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TRUTH DECAY

2024 Acton Lecture

Justice Andrew Bell

Culture, Prosperity & Civil Society
Defending Liberty in Australia

THE CENTRE FOR INDEPENDENT STUDIES

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An earlier and more extended version of this paper was delivered at the 4th Judicial Roundtable held at Durham University 23-26 April 2024. A copy of that paper may be found at https://supremecourt.nsw.gov.au/documents/Publications/Speeches/2024-speeches/chief-justice/Truth_Decay_29042024.pdf. 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.

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2024

Foreword

The Acton Lecture is presented within the Culture, Prosperity & Civil Society program at the Centre for Independent Studies. The program reflects upon questions of culture, society and civil society in contemporary Australia; including topics such as religious liberty, freedom of speech, multiculturalism and the philosophical foundations of classical liberalism. The Acton Lecture offers a platform for prominent individuals to offer their own reflections on these issues as they arise in, and confront, contemporary Australia.

The issue with which this year's lecture engages is truth and the challenges presented by shifting conceptions of truth, especially in the administration of justice. The courts, of course, are concerned with the kind of truth that has an evidentiary basis tested by the adversarial system. Pursuit of this kind of truth is qualified by considerations such as the exclusionary rules of evidence, and is highly specific to a question brought by the parties.

Even so, taking a matter to court is an exercise fraught with risk, and one in which the pursuit of victory often seems to take primary place over the pursuit of truth. In George Eliot's novel *The Mill on the Floss*, the determinedly litigious, but "strictly honest", Mr Tulliver said that law should be thought of as: "a sort of cock-fight, in which it was the business of injured honesty to get a game bird with the best pluck and the strongest spurs".

What might Mr Tulliver have made of today's postmodern notions of truth, which are frequently subjective, depend upon feelings, and are shaped by claims about 'lived experience'? And what is the impact of these postmodern notions of truth on the task faced by a judge? How do we come to terms with the idea of the decay of truth, with changing conceptions of 'honesty' — and how will all this affect the administration of justice?

The CIS is privileged to have these questions addressed in this year's Acton Lecture by the Honourable Andrew Bell, Chief Justice of NSW. His Honour's lecture was a searching and scholarly examination of the issue of truth in the administration of justice as well as an assessment of the challenges that truth decay presents to the rule of law in Australia.

—Peter Kurti, Director, Culture, Prosperity & Civil Society program

Introduction

It is a pleasure to have been asked to deliver the revived Acton Lecture for 2024, and I thank my friend, the Rev Peter Kurti, for his kind invitation to do so.

As some of you may be aware, this year marks the bicentenary of the Supreme Court of NSW which held its first sitting in May 1824. That was some 10 years prior to Lord Acton's birth. It is his great scholarship and values that this lecture honours.

Lord Acton, with his indelible commitment to liberty, would have approved strongly of our first Chief Justice, Sir Francis Forbes. Under the Third Charter of Justice which established this court (and an incipient version of the Legislative Council), the Chief Justice was required to certify that any law of the colony was not repugnant to the law of England (including the common law).

In 1827, Governor Darling was agitated by adverse press coverage of his actions, particularly by *The Australian* (then under different ownership!) and *The Monitor*. The Governor introduced legislation into the Legislative Council that required newspapers to be licensed and pay stamp duty on each publication. Chief Justice Forbes refused certification, quoting both Blackstone and Lord Ellenborough, and said:

> " … the right of printing and publishing belongs of common right to all his Majesty's subjects, and may be freely exercized like any other lawful trade or occupation. So far as it becomes an instrument of communicating intelligence and expressing opinion, it is considered a constitutional right, and is now too well established to admit of question that it is one of the privileges of a British subject ... To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and to make him the arbitrary and infallible judge of all controverted points in learning, religion and government ...
>
> "Indeed to admit the power of selection among publishers would be more repugnant to the spirit of the law than to impose a direct imprimatur. It would be not merely to confine the right of publishing within partial bounds, but it would be to establish a monopoly in favor of

> particular principles and opinions, to destroy the press as the privilege of the subject, and to preserve it only as an instrument of government.
>
> "By the proposed bill, this right is confined to such persons only as the Governor may deem proper. By the laws of England, the liberty of the press is regarded as a constitutional privilege, which liberty consists in exemption from previous restraint. By the proposed bill, a preliminary license is required, which is to destroy the freedom of the press and to place it at the discretion of the government."[1]

And, in considering the argument that such legislation was and should be justified as a matter of necessity, the Chief Justice said "[t]hat the press of this colony is licentious may be readily admitted, but that does not prove the necessity of altering the laws."

