

An Examination of Social Media's Impact on the Courts in Australia

By

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Perth, Western Australia, 2014.**

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Declaration

I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary education institution.

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Marilyn Krawitz

Abstract

In 2011, Joanne Fraill, a juror, was imprisoned for eight months because she chatted on Facebook with a co-accused from the trial that she participated in.¹ Fraill's case prompts questions about how social media affect courts, legal regulators and lawyers, as well as important legal principles. Those important legal principles are: (1) public confidence in the judiciary and the courts; (2) public confidence in the legal profession; (3) open justice; and (4) the right of an accused to a fair trial.

This thesis offers an analysis and conclusions on those issues. It examines case law, legislation, academic articles and internet materials on social media.

It is found that some Australian courts and legal regulators would benefit from doing more to adapt their procedures and rules to social media. The extent to which Australian courts and legal regulators adapt their procedures and rules to social media can have significant repercussions on the important legal principles considered.

This thesis provides Australian courts, the judiciary, legal regulators and lawyers with information and recommendations about their social media use that may assist them. The author believes that this is the first scholarly work to consider the impact that social media has had upon all of these stakeholders, and the first scholarly work in this area to recommend appropriate actions to maintain or possibly increase confidence in the judiciary, the courts and the legal profession, improve open justice and ensure that accused receive fair trials, despite the possibility that jurors may use social media inappropriately.

¹ See *Attorney General v Fraill* [2011] EWHC 1629 (Admin) (16 June 2011) (Ouseley J) for more information about this case.

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Chapter 1: Introduction

1.1 Introduction

Ned Kelly was arguably the most famous outlaw in Australia.¹ In 1880, he was tried for the murder of a police officer² at the Central Criminal Court in Melbourne, Victoria.³ Sir Redmond Barry presided over the trial and the triers of fact were a sequestered jury.⁴ Reporters from newspapers such as *The Argus* and *The Age* made handwritten notes at the trial;⁵ some submitted their stories to their editors by electric telegraph.⁶ Illustrators also attended the trial and drew images that were then made into wood engravings and printed by newspaper staff.⁷ The trial drew great public interest.⁸

Now, fast forward approximately 130 years to another famous Australian trial. In 2012 Lloyd Rayney was on trial in Western Australia for his wife's murder.⁹ Rayney was a prominent barrister.¹⁰ His wife had been a Registrar at the Supreme Court of Western Australia.¹¹ Brian Martin, a former judge of the Northern Territory Supreme Court, presided over the trial; there was no jury, at Rayney's request.¹² Court staff created a room at the Perth District Court with a video link where journalists could use social media to instantly inform the public about what occurred.¹³ Members of the public¹⁴ and journalists¹⁵ were highly interested in the case.

¹ Bruce Tranter and Jed Donoghue, 'Ned Kelly: Armoured Icon' (2010) 46(2) *Journal of Sociology* 187, 189.

² ABC Radio National, 'The Trial of Ned Kelly', *The Law Report*, 8 August 2009 (Susanna Lobez) <<http://www.abc.net.au/radionational/programs/lawreport/the-trial-of-ned-kelly/3470596#transcript>>.

³ National Archives of Australia, *The Trial of Ned Kelly* (October 2007)

<<http://vrrroom.naa.gov.au/records/?tab=about&ID=19379>>.

⁴ ABC Radio National, above n 2.

⁵ John H Phillips, *The Trial of Ned Kelly* (Lawbook, 1987) 90.

⁶ 'Trial of Kelly at Beechworth', *The Age* (Melbourne), 9 August 1880.

⁷ National Archives of Australia, *The Trial of Ned Kelly* (October 2007)

<<http://vrrroom.naa.gov.au/records/?ID=19379>>.

⁸ Morgan Pettersson, 'On this Day, Ned Kelly is Hanged', *Australian National Geographic* (online), 7 November 2012

<<http://www.australiangeographic.com.au/journal/on-this-day-ned-kelly-is-hanged.htm>>.

⁹ *Western Australia v Rayney [No 3]* [2012] WASC 404 (1 November 2012) [1].

¹⁰ *Ibid* [4].

¹¹ *Ibid* [36].

¹² Kate Robertson, 'Lloyd Rayney Opts for Judge-Only Murder Trial', *Perth Now* (online), 29 December 2011, [1] <<http://www.perthnow.com.au/news/western-australia/lloyd-rayney-opts-for-judge-only-murder-trial/story-e6frg13u-1226232677385>>.

¹³ Rania Spooner, 'Do We Want Court TV?', *The Sydney Morning Herald* (online), 10 May 2013, [7]

<<http://www.smh.com.au/comment/do-we-want-court-tv-20130509-2jace.html>>; Rebecca LeMay, 'Intense Interest in Lloyd Rayney Murder Trial', *The Telegraph* (Online), 13 July 2012, [15]

Trials have changed dramatically during the period between Ned Kelly's trial and Lloyd Rayney's. Communication about court procedures and proceedings has also changed dramatically during this time. One important aspect of these changes is the creation of social media and their rapid penetration into everyday life. According to the Chief Justice of Western Australia, Wayne Martin, technology, including social media, has 'had a profound impact upon virtually every aspect of our lives, including our courts.'¹⁶

This thesis will argue that Australian courts and legal regulators should modify their procedures and proceedings to begin adapting, or further adapt, to the presence of social media. Modifying such procedures and proceedings can have an impact on four important principles: (1) the public's confidence in the courts and the judiciary; (2) the public's confidence in the legal profession; (3) open justice; and (4) providing a fair trial to an accused.

1.2 Background on Social Media

Before going further, it is important to understand what social media are. In 1997, sixdegrees.com, one of the first social media sites, was created;¹⁷ however, the forms of social media that this thesis will consider in depth were created later.¹⁸ Social media have changed how people communicate,¹⁹ consisting of online communities that users can exploit to network, connect and correspond in different ways, including using words, photographs

<<http://www.dailytelegraph.com.au/news/national/intense-interest-in-lloyd-rayney-murder-trial/story-fndo2j1f-1226425586874>>.

¹⁴ Rania Spooner and Courtney Trenwith, 'The Rayney Trial: The Verdict Live', *The Mandurah Mail* (online), 1 November 2012

<<http://www.mandurahmail.com.au/story/523912/the-rayney-trial-the-verdict-live/>>.

¹⁵ Rebecca LeMay, 'Intense Interest in Lloyd Rayney Murder Trial', *The Telegraph* (Online), 13 July 2012, [1] <<http://www.dailytelegraph.com.au/news/national/intense-interest-in-lloyd-rayney-murder-trial/story-fndo2j1f-1226425586874>>.

¹⁶ Wayne Martin CJ, 'Managing Change in the Justice System' (Speech delivered at the 18th Australasian Institute of Judicial Administration Oration, Brisbane, 14 September 2012) 4.

¹⁷ Ruizhi Gao, *Social Network, Something Interesting*, 5

<theory.utdallas.edu/seminar/G2S13/RG/Social-Network-Presentation.pptx>.

¹⁸ For example, the social medium Facebook was created in 2004; see Sarah Phillips, 'A Brief History of Facebook', *The Guardian* (online), 25 July 2007

<<http://www.theguardian.com/technology/2007/jul/25/media.newmedia>>.

¹⁹ Pamela D Schultz, 'Trial by Tweet? Social Media Innovation or Degradation? The Future and Challenge of Change for Courts' (2012) 22(1) *Journal of Judicial Administration* 29, 29.

and video.²⁰ People can use social media to create profiles, usually with photos and biographical information, and to communicate with other users.²¹ Social media are easy²² for almost anyone to use²³ and are highly interactive,²⁴ allowing people to exchange knowledge and ideas easily and quickly.²⁵ People can respond to comments made on social media by mobile text, instant messaging or the internet.²⁶

Social media are different from usual media in three particular ways.²⁷ First, each social media user can create content for his or herself, as opposed to traditional media, in which one can receive but does not create content. Next, each social media user can quickly share his or her content. Finally, social media users can control the privacy settings that govern their content: they can allow many, few or no people to view it. Different social media have different privacy policies.²⁸

Social media are a type of web 2.0 technology. This means that people can use social media without needing to know how to design a website or have online publishing skills.²⁹ Web 2.0 sites make sharing information easy for an average user; in comparison, web 1.0 sites are 'static' and are not easy to change without knowing how to design a website or being familiar with online publishing.³⁰

²⁰ Kathleen Elliott Vinson, 'The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It' (2010) 41(2) *University of Memphis Law Review* 355, 357.

²¹ Audrie Garrison, *Tweeting from the Courtroom: The State of Social Media Reporting in Judicial Proceedings and How the Debate on Cameras Helped Shape It* (MA (Journalism) Thesis, Indiana University, 2011) 4.

²² Jane Johnston et al, *Juries and Social Media* (2013) Victorian Department of Justice, 2 <<http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/juries%20and%20social%20media%20-%20final.pdf>>.

²³ Jonathan Barrett, 'Open Justice or Open Season? Developments in Judicial Engagement with New Media' (2011) 11 *Queensland University of Technology Law & Justice Journal* 1, 13.

²⁴ Karen Salaz, Thomas Hodson and Chris J Davey, *New Media and the Courts: The Current Status and a Look at the Future* (26 August 2010) Social Science Research Network, 19 <<http://ssrn.com/abstract=1666332>>.

²⁵ Ibid.

²⁶ Jacob E Dean, 'To Tweet or Not to Tweet: Twitter, "Broadcasting," and Federal Rule of Criminal Procedure 53' (2010) 79(2) *University of Cincinnati Law Review* 769, 769.

²⁷ Hope A Comisky and William M Taylor, 'Don't Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas — Discovery, Communications with Judges and Jurors, and Marketing' (2011) 20(2) *Temple Political & Civil Rights Law Review* 297, 298.

²⁸ Johnston et al, above n 22, 3.

²⁹ University of Melbourne, *Wikis, Blogs and Web 2.0 Technology* [1] <<http://www.unimelb.edu.au/copyright/information/guides/wikiblogsweb2blue.pdf>>; Yvette Ostolaza and Ricardo Pellafone, 'Applying Model Rule 4.2 to Web 2.0: The Problem of Social Networking Sites' (2010) 11(1) *Journal of High Technology Law* 56, 58.

³⁰ Tech Ease, *What Is Web 2.0?* [1] <<http://etc.usf.edu/techease/win/internet/what-is-web-2-0/>>.

There are several different forms of social media.³¹ The most popular today are Facebook, Twitter, LinkedIn and MySpace.³² Eight hundred and twenty-nine million people used Facebook daily in June 2014,³³ there are currently about 500 million tweets daily,³⁴ and LinkedIn currently has over 313 million members.³⁵ In December 2012, it was estimated that 11.8 million Australians regularly used Facebook, 2.1 million Australians regularly used Twitter and 2.1 million Australians regularly used LinkedIn.³⁶ More than 60 per cent of Australians use any form of social media.³⁷ Other social media sites include Google+, blogs³⁸ and Flickr.³⁹

Twitter was created in 2006.⁴⁰ People using Twitter can write short remarks, called tweets, which anyone on the internet can see.⁴¹ Tweets must be 140 characters or less.⁴² Users can 'follow' people's tweets: this means that the tweets of the person whom one follows appear on one's homepage.⁴³ A person who tweets is called a tweeter;⁴⁴ tweeters can also use Twitter to send private messages to each other.⁴⁵

³¹ Anne Wallace et al, 'Courts and Social Media: Opportunities and Challenges' (2013) 40(7) *Brief* 36, 37.

³² Brian Hull, 'Why Can't We Be "Friends"? A Call for a Less Stringent Policy for Judges Using Online Social Networking' (2012) 66(2) *Hastings Law Journal* 595, 599.

³³ Facebook, *Our Mission* (2014) <<https://newsroom.fb.com/company-info/>>.

³⁴ Twitter, *How Twitter Can Help Your Business* (2014) <<https://business.twitter.com/how-twitter-can-help-your-business>>.

³⁵ LinkedIn, *About LinkedIn* (2014) <<http://press.linkedin.com/about>>.

³⁶ Lorana Bartels and Jessica Lee, 'Jurors Using Social Media in our Courts: Challenges and Responses' (2013) 23(1) *Journal of Judicial Administration* 35, 40.

³⁷ Patrick Keyzer et al, 'The Courts and Social Media: What Do Judges and Court Workers Think?' (2013) 25(6) *Judicial Officers' Bulletin* 47, 51.

³⁸ James Podgers, 'Legal Ethicists Are Playing Catch-Up to Create Social Media Guidelines for Lawyers, Judges' (10 August 2013) *ABA Journal*, 1 <http://www.abajournal.com/news/article/legal_ethicists_are_playing_catch-up_to_create_social_media_guidelines_for_>.

³⁹ Flickr, <<http://www.flickr.com/>>.

⁴⁰ Jane Douglas, 'All of a Twitter?' (2012) 26 *Online Currents* 305, 305.

⁴¹ Grant Amey, 'Student Commentary: Social Media and the Legal System: Analyzing Various Responses to Using Technology from the Jury Box' (2010) 35(1) *Journal of the Legal Profession* 111.

⁴² Dean, above n 26, 769. Note that there has been talk of increasing Twitter's 140-character limit recently, see: Rebecca Hyam and Alicia Barry, 'IPO may force Twitter to drop character limit: Analyst', *ABC News* (online), 4 October 2013.

⁴³ Twitter Inc., *Facts About Following* (2013) at [1] <<https://support.twitter.com/articles/14019-faqs-about-following>>.

⁴⁴ Oxford Dictionaries, *Definition of Tweeter in English* <<http://oxforddictionaries.com/definition/english/tweeter>>.

⁴⁵ J Paul Zimmerman, 'A Practical Guide to the Development of Jury Charges Regarding Social Media' (2013) 36(3) *American Journal of Trial Advocacy* 641, 644.

People who use Facebook can construct a profile page, share information and photos and comment on each other's profiles.⁴⁶ Facebook was created in 2004,⁴⁷ and allows people to instantly chat with friends and share photos and videos.⁴⁸ Facebook has a 'news feed' that becomes part of the homepages of the people who use it, containing the latest information that other Facebook users have posted.⁴⁹ Facebook users can also send private messages to each other.⁵⁰

LinkedIn, created in 2002⁵¹, is 'the modern-day equivalent of a business card'.⁵² It is a social medium that allows users to make a profile that resembles a CV.⁵³ Users can network with other business professionals on LinkedIn.⁵⁴ YouTube is a social medium that allows users to create a 'channel'.⁵⁵ Users can post videos on their channels for people to watch.⁵⁶ YouTube was created in 2005.⁵⁷

There are social media that are specifically for lawyers, such as lawyers.net, in which lawyers can create profiles and join groups.⁵⁸ Lawlink.com allows people to network, share documents and chat on a forum.⁵⁹ Social media constantly change, and new forms of social media appear regularly.⁶⁰

⁴⁶ Grant Amey, 'Student Commentary: Social Media and the Legal System: Analyzing Various Responses to Using Technology from the Jury Box' (2010) 35(1) *Journal of the Legal Profession* 111, 111.

⁴⁷ Phillips, above n 18.

⁴⁸ Brian Fitzgerald, Cheryl Foong and Megan Tucker, 'Web 2.0, Social Networking and the Courts' (2011) 35(3) *Australian Bar Review* 281.

⁴⁹ Andy Taylor, 'Friending and Following: Applying the Rules of Professional Conduct to Social Media' (2012) 34(3) *University of Arkansas at Little Rock Law Review* 551, 555–556.

⁵⁰ Zimmerman, above n 45, 644.

⁵¹ Andrew Warner, *Interview with Konstantin Guericke* (29 October 2010) [6] <<http://mixergy.com/konstantin-guericke-linkedin-interview/>>.

⁵² Kate Jones, 'Is LinkedIn a waste of time?', *The Age* (online), 6 September 2013, [1] <<http://www.theage.com.au/small-business/managing/is-linkedin-a-waste-of-time-20130906-2t8y5.html>>.

⁵³ LinkedIn, *What is LinkedIn?* <http://www.linkedin.com/static?key=what_is_linkedin>.

⁵⁴ Amber Mac, 'On its 10th Birthday, What is LinkedIn?', *Fast Company* (online), 10 May 2013, [7] <<http://www.fastcompany.com/3009537/dialed/on-it-is-10th-birthday-what-is-linkedin>>.

⁵⁵ Chris McLeod and James Neil, 'Transferring Social Media Accounts: Legal and Practical Problems' (2013) 16(3) *Internet Law Bulletin* 63, 64.

