The courts and social media: what do judges and court workers think?

Patrick Keyzer,1 Jane Johnston,2 Mark Pearson,3 Sharon Rodrick4 and Anne Wallace5

This article reports on the findings of a research project that examined the impact and issues arising from the use of social media in court.6

Introduction
“Social media” is a collective term for a group of internet-based applications that allow users to create, organise and distribute messages, pictures and audio-visual content.7 Generally speaking, social media is characterised by its accessibility, participatory culture and interactivity.8 Social media can be “two way” (allowing conversations characterised by varying degrees of publicity, depending on the privacy settings selected by the contributor) or “one way” (allowing publication of information, but not permitting comment).9 Social media has created intense challenges for the law and judicial administration.10 Traditionally, the courts have employed the law of sub judice contempt to prevent prejudicial publicity, to protect the right to a fair trial, and to ensure the due administration of justice. Courts also have the option of making non-publication orders about cases.11 However, social media applications have dramatically increased the number of people who can publish material about court cases.12 Many of these “citizen journalists” are unaware of the legal rules that restrict what they can publish.13

1 Professor of Law and Executive Director, Centre for Law, Governance and Public Policy, Bond University.
2 Associate Professor of Journalism and Director, Media Research, Centre for Law, Governance and Public Policy, Bond University.
3 Professor of Journalism and Social Media, Griffith University.
4 Senior Lecturer in Law, Monash University, Faculty of Law.
5 Professor and Head of School, Edith Cowan University.
6 The authors conducted their research at the NJC/ANU Conference, “Managing people in court”, 9–10 February 2013, Canberra.
11 D Butler and S Rodrick, Australian media law, 4th edn, Thomson Reuters, Sydney, 2011, ch 6. There is also an increasing tendency of courts to make general non-publication orders rather than rely on people knowing and complying with the common law of sub judice contempt. In other words, courts are prohibiting by specific order what would be prohibited by contempt laws anyway.
12 Keyzer, et al, above, n 8, at [2.3].
13 ibid.
At the same time, social media has created unprecedented opportunities for the courts to engage with journalists and the wider community.\textsuperscript{14}

This article reports on the findings of a small research project conducted in February 2013 with 62 judges, magistrates, tribunal members, court workers, court public information officers and academics working in the field of judicial administration. We acknowledge that there were no journalists present, and our findings therefore are skewed towards the legal profession. However, so far as we are aware, this is the first attempt to gauge the opinions of some key stakeholders on the issues in this area. We intend to follow up this pilot project with more research to build on our findings.

After describing our research methodology, we outline the findings and offer our brief reflections.

**Research methodology**

To ascertain the opinions of the participants, we employed a decision-making and problem-solving process referred to as nominal group technique (“NGT”).\textsuperscript{15} In an NGT session, participants identify problems, list them in their order of importance, pool their responses, and then conduct a secret ballot to list and rank the most important issues drawn from the pool.\textsuperscript{16} NGT has been used in a variety of decision-making contexts.\textsuperscript{17} We selected NGT because:

a. the technique provides for more balanced participation between group members,\textsuperscript{18}

b. it has been found to produce responses of high quality,\textsuperscript{19}

c. requiring participants to write down their ideas silently and independently before a group discussion takes place has been found to increase the number of solutions a group generates.\textsuperscript{20}

Participants were invited to identify and vote for the six most important issues involved/rapid spread of misinformation about trial processes and courts. Participants were given about 10 minutes to complete this task. The research team then compiled a list of all of the issues identified by the participants. At the conclusion of the discussion and presentation, a list of 27 issues was projected onto a screen at the front of the room. A number of issues were eliminated from the list by the participants, and/or opportunities that social media poses for the courts.

Findings

The issues the participants identified, in ranked order, were:

1. Juror misuse of social media (and digital media) leading to aborted trials,
2. Sub judice issues/breach of suppression orders (by tweets, Facebook or other social media), that “go viral”, and the difficulties associated with enforcement of restraining orders.
3. Increased risk of cyberstalking/opportunities for invasion of privacy or intimidation/bullying of the private lives of court case participants, including victims, jurors, judges, workers.
4. Misrepresentation of court work and activity to a community that may not understand the processes or issues involved/rapid spread of misinformation about trial processes and courts.
5. Disclosure of information to witnesses or others waiting outside inside court.
6. Difficulty in testing authenticity and credibility of social media journalism/lack of verification of social media publications.
7. Need to educate judges, court staff, the public and media. Risk of disenfranchisement of people and institutions that do not use social media.
8. Using social media to communicate court decisions and engage with the community.
10. Defamatory statements that “go viral” on social media, creating the spectre of increased litigation.
11. Using social media to enhance court procedure (eg service via Facebook).

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17 Delbecq, Van de Ven and Gustafson, above, n 15.
19 D Gustafson, R Shukla, A Delbecq and G Walster, “A comparative study of differences in subjective likelihood estimates made by individuals, interacting groups, delphi groups, and nominal groups” (1973) 9(2) Organizational Behavior and Human Performance 290–91.
20 Delbecq and Van de Ven, above, n 16.
12. The use of social media posts as relevant evidence.
13. Difficulty in ascertaining ownership of information sources on social media.
14. Public expectation that courts will adopt social media quickly/effectively.
15. Impact of social media on court orders, including orders relating to social media use, jury directions, sentencing.
16. Social media can be distracting in court/potential for disruption of court activity;
17. Whether to have central control of court communications.
18. Need for information technology systems/staff to support social media (lack of resources for social media officers).
19. Failure of courts to use social media affects timeliness of news.
20. Locating the origins of the user/tweeter/contributor.