Forbes' commitment to freedom of the press was not to deny the availability of actions of libel and slander, the written and verbal variations of what we now know as defamation.

In the law of defamation, 'truth' has not always been a defence, at least in cases of criminal libel.[2] In the area of civil libel in NSW, for many years since 1847, *truth* was only a partial defence in that the publication of true but defamatory matter also had to be shown to be in the public interest.[3]

Under the modern and uniform law of defamation in Australia, however, 'substantial truth' is now a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are 'substantially true'.[4]

The law of defamation, therefore, is an area in which the courts are expressly tasked with ascertaining 'the truth' or at least what is referred to in the legislation as 'the substantial truth', when this defence is raised.

In this lecture I propose to explore the extent to which the courts are concerned with the ascertainment of 'the truth' more generally, some limits on their ability to do so and the implications of what some scholars have identified as 'truth decay' for the work of the courts and respect for the third arm of government.

Truth decay

The alarming phrase 'truth decay' is associated with a 2018 publication, *Truth Decay: An Initial Exploration of the Diminishing Role of Facts and Analysis in American Public Life* (**Truth Decay**),[5] by Jennifer Kavanagh and Michael D. Rich which has, as its focus, 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. Kavanagh and Rich outline four trends that they argue characterise 'truth decay' in the US over the past two decades:

> "1. Increasing disagreement about facts and analytical interpretations of facts and data;
> 2. a blurring of the line between opinion and fact;
> 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."[6]

One matter to be flagged at the outset, and one consistent with the trends outlined by Kavanagh and Rich, is the corrosion of notions of objective truth and the dispassionate ascertainment of the facts, a topic upon which Henry Ergas recently wrote.[7] 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" and "alternative facts" also evidence the vice of relativism in this area. They often seek to mask or excuse what is simply dishonest.

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 claim is to "encourage ... an open, free, and honest global conversation without discriminating on the basis of political ideology".[8]

The fourth trend identified by the authors of *Truth Decay*, namely declining trust in formerly respected sources of factual information, may be seen in a judicial context (and one which post-dates publication of their work) by reference to recent experiences in the United States. I refer to the fact that,

notwithstanding that myriad superior courts including appellate courts in the US and comprising judges nominated by both Republican and Democrat Administrations have categorically rejected the claim that the 2020 Presidential election was "rigged" or "stolen", many, many millions of American citizens apparently continue to give credence to this narrative.[9]

Putting aside some cases which turned on technical questions of standing, the uniform dismissal of these cases entailed the conclusion that there was *no truth* to the factual allegations of widespread voter fraud. The apparently continued widespread acceptance of the narrative despite its judicial rejection means that a significant percentage of the United States population is either ignorant of the rulings of multiple courts of high standing or simply do not accept such rulings as factually accurate or reflective of the truth.

Neither explanation is comforting. The latter is particularly disconcerting to a sitting judge, albeit it in a distant jurisdiction and with a different tradition of judicial appointment, because it connotes a lack of respect for the work of the courts in reaching conclusions based upon evidence or the lack of it.

As a general and trite observation, any decline in trust of and respect for the decisions of judicial institutions is a matter of note and profound 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 in formerly respected sources of factual information focuses the mind and provokes thought about how such a trend may be resisted and reversed. Before turning to that topic, let me say a little about the relationship between the courts and the ascertainment of the truth.

