Social media and the courts

By Catherine Gleeson

You haven't read a court report until you have read Kate McClymont's twitter coverage of the committal hearing of murder charges against Ron Medich. Her minute-by-minute updates of proceedings included the following:

> Hitman Safetli said his payment for murdering Michael McGurk was $300,000 the threatening of Mrs McGurk was 'extra' another $50k #Medich. …
>
> Another prospective hitman wanted $100k upfront and $100k after the murder but Lucky said too dear. Not good with figures as cheaper offer (@Kate_McClymont, 12:07 and 12:10 pm, 26 August 2013)
>
> How old were you in 1990? Safetli's lips start moving as he does the mental arithmetic. Please don't tell us you don't know: sighs the Terra (@Kate_McClymont 2:33 pm, 22 August 2013)
>
> You paid $15,000 for a handgun!? says the Terra incredulously to Safetli, the hitman. Did it have a pearl handle? he said sarcastically. (@Kate_McClymont 2:13pm, 22 August 2013)
>
> The Terra theatrically marched 2 the witness box, flourishing a magnifying glass & then claimed he couldn't see Safetli's burn scars on hand (@Kate_McClymont 12:54 pm, 22 August 2013)

McClymont does not solely tweet.[1] Her report of proceedings she has attended is reduced, in the traditional way, to an article usually on Fairfax media websites, usually on the day of the hearing.[2] Both contain similar accounts to those posted on Twitter during the proceedings. One assumes that the tweets, and the articles, are all fair reports of what transpired during the evidence of the witnesses against Medich. The fact that they are entertaining, and concern cases of significant interest to the public (McClymont also regularly covers the recent ICAC inquiries concerning the New South Wales Labor government) result in McClymont's tweets having an extensive and dedicated following[3].

This relatively new form of court reporting is but one example of the manner in which the court must grapple with issues concerning the use of social media. This article considers how the courts are engaging with social media and the issues concerning its use.

Court reporting and social media

The ability to tweet or post other public comment in the course of court proceedings is facilitated by the use of smartphones and other mobile devices, such as tablets. Operation of these devices from within a courtroom is increasingly permitted by the courts.[4]

Justice Cowdroy allowed media to tweet live from the courtroom in *Roadshow Films Pty Ltd v iiNet Ltd (No 3)*.[5] In doing so, his Honour recognized that Twitter facilitated the public's right to be fully informed of proceedings.[6] Courts in the United Kingdom have also permitted live tweeting of court proceedings,[7] however, the use of Twitter or other social media broadcasting in the courtroom is not unregulated by the courts.

The Federal Court Rules confer a discretion to make directions in relation to the use of communication or recording devices.[8] The Victorian Supreme Court has issued a policy that permits journalists to use electronic devices in court, but requires permission of the presiding judge for immediate publication of material while in court.[9] The Supreme Court of South Australia has recently allowed live tweeting from the courtroom, with accompanying amendments to the Supreme Court Rules, including a 15 minute delay on posting to enable any applications for suppression orders to be made.[10]

In New South Wales, amendments were introduced to the *Court Security Act 2005* (NSW) in February 2013 preventing the transmission of sounds, images or information from a court proceeding from the courtroom by a number of means, including 'broadcasting or publishing the sounds, images or information by means of the Internet' (section 9A(1)(c)). Despite considerable disquiet among legal

practitioners and the media about the proposed legislation, Attorney General Greg Smith SC identified legitimate security concerns about the use of electronic devices in the courtroom, including an incident in which people in court were sending messages about evidence to witnesses who were waiting outside to give their evidence.[11]

Section 9A(2)(f) provides for exemptions to be given under the regulations. The *Court Security Regulation 2011* (NSW), Reg 6B, provides exemptions from the operation of the Act for a number of persons, including a journalist for the purposes of a media report on the proceedings concerned, or a lawyer, or court officers or other persons authorized by a practice note or policy direction.

The use of social media from the courtroom is otherwise not the subject of any specific direction in the court rules or in any practice directions issued by New South Wales courts. In the past, some judicial officers have had occasion to restrict live tweeting of proceedings, particularly where there are significant concerns about the accuracy of tweets that have been broadcast.[12]

Contempt and social media

More formal controls may also be utilized to prevent any prejudice to the administration of justice arising from the use of social media.

Concerns about the tendency of social media commentary to interfere with the administration of justice are several:

First, there is a risk that the immediate reporting, transcript style, of what is said in court may not be accurate. Twitter for example affords the user 140 characters per post, tweets are often truncated or abbreviated to fit within the medium.

