piece of evidence where the original file is available to the parties or to the court.[213]

164 Generally however, the emergence of deepfake and AI created evidence may impose significant evidentiary hurdles on both the proponent of the actual or suspected GenAI produced or deepfake evidence and on those who challenge its authenticity. In some cases, eyewitness testimony may be relied upon to verify the origins of audio-visual evidence adduced in proceedings. The possibility of using AI itself to detect AI synthesised evidence has also been raised. A machine-learning algorithm called XceptionNet can distinguish between videos which use a face swap and videos without AI modification. However, the same algorithm can also be used to improve AI generated evidence thereby making it harder to detect.[214]

165 Additionally, there may be an increasing demand for, and courts may need to place enormous reliance upon, the evidence of GenAI experts in distinguishing between fact and fiction where disputed GenAI evidence is sought to be adduced in proceedings.[215] This is exemplified by a United States securities case in which the plaintiff sought leave to file an expert report which it said explained that many of the videos on which the defendants sought to rely may have been the product of deepfake technology.[216] Courts have long drawn on the expertise of digital media forensics experts. However, experts in image and video forensic analysis may soon need to be well-versed in AI and even then, expert testimony may not be enough to verify the authenticity of evidence as the ability of AI to modify audio-visual evidence becomes more advanced.[217]

[213] James (n 208) at 44-45.
[214] Maras (n 205).
[215] Grossman (n 208) at 24.
[216] *Valenti v Dfinity USA Research LLC* 21-cv-06118-JD (8 May 2023).
[217] M Maras (n 205).

Expert evidence

166 The possibility of greater reliance needing to be placed on experts to distinguish between real and artificially generated written and audio-visual evidence presents further issues. Expert witnesses enjoy a special status in legal proceedings in that, unlike lay witnesses, they are able to express opinions on matters within their expertise. In order to enable experts to assume their privileged position in the courtroom, strict criteria are placed on the admissibility of their evidence. Importantly, an expert must have specialised knowledge based on their training, study or experience and any opinion they express must be based wholly or substantially on that knowledge.[218]

167 Questions arise as to the use by experts of AI in the preparation of their research and any underlying research and analysis.

168 Just as expert reports may in certain circumstances have input from people in addition to the expert,[219] it is obvious that an expert may seek to draw upon the assistance of GenAI. Even if an expert has genuine expertise, it is not difficult to envisage a situation in which he or she may rely on AI to generate the whole, or part of, the expert opinion. This risk is exemplified by events that took place in November 2023 when a group of academics were forced to publicly apologise to the Big Four consultancy firms after it came to light that they had used Google Bard AI, another LLM system similar to ChatGPT, to generate research relied upon in part of a submission to a Commonwealth parliamentary inquiry. The submission levelled several false accusations against the Big Four firms. Although the academics apologised for the error, they contended that the substance of their recommendations, and the rest of their research, was appropriately supported by evidence. The incident is the

[218] *Evidence* Act, s 79. See, also *Honeysett v The Queen* (2014) 253 CLR 122; [2014] HCA 29 and *R v Tang* (2006) 65 NSWLR 681; [2006] NSWCCA 167.
[219] See, for example, *R v Pabon* [2018] EWCA Crim 420. See also E Freer, "Experts and pretenders: Examining possible responses to misconduct by experts in criminal trials in England and Wales" (2020) 24(2) *The International Journal of Evidence & Proof* 180 at 181.

first time (so it is understood) that a parliamentary inquiry has received a submission with false AI generated information.[220]

169 An expert who deliberately lies to or misleads the court in respect of their qualifications or the origins of their report may be guilty of contempt of court or could be prosecuted for perjury. In New South Wales and other Australian jurisdictions, experts are bound to adhere to a Code of Conduct. Clause 2 of the Code applicable in New South Wales provides that an expert has a "paramount duty … to assist the court impartially". Pursuant to cl 3, an expert report must also include the following:

> "(d) the assumptions and material facts on which each opinion expressed in the report is based …
>
> (e) the reasons for and any literature or other materials utilised in support of each such opinion, and
>
> (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise, and
>
> (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications, and
>
> (h) the extent to which any opinion the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person, and
>
> (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate …, and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the court …"