⁵⁶ *Ibid.*

⁵⁷ Wikipedia, *YouTube*, [1] <<http://en.wikipedia.org/wiki/YouTube>>.

⁵⁸ Steve Mark, 'New Technologies — Social Networking Sites' (February 2011) *Without Prejudice: The Office of the Legal Services Commissioner*, [3] <http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/wp_issue53_feb11.pdf>.

⁵⁹ *Ibid.*

⁶⁰ Chatterbuzz Media, 'Changes and Trends in Social Media in 2013 — It's Evolving Every Day!' on Moz, *Youmoz* (5 July 2013) <<http://moz.com/ugc/changes-and-trends-in-social-media-in-2013>>.

This thesis will primarily consider the social media Facebook and Twitter, to the exclusion of others. The reason for choosing these two social media is because they were both created approximately 10 years ago. As a result, they have existed for sufficient time for examples to arise of their use by courts, lawyers and jurors. These social media are also among the most popular;⁶¹ it would follow, then, that more people would understand how to use them. The readers of this thesis may better understand the arguments that this thesis makes because they understand the social media under discussion.

Given the relative longevity of these networks and their widespread use in many sectors of society, the author feels that she can more easily hypothesise about their impact upon the legal system than other social media. The research for this thesis commenced in November 2011; at this time some of the social media networks that are more popular today were still new, or were yet to be created. For example, the social media site Google+ was created in 2011.⁶² The author preferred not to examine social media that were only a few months old. Not only was hard evidence of their impact relatively rare, but the possibility existed that such emerging platforms might prove ephemeral, or sufficiently unstable as to require significant alterations that would change the way in which they might affect the issues under discussion.

As previously stated, this thesis will consider social media in the context of the courts and these important legal principles: (1) the public having confidence in the judiciary and the courts; (2) the public having confidence in the legal profession; (3) open justice; and (4) providing an accused with a fair trial. These principles will be examined to the extent that they are relevant to social media. An exhaustive examination of them will not be provided.

1.3 The Impact of Social Media on Public Confidence in the Courts and the Judiciary

⁶¹ Derek Thompson, 'The Most Popular Social Network for Young People? Texting', *The Atlantic* (online), 19 June 2014
<<http://www.theatlantic.com/technology/archive/2014/06/facebook-texting-teens-instagram-snapchat-most-popular-social-network/373043/>>.

⁶² Google, *Our History in Depth* <<http://www.google.com.au/about/company/history/>>.

Chapter Two of this thesis discusses how social media can affect the public's confidence in the judiciary and the courts.⁶³ Australian courts depend on public confidence in the judiciary for their authority.⁶⁴ This means that when the public is confident in the judiciary, they are more likely to accept and comply with the decisions of judicial officers.⁶⁵ When court officials educate and engage the public, it is more likely that the public will have confidence in the courts and the judiciary.⁶⁶ A 2007 study by Kathy Mack and Sharon Roach Anleu from Flinders University found that 46.1 per cent of the 4569 people whom they surveyed had low confidence in the courts and the judiciary, and 22.2 per cent of the people surveyed had no confidence in the judiciary at all. Mack and Anleu note that the people surveyed may not have had personal experience of the courts. They further note that it is important that the court staff actively tries to improve the public's confidence in the courts and the judiciary.⁶⁷ Judges' work becomes more difficult if the public lacks confidence in the judiciary and the courts.⁶⁸ If the public believe that judicial officers are fair and impartial, this increases their confidence in the judiciary.⁶⁹ In 1998 Professor Stephen Parker of Griffith University released a report entitled 'Courts and the Public', discussing Australians' confidence in the judiciary. Parker's report stated that Australians have 'a perception that some courts are organised largely for the benefit of judicial officers'. It also stated that Australians who infrequently use the courts find them difficult to use.⁷⁰

1.4 The Impact of Social Media on Public Confidence in the Legal Profession

⁶³ In this thesis, the words 'judiciary' and 'judges' include other judicial officers, such as registrars, magistrates and masters.

⁶⁴ *Cesan v R* (2008) 236 CLR 358, 380 (French J).

⁶⁵ Chief Justice John Doyle, 'Should Judges Speak Out?' (Speech delivered at the Judicial Conference of Australia, Uluru, April 2001), 2 <<http://jca.flydigital.com.au/wp-content/uploads/2013/11/doyle.pdf>>.

⁶⁶ Patricia Seguin, *The Use of Social Media in Superior Court of Arizona in Maricopa County* (2011) Superior Court of Arizona in Maricopa County, 9 <<http://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2011/Social%20Media.ashx>>.

⁶⁷ Kathy Mack and Sharyn Roach Anleu, 'Judicial Demeanour: Implications for Public Confidence' (Paper presented at Confidence in the Courts Conference, Canberra, 9–11 February 2007), 7 <<http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2007/Confidence%20courts/papers/Mack&Anleu.pdf>>.

⁶⁸ Chief Justice Beverley McLachlin, 'Preserving Public Confidence in the Courts and the Legal Profession' [2002–2003] 29(3) *Manitoba Law Journal* 277, 278.

⁶⁹ Elizabeth Handsley, 'Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power' (1998) 20(2) *Sydney Law Review* 183, 195.

⁷⁰ Stephen Parker, *Courts and the Public* (1998) Australasian Institute of Judicial Administration <<http://www.ajja.org.au/online/Pub%20no19.pdf>>.

Chapter Three of this thesis discusses the ways in which social media can affect the public's confidence in the legal profession. It is extremely important that the public has confidence in the legal profession⁷¹ because of the role that lawyers play in the administration of justice.⁷² If the public do not have confidence in the legal profession, then it is difficult for the legal profession to function;⁷³ they may choose not to use lawyers when they are involved with the courts, making it difficult for the public to navigate the court system, particularly higher courts. The public must also be confident in the ability of the system to discipline lawyers when necessary, such as in cases of negligence or misconduct.⁷⁴ It is in the public's interest that it has confidence in the legal profession.⁷⁵ This confidence is secured when only lawyers who are 'fit and proper' are in practice.⁷⁶ The public expect lawyers to have high ethical standards.⁷⁷ Maintaining these ethical standards will ensure that lawyers continue to be engaged by members of the public, as well as supporting other important principles discussed in this thesis, such as ensuring that the accused receives a fair trial.

1.5 The Impact of Social Media on Providing a Fair Trial for the Accused

Chapter Six of this thesis discusses the way in which social media can affect the fairness of a trial for an accused. Providing an accused with a fair trial is an important principle in Australian law;⁷⁸ many practices and rules exist to protect this principle.⁷⁹ No person can be convicted of a crime unless they have received a fair trial.⁸⁰ A fair trial is best described by a series of 'general propositions' and examples from past cases.⁸¹ For example, one of the general propositions is that if an accused is charged with a serious criminal offence and does not have a lawyer, this could result in an unfair trial.⁸² An unfair trial may occur if the prosecution deliberately does not provide important evidence to an accused that the accused

⁷¹ *Legal Practitioners Conduct Board v Figwer* [2013] SASC 135 (23 August 2013) [13].

⁷² *Legal Services Commissioner v Nguyen* [2013] VSC 443 (23 August 2013) [25].

⁷³ *Law Society (SA) v McKerie* [2008] SASC 222 (12 August 2008) [22] (Gray J).

⁷⁴ *Legal Practitioners Conduct Board v Condon* [2004] SASC 346 (3 November 2004) [18] (Gray J).

⁷⁵ *Legal Practitioners Conduct Board v Viscariello* [2013] SASCFC 37 (21 May 2013) [12] (Gray, Sulan and Blue JJ).

⁷⁶ *Legal Services Commissioner v Rushford* [2012] VSC 632 (20 December 2012) [16].

⁷⁷ *Legal Practitioners Conduct Board v Clisby* [2012] SASCFC 43 (1 May 2012) [6].

⁷⁸ *Dietrich v The Queen* (1992) 177 CLR 292, 326, quoted in Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21st Century — Has Trial by Jury Been Caught in the World Wide Web?' (2012) 36(2) *Criminal Law Journal* 103, 103–104.

⁷⁹ Bartels and Lee, above n 36, 38.

⁸⁰ *Jago v The District Court of New South Wales* (1989) 168 CLR 23, 25.

⁸¹ *Ibid* 57.

⁸² *Dietrich v The Queen* (1992) 177 CLR 292, 311.

requires to prepare a defence.⁸³ An unfair amount of media attention on an accused can potentially result in an unfair trial.⁸⁴

One aspect of providing a fair trial to an accused is that verdicts by jurors must be based on the evidence and argument that they saw in court, during the trial.⁸⁵ At trial, the judge and lawyers can ensure that the rules of evidence are applied to all evidence tendered.⁸⁶ Jurors must also be ‘indifferent’ to the trial before them.⁸⁷ During a trial, jurors should communicate about a case only with each other, and only after the evidence and law in a trial are finished.⁸⁸ They should not communicate with any third party about the trial in which they are to give a verdict,⁸⁹ in case the third party might affect the juror’s decisions.⁹⁰ This type of juror misconduct can result in a presumption that the juror is prejudiced.⁹¹

1.6 A Brief Explanation of the Open Justice Principle

Chapter Five of this thesis examines how social media can help to realise the open justice principle, an important part of the Australian justice system.⁹² Open justice ‘was derived from observation of the actual practice of dispute resolution over long periods of time’⁹³ and has been embraced in England ‘from time immemorial’.⁹⁴ Open justice is now considered ‘one of the most fundamental aspects of the system of justice in Australia’.⁹⁵ The open justice principle requires the public and the media to be able to watch most court proceedings in the

⁸³ *Jago v The District Court of New South Wales* (1989) 168 CLR 23, 57.

⁸⁴ Chief Justice James Spigelman, ‘The Truth Can Cost Too Much: The Principle of a Fair Trial’ (Speech delivered at the Fourth Gerard Brennan Lecture, Bond University, Gold Coast, Queensland, 25 October 2003) [40] <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_speech_spigelman_251003>.

⁸⁵ *Patterson v Colorado*, 205 US 454, 462 (1907); *Glennon v R* (1992) 173 CLR 592, 614 (Brennan J).

⁸⁶ Leslie Ellie, ‘Friend or Foe? Social Media, the Jury and You’ (2011) 23(5) *The Jury Expert* 1, 3.

⁸⁷ *Irvin v Dowd*, 366 US 717, 722 (1961).

⁸⁸ *United States v Cox*, 324 F 3d 77, 86 (2nd Cir, 2003).

⁸⁹ *Washington v Depas*, 165 Wn 2d 842, 18 (Wash, 2009).

⁹⁰ Thaddeus Hoffmeister, ‘Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age’ (2012) 83(2) *University of Colorado Law Review* 409, 430.

⁹¹ *Washington v Depas*, 165 Wn 2d 842, 18 (Wash, 2009).

⁹² Burd and Horan, above n 78, 104.

⁹³ Chief Justice James Spigelman, ‘Seen to Be Done: The Principle of Open Justice’ 11 (Speech delivered at the 31st Australian Legal Convention, Canberra, 9 October 1999) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_speech_spigelman_091099>.

⁹⁴ *Richmond Newspapers Inc v Virginia*, 448 US 555, 567 (1980), quoting E Jenks, *The Book of English Law* (Ohio University Press, 6th ed, 1967) 73–74.

⁹⁵ *John Fairfax v District Court of NSW* (2004) 61 NSWLR 344, 352 (Spigelman CJ).

courtroom.⁹⁶ Accordingly, Australian State and Federal Court officials currently allow the public to attend the majority of court proceedings.⁹⁷

One reason for open justice is that it helps ‘to inform the public about the workings of the third arm of government and to ensure that courts and judges administer the justice system in a way that will maintain and foster its integrity, fairness and efficiency’.⁹⁸ Open justice keeps the judiciary accountable.⁹⁹ The principle reassures the public that judicial officers administer trials fairly and without prejudice.¹⁰⁰ It also discourages witnesses from committing perjury and allows the public to ‘judge whether our system of criminal justice is fair and right’.¹⁰¹ It is also important for the public to see that people who are charged with an offence go on to face a judicial officer.¹⁰² In this way, open justice may be considered ‘therapeutic’, partially because it allows the public to assess the quality of the justice system.¹⁰³

As a result of the open justice principle, journalists may attend court proceedings.¹⁰⁴ Their attendance and reports are critical to the maintenance of open justice, because the public cannot attend court on a daily basis to see what occurs themselves.¹⁰⁵ An extension of the principle is that journalists should report trials fairly and accurately.¹⁰⁶

According to the Chief Justice of the Supreme Court of Canada, Beverley McLachlin, open justice is also crucial to the rule of law.¹⁰⁷ She stated that the rule of law ‘cannot exist without

⁹⁶ *Scott v Scott* [1913] AC 417, quoted in *McJannett v Daley [No 2]* [2012] WASC 386 (25 October 2012) [4] (Le Miere J).

⁹⁷ Isolde Lueckenhausen, ‘Facebook v a Fair Trial? Court Reporting Restrictions and the Internet’ (2009) 92 *Precedent* 15, 15.

⁹⁸ *Re Hogan; Ex parte West Australian Newspapers Ltd* [2009] WASCA 221 (8 December 2009) [50], quoted in *Re Bartlett; Ex Parte R* [2012] WASC 34 (6 February 2012) [22] (McKechnie J).

⁹⁹ *O’Shane v Burwood Local Court (NSW)* [2007] NSWSC 1300 (19 November 2007) [21] (McClellan CJ).

¹⁰⁰ *Richmond Newspapers Inc v Virginia*, 448 US 555, 569 (1980).

¹⁰¹ *Maryland v Baltimore Radio Show Inc*, 338 US 912, 910 (1950) (Frankfurter J), quoted in *Richmond Newspapers Inc v Virginia*, 448 US 555, 574 (1980).

¹⁰² Burd and Horan, above n 78, 104.

¹⁰³ Daniel Stepniak, ‘The Therapeutic Value of Open Justice’ (Speech delivered at the Law School, The University of Western Australia, 7 June 2006) <<http://www.aija.org.au/TherapJurisp06/Papers/Stepniak.pdf>>.

¹⁰⁴ *Scott v Scott* [1913] AC 417, quoted in *McJannett v Daley [No 2]* [2012] WASC 386 (25 October 2012) [4] (Le Miere J).

¹⁰⁵ Lueckenhausen, above n 97, 15.

¹⁰⁶ Judiciary of England and Wales, *Practice Guidance: The Use of Live Text-Based Forms of Communication (including Twitter) from Court for the Purpose of Fair and Accurate Reporting* (14 December 2011) 2 <<http://www.judiciary.gov.uk/JCO%2fDocuments%2fGuidance%2fltbc-guidance-dec-2011.pdf>>.

¹⁰⁷ Chief Justice Beverley McLachlin, ‘The Relationship Between the Courts and the Media’ (Speech delivered at Carleton University, Ottawa, Canada, 31 January 2012) [4] <<http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2012-01-31-eng.aspx>>.

open justice and deep public confidence in the judiciary and the administration of justice. And the media is essential to building and maintaining that public confidence'¹⁰⁸ because it informs people of the logic and principles that judicial officers use in their decisions.¹⁰⁹ Judges have said that the open justice principle is a presumption in criminal trials.¹¹⁰

1.7 Aims and Outline of the Thesis

This thesis argues that the courts and legal regulators should change their policies and procedures regarding social media because they have not taken sufficient action to date.

Chapter Two examines the topic of judges using social media privately and how this can affect the public's confidence in the courts and the judiciary. It considers three specific issues: (1) whether judges should be discouraged from using social media privately; (2) whether they should be prevented from being 'friends' with lawyers who may appear before them; and (3) judges participating in ex parte communication about cases before them. It is argued that ethical guidelines for judges should be modified to include conduct on social media, and that this will help maintain public confidence in the judiciary.

Chapter Three discusses the challenges that result from lawyers using social media. If lawyers face ethical challenges when they use social media, this can lower public confidence in the courts and in the legal profession. It is crucial that lawyers act ethically to maintain this public confidence in the courts¹¹¹ and in the legal profession.¹¹² The chapter examines three ethical issues that lawyers may face if they use social media: (1) unintended or faulty retainers, (2) challenges involving their duty to the court, and (3) their duty of confidentiality. It also argues that ethical guidelines involving social media should be created for lawyers for the same reasons that they should be for judges. Appendix A of this thesis suggests sample guidelines.

¹⁰⁸ Ibid.

¹⁰⁹ *R v Tait and Bartley* (1979) 24 ALR 473, 492 (Brennan, Deane and Gallop JJ).

¹¹⁰ *Richmond Newspapers Inc v Virginia*, 448 US 555, 573 (1980).