Second, there is a risk that the report of what occurs in court may be blended with the personal observations and impressions of the poster in such a way that it is unclear to the reader what is a report of the proceedings and what is not.

Third, immediate posting of what is heard in court might result in the publication of material that should be the subject of a suppression order, before there is time for an application for that order to be made.

Fourth, there is a risk that any report of court proceedings[13] might be picked up by other users of social media and commented on in a way that might have the tendency to influence jurors or witnesses. Social media is designed to facilitate conversation, with the ability to comment on individual posts or to post with a 'hashtag' marker so that the post can be linked to other posts on the same subject. In this way, it is easy for posts on popular topics, including prominent court proceedings, to proliferate in largely unrestricted fashion. That may lead to the publication of prejudicial material not from the courtroom. It also raises the spectre of material being published in breach of a suppression order.[14]

Controlling the publication of material on social media can be facilitated in a number of ways. What is important is to strike a balance between the obvious benefits to open justice for there to be accessible reports of court proceedings, and the need for there to be such controls on publication as are necessary to ensure that the administration of justice is not compromised.

The *Court Suppression and Non-Publications Orders Act 2010* (NSW) (CSPO) operates to achieve that balance, by providing first that the primary objective to the administration of justice is to safeguard the public interest in open justice (s 6), and by then empowering the court to make orders restricting the disclosure of information that might identify a person or information comprising evidence in proceedings before the court (ss 7 and 8). The legislation is not intended to trespass on the existing law as it relates to contempt of court, or any specific legislative provisions that restrict publication of information connected with trials (ss 4 and 5).

When it comes to restriction of material disseminated in social media, the CSPO is applicable, as broadcast or publication by means of the internet falls within the scope of the Act.[15] The question then arises as to whether orders can be made that effectively protect the integrity of proceedings in circumstances in which the reach of social media platforms (both in terms of who may post material to the platforms and who may access the material) is global.

For example, in *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim*[16] the District Court made an order restricting any disclosure or dissemination

within Australia, including broadcast or publication by means of the internet, of any material in which the three accused were parties or witnesses, or any material referring to other unlawful conduct in which the accused were allegedly involved.

The Court of Appeal overturned the order. In doing so, Basten JA affirmed that superior courts did not have the power to make orders binding the world at large.[17] However, it was within the scope of ss 7 and 8 of the Act to make orders restricting public access to existing material contained on a website.[18] His Honour held that this power did not extend so far as to permit the making of orders to third parties unconnected with the proceedings to remove material from potential access to jurors.[19]

Basten JA then turned to whether 'whether novel problems are created with respect to the fairness of criminal trials where there is significant prejudicial material available on the internet.' Considering cases in which the court has ordered the removal of identified material from specified websites,[20] and in which the court has made a more broad ranging order intended to bind not just the direct publisher, but secondary content providers such as Wikipedia and Google (provided they had notice of the order)[21] his Honour observed that 'it invites consideration as to how an internet content host or search engine operator in another country can properly be given notice of the order or be the subject of enforcement proceedings.'[22]

The rejection of the order sought in Ibrahim ultimately turned on its effectiveness, and therefore whether it was 'necessary' for the prevention of the administration of justice within the meaning of s 8(1) of the CSPO. Basten JA held that an order which is ineffective could not be construed as necessary for the purposes of s 8(1).[23] An order which is insufficiently specific, both in terms of the persons potentially bound by the order, and the geographical limits of the order, will not be necessary because it will be other unnecessary and impracticable to enforce.[24] As to the first issue, his Honour observed:

> Assuming, as the evidence reveals, that such material may be available on the internet despite its removal from sites controlled by the applicants, there are serious questions raised as to whether a whole range of businesses which provide access to the internet through public use of computers may fall within the terms of the order. Secondly, there is a question as to whether internet service providers, which make available search engines permitting access to material without knowledge of the relevant URLs, may also be caught by the terms of the order, if the access is had anywhere in Australia.[25]

As to the second issue, Basten JA observed that the utility of an order limiting access to the material to persons outside the pool of potential jurors at a trial in Sydney was limited.[26] Observing that the order sought to overcome the geographical reach of the internet, his Honour observed:

> …the fact that it is not possible to control material on servers outside Australia demonstrates the limited value of an order seeking to control availability on servers inside the country. No doubt it is arguable that most of the offending material, being of more topical than national let alone international interest, will be found on servers within the country, and even perhaps within New South Wales. However, that may underestimate the likelihood that such material is also available from other sources. Given the efficiency of modern search engines, limiting the number of sources, without removing them all, is likely to be ineffective.[27]