Some of the items above (the ones incorporating “/”) involved the combining of responses where the group believed the subject matter warranted combination of the issues. In the next part of the paper we offer some brief reflections on the data.

Juror misuse of social and digital media leading to aborted trials

This was, by far, the most significant concern that participants expressed. Social media has been misused in many different ways in the US, UK and Australia: jurors have “friended” each other on Facebook during trials, used social media to publish details of a trial, and made comments on Facebook about jury deliberations. In one case a juror asked her friends on Facebook to help her make up her mind. In 2011, the High Court of Justice in England and Wales sentenced juror Joanne Fraill for contempt for exchanging Facebook messages with an accused in a drug trial. This case is not an isolated example.

The Standing Council on Law and Justice is aware of the problem of juries and social media misuse and recently commissioned a report on the topic. The report recommended that jury directions be more explicit, that jurors receive specific training on their role and the risks of social media use, and that signage in the jury room be more prominent. Victoria has developed jury directions that specifically target social media use. Some jurisdictions have taken steps to deal with the misuse of electronic devices in courts by enacting legislation prohibiting their use in court without permission. Section 9A(1)(b) of the Court Security Act 2005 specifically prohibits posting information of court proceedings on social media sites or any other website without express judicial approval.

Information that has been suppressed by a court “going viral” via social media

At common law, sub judice contempt enabled the punishment of people who published material that had a real and definite tendency to prejudice the administration of justice in a pending proceeding. Parliament has also provided that the courts may make a non-publication order directed at preventing prejudicial material from being published at this time at any time during proceedings.

Social media present new challenges to these traditional approaches. Social media empower anyone to be a publisher. “Citizen journalists”—people formerly known as the audience who can now employ press tools to inform each other—tend not have any professional training in journalism or the law; it is unlikely that they would be aware of the law of sub judice contempt, defamation and other restrictions on freedom of speech.
In addition, in a professional media system, checking takes place at multiple levels, by sub-editors, production editors and lawyers. In contrast, “citizen journalists” do not have their work verified and are less likely to appreciate the legal constraints involved. Indeed, they may be unaware of the existence of these rules, believing instead that Australians enjoy free speech to say whatever they like about anything or anybody at any time. The rules of contempt are not exerting the chilling effect on speech that was traditionally regarded as necessary to ensure the due administration of justice.

Increased risk of cyberstalking/invasions of privacy/bullying of participants, including litigants, jurors, judges, court workers

The internet dramatically expanded the amount of information that is available about people, and made it accessible to anyone with a computer anywhere in the world (with the exception of people in countries where internet filtering is used). Social media simply amplifies opportunities to access personal information. Facebook, in particular, is a social media application that provides unprecedented potential to build and maintain friendships, but it can also be used to inflict damage to people online.

The use of social media to harass people has become a significant problem in family law cases, where judges now fashion their orders to prevent harassment via Facebook and the like.

Use of social media to misrepresent court work and activity

Again, this concern is really an amplification of a problem that emerged with the internet. There are websites all over the world that misrepresent judicial decisions and court activities. A search of the internet using the phrase “judicial corruption” reveals many such blogs, almost invariably developed by disgruntled or perhaps querulant litigants. The rarity of scandalising contempt cases suggests that this material tends to be ignored. However, social media do increase the number of information producers, amplifies their messages, and creates a platform for conversations about court cases that can get out of hand.

Disclosure of information to witnesses or others waiting outside or inside court

Currently there is a general prohibition on the use of electronic devices in courts without permission. However there have been cases where people in the public gallery have ignored the request of court officers and have used devices in court and in 2013 one US judge even fined himself when his own phone rang while his court was in session.

Difficulty in testing the authenticity and credibility of journalists using social media

The sixth issue centred on concerns that journalists using social media (when contrasted to journalists in the mainstream or “legacy” media) lacked credibility. With the rise of “citizen journalists” not everyone who reports on courts will be trained and experienced in this field.

The positives

Not all of the responses were negative. The participants in this research exercise recognised the need to educate judges, court staff, the public and the media about the work of the courts, and that social media should be part of that strategy (issue no 7). There was strong interest in using social media to communicate court decisions and engage with the community (issue no 8). In the Juries and Social Media report, the authors, together with Geoff Holland from the University of Technology, Sydney, noted the many US courts that are now using Twitter to publish links to judgments, updates to court rules and procedures, and other court administration information.

In Victoria, a group of public information officers has been exploring the potential of social media to enhance court communications. Social media can and has been used in Australia to improve service of process, generate vital evidence in civil cases, and track down perpetrators of...
crime. Australian judges and courts are demonstrating increasing awareness of the opportunities and a number of courts in Australia now regularly use Twitter. As noted above, the participants in our research recognised the utility of social media to enhance court procedure (eg service via Facebook) (issue no 11) and the use of social media posts as relevant evidence (issue no 12).

Conclusion
Social media use is ubiquitous, with 93 per cent of under-30s and more than 60 per cent of the Australian population using it. Use is likely to increase. This small research exercise starts the task of charting the issues that merit further research and consideration as the courts navigate the social media environment.


44 The Supreme Court of Victoria and the Family Court of Australia now use Twitter.