The courts and the ascertainment of the truth

On the face of things, there is a close connection between the work of the courts and the ascertainment of the truth. Thus, witnesses must swear to tell "the truth, the whole truth, and nothing but the truth".[10] Professional conduct rules require prosecutors to "fairly assist the court to *arrive at the truth*"[11] and lawyers are also obliged to assist investigative and inquisitorial tribunals fairly to arrive at the truth.[12]

Further, lawyers in the discharge of their duty to the court and to the administration of justice must not engage in conduct that is dishonest,[13] and must not knowingly or recklessly mislead the court[14] nor make false or misleading

statements to an opponent.[15] Lawyers must not advise witnesses to provide false or misleading evidence, or coach witnesses about which answers they should provide to certain questions.[16] They must also refuse to take further part in cases where, to their knowledge, their client has lied to the court, falsified documents, or suppressed material evidence for which there was a duty to disclose.[17]

Consistent with these strictures on practitioners, as Lord Denning MR put it, "the primary duty of the courts is to ascertain the truth by the best evidence available".[18]

In the law of defamation, as I have already explained, the courts may be expressly tasked with ascertaining 'the truth' or at least what is referred to in the legislation as 'the substantial truth' when a defence of justification is relied upon. But this is only one such example.

This year is the 50th anniversary of the passage of the *Trade Practices Act 1974* (Cth). This transformative consumer protection statute contained a provision (section 52) that proscribed conduct that is misleading or deceptive, or likely to mislead or deceive.[19] Critically for present purposes, the statute is not directed solely towards intentionally deceptive conduct but operates at an objective level.

To borrow the language of 2024, it is concerned not just with disinformation (i.e., deliberately false information) but also with misinformation (objectively false information, irrespective of the information provider's subjective intent).

Section 52 of the *Trade Practices Act*, continued in s 18 of the *Australian Consumer Law* and state and territory analogues, has resulted in Australian courts being placed in a role of peculiar responsibility for policing conduct that objectively deviates from factually accurate or 'true' positions. From an early stage in its history, the legislation has necessarily involved the courts in the ascertainment of the truth.

As Sir Gerard Brennan wrote in a 1977 case:

> "Before a statement can be said to be misleading or deceptive or falsely to represent a fact, it must convey a meaning inconsistent with the truth. A statement which conveys no meaning but the truth cannot

> mislead or deceive or falsely represent; although a statement which is literally true may nonetheless convey another meaning which is untrue, and be proscribed accordingly."[20]

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 neither absolute nor 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 conduct a search for truth through the mechanism of the adversarial system,[21] this is in fact something of an oversimplification of the role of the courts. 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 or competing considerations, often derived from exclusionary rules of evidence, some of which exist to serve policy objectives extraneous to the 'pursuit of truth' (such as the need for finality in dispute resolution and procedural fairness) or which are informed by appreciation of the imperfections of human nature and human memory.

The Hon James Spigelman AC KC, a former Chief Justice of NSW recognised that at times "the untrammelled search for truth may impinge upon other public values":[22]

> "… 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.[23] 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
- the exclusion of evidence after balancing prejudice and probative value.

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".[24] 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."

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*".[25] With elegant simplicity, his Honour noted that:[26]

> "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."[27]

To the extent that the judicial process involves the pursuit of truth in the course of the administration of justice, the particular *kind* of truths ventilated in courtrooms tend to be highly specific to the parties to the dispute (although they may involve matters of great public interest, for example, whether there has been an abuse of power by a public official or misconduct by law enforcement officers).

Thus, although some high-profile litigation may touch upon social issues about which there is intense factual disagreement,[28] 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:[29]

> "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."

To the extent that the courts are viewed as arbiters of the truth, however narrow, or as "source[s] of factual information" more generally, the fourth trend pointed out by Kavanagh and Rich in *Truth Decay* in relation to declining trust in civic institutions focuses the mind upon whether there is in fact a decline in trust in our courts in Australia and, whether or not that is so, what can be done to resist and or reverse any such trend.

Trust in the courts

In Australia, during the Australian Law Reform Commission's 2021 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).[30] 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".[31]

There is, however, no room for complacency and, as explained below, courts have real vulnerability to the pernicious effects and reach of "truth decay".