Conclusion

170 The rise of GenAI exposes Australian courts to considerable "truth decay" risks. Its prospective use by lawyers, self-represented litigants, judges and experts alike, as well as the scope for its malign use in the fabrication of evidence, will expose courts to serious new challenges in ensuring that they

[220] H Belot, "Australian academics apologise for false AI-generated allegations against big four consultancy firms" *The Guardian* (online, 3 November 2023) <https://www.theguardian.com/business/2023/nov/02/australian-academics-apologise-for-false-ai-generated-allegations-against-big-four-consultancy-firms>.

remain respected arbiters of the truth, and discriminators between fact and fiction in the years to come.

171 More generally, and as discussed in the first part of this paper, the courts already have a number of tools with which the corrosive effects of "truth decay" may be resisted but it is a task which demands eternal vigilance and a degree of pro-activity on the part of leaders of superior courts in defending them and their work from unprincipled and misinformed attack. In the area of Gen AI, it is essential that judges are educated as to the potential and potency of this technology which has rightly been described as transformative. It carries both benefits but also serious challenges for judiciaries, and raises fundamental questions about the nature and future of the judicial process.

172 I have found no better discussion of the challenges to our legal system posed by AI than that of Professor Adrian Zuckerman in his 2020 article "Artificial intelligence - implications for the legal profession, adversarial process and rule of law".[221] His sage conclusions[222] merit full reproduction:

> Machine takeover of some routine tasks, such as document disclosure or review, may reduce the number of lawyers without adverse effects to the system as a whole. But as AI performs more complicated tasks, a point may be reached when the legal profession is reduced not only in size but also in the skillsets it possesses. A leaner legal profession may no longer be able to make its traditional contribution to the development of the law, to holding the executive and the powerful to account, and contribute more generally to social wellbeing.
>
> It is not only the economic interests of the legal profession that are at stake but also important legal institutions. Policymakers are pressing for court digitisation, for using computer technology to upload arguments and evidence, so that much of the litigation process may be transacted without face to face interaction in the public space. Before long, this trend will have shunted so much of the process into the cloud that little scope will be left for physical courts. If machines replaced judges, the adversarial system as we know it would disappear since the decision-making process (data input and decision output) would effectively take place in the interstices of a computer.
>
> Yet the adversarial system, consisting of open debate and presentation of evidence before a human adjudicator, underpins court legitimacy and the

[221] (2020) 136 LQR 427.
[222] ibid at 452-3 (omitting footnotes)

belief that the court has the right to demand compliance. It is this belief which inclines people to comply with the law, independently of benefits and sanctions. The legitimacy of judicial institutions depends to a large extent on their moral authority. Courts command moral authority because they are seen to respect the individual and engage with human concerns, moral outlook, beliefs, ambitions, emotions and social consciousness. Since machines lack first-person subjectivity, AI decisionmaking may lead to an ever-widening gulf between machine law and human conceptions of justice and morality, to the point where legal institutions begin to lose public confidence and legitimacy.

Despite such risks to the integrity of our legal institutions the use of technology in legal services is set to expand due to its undoubted advantages. Court digitisation will achieve savings and greater efficiency. Computer adjudication would offer access to justice to the great part of the population which cannot afford to employ lawyers. High-end users who have seen the advantages of AI in their own businesses would increasingly expect lawyers likewise to exploit its potential. New entrants are likely to develop AI systems to compete with traditional providers of legal services, offering alternatives to human-centred services at lower cost.

As people get used to digital technology, they may come to prefer machine conflict-resolution which strips out factors that algorithms consider irrelevant, such as emotions, and provide standardised outcomes faster and at lower cost. To begin with, machine dispute-resolution would probably yield results similar to those we have come to expect from judges. But with time, the gap between AI and human wants and expectations may widen to a point where people may become alienated from legal institutions, leading to loss of legitimacy and damage to the rule of law. To be able to moderate the risks posed by AI, we must consider how best to benefit from what AI offers without undermining the foundations of our legal and social institutions.