Finally, Basten JA observed that the scope of any order must be determined by what is necessary to provide a control on the existing restrictions on jurors making their own enquiries. The order should take account of the type of material an errant juror is likely to seek out, whether because it is of recent origin or because it was likely to have come to the juror's attention at an earlier time.[28]

The outcome of *Ibrahim* was that any orders sought under CSPO must be targeted in their approach. It is unlikely, though not impossible, that an order seeking to pre-emptively restrain publication of prejudicial material will not fall within the scope of the Act. However, Basten JA did identify a solution that would allow for the making of specified orders: the Crown could undertake searches to identify potentially prejudicial material before the trial, and then issue a notice to the content provider and request removal of the material for a specified period. If the request was not complied with within a reasonable period, the Crown could seek an order in respect of the identified material.[29]

Courts have also been astute to punish contempts

committed by persons using social media. Two examples illustrate the degree to which the interaction between social media users can influence the application of contempt principles.

In *The Queen v Hinch* [2013] VSC 520, media personality Derryn Hinch was convicted of contempt in relation to an article he had written and posted on his website that discussed information relating to the previous criminal history of Adrian Bayley who was then being tried for the murder of Jill Meagher. The article was also posted by means of a link to his Twitter feed. The material contained in the article was caught by a suppression order made in the Victorian Magistrate's Court. Following publication, a similar suppression order was made by Nettle JA in the Victorian Supreme Court.

Following the making of the second order, Hinch re-posted the link to the article on Twitter. He then posted a series of tweets, first criticizing the suppression order and then indicating to his followers that he had been summoned to appear before Nettle JA. Upon learning that he was to be charged with contempt, Hinch arranged for the offending parts of the article to be redacted.

At the hearing the defence adduced reams of material, including extracts from discussions of the case on Facebook and Twitter, that revealed information of the same nature as that contained in the Hinch article. The defence also relied on forensic evidence of the number of page 'hits' of the article versus the circulation of other major news publications that had published material relating to the Meagher trial. The material was relied on in support of a submission that, first, the material published by Hinch did not have a tendency to frustrate the administration of justice, because of the breadth of publication on the issue; and second, that there was a significant public concern in the issues surrounding Bayley's criminal history that outweighed the public interest in the administration of justice.

In convicting Hinch of the charge of contravening the suppression order, Kaye J relied on Hinch's tweets to infer knowledge of the terms of the suppression order in the period following publication.[30] Hinch was acquitted of a separate charge of publishing material that had a tendency to prejudice the administration of justice. Kaye J took into account the relatively small readership of the article (at least before the charge of contempt), the time to the likely date of the trial, and publication of other prejudicial material, and concluded that they raised a reasonable doubt as to the prejudicial nature of the article.[31] The publication of prejudicial material was found to be of lesser significance, because it was historical (having been published at the time of Meagher's death)[32] and because, being comprised of comments and allegations on Facebook and Twitter, it was 'conversational', by contrast with Hinch's article which was 'editorial'[33] (and presumably for that reason more credible). Were it necessary for his Honour to decide, Kaye J would not have found that the degree of public discussion of the Meagher case in social media and elsewhere elevated the public interest in the issues surrounding Bayley's criminal history above the interest in Bayley receiving a fair trial.[34]

In *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)*[35] the ACCC moved to punish the defendants for contempt for breaches of undertakings given by the defendants not to undertake misleading and deceptive advertising in relation to the merits of allergy treatments marketed by the defendants. The breaches concerned publication of advertisements on the company's Facebook and Twitter pages. The advertisements consisted of statements by the company, as well as testimonials from third parties posted on the Facebook and Twitter pages, both by the company and by the third parties themselves by means of posting on the company's Facebook wall and Twitter feed.

Finkelstein J held that Allergy Pathway became the publisher of the third party testimonials posted on the Facebook wall when it became aware of the postings and did not remove them.[36] It is easy to infer that this was the case as the company often posted responses to the testimonials or questions posted by third parties.

Service via social media

A number of judgments have recognized that substituted service might be effected using social media, particularly Facebook but also Twitter. Both platforms provide for 'private messaging' that is

a possible means of making proceeding known to a defendant.[37] The considerations attendant on whether service should be allowed are no different to those attending any other form of alternative service, namely, that the documents being served are likely to come to the attention of the defendant by that means of service. It has been suggested that it would not be appropriate for service to be effected in this manner without the court's approval.[38]

In the case of social media, this requires proof that, first, the social media account identified is in fact that of the defendant, and second, that the defendant's use of the site is of such a nature that service by that means will come to the defendant's notice. A further issue arises as to the limits to territorial jurisdiction can be overcome by access to social media platforms that are available worldwide.