¹¹¹ Law Council of Australia, *Australian Solicitors' Conduct Rules* (at June 2011) r 5.1.1; Justice Michael Kirby, 'The Rule of Law Beyond the Law of Rules' (2010) 33 *Australian Bar Review* 195, 210.

¹¹² *Legal Services Commissioner v CBD* [2012] QCA 69 (27 March 2012) [18].

Chapter Four discusses the results of a survey conducted by the author of the social media use of court staff in various jurisdictions.¹¹³ Between May and July 2013, the author emailed the survey to 23 courts in Australia, Canada, the United Kingdom and the United States. In stating that the author emailed a survey to 23 different staff at different courts, she did not include the emails that she sent to staff who worked at the same courts as the 23.¹¹⁴ The following table shows the courts contacted and which of them did and did not complete the survey.

Table 1. Courts Contacted by the Author

Courts that Completed the Survey	Courts that Did not Complete the Survey
In Australia	
Family Court of Australia	High Court of Australia
Federal Court of Australia	Queensland Courts
New South Wales Supreme Court	Tasmanian Courts
Northern Territory Supreme Court	
South Australia Courts	
Victoria Children’s Court	
Victoria Magistrates’ Court	
Victoria Supreme Court	
The Supreme Court of Western Australia	
Outside of Australia	
Alberta Court of Queen’s Bench	Federal Court of Canada
British Columbia Court of Appeal	Prince Edward Island Courts
Nova Scotia Courts	Quebec Courts
Saskatchewan Courts	Winnipeg Law Courts
Massachusetts Court System	
United Kingdom (a member of Her Majesty’s Courts and Tribunals Service Performance Analysis, Reporting Team)	

The survey was designed to ask court staff about whether they used social media to engage the public, and their reasons for their chosen practice. The author hoped to obtain examples

¹¹³ The author believes that this research is the first of its kind in Australia.

¹¹⁴ For example, if the author sent an email to a staff member at Court X, but the staff member told her to email another staff member at Court X, only one of the two staff members would be included in the total count of respondents. This occurred twice.

of courts using social media to engage the public and the benefits gained from doing so. She also sought examples of reasons why courts do not use social media in order to consider them and analyse whether these reasons could potentially be overcome. It was not part of the aims of the survey to: (1) submit it to a significant sample size; (2) use a methodology informed by social science research; or (3) analyse it using complex statistics. Chapter Four considers the information that court staff could post on social media, which types of social media court staff could use and which court staff could use social media. Appendix B of this thesis contains the social media URLs for the courts that participated in the survey. Appendix C contains the participant consent information and the questions used. Appendix D contains an information letter addressed to the survey participants that accompanied the survey's questions. Appendix E contains the questions that the survey asked with the answers that the participants provided.

The author chose to send a survey to the Massachusetts Court System because she hoped to present her findings at Harvard University, Massachusetts at some point in the future. She felt that this information would be relevant to a Harvard University audience. The author did present her findings at Harvard University in January 2014. Chapter Four concludes that courts should embrace social media as a method of self-promotion and engaging the public. The examples from the survey show that some courts are using social media successfully as a method of self-promotion.

Chapter Five of this thesis examines whether journalists should be allowed to use social media in the courtroom, in accordance with the open justice principle. It considers the positive and negative aspects of journalists using social media in the courtroom. It is concluded that journalists should be able to use social media in the courtroom as a result of the open justice principle. Appendix F to this thesis contains a model policy drafted for court staff to use in relation to journalists using social media in the courtroom.

Chapter Six examines jurors who use social media inappropriately in relation to providing an accused with a fair trial, and considers the question of how to prevent jurors from using social media inappropriately. An example of a juror using social media inappropriately would be if he or she wrote something specific about the trial in which he or she was participating. For example, it would be inappropriate if a juror wrote on their Facebook wall, 'When I saw the bloody gun in court today, I did not think that the accused would have been able to figure out

how to use it.’ Another example of inappropriate use would be if a juror asked other social media users for their opinion about the relevant trial. By contrast, a juror who complained on social media about the quality of the coffee available to jurors at court would not be considered inappropriate; while it would be preferable that jurors do not comment about the court whatsoever on social media, the coffee example just given would not have an impact on providing an accused with a fair trial. Chapter Six also discusses how to assist court staff in determining whether jurors have used social media inappropriately and the consequences to the juror and to the trial when this has occurred. It is argued that the court should take more action regarding inappropriate social media use by jurors. Possible strategies could include hanging posters that warn against inappropriate social media use in the area where the jury deliberates.

Chapter 7 discusses the issues in this thesis that affect the majority of the relevant stakeholders (e.g. the judiciary, lawyers, jurors) and it states the main findings of this thesis. It states the main recommendations that this thesis makes and it makes suggestions for future research in the area of social media and the courts. It also makes some concluding remarks.

This thesis is grounded in the discipline of law with a view to law reform.¹¹⁵ It aims to address an existing gap in that there is little to no academic research that applies the following legal concepts to social media: (1) confidence in the courts and the judiciary; (2) confidence in the legal profession; (3) open justice; and (4) providing a fair trial to an accused. It aims to provide a systematic policy framework that responds to the recent significant phenomenon of social media in the legal context. It is intended that this thesis will provide a comprehensive foundation in this area for future researchers. The research questions in this thesis are the following:

- a. How has social media caused challenges in the areas of: (1) confidence in the courts and the judiciary; (2) confidence in the legal profession; (3) open justice; and (4) providing a fair trial to an accused?
- b. How might social media cause challenges in these areas in the future?
- c. What law reforms could be helpful in addressing these challenges?

¹¹⁵ Legal research may be ‘reform oriented — recommendations for change, based on critical examination’; see Council of Australian Deans, *Statement on the Nature of Legal Research* (October 2005) <<http://www.cald.asn.au/docs/cald%20statement%20on%20the%20nature%20of%20legal%20research%20-%202005.pdf>>.

- d. Are new ethical guidelines or modified ethical guidelines on social media use necessary for the judiciary and lawyers?
- e. How might courts benefit if they could use social media for promotion and if they permit journalists to use social media in the courtroom?
- f. How can the courts try to lessen the chances that jurors will use social media inappropriately?

This thesis will reference the experiences of other jurisdictions (Canada, the United Kingdom and the United States) in relation to some matters to help shed light on the Australian experience. This is especially because: (1) more incidents of inappropriate social media use in the legal context have occurred in some jurisdictions other than in Australia; (2) Australian courts have been slower to make modifications to their processes, etc. due to social media than some of the other jurisdictions; and (3) social media is so new that in some research areas there is simply no Australian scholarly material available, so the material and experience of other jurisdictions is valuable. This thesis does not attempt to engage in comparative law analysis. This thesis primarily focuses on the challenges that social media can create, and only looks at the benefits that it can provide comprehensively in the areas of journalists using social media in the courtroom. Because the research area of social media and the courts is still so new, the author indulges in conjecture at certain points to share new ideas about potential directions for the field.

This thesis does not cover the following topics: using social media material as evidence in trials, and the effect that pre-trial publicity on social media can have upon jurors. The thesis leaves these areas to other researchers in order to focus more closely on the scope thus far described. While this thesis does address some ethical aspects of social media use, using social media as evidence in trials is more of an evidentiary issue than an ethical one.

This thesis uses research published online in books and journals. The author draws upon her experience as a lawyer in Australia in the areas of civil litigation and criminal and family law and her experience as a freelance journalist in Toronto, Canada. She has presented parts of her thesis to judicial officers and court staff at the Federal Court in Sydney, the Court of Appeal for Ontario in Canada, the Supreme Court of Canada in Ottawa, the Supreme Court of Western Australia in Perth and the State Administrative Tribunal in Perth. She has also presented parts of her thesis to staff and students at Harvard University in Cambridge,

Massachusetts. Some of the chapters of this thesis have been amended and published in peer reviewed and non-peer reviewed publications.¹¹⁶ Court staff, academics and the editors of law journals have provided the author with encouraging feedback that has confirmed her belief that her research is necessary and will be valued. The research included in this thesis is dated up to 31 December 2013;¹¹⁷ meanwhile, the area of social media and the courts continues to develop.¹¹⁸

1.8 Conclusion

Australian researchers are starting to consider social media's impact on the courts. For example, academics from five Australian universities were part of a national taskforce who advised Australia's Standing Council on Law and Justice on how social media can affect juries.¹¹⁹ They released an options paper for the Commonwealth Attorney General.¹²⁰ The Government's support for research in this area is evidence that the topics discussed in this thesis are of significant legal relevance.

¹¹⁶ The peer-reviewed publications are: Marilyn Krawitz, 'Can Australian Judges Keep their 'Friends' Close and their Ethical Obligations Closer? An Analysis of the Issues Regarding Australian Judges' Social Media Use' (2013) 23(1) *Journal of Judicial Administration* 14; Marilyn Krawitz, 'Summoned by Social Media: Why Australian Courts Should Have Social Media Accounts' (2014) 23(3) *Journal of Judicial Administration* 182; Marilyn Krawitz, 'Stop the Presses, but not the Tweets! Why Australian Judicial Officials Should Permit Journalists to Use Social Media in the Courtroom' (2013) 15(1) *Flinders Law Journal* 1; Marilyn Krawitz, 'May It Tweet the Court: Ethical Considerations Involving Australian Lawyers' Social Media Use' (2013) 2 *Journal of Civil Litigation and Practice* 85. The non-peer reviewed publication is: Marilyn Krawitz, 'Guilty as Tweeted: Jurors Using Social Media Inappropriately During the Trial Process' (16 November 2012) UWA Faculty of Law Research Paper No 2012-02 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176634>.

¹¹⁷ After that date, the author finalised this thesis for submission.

¹¹⁸ For example, after the final date for research to be included in this thesis, it was announced that journalists may now use social media in Western Australian courtrooms. See Val Buchanan, 'Live Tweeting from WA Courts Allowed' (Media Release, 31 January 2014).

¹¹⁹ Gemma Alker, 'Check your Facebook and Google at the Door' (Media Release, 29 April 2013) [1].

¹²⁰ *Ibid* [7].

Chapter 2: Ethical Considerations Relating to Australian Judges' Social Media Use

2.1 Introduction

In a 2012 speech at Carleton University in Ontario, Canada, the Chief Justice of the Supreme Court of Canada, Beverley McLachlin, asked the following questions: '[s]hould judges "tweet"? Should they be on Facebook?'¹ She did not answer her own questions. It is not surprising that the Chief Justice neglected to answer these questions, because there are as yet no adequate guidelines for Canadian, Australian and British judges about social media use.

Many Australian judges already have public presences on social media: the Chief Justice of the Supreme Court of Victoria, Marilyn Warren, blogs for the *Herald Sun* newspaper in Victoria;² Judge Judith Gibson of the New South Wales District Court uses social media;³ the Deputy Chief Magistrate of Tasmania, Michael Daly, uses Facebook;⁴ some Australian Registrars have accounts on LinkedIn.⁵ A large proportion of Australians in general use social media,⁶ and thus it is likely that many Australian judges use social media as well. The situation is similar for American judges. A 2012 survey of 623 American judges from state courts about their use of social media revealed that 46.1 per cent of the judges surveyed used social media.⁷ This had increased from 43.6 per cent in 2011.⁸

¹ Chief Justice Beverley McLachlin, 'The Relationship Between the Courts and the Media' (Speech delivered at Carleton University, Ottawa, Canada, 31 January 2012) [34]

<<http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2012-01-31-eng.aspx>>.

² Alysia Blackham and George Williams, 'Australian Courts and Social Media' (2013) 38(3) *Alternative Law Journal* 170, 174.

³ ABC Radio National, 'Justice Tweeted Is Justice Done', *The Law Report*, 9 July 2013 (Judith Gibson J).

⁴ Philip Heyward, 'New Delay in Ellis Case as Deputy Seeks Trial Advice', *The Mercury* (online), 14 December 2013, [7]–[8] <<http://www.themercury.com.au/news/scales-of-justice/facebook-friendship-could-rule-senior-magistrate-out-of-hearing-dpp-tim-elliss-case-court-told/story-fnj8cre7-1226782479607>>.

⁵ See, eg, the LinkedIn profile of a Registrar at the Department of Justice in Victoria, Candice Batty, <http://www.linkedin.com/profile/view?id=195809811&authType=NAME_SEARCH&authToken=0Hxl&locale=en_US&srchid=836916851389236176602&srchindex=1&srchttotal=1&trk=v srp_people_res_name&trkInfo=VSRPsearchId%3A836916851389236176602%2CVSRPtargetId%3A195809811%2CVSRPcmpt%3Aprimary> and the LinkedIn profile of the Principal Registrar at the Supreme Court of Victoria, Peter Washington, <http://www.linkedin.com/profile/view?id=10427582&authType=NAME_SEARCH&authToken=Mdwd&locale=en_US&srchid=836916851389236423870&srchindex=2&srchttotal=31265&trk=v srp_people_res_name&trkInfo=VSRPsearchId%3A836916851389236423870%2CVSRPtargetId%3A10427582%2CVSRPcmpt%3Aprimary>.

⁶ Brian Fitzgerald, Cheryl Foong and Megan Tucker, 'Web 2.0, Social Networking and the Courts' (2011) 35(3) *Australian Bar Review* 281, 281.

⁷ Conference of Court Public Information Officers, *2012 CCPIO New Media Survey* (31 July 2012) 4 <<http://ccpio.org/wp-content/uploads/2012/08/CCOIO-2012-New-Media-ReportFINAL.pdf>>.

⁸ *Ibid* 5.

The topic of social media has become one ‘of particular interest to judges because of the public nature of the activities and the multitude of topics on which comments may be posted and viewed’.⁹ American academics and State ethical advisory groups have given judicial social media use considerable attention. Cynthia Gray, director of the American Judicature Society Center for Judicial Ethics, states that, ‘[a]lthough social networks are a relatively new phenomenon, some judges have already begun to display a lack of judgment usually associated with teenagers.’¹⁰ Later, this chapter provides some examples of judges who have displayed a lack of judgment in regard to social media use. Despite these examples, John Z Vertes J of the Supreme Court of the Northwest Territories in Canada¹¹ believes that there has been insufficient study of the ethical challenges judges face due to social media.¹²

The purpose of this chapter is to examine some of the issues surrounding Australian judges’ use of social media. As mentioned, it is crucial that judges uphold high standards of behaviour so that Australians ‘have confidence in [the] judiciary’.¹³ This standard should also apply to social media use. If judges use social media inappropriately, they risk lowering the public’s confidence in the judiciary.

This chapter gives a brief history of regulating judges’ behaviour. It then outlines the problems that can occur when judges use social media and briefly discusses the guidelines (or lack thereof) available to judges in Australia, Canada, the United States and the United Kingdom on this subject to date. The following specific issues are considered: (1) whether Australian judges should be prevented from using social media, (2) whether Australian judges should be discouraged from becoming friends on social media with lawyers who may appear before them, and (3) ex parte communication on social media. In particular, it discusses whether written guidelines on social media use are necessary for Australian judges, examining these issues in light of whether existing case law and ethical guidelines in Australia assist judges with social media concerns. Ultimately, it is argued that social media present outlets for communication that may not occur in any other context, so guidelines for judges about how to use them are necessary in order to maintain the public’s confidence in

⁹ 01 Informal Op. Utah Ethics Advisory Committee (2012).

¹⁰ Cynthia Gray, ‘The Too Friendly Judge? Social Networks and the Bench’ (2010) 93(6) *Judicature* 236, 237.

¹¹ Health Services Preferential Access Inquiry, *Commissioner Mr Justice John Z Vertes* (2013), [3] <<https://healthaccessinquiry.com/assets/pdf/Justice-Vertes-Biography.pdf>>.

¹² Justice John Z Vertes, ‘Should Judges Be on Facebook?’ (2011) 19(2) *Commonwealth Judicial Journal* 3, 3.

¹³ Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at March 2007) ix.

the judiciary. The use of social media by judges as educational tools is beyond the scope of this chapter.

In order to understand this chapter, a brief explanation of the word ‘recuse’ is necessary. Recuse means that a judge decides not to preside over a hearing or trial.¹⁴

2.2 A Brief History of Regulating Judicial Behaviour

If people contact judges on social media or make general comments it calls into question the impartiality of the judiciary. There are rules governing this behaviour that put pressure on judges. Section 72 of the Australian Constitution states that federal judges would ‘not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour and incapacity.’¹⁵ This protects judges from people trying to put pressure on them to make a specific decision.