A more recently reported survey tells a different story. On 30 July of this year, the *Sydney Morning Herald* reported a Resolve Political Monitor Survey to the effect that only 30% of Australians have faith in the country's courts and judicial system with 47% apparently responding that they had no faith in the judiciary with 23% declaring that they were undecided or neutral.

There may be a variety of reasons for erosion of trust in the courts, irrespective of a more general trend of so-called 'truth decay' in our society. But to the extent that there has been or is an erosion of trust, it may contribute to the phenomenon of 'truth decay' and a further diminution of respect for what should be the authoritative and respected fact finding role of the courts.

Limited insulation against truth decay

Several features of courts and the judicial system provide some form and degree of insulation from the corrosive effects of 'truth decay'.

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".[32] It should be acknowledged that this statement was made many decades before more recent scholarship relating to considerations of subconscious bias.

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 specialised training or experience.[33]

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,[34] the outcome of whose determinations have not been distorted by procedural irregularity.

On the other hand, 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.[35] 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.

Another 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.

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 courts

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 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".[36]

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*,[37] he ordered his supporters, "don't trash the Supreme Court".[38] 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:[39]

> "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."

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.

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,[40] 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:[41]

> "… 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."

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.[42] Second, the existence of *any* independent check on the "will of the people" is incompatible with populist ideology;[43] 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.

'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 has been the focus of the Supreme Court of NSW's bicentenary celebrations, but much more than that is required.

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 what circumstances — courts should publicly 'correct the record'.[44] 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".[45]

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*[46] and the Australasian Institute of Judicial Administration's *Guide to Judicial Conduct.*[47] 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."[48]

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

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.[49] In a speech delivered in 1989, Sir Anthony Mason, after referring to the tradition of Attorneys-General representing the interests of the judiciary, said:[50]

> "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.)

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:[51]

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

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 publicly communicating the work of the courts to the journalistic profession and facilitating requests for information.[52]

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"[53] 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.

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.*[54] 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.

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.

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.

Conclusion

The concept of 'truth decay' is an arresting one. An element of it is bound up with a deterioration in respect for institutions which have traditionally been associated with authoritative fact finding. The courts are such institutions. While the ascertainment of 'truth' does not represent all of the work done by courts, it is nonetheless an important component. Maintenance of respect for the work and independence of Australian courts is important for many reasons. One of those reasons is to preserve the notion that truth is not relative, and its ascertainment is the foundation for many, many legal outcomes of significance not only to the parties in the immediate case but also at a more general level of institutional importance.

Endnotes

1 See B Kercher and B Salter The Kercher Reports 2009 at 855-857.
2 See also R v Howe [1826] NSWKR 2
3 See WJV Windeyer "The Truth of a Libel" (1935) 8 Australian Law Journal 319.
4 Defamation Act 2005 (NSW) s 25. There is also a defence of "contextual truth": Defamation Act 2005 (NSW) s 26. Substantial truth was successfully raised as a defence in two recent high profile defamation cases heard in the Federal Court concerning Ben Roberts Smith and Bruce Lerhmann.
5 (RAND Corporation, 2018).
6 Ibid at xi-xii.
7 "Does truth still matter at Sydney University?" The Australian (13 September 2024).
8 See, Truth Social <https://truthsocial.com/>.
9 O Averill, A Hazrati and E Kamarck, "Widespread election fraud claims by Republicans don't match the evidence" (online, 22 November 2023) <https://www.brookings.edu/articles/widespread-election-fraud-claims-by-republicans-dont-match-the-evidence/>.
10 Evidence Act 1995 (NSW) (Evidence Act), s 21, sch 1.
11 For barristers, see, Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) (Barristers Rules), r 83; for solicitors, see, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) (Solicitors Rules), r 29.1.
12 For barristers, see, Barristers Rules, r 97; for solicitors, see Solicitors Rules, r 29.13.
13 For barristers, see Barristers Rules, r 8(a); for solicitors, see Solicitors Rules, rr 4.1.2, 5.
14 For barristers, see Barristers Rules, r 24; for solicitors, see Solicitors Rules, r 19.1.
15 For barristers, see, Barristers Rules, r 49; for solicitors, see, Solicitors Rules, r 22.1.
16 For barristers, see, Barristers Rules, r 69; for solicitors, see, Solicitors Rules, r 24.1.
17 For barristers, see, Barristers Rules, r 79; for solicitors, see, Solicitors Rules, r 20.1.
18 Harmony Shipping Co SA v Davies [1979] 3 All ER 177 at 181; [1979] 1 WLR 1380 at 1385.
19 Trade Practices Act 1974 (Cth), now the Australian Consumer Law.
20 World Series Cricket Pty Ltd v Parish (1977) ATPR 40-040 at 17,436
21 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.
22 "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".
23 Ibid at 103.
24 William Twining, Rethinking Evidence: Exploratory Essays (Northwestern University Press, 1994) 72–4, quoted in Gageler (n 26) below.
25 (2018) 46 Australian Bar Review 205.