In *Flo Rida v Mothership Music Pty Ltd*[39] the Court of Appeal set aside a judgment against a defendant that was based on an order for substituted service by means of a message posted on Facebook. The defendant was a performer who had cancelled an appearance at a music festival and was being sued for damages for breach of contract. By the time of the application for substituted service, the defendant had left the jurisdiction.

The Court of Appeal noted that the jurisdiction of the District Court is dependent on proper service of the Statement of Claim.[40] Accordingly, it would not have been possible to obtain substituted service of the Statement of Claim in the event that the defendant had left Australia. The position would be different if the defendant was merely interstate and personal service was possible under the *Service and Execution of Process Act 1992* (Cth).[41]

In any event, the Court of Appeal was not convinced that there was a prospect that the message would come to the defendant's attention while he remained in Australia.[42] Moreover, there was no evidence on which the court could be satisfied that the Facebook page was in fact that of the defendant.[43] It is common for social media pages for public personalities to be maintained by other persons.

Courts on social media

Notwithstanding the issues surrounding the treatment of court-related matters on social media, courts themselves have not shied away from Twitter. A number of courts have now set up Twitter accounts by which judgments and other announcements may be posted.[44] There is less evidence of courts on Facebook, with only the European Court of Human Rights actively maintaining a page.

The existence of court Twitter accounts accompanies a number of other web-based advances. For example, the Federal Court and other courts have long maintained court portal sites allowing members of the public to access details about the progress of various matters before the court.[45] The High Court has in recent years posted summaries of its judgments on the High Court website immediately after they are handed down. The full reasons are simultaneously posted on AustLII. The High Court also makes available all submissions filed in hearings before it on its websites, together with transcripts of proceedings on Austlii. You can now view audio-visual recordings of proceedings before the full court on the High Court website.[46] The recordings will initially be posted some days after the hearing to enable vetting of the recording to identify any material that should be suppressed. By contrast, the UK Supreme Court has recently commenced live steaming of hearings in the court and the Privy Council.[47]

Use of the technology discussed above renders the court system more accessible to users. Questions arise as to whether the courts may seek to use social media as a form of more direct public engagement in the face of public criticism of the judiciary, for example by providing some (presumably anonymous) explanation of the role of judges in presiding over trials and in sentencing.[48]

Endnotes

1. This article assumes knowledge of the workings of prominent social media platforms. A useful explanation of their workings can be found in *ACCC v Allergy Pathway Pty Ltd (No 2)* (2011) 192 FCR 34 at [18] (describing Twitter) and [15]-[16] (describing Facebook).
2. The articles published on 22 August 2013 were as follows: 'Hitmen, rat poison, gun buys and Maccas: it's just another day in court' <http://www.smh.com.au/nsw/hitmen-rat-poison-gun-buys-and-maccas-its-ust-another-day-in-court-20130821-2sbmy.html#ixzz2kWFA4Ggd> and 'Safetli denies making teen a 'fall guy' in McGurk hit' <http://www.smh.com.au/nsw/safetli-denies-making-teen-a-fall-guy-in-mcgurk-hit-20130822-2sdfj.html#ixzz2kWFq4nQK>.