2.2.1 The Position in Australia

In the mid-1980s, some senior Australian judicial officers were accused of ‘serious misconduct’. For example, in 1985 and 1986, Lionel Murphy J of the High Court of Australia faced a parliamentary commission of inquiry into whether he should be dismissed from his position.¹⁶ Justice Murphy was accused of attempting to pervert the course of justice¹⁷ by speaking to the Chief Magistrate of New South Wales and a District Court Judge about his friend, solicitor Morgan Ryan. Ryan was charged with two indictable offences. It was alleged that Murphy tried to influence the Chief Magistrate and the District Court Judge to be positively biased towards Ryan.¹⁸ This resulted in the New South Wales Parliament passing the *Judicial Officers Act 1986* (NSW), which created the Judicial Commission of New South Wales, an independent organisation that receives and investigates complaints about judicial

¹⁴ *Collier v NSW* [2014] NSWSC 1073 (13 August 2013) [3] (Harrison J).

¹⁵ *Australian Constitution* s 72.

¹⁶ Judge Ronald Sackville, ‘Judicial Ethics and Judicial Misbehaviour: Two Sides of the One Coin’ (2009) 3 *Public Space: The Journal of Law and Social Justice* 1, 2.

¹⁷ A R Blackshield, ‘The Appointment and Removal of Federal Judges’ in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 400, 411.

¹⁸ Nicholas Cowdery, ‘Reflections on the Murphy Trials’ (2008) 27(1) *University of Queensland Law Journal* 5, 7.

officers.¹⁹ The *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth) established a mechanism for the public to complain to the heads of Federal Courts about judicial officers.²⁰

In 2001, Chief Justice John Doyle of the Supreme Court of South Australia wrote an article recommending that the Australian Institute of Judicial Administration or the Council of Chief Justices of Australia and New Zealand create written guidelines for judicial behaviour.²¹ The Council of Chief Justices of Australia, a non-statutory body comprised of the Chief Justice of the High Court and the heads of superior Federal, State and Territory Courts, instructed two retired judges to draft the guidelines.²² Staff of the Australian Institute of Judicial Administration published the first edition of the *Guide to Judicial Conduct* in 2002²³ and a second edition in 2007 (AIJA Guide).²⁴ The AIJA Guide gives judges advice about the community's expectations of them.²⁵ In particular, the AIJA Guide discusses issues that judges may be unclear about.²⁶ Justice Ronald Sackville of the Court of Appeal of the Supreme Court of New South Wales believes that the AIJA Guide 'emerged as a response to social changes and the more diverse composition of the judiciary'.²⁷ Additionally,

[a]lthough the Guide has considerable prestige, it has no legal standing. Moreover, it is indicative or suggestive, and not prescriptive. Nonetheless, in terms of identifying issues for consideration by judicial officers in relation to personal relationships, it reflects and explores legal principles stated in judgments of the High Court of Australia.²⁸

In *Willoughby City Council v Transport Infrastructure Development Corporation*,²⁹ David Lloyd J said that the AIJA Guide 'reinforced [his] view'³⁰ on his decision about whether the Acting Commissioner hearing the case with him should be disqualified for bias because his

¹⁹ Sackville, above n 16, 4.

²⁰ Explanatory Memorandum, *Courts Legislation Amendment (Judicial Complaints) Bill 2012* (Cth) 1.

²¹ See John Doyle CJ, 'Judicial Standards: Contemporary Constraints on Judges — The Australian Experience' (2001) 75(2) *Australian Law Journal* 96, 101.

²² Sackville, above n 16, 7.

²³ Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at 2002).

²⁴ Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at 2007).

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Sackville, above n 16, 14.

²⁸ *DPP v McNamara* [2012] NTSC 81 (12 October 2012) [19] (Barr J).

²⁹ *Willoughby City Council v Transport Infrastructure Development Corporation* [2008] NSWLEC 231 (12 August 2008) (Lloyd J).

³⁰ *Ibid* [13].

son was a partner in the firm acting for the respondent.³¹ Approximately half a dozen Australian judgments quote the AIJA Guide.³²

2.2.2 The Position in the United States

In the 1920s, Kenesaw Mountain Landis J of the United States District Court for the Northern District of Illinois took a second job as a Major League Baseball commissioner to earn extra income.³³ As commissioner, Landis J had to decide whether teams and players were guilty of crimes such as gambling and bribery.³⁴ Some lawyers believed that Landis J created ethical problems by serving in both positions, but could not find a law or ethical rule that forbade him from doing so.³⁵ As a result, the American Bar Association passed *Canons of Judicial Ethics*³⁶ in 1924,³⁷ presenting rules of conduct for judges.³⁸

The Canons were modified and released as the *Code of Judicial Conduct* in 1972.³⁹ The Code was released again as the *ABA Model Code of Judicial Conduct*, and the staff of most American state regulatory bodies adopted it.⁴⁰ There is another version of this Code for the American federal judiciary: the *Code of Conduct for United States Judges*.⁴¹

2.2.3 The Position in Canada, the United Kingdom and Internationally

There are ethical materials for judges in Canada and the United Kingdom that are similar to the AIJA Guide. The Canadian Judicial Council released *Commentaries on Judicial Conduct* in 1991 and *Ethical Principles for Judges*⁴² in 1998.⁴³ The Judges' Council of England and

³¹ Ibid [1], [8].

³² See, eg, *Barmettler v Greer* [2007] QCA 170 (25 May 2007) [41] (McMurdo P, Williams and Jerrard JA); *Szded v Minister for Immigration* [2006] FMCA 96 (9 March 2006) [22] (Nicholls FM); *DPP (Cth) v Thomas* [2005] VSC 85 (6 April 2005) [17] (Teague J).

³³ Daniel Smith, 'When Everyone is the Judge's Pal: Facebook Friendship and the Appearance of Impropriety Standard' (2012) 3(1) *Journal of Law, Technology & The Internet* 1, 10.

³⁴ Ibid.

³⁵ Ibid 11.

³⁶ Sackville, above n 16, 12.

³⁷ Smith, above n 33, 11.

³⁸ Ibid.

³⁹ American Bar Association, *Model Code of Judicial Conduct: Preface*, [1].

⁴⁰ James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 296.

⁴¹ United States Courts, *Code of Conduct for United States Judges* (2 June 2011) <<http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx>>.

⁴² Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at 2007) vii.

⁴³ Vertes, above n 12, 3.

Wales released the *Guide to Judicial Conduct* in 2004.⁴⁴ The AIJA Guide and the similar Canadian and British guidelines ‘tend to be limited to providing guidance rather than binding authority’.⁴⁵ Despite this failure to provide binding authority, the simple fact that these guidelines exist and the public’s ability to easily find them online may increase the public’s confidence in the judiciary. The average person reading these documents can likely learn and understand some of the ethical standards that are generally expected of the judiciary.

In 2000, the Centre for International Crime Prevention of the Secretariat asked the Judicial Group on Strengthening Judicial Integrity to create a document that later became known as the Bangalore Principles. Some of the Bangalore Principles state that judges must be impartial, have integrity and treat all people equally.⁴⁶ The Bangalore Principles state ethical guidelines for judges worldwide to follow.⁴⁷ The Bangalore Principles are ‘widely accepted’ and many jurisdictions use them as a model.⁴⁸ The Bangalore Principles are an example of the importance of ethical guidelines for judges internationally.

This section has shown that attention has been given to guidelines for judicial conduct, particularly during the past 20 years. The next section will examine why judges using social media can cause problems. This is important because it will inform the later discussion considering whether judges should be prevented from using social media.

2.3 Potential Problems with Judges Using Social Media

There are several reasons why judges using social media can be a problem. As stated previously, Australian courts depend on public confidence in the judiciary for their authority;⁴⁹ when the public has confidence in the judiciary, they are more likely to respect

⁴⁴ Ibid.

⁴⁵ Sarah M R Cravens, ‘Promoting Public Confidence in the Regulation of Judicial Conduct: A Survey of Recent Developments and Practices in Four Common Law Countries’ (2010) 42(1) *McGeorge Law Review* 177, 195.

⁴⁶ Judicial Group on Strengthening Judicial Integrity, *Strengthening Basic Principles of Judicial Conduct* (2006) United Nations Office on Drugs and Crime
<http://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf>.

⁴⁷ Judge Michael Kirby, ‘Judicial Accountability in Australia’ (2003) 6(1) *Legal Ethics* 41, 53.

⁴⁸ Robert Nicholson AO, ‘Updating Asian-Pacific Judicial Conduct Provisions’ (2008) 17(3) *Journal of Judicial Administration* 144, 144.

⁴⁹ *Cesan v R* (2008) 236 CLR 358, 380 (French J).

and abide by judges' decisions.⁵⁰ Judges must refrain from acting in a way that 'will erode public confidence in the judiciary, or impair respect for the judicial office'⁵¹ both within and outside of their work.⁵² This means that judges must act impartially and appear impartial.⁵³

Justice John Vertes states that conventional communications give judicial officers time to think between writing a message and sending it, whereas social media use is immediate. This immediacy increases '[t]he opportunities for a judge to engage in spontaneous and ill-considered communications that may reflect badly on the judiciary'.⁵⁴ In other words, because of this immediacy, judges may write comments without considering their consequences.⁵⁵ These comments may negatively affect their reputation and the judiciary's image.⁵⁶ Further, comments written on social media can be sent to thousands of people without the judge who wrote them knowing or approving.⁵⁷ Comments on social media may be permanent, even if they are deleted.⁵⁸ They may also be public.⁵⁹

Genelle Belmas states that 'it is easy to imagine situations in which judges could use social media sites in ways that suggest impropriety, and just as easy to imagine situations that seem innocuous on the surface but that could develop into problems.'⁶⁰ Belmas provides the example of a judge who posts information on a Facebook page that supports a football team. The football team's coach is fired and sues the team. The case then comes before the judge.⁶¹ In that situation the judge should disqualify him or herself from the case because the public may reasonably believe that the judge's comments demonstrate that he or she has a bias towards the football team.

⁵⁰ Chief Justice Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 14(7) *Judicial Officers' Bulletin* 49, 49–50.

⁵¹ Doyle, above n 21, 98.

⁵² *R v Debono* (2012) 268 FLR 261, 282 (Kryrou J).

⁵³ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363 (Gaudron J).

⁵⁴ Vertes, above n 12, 4.

⁵⁵ Angela O'Brien, 'Are Attorneys and Judges One Tweet, Blog or Friend Request Away from Facing a Disciplinary Committee?' (2010) 11(2) *Loyola Journal of Public Interest Law* 511, 529.

⁵⁶ Julien Goldszlagier, Julie Hugues and Florence Lardet, *Magistrates' Ethics and Deontology: The Ethical Challenges of Internet Use By Judges* (2012) European Judicial Training Network, 13 <<http://www.ejtn.net/Documents/Themis%202012/THEMIS%202012%20ERFURT\%20DOCUMENT/Written%20paper%20France%204.pdf>>.

⁵⁷ Judge's Use of Electronic Social Networking Media, 462 American Bar Association Formal Opinion 2 (2013).

⁵⁸ *Ibid.*

⁵⁹ Aurora J Wilson, 'Let's Be Cautious Friends: The Ethical Implications of Social Networking for Members of the Judiciary' (2012) 7(3) *Washington Journal of Law, Technology & Arts* 225, 228.

⁶⁰ Genelle I Belmas, 'That's What "Friend" Is For? Judges, Social Networks and Standards for Recusal' (2011) 1(2) *Reynolds Court and Media Law Journal* 147, 150.

⁶¹ *Ibid.* 160.

There have been cases in the United States where judges have misused social media. This misuse has been to varying degrees of seriousness. On the lower end of the spectrum is Judge Thomas A Placey of the Cumberland County Court in Pennsylvania,⁶² who was criticised for permitting himself to serve as the judge at a preliminary hearing in which the defendant was his Facebook friend.⁶³ Judge Placey stated that he was not a friend of the defendant in reality and that he never refused a Facebook friend request.⁶⁴ Judge Matthew Destry of the Broward Circuit Court in Florida tweeted from the courtroom about upcoming cases and posted photos of lawyers before him. Whether Judge Destry's behaviour was highly inappropriate would depend on the words that he tweeted. If Judge Destry simply tweeted comments about what he saw in the courtroom, journalists would have been able to tweet something similar, if they were permitted to use social media in the courtroom (journalists' use of social media in the courtroom is discussed in detail in Chapter Five). Judge Destry's photographing of lawyers who appeared before him was probably unprofessional and out of the ordinary. A lawyer who appeared before Judge Destry requested that he not tweet during the trial.⁶⁵ On the higher end of the spectrum is Chief Judge Ernest Woods of the Mountain Judicial Circuit Court in Georgia, who initiated Facebook contact with an accused appearing before him.⁶⁶ The Chief Judge and the accused discussed the accused's case strategy on Facebook.⁶⁷ The accused also asked the Chief Judge if she could borrow money from him.⁶⁸ When the District Attorney attempted to discuss the Facebook exchange with the Chief Judge, His Honour stood down from his position.⁶⁹ If social media did not exist and the Chief Judge had to use a less instantaneous communication tool, perhaps he would have thought more carefully before acting. If that had been the case, perhaps he would still work as a judge. The majority of the

⁶² Pennsylvania Cumberland County Court, *Judge Bios*, [7] <<http://www.ccpa.net/index.aspx?nid=1957>>.

⁶³ Courtney Daniels, 'Pennsylvania Judges Under Fire For Their Use of Social Media' on University of Miami School of Law, *Legal Ethics in Motion* (8 March 2012) [2] <<http://www.legalethicsinmotion.com/2012/03/pennsylvania-judges-under-fire-for-their-use-of-social-media/>>.

⁶⁴ *Ibid*.

⁶⁵ William E Lewis Jr, 'Order in the Court as Broward Circuit Judge Matt Destry Turns to Twitter', *The Examiner* (online), 21 May 2013 <<http://www.examiner.com/article/order-the-court-as-broward-circuit-judge-matt-destry-turns-to-twitter>>.

⁶⁶ Debra Cassens Weiss, 'Ga. Judge Resigns After Questions Raised About Facebook Contacts' (2010) *ABA Journal*, [1] <http://www.abajournal.com/news/article/ga._judge_resigns_after_questions_raised_about_facebook_contacts/>.

⁶⁷ *Ibid* [7].

⁶⁸ *Ibid* [6].

⁶⁹ *Ibid* [8].

American advisory opinions about judges using social media state that judges face ethical dangers if they use social media.⁷⁰

In Australia, the Chief Magistrate of Tasmania, Michael Hill, disqualified himself from hearing a case that involved a former prosecutor, Tim Ellis, who was charged with death by negligent driving.⁷¹ The Deputy Chief Magistrate of Tasmania, Michael Daly, was then assigned to the case. However, His Honour informed the parties that he was a Facebook friend of the accused's wife and he had met with the accused several times socially.⁷² He asked the prosecution and the accused to provide submissions about whether he should be disqualified from the case.⁷³ This situation demonstrates that judicial officers using social media in Australia can be a problem, because the Deputy Chief Magistrate's use of social media caused confusion about whether he should preside over Ellis' trial. This took up the parties' lawyers' time with the need to write submissions on the matter.

Having established that the use of social media by judges can be problematic, the following section will examine the actions that staff of Australian, Canadian, American and British judicial organisations have taken to address this matter to date.

2.4 Background to the Actions that Judicial Regulators Have Taken to Date

Staff of organisations regulating or advising on judicial conduct in Australia, the United States, Canada and the United Kingdom have chosen different courses of action (including inaction) in advising judges about social media use.

⁷⁰ Nathanael J Mitchell, 'Judge 2.0: A New Approach to Judicial Ethics in the Age of Social Media' [2012] 4 *Utah Law Review* 2127, 2137.

⁷¹ David Benjuk, 'Facebook Friend Could Rule Magistrate Out', *The West Australian* (online), 13 December 2013, [2], [4] <<http://au.news.yahoo.com/thewest/a/20303999/facebook-friend-could-rule-magistrate-out/>>.

⁷² Heyward, above n 4, [7]–[8].

⁷³ *Ibid* [15].

2.4.1 The Position in Australia

In Australia, information about regulating judicial conduct is found in various places, including case law, the AIJA Guide,⁷⁴ legislation and books about judicial ethics.⁷⁵ None of these sources of information currently mention the use of social media by judges.