26 Ibid at 207.
27 Ibid at 208.
28 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).
29 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.
30 Australian Law Reform Commission, "Without Fear or Favour: Judicial Impartiality and the Law on Bias" (December 2021, Final Report, No 138) at 146.
31 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.
32 Sir O Dixon, "Concerning Judicial Method" (1956) 29 Australian Law Journal 468 at 471.
33 Evidence Act, ss 76, 78 and 79.
34 Robert French, "Procedural Fairness – Indispensable to Justice?" (Speech, Sir Anthony Mason Lecture, University of Melbourne Law School, 7 October 2010) at 1.
35 See Amy Dale and Francisco Silva, "Future Proofing the Jury System" (March 2023) Law Society Journal at 40.
36 AM 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".
37 531 US 98 (2000).
38 Stephen Breyer, The authority of the court and the peril of politics (2021, Harvard University Press) at 28.
39 Gleeson, "Public confidence in the judiciary" (n 37).
40 Alexander Hamilton, "Federalist No 78" in Alexander Hamilton, James Madison and John Jay, The Federalist Papers (New American Library, 1961) 465.
41 Wojciech Sadurski, A Pandemic of Populists (Cambridge University Press, 2022) at 106.
42 Ibid at 108.
43 Ibid at 109.
44 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).
45 See also 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) 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.

46 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."

47 Australasian Institute of Judicial Administration, Guide to Judicial Conduct (3rd ed, 2023), clause 5.7.

48 Sir Anthony Mason, "Judicial Independence and the Separation of Powers - Some Problems Old and New" (1990) 13(2) UNSW Law Journal 173 at 181.

49 Groves (n 46) at 262ff; Beech-Jones (n 32) 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

50 Sir Anthony Mason (n 49) at 181.

51 McMurdo (n 50) at 5.

52 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.

53 Marilyn Warren, "Open Justice in the Technological Age" (2014) 40 Monash University Law Review 45 at 57.

54 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.

TRUTH DECAY

2024 ACTON LECTURE

In this CIS Acton Lecture, the Chief Justice of NSW, The Honourable Andrew Bell, addresses the issue of truth and the challenge presented by shifting conceptions of truth in the administration of justice and the implications this has for judicial integrity. These trends have significance not just on a national scale but also globally with the erosion of objective notions of truth. The rise of subjective, or 'felt' truth, has also been fuelled in part by the ubiquity of social media leading to increasing demands for the regulation of online discourse, especially in political advertising. How can our society best adapt to the challenge of 'truth decay'?

His Honour Andrew Bell was sworn in as NSW Chief Justice in March 2022, after three years as President of the NSW Court of Appeal. He is also President of the Judicial Commission of NSW. Justice Bell was admitted to the Bar in 1995 and was appointed Senior Counsel in 2006. During his time at the Bar, his Honour had a broad national practice at trial and appellate levels, and also was engaged in numerous international arbitrations. At the time of his appointment to the Bench, he was Senior Vice-President of the NSW Bar Association. He is also Fellow of the Australian Academy of Law and an Adjunct Professor at the University of Sydney where he taught part time for many years.

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