3. At the time of writing, McClymont has 14,530 followers.
4. In this writers' experience, it is now extremely rare in superior court proceedings for there to be no-one at the bar table using an ipad. The smartphone is now the most common means of consulting one's diary at directions hearings.
5. (2010) 263 ALR 215.
6. *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* (2010) 263 ALR 215, see *The Australian* 'Judges have final decision on Twitter' <http://www.theaustralian.com.au/archive/news/judges-have-final-decision-on-twitter/story-e6frgal6-1225788184795> 19 October 2009.
7. *Swedish Judicial Authority v Assange* [2010] EWHC 3473 (Admin); Lord Chief Justice of England and Wales, 'Practice Guidance: the use of live text-based forms of communication (including Twitter) from court for the purposes of fair and accurate reporting', 14 December 2011.
8. FCR 2011 r 6.11(2)
9. Victorian Supreme Court Media and Policies and Practices 'Journalists using electronic equipment in court' p 6.
10. Media Release, 9 September 2013: http://www.courts.sa.gov.au/ForMedia/Pages/Media-Releases.aspx; *Supreme Court Civil Rules 2006* rules 9A and 9B, Supreme Court Criminal Rules 2013 rules 37 and 38.
11. *Sydney Morning Herald* 'Laws may stop media blogging from court' 14 January 2013, http://www.smh.com.au/technology/technology-news/laws-may-stop-media-blogging-from-court-20130113-2cnm1.html.
12. See, for example, Magistrate Mealy's direction in the committal hearing of Simon Artz discussed in B Fitzgerald, C Foong and M Tucker, 'Web 2.0, Social Networking and the courts' (2011) 35 *Australian Bar Review* 281 at 293.
13. It is common practice for journalists and publications to post links to long-form articles on Twitter and Facebook.
14. An example is the publication of the identity of an English footballer on social media after he obtained a so-called 'super-injunction' restricting publication of his name in connection with allegations that he had had an extramarital affair, and the fact that he had obtained the order. His name had been identified so widely on Twitter that it was eventually revealed in the House of Commons, with MP John Hemmings saying under parliamentary privilege: 'With about 75,000 people having named Ryan Giggs on Twitter, it is obviously impracticable to imprison them all …' BBC News 'Ryan Giggs named by MP as injunction footballer' 23 May 2011 <http://www.bbc.co.uk/news/uk-13503847>.
15. see s 3, definition of 'publish', *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [1], [43], [106].
16. (2012) 83 NSWLR 52. The case has been discussed in greater detail in a previous issue of *Bar News*: see Dawson S and Roughley F 'Suppression and non-party access Part 1: Keeping it quiet' *Bar News Summer* 2012-2013, 45 at 49, see also Fitzgerald B and Foong C 'Suppression orders after Fairfax v Ibrahim: Implications for internet communications' (2013) 37 *Australian Bar Review* 175.
17. At [56]-[60], citing *General Television Corporation Pty Ltd v Director of Public Prosecutions* (2008) 19 VR 68; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465.
18. At [61].
19. At [63].
20. *R v Perish* [2011] NSWSC 1102 at [44], [55].
21. *R v Debs* [2011] NSWSC 1248 at [40], [52].
22. At [70].
23. At [78].
24. At [78]. His Honour found that enforcement was a realistic impossibility because the evidence did not disclose how material could be removed globally so as to prevent its being accessed in New South Wales, or how the material could be blocked from access by users within New South Wales. The latter outcome may not be an impossibility as many websites engage in location-specific content blocking by reference to the user's IP address: see Fitzgerald B and Foong C 'Suppression orders after *Fairfax v Ibrahim*: Implications for internet communications' (2013) 37 *Australian Bar Review* 175 at 186-187.
25. At [72].
26. At [73].
27. At [74].
28. At [77].
29. At [94]. For further discussion see Fitzgerald B and Foong C 'Suppression orders after Fairfax v Ibrahim: Implications for internet communications' (2013) 37 *Australian Bar Review* 175 at 188-190.
30. At 83.
31. At 116.
32. At 107.
33. At 108.
34. At 120.
35. [2011] FCA 74.
36. At [32]-[33].
37. *MKM Capital Pty Ltd v Corbo & Poyser* (unreported, ACTSC, Harper M, 12 December 2008) (service via Facebook); *Blaney v Persons Unknown* (unreported, EWHC Ch D, Lewison J, 1 October 2009) (service via Twitter); Symes v Saunders [2011] QDC 217.
38. *Symes v Saunders* [2011] QDC 217.
39. [2013] NSWCA 268.
40. At [25], s 47 of the *District Court Act 1973* (NSW).
41. At [29]-[31], [36].
42. At [37].
43. At [38].
44. Examples include the Family Court of Australia (@FamilyCourtAU) Supreme Court of Victoria (@SCVSupremeCourt), County Court of Victoria (@CCVMedia) Magistrate's Court of Victoria (@MagCourtVic), the UK Supreme Court: (@UKSupremeCourt) UK Judiciary (@JudiciaryUK) Scottish Judiciary (@JudgesScotland), US Supreme Court (@USSupremeCourt), the European Court of Justice (@EUCourtPress) and the International Criminal Court in the Hague (@IntlCrimCourt).
45. Available on https://www.comcourts.gov.au/public/esearch/disclaimer.
46. See media release at: http://www.hcourt.gov.au/assets/news/MR-audio-visual-recordings-Oct13.pdf
47. Accessible at http://news.sky.com/info/supreme-court.
48. Victorian Chief Justice Warren made reference to these possibilities when announcing the launch of the Supreme Court's Twitter account: http://news.smh.com.au/breaking-news-national/victorian-courts-look-at-tweeting-rulings-20110831-1jloc.html. See B Fitzgerald, C Foong and M Tucker, 'Web 2.0, Social Networking and the courts' (2011) 35 *Australian Bar Review* 281 at 295.