2.4.2 The Position in Canada

In Canada, no cases exist to date regarding a judge who has used social media inappropriately.⁷⁶ Canada's *Ethical Principles for Judges*⁷⁷ does not mention judicial social media use, nor yet does Canadian legislation. Staff of the Canadian Judicial Council have released three documents, *Is Skype Safe for Judges?*,⁷⁸ *Facebook and Social Networking Security*,⁷⁹ and *Blueprint for the Security of Judicial Information*,⁸⁰ which explain security issues involving social media, but provide little guidance on judges' social media use.

2.4.3 The Position in the United Kingdom

The United Kingdom's *Guide to Judicial Conduct* briefly mentions judicial social media use. It also explains privacy and security problems of which judges should be aware.⁸¹ It does not advise judges about whether they can 'friend' on social media lawyers who appear before them, or whether judges can communicate with these lawyers on social media during the course of their appearance. There is as yet no case law or legislation on this subject in the United Kingdom.⁸² Sir John Goldring, Lord Justice of Appeal of the Court of Appeal of England and Wales, released guidelines that state that judicial officers cannot post controversial opinions on social media. The guidelines state that it is irrelevant whether

⁷⁴ Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at 2007), ix.

⁷⁵ Kirby, above n 47, 53.

⁷⁶ Vertes, above n 12, 5.

⁷⁷ Canadian Judicial Council, *Ethical Principles for Judges* (2004)

<www.cjc-ccm.gc.ca/.../news_pub_judicialconduct_Principles_en.pdf>.

⁷⁸ Martin Felsky, *Is Skype Safe for Judges?* (6 July 2010) Canadian Judicial Council

<<http://www.cjc-ccm.gc.ca/cmslib/general/JTAC-Ssc-Skype-security-article-FinalE.pdf>>.

⁷⁹ Martin Felsky, *Facebook and Social Networking Security* (November 2009) Canadian Judicial Council

<<http://www.cjc-ccm.gc.ca/cmslib/general/JTAC-Ssc-Report-to-JTAC-2010-01-29-Appendix-C-Facebook-ArticleE.pdf>>.

⁸⁰ Martin Felsky, *Blueprint for the Security of Judicial Information* (2009) Canadian Judicial Council

<<http://www.cjc-ccm.gc.ca/cmslib/general/JTAC-ssc-Blueprint-Third-edition-finalE.pdf>>.

⁸¹ Judges' Council, *Guide to Judicial Conduct* (August 2011) Judiciary of England and Wales, r 8.12.1.

⁸² The author searched for case law and legislation on this subject on 31 December 2013.

judicial officers post controversial opinions anonymously,⁸³ and also require judicial officers to delete any such opinions that they have already posted. Judicial officers who disobey the guidelines may be sanctioned.⁸⁴

2.4.4 The Position in the United States

The greatest body of literature about judges' social media use comes from the United States. Staff of judicial ethics committees in the following states have published advisory opinions on this issue: Florida,⁸⁵ New York,⁸⁶ Utah,⁸⁷ Maryland,⁸⁸ South Carolina,⁸⁹ Massachusetts,⁹⁰ Tennessee,⁹¹ Ohio,⁹² California,⁹³ Oklahoma⁹⁴ and Kentucky.⁹⁵ Staff of the American Bar Association have also released a formal opinion.⁹⁶ Some American case law,⁹⁷ several journal articles⁹⁸ and a written reprimand of a District Court Judge⁹⁹ also exist on this subject.

It is possible that there is a paucity of guidelines about social media use for judges because social media is relatively new and the staff of relevant judicial bodies have not had the ability to produce such guidelines. Staff of judicial bodies may also believe that existing guidelines

⁸³ Martin Beckford, 'Judges Banned from Blogging or Tweeting about Cases', *The Telegraph* (online), 15 August 2012, [1]

<<http://www.telegraph.co.uk/news/uknews/law-and-order/9477275/Judges-banned-from-blogging-or-tweeting-about-cases.html>>

⁸⁴ Ibid [2].

⁸⁵ 20 Op. Florida Supreme Court Judicial Ethics Advisory Committee (2009); 06 Op. Florida Supreme Court Judicial Ethics Advisory Committee (2009); 12 Op. Florida Supreme Court Judicial Ethics Advisory Committee (2012).

⁸⁶ 08-176 Op. New York Advisory Committee on Judicial Ethics (2009).

⁸⁷ 01 Op. Utah Ethics Advisory Committee Informal Opinion (2012).

⁸⁸ Judge Must Consider Limitations on Use of Social Networking Sites, 07 Op. Maryland Judicial Ethics Committee, 5 (2012).

⁸⁹ 17 Op. South Carolina Judicial Department Advisory Committee on Standards of Judicial Conduct (2009).

⁹⁰ Facebook: Using Social Networking Website, 6 Op. Massachusetts Committee on Judicial Ethics (2011).

⁹¹ 01 Op. Tennessee Judicial Ethics Committee, 3-4 (2012).

⁹² 7 Op. The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, 8 (2010).

⁹³ Online Social Networking, 66 Op. California Judges' Association Judicial Ethics Committee, 7 (2010).

⁹⁴ 3 Op. Oklahoma Judicial Ethics Advisory Panel (2011).

⁹⁵ Judges' Membership on Internet-Based Social Networking Sites, JE-119 Op. Ethics Committee of the Kentucky Judiciary, 2 (2010).

⁹⁶ Judge's Use of Electronic Social Networking Media, 462 American Bar Association Formal Opinion 1 (2013).

⁹⁷ See, eg, *Domville v Florida*, 103 So 3d 184, 185 (Fla, 2012).

⁹⁸ See, eg, Justice Craig Estlinbaum, 'Social Networking and Judicial Ethics' (2012) 2(1) *St. Mary's Journal on Legal Malpractice and Ethics* 2; Belmas, above n 60; Kellen A Hade, 'Not All Lawyers Are Antisocial: Social Media Regulation and the First Amendment' (2011) 1 *Journal of the Professional Lawyer* 133; Justice Herbert B Dixon Jr, 'The Black Hole Effect: When Internet Use and Judicial Ethics Collide' (2010) 49(4) *Judges Journal* 38.

⁹⁹ Public Reprimand of B. Carlton Terry Jr., N.C. Judicial Standards Comm'n Inquiry No 08-234 (2009).

about judicial ethics can apply to social media, and may not see a need to produce new guidelines about social media use.

While the American body of guidelines and literature is helpful in considering the position that Australian judicial officers should adopt regarding social media use, one must remember that American and Australian judges differ in some important ways. For example, 87 per cent of American State judges are elected,¹⁰⁰ while Australian judges are all appointed.¹⁰¹ American Federal judges are also appointed.¹⁰² Nearly 10 000 of the approximately 30 000 elected State American judges have no legal background or exposure to judicial ethics.¹⁰³ As a result, guidelines for Australian judges should differ at least partially to guidelines for American judges.

Staff of American legal regulatory bodies may be ahead of other jurisdictions on this issue because many judges use social media as part of their election campaigns;¹⁰⁴ elected judges are more likely to use social media than unelected judges.¹⁰⁵ Elected judges need to engage with the public themselves more than unelected judges do. Using social media is a useful and cost-effective way for elected judges to achieve this. Another reason why American regulators may be ahead in this area is because American judges are asking state ethical bodies for guidance on this subject and the ethical bodies make their answers public.¹⁰⁶ If Australian judges are asking for guidelines about this issue, the available research does not show it.

Staff of the legal bodies in the four jurisdictions discussed (Australia, Canada, United Kingdom, and the United States) took different actions regarding providing guidelines to judges about social media use. The following section will discuss specific situations involving judges' potential social media use.

¹⁰⁰ 'Guilty, your Honour?', *The Economist* (online), 22 July 2004 <<http://www.economist.com/node/2946978>>.

¹⁰¹ *Australian Constitution* s 72(i).

¹⁰² *United States Constitution* art III.

¹⁰³ Justice Douglas Drummond, 'Do Courts Need A Complaints Department?' (2001) 21(1) *Australian Bar Review* 22, 28–29.

¹⁰⁴ Goldszlagier, Hugues and Lardet, above n 56, 2; Samuel Vincent Jones, 'Judges, Friends, and Facebook: The Ethics of Prohibition' (2011) 24(2) *Georgetown Journal of Legal Ethics* 281, 300.

¹⁰⁵ Goldszlagier, Hugues and Lardet, above n 56, 2.

¹⁰⁶ For example, see the advisory opinions of the relevant ethical organisations in Maryland, Utah, South Carolina, Kentucky and New York later in this chapter.

2.5 Examining Specific Issues

2.5.1 Should Australian Judges Be Discouraged from Using Social Media?

Whether Australian judges should be discouraged from using social media is a new issue, and existing Australian judicial ethical resources do not directly apply to it. It is argued here that Australian judges should not be discouraged from using social media altogether, but that there should be some limits on their use.

International empirical research does not support preventing judges from using social media. As previously stated, an American survey of 623 judicial officers revealed that 46.1 per cent of those surveyed used social media.¹⁰⁷ Given this high proportion, it would be important to ensure that it is indeed problematic before asking so many to stop using it. Admittedly, there are differences between Australian judges and the American judges surveyed. However, the survey still supports the view that Australian judges should not be discouraged from using social media. Staff of the International Bar Association surveyed approximately 60 bar associations internationally about social media.¹⁰⁸ One of the questions asked was whether judges should cease their social media use upon becoming judges. Over 70 per cent of respondents answered in the negative.¹⁰⁹ Members of three of the associations questioned were Australian: the Australian Bar Association, the Law Society of New South Wales and the South Australian Bar Association.¹¹⁰ While three bar associations out of 60 is not many, it suggests that members of Australian bar associations may be in favour of Australian judges using social media.

Different opinions exist about how Australian judges should live outside of their work. The AIJA Guide states that some people believe that judges choose a ‘monastic’ life that involves few activities outside their judicial work.¹¹¹ Living this way may engender public respect for judges; however, critics of this ‘monastic’ life believe that judges are ‘remote’ from the rest

¹⁰⁷ Conference of Court Public Information Officers, above n 7, 5.

¹⁰⁸ Legal Projects Team, *The Impact of Online Social Networking on the Legal Profession and Practice* (February 2012) International Bar Association, 8 <http://www.ibanet.org/Committees/Divisions/Legal_Practice/Impact_of_OSN_on_LegalPractice/Impact_of_OSN_Home.aspx>.

¹⁰⁹ Ibid 16.

¹¹⁰ Ibid 8.

¹¹¹ Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at 2007), 1.

of society, which could lower confidence in the judiciary.¹¹² This way of thinking would apply to the ‘restrictive approach’ of judges using social media. The ‘restrictive approach’ states that judges should not use social media at all, or else use it in a very limited way.¹¹³

The AIJA Guide states that the more commonly accepted judicial lifestyle is for judges to participate in their communities so that they remain in touch with them.¹¹⁴ Justice James Thomas AM of the Supreme Court of Queensland, adds that

a capacity to understand community attitudes and the practicalities of everyday life is essential to the dispensation of justice. How else can a judge realistically assess damages, sentence offenders, decide if something is capable of being defamatory, tell if something is in the public interest, spot the tricky witness, or make true to life findings of fact on the myriads of controversial issues that come before the courts?¹¹⁵

Social media is a part of life and Australian judges should be able to use it for a number of reasons. Given how prevalent social media is, as time passes it will become increasingly likely that a lawyer has used social media prior to his or her judicial appointment. It may be onerous for a judge to cease that aspect of his or her life for work. While some may argue that judges are expected to have ‘some limitations in private and public conduct’¹¹⁶, it would be unfair to expect judges to sacrifice activities that are unlikely to reduce confidence in the judiciary if undertaken responsibly. Social media may enable Australian judges to stay in touch with their family, friends and community. If judges are prevented from using social media, they may not ‘understand changing social values’.¹¹⁷ In the past, judges could learn about the social values of the majority of Australians in different ways, such as reading print newspapers; that may not be the case today.¹¹⁸ Social media may also make it easier for Australian judges to stay in touch with judges abroad, with whom they can potentially discuss the law in their respective jurisdictions. Some judges use social media creatively in their

¹¹² Ibid.

¹¹³ John G Browning, ‘Why Can’t We Be Friends? Judges’ Use of Social Media’ (2014) 68 *University of Miami Law Review* 487, 489.

¹¹⁴ Ibid 1, 6.

¹¹⁵ Thomas, above n 40, 110; Justice Clifford Einstein, ‘Judicial Ethics [Out of Court Perspective]’ (Paper Presented at the National Judicial Conference, Beijing, 11–13 October 2004) [4].

¹¹⁶ Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at 2007), 6.

¹¹⁷ Judge Judith Gibson, ‘Should Judges Use Social Media?’ (Paper presented at the Australasian Institute of Judicial Administration Public Information Officers’ Conference: Social Media and the Courts, Sydney, 14 June 2013) 13.

¹¹⁸ Ibid.

work; for example, Judge Kathryn Lanan of the Juvenile Court in Galveston, Texas, requires all minors to ‘friend’ her on her Facebook or MySpace page so that she can see if they have acted inappropriately and must appear before her again as a result.¹¹⁹ Judge Lanan’s use of social media in this way may raise ethical issues about whether she should be permitted to monitor minors using this method.

It is acknowledged that the Australian judiciary has considerable integrity.¹²⁰ It is reasonable to expect that people of this calibre are capable of using social media in a way that would not lower confidence in the judiciary. This is especially the case if they are given written guidelines to follow. Current resources for judicial ethics in Australia do not forbid judges from using any other new technology, such as email;¹²¹ it would not make sense to single out social media in this context. Judge Gibson believes that it is ‘too late’ to create a rule that prevents judicial officers from using social media because too many use it already,¹²² and that the better question to consider is what content judicial officers should be permitted to post on social media.¹²³ However, it is arguably not too late to discourage judges from using social media; if the AIJA Guide is amended to state that judges should be discouraged from using social media, then it would be reasonable to expect that Australian judges would shut down their social media accounts voluntarily.

Every American advisory opinion about judges using social media expressly permits social media use.¹²⁴ The United Kingdom’s *Guide to Judicial Conduct* states that it ‘is a matter of personal choice’ whether judges use social media.¹²⁵ Some judges and retired judges have provided written support for the judiciary’s use of social media. Justice John Vertes is one

¹¹⁹ Michael C Smith, ‘The “Best of” Litigation Update 2012: Social Media Update’ (2012) 58 *Advocate* 15, 16.

¹²⁰ Kirby, above n 47, 54.

¹²¹ For example, the AIJA Guide does not say that judges cannot use email.

¹²² Gibson, above n 3, 2.

¹²³ *Ibid.*

¹²⁴ 20 Op. Florida Supreme Court Judicial Ethics Advisory Committee (2009); 08-176 Op. New York Advisory Committee on Judicial Ethics (2009); 01 Op. Utah Ethics Advisory Committee Informal Opinion (2012); Judge Must Consider Limitations on Use of Social Networking Sites, 07 Op. Maryland Judicial Ethics Committee 5 (2012); 17 Op. South Carolina Judicial Department Advisory Committee on Standards of Judicial Conduct (2009); Facebook: Using Social Networking Website, 6 Op. Massachusetts Committee on Judicial Ethics (2011); 01 Op. Tennessee Judicial Ethics Committee, 3–4 (2012); 7 Op. The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline 8 (2010); Online Social Networking, 66 Op. California Judges’ Association Judicial Ethics Committee 7 (2010); 3 Op. Oklahoma Judicial Ethics Advisory Panel (2011); Judges’ Membership on Internet-Based Social Networking Sites, JE-119 Op. Ethics Committee of the Kentucky Judiciary 2 (2010).

¹²⁵ Judges’ Council, *Guide to Judicial Conduct* (August 2011) Judiciary of England and Wales, r 8.12.1.

example. He states that preventing judges from using social media ‘would be a far-reaching intrusion into their private lives’.¹²⁶ Justice Estlinbaum of the 130th Judicial District Court of Texas¹²⁷ also supports not preventing judges from using social media.¹²⁸

Belmas states that discouraging judges from using social media would be ‘an extreme solution to a currently small problem’.¹²⁹ The small problem to which Belmas is likely referring is the number of American judges who have used social media inappropriately to date. Jonathan McArthur, a former substitute judge at the North Las Vegas Justice Court, is one such judge. McArthur listed his personal interests on MySpace as ‘breaking my foot in a prosecutor’s ass ... and improving my ability to break my foot in a prosecutor’s ass’.¹³⁰ This appeared to show a bias against prosecutors.¹³¹ A District Attorney saw McArthur’s MySpace page and recommended to the North Las Vegas Justice Court administrator that McArthur be disqualified.¹³² McArthur was later stood down from his position.¹³³ While McArthur may only have been a substitute judge, he presided over trials; the public would be entitled to expect that his behaviour inside and outside of court be as impeccable as that of a permanent judge. McArthur’s possession of a MySpace page let others easily and quickly learn about his bias towards prosecutors. Had the only evidence of McArthur’s potential bias been in the implementation of his decisions, detecting the bias would have been more difficult. McArthur’s case appears to be an extreme example of a judge using social media inappropriately.

While the present author recommends that Australian judges should not be discouraged from using social media, it is important that they use it ‘with caution and with the expectation that their use of the media likely will be scrutinized’¹³⁴ because it may become public.¹³⁵ Similarly, Martin Felsky, PhD recommends that judges use social media ‘with caution’ and ‘judiciously’ because judges cannot control what others do with the information that they

¹²⁶ Ibid.

¹²⁷ Estlinbaum, above n 98, 2.

¹²⁸ Ibid 27.

¹²⁹ Belmas, above n 60, 165.

¹³⁰ K C Howard, ‘MySpace Judgment: Guilty’, *Las Vegas Review-Journal* (online), 13 August 2007, [2] <<http://www.lvrj.com/news/9121536.html>>.

¹³¹ Ibid [8].

¹³² Ibid [4].

¹³³ Ibid [15].

¹³⁴ 01 Op. Tennessee Judicial Ethics Committee, 3–4 (2012).

¹³⁵ Judge’s Use of Electronic Social Networking Media, 462 American Bar Association Formal Opinion 1 (2013).

post.¹³⁶ The word ‘judiciously’ is not defined, but one may assume that this refers to using social media in a manner that does not breach existing Canadian ethical guidelines for judges. Australian judges should be careful to use social media in a way that does not breach any existing Australian laws and to consider those sections of the AIJA Guide that could be relevant to social media use. For example, the AIJA Guide states that judges should generally not become involved in controversial political debates,¹³⁷ nor should they comment in public about a trial after the reasons for judgment are published.¹³⁸ Judges should not, therefore, discuss any controversial matter, or a trial, before or after reasons for judgment are published, on social media. The AIJA Guide also states that judges should not fundraise,¹³⁹ so judges should avoid mentioning fundraising activities on social media.

Alternatives exist for judges who want to have a presence on social media, but do not feel comfortable having a personal account. Some of these alternatives are discussed in the sections below.

2.5.1.1 Facebook Fan Page

One possible alternative for judges is to create a Facebook fan page for their public persona that provides information, but is not interactive.¹⁴⁰ This would avoid the argument that there is an appearance of bias if judges and lawyers become friends on social media.¹⁴¹ Unfortunately, if judges have fan pages, instead of personal pages, they may miss some of the important benefits that the average person enjoys from using social media, such as sending messages to their friends.

2.5.1.2 Social Media Site Just for Judges

In Canada, judges have their own social media site, JUDICOM.¹⁴² JUDICOM is restricted to Canadian Federal judges and their staff.¹⁴³ While JUDICOM appears to be a good idea,

¹³⁶ Felsky, above n 79, 10.

¹³⁷ Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at 2007) 23.

¹³⁸ *Ibid* 24.

¹³⁹ *Ibid* 30.

¹⁴⁰ Estlinbaum, above n 98, 25.

¹⁴¹ *Ibid* 26.

¹⁴² Martin Felsky, *Facebook and Social Networking Security* (November 2009) Canadian Judicial Council

Australian judges may not want to implement it, because its design does not allow Federal judges to associate with provincial judges and others outside the judiciary.

2.5.1.3 Separating Social Media for Personal and Professional Uses

It is also possible for judges to have one social medium account that is used personally and another that is used professionally.¹⁴⁴ A judge would rely on the particular social network's privacy settings so that the public could not see the personal account. Judges should not try to rely on social media's privacy settings concealing any information because privacy settings can be unilaterally changed without the user's knowledge or consent and the privacy settings often change.

2.5.2 Australian Judges Being 'Friends' on Social Media with Lawyers who Appear Before Them

If judges use social media, then a subsequent relevant issue to consider is whether judges can or should 'friend' counsel appearing before them on social media. A former Canadian Minister of Justice stated that 'a judge should not be seen dancing with the wife of a litigant who will appear before him the next morning'.¹⁴⁵ This quote demonstrates the importance of judges being careful regarding with whom they associate in public and what they say to those people. For example, a judge should not go for a drink with a barrister who is arguing a matter before him or her.¹⁴⁶ A somewhat similar issue to consider is whether Australian judges should be prevented from being friends on social media with lawyers who may appear before them. The AIJA Guide, case law and existing judicial information are not sufficient to give a definitive answer. The better view for Australian judges based on existing resources is that they should not be prevented from being friends on social media with lawyers who may appear before them.

<<http://www.cjc-ccm.gc.ca/cmslib/general/JTAC-Ssc-Report-to-JTAC-2010-01-29-Appendix-C-Facebook-ArticleE.pdf>>.

¹⁴³ Office of the Commissioner for Federal Judicial Affairs Canada, *JUDICOM Portal* (21 September 2010) [1] <<http://www.judicom.ca/home-eng.html>>.

¹⁴⁴ Editorial, 'Social Networks and the Judiciary' (2013) 96(5) *Judicature* 201, 202.

¹⁴⁵ Justice John Sopinka, 'Must a Judge Be a Monk? — Revisited' (1996) 45 *University of New Brunswick Law Journal* 167, 172.

¹⁴⁶ *Emanuele v Emanuel Investments* (1996) 21 ACSR 83 (30 March 1996) [91] (Debelle J).

The International Bar Association survey previously asked whether judges ‘should discontinue being online contacts with former colleagues comprising advocates and legal practitioners once they become judges’. Of those surveyed, 60 per cent answered no.¹⁴⁷ Given that three of the 60 bar associations surveyed are Australian,¹⁴⁸ this suggests that there may be some support for Australian judges being allowed to remain friends on social media with lawyers who may appear before them.

Advisory opinions from the American State judicial ethics bodies differ on this issue. The majority who wrote the Florida advisory opinion (“Florida Majority”) state that judges cannot add lawyers who may appear before them as friends on social media, because this ‘conveys the impression that the lawyer is in a position to influence the judge’.¹⁴⁹ They add that a judge ‘friending’ a lawyer violates Canon 2B of the Florida Code of Judicial Conduct, which states that ‘[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.’¹⁵⁰ The Massachusetts¹⁵¹ and Oklahoma¹⁵² advisory opinions similarly state that judges should be prevented from being friends with lawyers who may appear before them.¹⁵³

Judge Robert Gross applied the Florida Majority’s opinion in *Domville v Florida*¹⁵⁴ (*Domville*). In *Domville*, the accused requested that the trial judge in his matter be disqualified,¹⁵⁵ because the trial judge and the prosecutor were Facebook friends.¹⁵⁶ The accused submitted that the trial judge was not ‘fair and impartial’ as a result. Judge Gross stated that a judge will be disqualified from a case if the application is ‘legally sufficient’. In a ‘legally sufficient’ application ‘the facts alleged (which must be taken as true) would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial’.

¹⁴⁷ Legal Projects Team, above n 108, 16.

¹⁴⁸ Ibid 8.

¹⁴⁹ 20 Op. Florida Supreme Court Judicial Ethics Advisory Committee (2009).

¹⁵⁰ Ibid.

¹⁵¹ Facebook: Using Social Networking Website, 6 Op. Massachusetts Committee on Judicial Ethics (2011).

¹⁵² 3 Op. Oklahoma Judicial Ethics Advisory Panel (2011).

¹⁵³ It is noted that Justice Stephen Breyer of the United States Supreme Court does not think that judges should be able to have any friends on social media. See Mary-Rose Papandrea, ‘Moving Beyond Cameras in the Courtroom: Technology, the Media, and the Supreme Court’ (2012) 6 *Brigham Young University Law Review* 1901, 1910.

¹⁵⁴ 103 So 3d 184, 185 (Fla, 2012).

¹⁵⁵ Ibid 184.

¹⁵⁶ Ibid 185.

Judge Gross stated that the facts in this case ‘would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial’, so he directed the matter to the Circuit Court ‘for further proceedings consistent with this opinion’. Judge Gross added that ‘judges must be vigilant in monitoring their public conduct so as to avoid situations that will compromise the appearance of impartiality’.¹⁵⁷ Neither Judge Gross, nor any part of the *Domville* judgment, described the friendship between the trial judge and the prosecutor as it existed in reality. The judgment is lacking in that respect. Judge Gross made assumptions about what a Facebook friendship may appear to be to the public, and did not consider that the reality of the friendship was relevant. Venkat Balasubramani comments as follows about *Domville*:

I'm still struggling to see how this is different from other forms of social interaction between lawyers and judges. Social interaction between judges and lawyers happens all the time and is not a basis for disqualification. I think there may be a bit of Facebook exceptionalism going on here.¹⁵⁸

Perhaps Balasubramani missed the point that the publication on Facebook has a different character to an actual friendship. Nicole Black states that Judge Gross’ decision in *Domville* was ‘short-sighted and misguided. Online connections are no different than those made offline. Certain types of offline interactions with judges have always been considered acceptable and are commonplace, such as lunching or golfing with a judge’.¹⁵⁹ Black does not clarify whether or not the golfing and lunching would occur while the lawyer was appearing in a trial before a judge. One would assume that a lawyer and a judge would not fraternise while the lawyer was appearing before the judge, although the same activities would be acceptable at other times.

Several lawyers and academics disagree with the Florida Majority’s opinion. Stephen Gillers of New York University believes that the Florida Majority’s view is ‘hypersensitive’, and that where a judge and a lawyer have a close friendship in reality, opposing counsel can request

¹⁵⁷ Ibid 185–6.

¹⁵⁸ Venkat Balasubramani, ‘Florida Judge Disqualified Over Facebook Friendship with Prosecutor — *Domville v. Florida*’ on Eric Goldman, *Technology & Marketing Law Blog*, [7] (11 September 2012) <http://blog.ericgoldman.org/archives/2012/09/florida_judges.htm>.

¹⁵⁹ Nicole Black, ‘Commentary Legal Loop: Fla. Judge Disqualified for Social Media Activities’, *The Daily Record* (online), 17 September 2012, [8] <<http://nydailyrecord.com/blog/2012/09/17/legal-loop-fla-judge-disqualified-for-social-media-activities/>>.

that the judge be disqualified.¹⁶⁰ Gillers's opinion has merit, because it appears to apply common sense while acknowledging that a genuine close friendship between a judge and a lawyer can be a problem, as opposed to a judge and a lawyer who are friends only on social media and potentially never exchange a single word through that medium. Bill Haltom, a former president of the Tennessee Bar Association, states that the Florida Majority's opinion is 'nonsense on stilts', as he is actual friends with several judges before whom he has appeared, and has not experienced any problems.¹⁶¹ Haltom did not state whether he socialised with the judges with whom he was friends while he appeared before them for a trial or hearing. If Haltom socialised with judges while he was not before them, this should not present any problems.

Kellen Hade states that the Florida Majority's opinion 'probably best illustrates misconceptions the uninitiated harbor about the nature of social media; specifically the mistaken belief that a user will add as friends only those people with whom he socializes on a frequent basis.' Hade adds that "[f]riendships" in a social network are better understood as simple links between people, either on [a] personal or professional level, and even as mere acquaintances'.¹⁶² Hade's definition may be too narrow, however, as it is possible that friends on social media could be very close friends in reality. Angela O'Brien states that the Florida Majority's opinion 'will only stifle the use of these communication devices and prevent these tools from being embraced by the legal community'.¹⁶³ Assuming that O'Brien's comment is accurate, it would be unfortunate if judges in Florida missed out on the benefits of using social media as a result of the Florida Majority.

The minority in the Florida advisory opinion believe that a judge can 'friend' lawyers who may appear before her or him without violating Canon 2B. They state that

social networking sites have become so ubiquitous that the term 'friend' on these pages does not convey the same meaning that it did in the pre-internet age; that today, the term 'friend' on social networking sites merely conveys the message that a person so identified is a contact or

¹⁶⁰ John Schwartz, 'For Judges on Facebook, Friendship Has Limits', *The New York Times* (online), 10 December 2009, [6] <http://www.nytimes.com/2009/12/11/us/11judges.html?_r=0>.

¹⁶¹ Belmas, above n 60, 158–159.

¹⁶² Hade, above n 98, 151.

¹⁶³ O'Brien, above n 55, 539.

acquaintance; and that such an identification does not convey that a person is a ‘friend’ in the traditional sense.¹⁶⁴

The minority’s view is better than the Florida Majority’s¹⁶⁵ because it takes a practical approach to interpreting the word ‘friend’. The Utah advisory opinion permits judges to add lawyers who may appear before them, because this

is not a violation of the Code of Judicial Conduct. Furthermore, the designation of someone as a ‘friend’ on a website such as Facebook does not indicate that the person is a friend under the usual understanding of the term. Many Facebook users have hundreds or even thousands of ‘friends.’ Whether someone is truly a friend depends on the frequency and the substance of contact, and not on an appellation created by a website for users to identify those who are known to the user.¹⁶⁶

The Utah advisory opinion appears similar to the minority’s view in Florida. The advisory opinions of the American Bar Association,¹⁶⁷ and the guidelines in Maryland,¹⁶⁸ Ohio,¹⁶⁹ California,¹⁷⁰ New York¹⁷¹ and Kentucky¹⁷² permit judges to ‘friend’ lawyers who may appear before them on social media. Steven Seidenberg states that ‘friendships in social media are less threatening to judicial impartiality than are friendships in the real world, according to some experts’ because the public can see these relationships, as opposed to friendships in reality, which may be hidden.¹⁷³ Seidenberg’s comment appears reasonable, particularly when coupled with the knowledge that social media friendships may consist of nothing more than the original friendship request. Judges are often friends with lawyers prior

¹⁶⁴ 20 Op. Florida Supreme Court Judicial Ethics Advisory Committee (2009).

¹⁶⁵ See Tal Harari, ‘Facebook Frenzy Around the World: the Different Implications Facebook Has on Law Students, Lawyers and Judges’ (2012) 19(1) *ILSA Journal of International & Comparative Law* 1, 24, for another discussion that supports the Minority’s over the Majority’s view.

¹⁶⁶ 01 Op. Utah Ethics Advisory Committee Informal Opinion, 6 (2012).

¹⁶⁷ Judge’s Use of Electronic Social Networking Media, 462 American Bar Association Formal Opinion 1, 2–3 (2013).

¹⁶⁸ Judge Must Consider Limitations on Use of Social Networking Sites, 07 Op. Maryland Judicial Ethics Committee 5 (2012).

¹⁶⁹ 7 Op. The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline 8 (2010).

¹⁷⁰ Online Social Networking, 66 Op. California Judges’ Association Judicial Ethics Committee 7 (2010).

¹⁷¹ 08-176 Op. New York Advisory Committee on Judicial Ethics 2 (2009).

¹⁷² Judges’ Membership on Internet-Based Social Networking Sites, JE-119 Op. Ethics Committee of the Kentucky Judiciary 2 (2010).

¹⁷³ Steven Seidenberg, ‘Seduced: For Lawyers, the Appeal of Social Media is Obvious. It’s Also Dangerous’ (2011) *American Bar Journal* [39] <http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous/>.

to entering the judiciary. It would be wrong to assume that these friendships automatically end when one of the parties joins the judiciary.¹⁷⁴

The California advisory opinion states that if a judge interacting with a lawyer on social media ‘would create the impression the attorney is in a special position to influence the judge and cast doubt on the judge’s ability to be impartial’, then the judge should not interact with the lawyer on social media.¹⁷⁵ The opinion also states factors that can be used to decide whether the lawyer is indeed in such a position; for example, if the judge’s page is very personal, then it would be more likely that the friendship could influence the judge.¹⁷⁶ It is a positive step that the advisory opinion provides factors for people to consider before deciding that a social media friendship between a judge and a lawyer must have an impact on the judge’s impartiality. This can help people to critically analyse the relationship between the two, instead of making an assumption simply based upon the existence of the social media friendship.

The Kentucky opinion states that judges should be aware that if social media friendships, either on their own or together with other evidence, comprise ‘a close social relationship’,¹⁷⁷ then this should ‘be disclosed and/or require recusal’.¹⁷⁸ Similarly, the Utah opinion states that while a judge may not be prevented from being friends on social media with lawyers who appear before him or her, if the judge and the lawyer often communicate on social media, the judge may consider disqualifying him or herself from hearings, trials, etc. involving that lawyer because this could ‘create the appearance that the lawyer has a special position in relation to the judge’.¹⁷⁹ The Ohio opinion states that if a judge’s social media relationship with a lawyer results in the judge becoming biased or prejudiced, then the judge should disqualify him or herself from cases involving that lawyer.¹⁸⁰ The Kentucky, Utah and Ohio opinions appear to apply common sense in a similar way to the California opinion. They do not merely assume that a social media friendship between a judge and a lawyer creates an apprehension of bias. These opinions consider other facts besides the mere ‘friending’, such

¹⁷⁴ Black, above n 159, [12].

¹⁷⁵ Online Social Networking, 66 Op. California Judges’ Association Judicial Ethics Committee 8 (2010).

¹⁷⁶ Ibid.

¹⁷⁷ Judges’ Membership on Internet-Based Social Networking Sites, JE-119 Op. Ethics Committee of the Kentucky Judiciary 3 (2010).

¹⁷⁸ Ibid 2.

¹⁷⁹ 01 Op. Utah Ethics Advisory Committee Informal Opinion, 6–7 (2012).

¹⁸⁰ 7 Op. The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline 8 (2010).

as how often the judge and the lawyer communicate on social media. While compelling judicial officers to consider these other factors creates more work in deciding whether the judge should disqualify him or herself, it is likely fairer and more practical than deciding outright that a judge should disqualify him or herself from a trial where he or she is friends on social media with one of the lawyers. American lawyer Peter Vogel states that if lawyers contribute money to a judge's electoral campaign, then lawyers should be able to be friends with the judge on social media,¹⁸¹ but the lawyer and judge should not be able to communicate with each other on social media while the lawyer appears before the judge.

In Australia, '[a] judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the question involved in it'.¹⁸² Also, '[t]he appearance of impartiality' 'plays a part in maintaining public confidence in the courts irrespective of their relationship to the actual outcome of the process'.¹⁸³ The fact that a judge and a lawyer are friends on social media should not automatically mean that an apprehension of bias towards the lawyer exists, although several American academics and ethical advisory opinions have argued that it does. When Australian judges consider whether they should disqualify themselves from appearing on a matter because of an apprehension of bias, it is important that they do not agree too quickly that an appearance of bias exists. This could encourage parties to try to disqualify judges without sufficient reason.¹⁸⁴ An Australian judge is 'selected for judicial office because of his learning and training in law, his integrity and capacity for impartiality. The combination of these factors results in a judge being assumed to be able to bring a detached mind to his task of judgment'.¹⁸⁵ This should remain the case even where the judge is friends on social media with the lawyer appearing before him or her in court.

In *Emanuele v Emanuel Investments* a liquidator applied for examinations pursuant to the *Corporations Law*.¹⁸⁶ The plaintiffs requested that the examinations be stayed and that all

¹⁸¹ Peter S Vogel, 'Impact of Information Technology, the Internet, and Social Media on the Courts' (2010) 51(4) *South Texas Law Review* 1003, 1018.

¹⁸² *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 294 (Mason, Murphy, Brennan, Deane and Dawson JJ).

¹⁸³ *Cesan v R* (2008) 236 CLR 358, 380 (French J).

¹⁸⁴ *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352 (Mason J).

¹⁸⁵ *R v Leckie; Ex parte Felman* (1977) 18 ALR 93, 101 (Jacobs J).

¹⁸⁶ *Emanuele v Emanuel Investments* (1996) 21 ACSR 83 (30 March 1996) (DeBelle J).

evidence from the examinations be removed from the court's file and destroyed.¹⁸⁷ The plaintiffs' request was based on the fact that Justice Timothy Anderson, who presided over the examination, met with the liquidator's counsel at a bar for an hour for a drink and a chat during the course of the examinations.¹⁸⁸ The plaintiffs submitted that the meeting resulted in 'a reasonable apprehension of a bias on the part of Anderson J,¹⁸⁹ despite Anderson J recusing himself from the examination after the meeting.¹⁹⁰ Justice Bruce DeBelle of the Supreme Court of South Australia stated that 'a judge should disqualify himself from hearing, or continuing to hear, the matter if the parties or the public entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the issues'.¹⁹¹ Justice Anderson and the liquidator's counsel said that they did not discuss the examination at their meeting at the bar, but DeBelle J stated that 'it was entirely wrong'¹⁹² of them to meet and their 'meeting should not have taken place'.¹⁹³ Justice DeBelle stated that

a reasonable member of the public and the plaintiffs as persons who must submit themselves to further examination, would entertain a reasonable suspicion that Judge Anderson might not bring an impartial and unprejudiced mind to the adjudication of rulings in the examinations and to orders to be made in the course of the proceedings. It was, therefore, not only appropriate but necessary for the judge to desist from presiding over the examination and from hearing any applications.¹⁹⁴

DeBelle J dismissed all of the plaintiffs' applications.¹⁹⁵ Given that the public meeting between Anderson J and the liquidator's counsel was held to be inappropriate, does it follow that judges and lawyers who may appear before them should not be friends on social media? The author suggests not. In this case, Anderson and the liquidator's counsel met alone. In contrast, on social media, a judge may be friends with hundreds or even thousands of people, and the online friendship does not mean that the judge is discussing anything with the lawyer on social media while the lawyer appears before him or her. Additionally, psychological research shows that Facebook users have friends who may be close or may be merely

¹⁸⁷ Ibid [84].

¹⁸⁸ Ibid [86].

¹⁸⁹ Ibid [84].

¹⁹⁰ Ibid [93].

¹⁹¹ Ibid [91].

¹⁹² Ibid [90].

¹⁹³ Ibid [91].

¹⁹⁴ Ibid [93].

¹⁹⁵ Ibid [107].

acquaintances.¹⁹⁶ A judge and a lawyer who appears before him or her may have absolutely no interaction on social media at all besides their initial ‘friending’.

An examination of Australian case law regarding judges being friends outside of social media with lawyers who appear before them provides some assistance. *Bienstein v Bienstein*¹⁹⁷ involved a family dispute about maintenance of an adult disabled child. When the matter came before Kenneth Hayne J, the appellant requested that Hayne J disqualify himself, but Hayne J refused. The appellant then appealed on several grounds, and one was Hayne J’s refusal to disqualify himself.¹⁹⁸ The appellant requested that Hayne J disqualify himself because her application before him involved serious allegations against the Melbourne Registry of the Family Court and the bodies who regulate lawyers in Victoria. She stated that there may be a conflict of interest and bias because Hayne J was ‘from the Melbourne legal fraternity and is likely to have past and continuing associations and friendships with the solicitors, barristers, serving and retired Judges and Registrars’ who were implicated in the appellant’s complaint.¹⁹⁹

Their Honours stated that ‘[a] judge is disqualified from determining a case if the judge is biased or [if] a party or a member of the public might reasonably apprehend that the judge is biased. Bias exists if the judge might not bring an impartial and unprejudiced mind to the resolution of the issues.’²⁰⁰ They added that

a reasonable apprehension of bias may exist where the presiding judge has a substantial personal relationship with a party to, or a person involved in, proceedings or a substantial personal relationship with a member of the family of that party or person. But absent such relationships or others like them, it is absurd to suggest that a reasonable apprehension of bias can exist merely because a person involved in the proceedings comes from a city where the judge once practised professionally or because the judge may have had professional dealings with that person in the course of professional practice.²⁰¹

¹⁹⁶ Erin M Bryant and Jennifer Marmo, ‘The Rules of Facebook Friendship: A Two-Stage Examination of Interaction Rules in Closer, Casual, and Acquaintance Friendships’ (2012) 29(8) *Journal of Social and Personal Relationships* 1013, 1018.

¹⁹⁷ *Bienstein v Bienstein* (2003) 195 ALR 225 (McHugh, Kirby and Callinan JJ).

¹⁹⁸ *Ibid* 226.

¹⁹⁹ *Ibid* 229.

²⁰⁰ *Ibid* 231.

²⁰¹ *Ibid* 232.

Their Honours also stated that

[s]imilarly, ordinarily interaction (social or otherwise) between a practising lawyer who becomes a judge and other members of the legal community in that city does not itself give rise to an apprehension of bias if one of those members is involved in proceedings before the judge.²⁰²

Justice Hayne did not make a mistake when he refused to disqualify himself.²⁰³ The fact that a judge is friends on social media with lawyers who may appear before him or her could qualify as ‘ordinary interaction (social or otherwise)’.²⁰⁴ While this case did not involve a social media friendship between a judge and a lawyer who appeared before him or her, it is useful in showing how judicial officers dealt with a judge facing an accusation of bias involving a possible friendship. Their Honours appeared to take a practical approach by not finding that an apprehension of bias existed. It is inevitable that judges and lawyers who appear before them interact on a social basis, particularly in small jurisdictions. This judgment should likely apply to those situations.

*Mazukov v University of Tasmania*²⁰⁵ was an appeal of a decision not to quash an Acting District Registrar’s decision²⁰⁶ where the Acting District Registrar failed to waive a requirement that the appellant had to pay security for costs for the taxation of a bill of costs.²⁰⁷ In the hearing before the trial judge, Peter Heerey J, the appellant submitted that Heerey J should disqualify himself from hearing the matter because of apprehended bias, because he was a graduate of the respondent university and had previously rejected a different application by the appellant.²⁰⁸ Judge Heerey dismissed the appellant’s application.²⁰⁹ On appeal, their Honours stated that ‘no “fair-minded, lay observer” with knowledge of these “material objective facts” would entertain a reasonable concern that the primary judge would not bring “an impartial and unprejudiced mind” to bear on the question

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ *Mazukov v University of Tasmania* [2004] FCAFC 159 (17 June 2004) (Kiefel, Weinberg and Stone JJ).

²⁰⁶ Ibid [1].

²⁰⁷ Ibid [1].

²⁰⁸ Ibid [6].

²⁰⁹ Ibid [7].

that His Honour was asked to decide'. They added that the trial judge was correct not to disqualify himself.²¹⁰

The AIJA Guide states that '[f]riendship or past professional association with counsel or solicitor is not generally to be regarded as a sufficient reason for disqualification.'²¹¹ This strongly suggests that social media friendship between a judge and a lawyer is not inappropriate. The AIJA Guide also states that

[t]here is a long-standing tradition of association between bench and bar, both in bar common rooms and on more formal occasions such as bar dinners or sporting activities. Many judges attend Law Society functions by invitation. The only caveat to maintaining a level of social friendliness of this nature, one dictated by common sense, is to avoid direct association with members of the profession who are engaged in current or pending cases before the judge. A similar test should be applied in cases of private entertaining.²¹²

While one may argue that a social media friendship between a judge and a lawyer who appeared before him or her is a 'direct association', if the judge and the lawyer who appeared before him or her do not communicate on social media while the lawyer is before the judge, then a 'direct association' arguably does not exist. A judge and a lawyer who appears before him or her regularly may not be engaging in 'particularly close contact'²¹³ if they are friends on social media. However, if the judge and the lawyer are close friends outside of social media, or frequently communicate on social media, then the judge should consider disqualifying him or herself from the case because an apprehension of bias could potentially apply and ethical problems may arise.

If a judge becomes friends on social media with lawyers who may appear before him or her, there are some opportunities to lessen the chance that this may lead to an appearance of bias. One possible strategy is that when a lawyer comes before a judge for a trial, the judge should delete the lawyer from his or her friends on social media. After the trial concludes, the judge can 'friend' the lawyer again. This way judges can be friends on social media with lawyers,

²¹⁰ Ibid [18].

²¹¹ Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at 2007) 14.

²¹² Ibid 31–32.

²¹³ Thomas, above n 40, 147.

but not during the relevant time when a judge is making a decision that could affect the lawyer's client.

A judge in Florida suggested that she might place a message on her social media profile page that states that 'friend' on her page means acquaintance, and not a 'friend' according to the word's usual meaning.²¹⁴ This may be helpful for people who are new to Facebook and are not aware that a friend on social media may simply be an acquaintance. The disclaimer may not always be accurate, because it is possible that one or more of the judge's social media friends may be genuine friends in reality. Balasubramani suggests that judges should simply hide their Facebook friendships from the public, which Facebook's privacy settings permit.²¹⁵ It is submitted that this is not an appropriate solution because it is dishonest; its lack of transparency may lower confidence in the judiciary, should the public find out.

It is also possible for a judge to be friends on social media with a party or a relative of one of the parties in a trial or hearing.²¹⁶ The judge or one of the judge's relatives may be social media friends with someone related to the victim or someone related to the case in some way.²¹⁷ Consideration of these issues is outside the scope of this thesis, but it is likely that the appropriate view on these issues would be different to that on the cases considered in this thesis. This is because judges and lawyers necessarily have ongoing professional associations, while judges, victims and parties do not. Due to the professional association between judges and lawyers, a stronger argument could be made that judges should be able to be friends on social media with lawyers, than that they should be able to with victims or parties.

This section of the chapter has argued that Australian judges should not be prevented from being friends on social media with lawyers who may appear before them. Assuming that this argument is accepted, the next appropriate step is a discussion about ex parte communication on social media; this issue will be addressed in the following section.

²¹⁴ Gray, above n 10, 236.

²¹⁵ Balasubramani, above n 158, [8]. If judges decide to unfriend the lawyers who appear before them from their social media, there may be ethical implications to consider. See, eg, Kelly Lynn Anders, 'Ethical Exits: When Lawyers and Judges Must Sever Ties on Social Media' (2012–2013) 7(2) *Charleston Law Review* 187.

²¹⁶ See, eg, *Clare v Clare*, (Ala Court of Civil Appeals, No 2110967, 28 June 2013).

²¹⁷ See, eg, *Illinois v Schiller* (Ill Appellate Court Second District, No 09-CF-2815, 19 December 2012) or *Pennsylvania v Parker* (Municipal Court of Philadelphia, No MC-51-CR-18485-2011, 10 November 2011).

2.5.3 Ex Parte Communication on Social Media

Ex parte communication occurs when one of the parties in a trial, their lawyers or a third party communicates about the trial with the judge without informing all the lawyers or parties involved.²¹⁸ If ex parte communication occurs, then the public may not believe that the judge is making his or her decisions impartially.²¹⁹

Belmas states that it is a relatively straightforward question whether judges and lawyers can communicate on social media about a case both are involved with. Because ex parte communication in other contexts is not permitted, it should not be permitted on social media either.²²⁰ This may be true, but since it has never been as easy for parties, lawyers, witnesses and other court stakeholders to send ex parte communication to judges as it is in the age of social media, a discussion of this issue is necessary.

The American Bar Association,²²¹ Kentucky,²²² California,²²³ Utah²²⁴ and Ohio²²⁵ advisory opinions address this topic. The Kentucky and Utah opinions state that a judge should disqualify him or herself if ex parte communication with a lawyer occurs.²²⁶ The Ohio opinion states that the relevant judge should inform the parties and their counsel about the communication.²²⁷

Ex parte communication on social media between a judge and a party or a lawyer before him or her occurred in the United States with B Carlton Terry Jr., a District Court Judge.²²⁸ While Terry J was presiding over a child custody and child support matter, he and the defendant's counsel became Facebook friends.²²⁹ The two then discussed the case on Facebook.²³⁰ Judge

²¹⁸ *Re JRL; Ex parte CJL* (1986) 66 ALR 239, 244–245 (Mason J).

²¹⁹ *R v Magistrates' Court at Lilydale; Ex Parte Ciccone* [1973] VR 122, 127 (McInerney J).

²²⁰ Belmas, above n 60, 164.

²²¹ Judge's Use of Electronic Social Networking Media, 462 American Bar Association Formal Opinion 1 (2013).

²²² Judges' Membership on Internet-Based Social Networking Sites, JE-119 Op. Ethics Committee of the Kentucky Judiciary 4 (2010).

²²³ Online Social Networking, 66 Op. California Judges' Association Judicial Ethics Committee 10 (2010).

²²⁴ 01 Op. Utah Ethics Advisory Committee Informal Opinion, 9 (2012).

²²⁵ 7 Op. The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline (2010).

²²⁶ Judges' Membership on Internet-Based Social Networking Sites, JE-119 Op. Ethics Committee of the Kentucky Judiciary 4 (2010); 01 Op. Utah Ethics Advisory Committee Informal Opinion, 9 (2012).

²²⁷ 7 Op. The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline (2010).

²²⁸ Public Reprimand of B. Carlton Terry Jr., N.C. Judicial Standards Comm'n Inquiry No 08-234 (2009), [1].

²²⁹ *Ibid* [3].

²³⁰ *Ibid* [5].

Terry later told the plaintiff's counsel about the Facebook exchanges.²³¹ The plaintiff's counsel filed a motion that requested that Terry J's decision be vacated, for Terry J to be disqualified and that a new trial be held.²³² The plaintiff's motion was granted.²³³ The Chairman of the Judicial Standards Commission publicly reprimanded Terry J for his behaviour.²³⁴ He stated that Terry J's conduct demonstrated

a disregard of the principles of conduct embodied in the North Carolina Code of Judicial Conduct, including failure to personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved (Canon 1), failure to respect and comply with the law (Canon 2A), failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2A), engaging in *ex parte* communication with counsel and conducting independent *ex parte* online research about a party presently before the Court (Canon 3A(4)). Judge Terry's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute.²³⁵

The public nature of the reprimand of Terry J should discourage others from behaving similarly. It is also a reminder of the importance of reporting *ex parte* communication when it happens. If Terry J had not informed the plaintiff's counsel about the *ex parte* communication between him and the defendant's counsel, then it may not have come to the Chairman's attention and the Chairman may not have reprimanded Terry J. Judge Terry's communication with the defendant's counsel may not have occurred if social media did not exist. This demonstrates that it is important that the staff of ethical bodies carefully consider how judges should use social media.

2.5.3.1 How a Judge Should Handle Ex Parte Communication

The actions that a trial judge takes after he or she becomes involved in *ex parte* communication are important, and may be relevant to an appeal judge deciding whether to grant an appellant's appeal when the *ex parte* communication is one of the grounds of appeal.

²³¹ *Ibid* [6].

²³² *Ibid* [14].

²³³ *Ibid* [15]–[16].

²³⁴ *Ibid* [22].

²³⁵ *Ibid* [18].

In *Youkers v Texas*, the appellant had been convicted of assaulting his girlfriend²³⁶ and sentenced to eight years in gaol. One of the appellant's four grounds of appeal involved the fact that the judge had communicated with his girlfriend's father on Facebook during the initial trial.²³⁷ The appellant alleged that the trial judge was biased due to the Facebook communication. The appellant's girlfriend's father and the trial judge were Facebook friends who had previously run election campaigns at the same time. The appellant's girlfriend's father sent a Facebook message to the judge in which he requested that the judge not sentence the appellant harshly.²³⁸ The trial judge stopped reading the message when he learned that it was about the trial before him and then told the father online that the communication violated ex parte communication rules.²³⁹ He also stated that if the father contacted him again about the trial then the judge would delete the father from his Facebook friends. He further stated that he would put a copy of the Facebook message in the court's file, inform the relevant lawyers and contact the Judicial Conduct Commission to enquire about whether he needed to take further steps. The father responded and apologised. The judge then followed through with the actions as promised.²⁴⁰ Justice Mary Murphy, who presided over the appeal of this action, stated that the Facebook communication was not indicative of bias because the girlfriend's father sought leniency and the judge followed all of the steps required by the Texas Committee on Judicial Ethics in cases where ex parte communication occurs. Her Honour stated that she did not find an appearance of bias, either, because 'a reasonable person' who knew all the facts of the case would have thought that the judge was still impartial despite the Facebook communication, and the manner in which the judge dealt with the ex parte communication did not result in an appearance of bias.²⁴¹ The appellant was unsuccessful with his appeal.²⁴² This case shows that the way in which judges deal with ex parte communication is significant. Judges should inform courts and counsel when they use social media inappropriately. It is similarly important that jurors tell court staff if they use social media inappropriately; this issue will be discussed in further detail in Chapter Six of this thesis. *Youkers v Texa* also shows that the content of ex parte communication is important: if the father in this case had asked Her Honour to sentence the appellant harshly,

²³⁶ *Youkers v Texas* (Court of Appeals, 5th District of Tex at Dallas, No 05-11-01407-CR, 15 May 2013) (Murphy J).

²³⁷ Ibid 1.

²³⁸ Ibid 3.

²³⁹ Ibid 1.

²⁴⁰ Ibid 4.

²⁴¹ Ibid 8.

²⁴² Ibid 19.

the appellant may have had a better chance of succeeding on appeal. The actions that the trial judge took in this case when he faced ex parte communication on social media contrast with the actions of Terry J. While Terry J discussed the trial before him on social media, the trial judge in this case did not. It could be helpful for Australian judges if there was information available to them that stated the specific steps that they should consider taking if they become involved in ex parte communication on social media.

Ex parte communication on social media was also considered in *Onnen v Sioux Falls Independent School District #49-5*.²⁴³ In this case, the appellant sued his former employer for alleged wrongful termination.²⁴⁴ One of the appellant's grounds for appeal was that the trial judge wrongly used his discretion to reject the appellant's motion for a new trial. The appellant had requested a new trial on the grounds that the trial judge was allegedly biased because a witness in the trial had communicated with the trial judge on Facebook during the trial.²⁴⁵ The witness wrote 'happy birthday' in Czech on the trial judge's Facebook wall.²⁴⁶ Chief Justice David Gilbertson stated that the Facebook post was not ex parte communication because nothing was said in it about the trial.²⁴⁷ His Honour added that even if the Facebook post had constituted ex parte communication, it would not merit a new trial because the trial judge was not prejudiced.²⁴⁸ The trial judge did not ask the witness to write on his Facebook wall, the birthday message was one of many, and the trial judge did not know the witness.²⁴⁹ The Chief Justice denied the appellant's appeal application.²⁵⁰ In this case, His Honour took a practical approach to the alleged bias; it makes sense that the trial judge would not be biased by a Facebook post from someone he did not know. It is possible for a Facebook user who does not use Facebook's privacy settings to receive thousands of happy birthday messages on his or her Facebook wall from people he or she does not know. Some of these people could appear before the judge, particularly in small communities. It would not make sense if a judge was considered to be biased as a result of each of the messages. It is interesting that His Honour discussed bias in this case, but not the appearance of bias. An argument could be made that the witness's Facebook post could cause others to believe that there was an

²⁴³ *Onnen v Sioux Falls Independent School District #49-5* (2011 SD 45, 26 April 2011).

²⁴⁴ *Onnen v Sioux Falls Independent School District*, 801 N W 2d 752, 753 (SD, 2012).

²⁴⁵ *Ibid* 754, 757.

²⁴⁶ *Ibid* 757.

²⁴⁷ *Ibid* 757–758.

²⁴⁸ *Ibid* 758.

²⁴⁹ *Ibid*.

²⁵⁰ *Ibid* 759.

appearance of bias. However, this is likely a weak argument in this case because the trial judge did not even know who the witness was when the witness posted on his wall. If a party (rather than a witness) in the case, whom the judge knew, posted on the judge's wall, perhaps a different approach would be taken. In that situation, there could be a chance that there was at least an appearance of bias. In Australia, the position on ex parte communication is clear:

The sound instinct of the legal profession — judges and practitioners alike — has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined.²⁵¹

The AIJA Guide states a similar position to the one above and adds that this position is 'of course, very well known'.²⁵² Additionally, ex parte communication in Australia

is not confined to representations made by a party or the legal adviser or witness of a party. It is equally true that a judge should not, in the absence of the parties or their legal representatives, allow any person to communicate to him or her any views or opinions concerning a case which he or she is hearing, with a view to influencing the conduct of the case. Indeed, any interference with a judge, by private communication or otherwise, for the purpose of influencing his or her decision in a case is a serious contempt of court.²⁵³

Given that the position on ex parte communication in Australia is clear in case law and in the AIJA Guide, the position on social media should be similarly clear: judges and lawyers who appear before them may not communicate on social media about a case that they are involved in.

²⁵¹ *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122, 12 (McInerney J).

²⁵² Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at 2007) 17.

²⁵³ *Re JRL; Ex Parte CJL* (1986) 161 CLR 342, 346–347 (Gibbs CJ).

A motivation for this discussion of ex parte communication is that it provides a clear example where existing Australian case law and judicial ethical resources can easily and clearly be applied to social media use. It was previously recommended in this chapter that Australian judges should not be prevented from friending on social media lawyers who may appear before them. However, being able to friend each other makes it easier for judges and lawyers to engage in ex parte communication. As a result, a reminder about the importance of refraining from ex parte communication is appropriate. While a lawyer is appearing before a judge, the lawyer and judge should not communicate at all on social media. This precaution is necessary to ensure that nothing between the two individuals is misconstrued by either, or by others, as being about the case before the judge. Allowing judges and lawyers to be friends on social media but not allowing them to communicate on social media while the lawyer is appearing before the judge requires the public to place a considerable amount of trust in judges and lawyers. Nevertheless, it is submitted that the public can have this confidence.

Ex parte communication is mentioned in this chapter as a warning to judges that it can occur without the judge's intention. When people are Facebook friends, they see what is posted on each other's walls whether or not it is intended for that specific person.²⁵⁴ A lawyer may post information on his or her Facebook wall that was not tendered as evidence and a judge may accidentally see it.²⁵⁵ If this occurs, judges may want to consider informing the parties and their lawyers accordingly and seeking guidance from senior judges about next steps. Having this procedure in place for Australian judges can help maintain the public's confidence in the judiciary. Having discussed the Australian position on three situations involving social media for judges, the next issue for this chapter to consider is whether written guidelines for Australian judges about social media use are necessary.

2.6 Recommendation: The AIJA Guide Should Be Revised to Include Social Media

Seidenberg states that '[e]xperts are divided on how, or whether, legal ethics rules need to be revised to address social media.'²⁵⁶ Some experts say that ethical rules should not be changed

²⁵⁴ Bethany Leigh Rabe, 'Can Judges "Friend" Attorneys on Social Media', *Litigation News* (online), 14 January 2013, [8]

<http://apps.americanbar.org/litigation/litigationnews/top_stories/011413-judicial-ethics-social-media.html>.

²⁵⁵ *Ibid.*

²⁵⁶ Seidenberg, above n 173, [52].

every time new technology is created,²⁵⁷ and that judges can refer to existing ethical rules if they face an ethical challenge involving social media.²⁵⁸ In contrast, Belmas recommends updating judicial ethical guidelines to reflect new changes in technology.²⁵⁹ Admittedly, it would be difficult to constantly update the AIJA Guide every time new technology is created. Nevertheless, occasional updates to the AIJA Guide when revolutionary technology is created could be very helpful to Australian judges, without being too onerous on the AIJA Guide's editors to implement. Social media is not just any new technology; it has had a major impact on how people communicate,²⁶⁰ and ethical rules should be amended to address it.

Hade states that new ethical guidelines on judges' use of social media are unnecessary, because existing ethical guidelines cover the potential problems that may arise from its use. He adds that statements are required that make it clear that existing ethical guidelines apply to social media.²⁶¹ Hade's statements are made in regard to the American ethical guidelines, which differ greatly from Australia's.²⁶² Hade's comment is arguably not applicable in Australia; as this chapter has established, existing Australian ethical guidelines do not clearly address all situations that can occur when a judge uses social media. Consequently, it is recommended that the AIJA Guide be modified to provide guidelines for Australian judges on social media use. Updating the AIJA Guide will show Australians that initiatives are being taken to advise judges about social media use, which may increase confidence in the judiciary.

Julien Goldszlagier, Julie Hugues and Florence Lardet are in favour of ethical guidelines on social media use for European judges.²⁶³ They state that without guidelines, there is 'uncertainty about what is tolerable or not', which 'worries judges and disturbs the public'.²⁶⁴ It clearly worries some American judges, which is probably why they sought advisory opinions from ethical bodies about this issue. Their worries may also have stemmed from the

²⁵⁷ Ibid [53].

²⁵⁸ See, eg, Sandra Hornberger, 'Social Networking Websites: Impact on Litigation and the Legal Profession in Ethics, Discovery and Evidence' (2011) 27(2) *Touro Law Review* 279, 290.

²⁵⁹ Belmas, above n 60, 165.

²⁶⁰ Hade, above n 98, 133; Helia Garrido Hull, 'Why We Can't Be Friends: Preserving Public Confidence in the Judiciary through Limited Use of Social Networking' (2013) 63(2) *Syracuse Law Review* 175, 195.

²⁶¹ Hade, above n 98, 155.

²⁶² For example, the American *ABA Model Code of Judicial Conduct* has the word 'code' in its title, whilst page 2 of the *Australian Guide to Judicial Conduct* states that it 'does not purport to be a code in any sense of that word'.

²⁶³ Goldszlagier, Hugues and Lardet, above n 56, 17.

²⁶⁴ Ibid 18.

incidents in which American judges have used social media inappropriately and have been fired or stood down as a result. Justice Vertes in Canada similarly believes that guidelines on social media are helpful for judges who are unsure of how they may use social media.²⁶⁵

At least one Australian judicial officer is unsure of the repercussions of using social media: the previously mentioned Deputy Chief Magistrate of Tasmania, who was a Facebook friend of the wife of an accused who was about to appear before him.²⁶⁶ This Facebook friendship was one reason why the Deputy Chief Magistrate requested that the prosecution and the accused provide submissions to him about whether he should be disqualified from the case.²⁶⁷ If the AIJA Guide is amended to discuss social media, it may provide some advice about what Australian judicial officers should do in this type of situation.

The Judicial Conference of Australia states that ‘judicial officers are human. [They] are therefore imperfect. Inevitably, some of [them] will occasionally fail to conduct [themselves] as judicial officers should’.²⁶⁸ Updating the AIJA Guide will make it easier for Australian judges to learn how they should conduct themselves as they ‘should’. The AIJA Guide also states that it ‘sets out to address issues upon which there is more likely to be uncertainty and upon which guidance will be helpful’.²⁶⁹ Judicial use of social media is an area of uncertainty in Australia because current judicial resources do not address whether judges should be prevented from using social media or befriending lawyers who may appear before them; it is precisely these issues that the AIJA Guide should clarify.

Some Australian judges work in near isolation and cannot easily discuss ethical issues with other judges.²⁷⁰ These judges in particular may benefit from formal direction on social media from the AIJA Guide. These judges may not have anyone to seek advice from about the possible dangers of social media; some may not have the skills or interest in social media to be aware of the potential problems created if they use it. By providing guidelines on social media use, the AIJA Guide could potentially prevent misuses of social media from occurring in Australia, particularly for judges who are unaware of the dangers of using social media. It

²⁶⁵ Vertes, above n 12, 8.

²⁶⁶ Heyward, above n 4, [7]–[8].

²⁶⁷ Ibid [15].

²⁶⁸ Judicial Conference of Australia, *Report of the Complaints Against Judicial Officers Committee* (22 April 2009) [3] <http://www.jca.asn.au/publications/First_Report.pdf>.

²⁶⁹ Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at 2007) ix.

²⁷⁰ Ibid.

would be easier for judges and judicial organisations to modify the AIJA Guide than to deal with Australian judges who used social media inappropriately because they had no ethical guidelines on the issue available.

Staff at the New South Wales Supreme Court are thinking about drafting a policy on social media use for judges.²⁷¹ Judge Gibson agrees that rules are necessary for judicial officers' social media use.²⁷² It is possible that other Australian judges feel the same way.

The Australian Law Reform Commission observes that 'in recent years courts have come under pressure to operate with a greater degree of efficiency, transparency and accountability'.²⁷³ If the AIJA Guide is amended to address social media use, this will increase the courts' transparency and accountability. The AIJA Guide also states that

[t]here is such a wide range of social and recreational activities in which a judge may wish to engage that it is not possible to do more than suggest some guidelines. Judges should themselves assess whether the community may regard the judge's participation in certain activities as inappropriate. In cases of doubt, it is better to err on the side of caution, and judges generally will be anxious and careful to guard their own reputation.²⁷⁴

Some people may argue that social media use is one of the activities that falls within this quoted section of the AIJA Guide, and judges should consider only whether the community 'may regard the judge's participation in certain activities as inappropriate'. That is, judges should simply 'err on the side of caution' by not using social media and no amendments to the AIJA Guide are required. This view is not recommended, because Australian judges would miss out on the benefits of social media discussed earlier, such as keeping in touch with family, friends and the judiciary abroad.

If it is accepted that guidelines for judges on social media use are necessary, one should consider who should draft them. Judge Ronald Sackville of the Court of Appeal of the New

²⁷¹ Harriet Alexander, 'Court Publicity: Trial by Social Media for Judges', *The Sydney Morning Herald* (online), 2 July 2013, [8]

<<http://www.smh.com.au/nsw/court-publicity-trial-by-social-media-for-judges-20130701-2p711.html>>.

²⁷² Gibson, above n 3, 13.

²⁷³ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (1999) [2.250].

²⁷⁴ Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at 2007) 31.

South Wales Supreme Court states that academics should be responsible for advising judges about judicial ethics. He states that

judges have neither the expertise nor the experience to assess community expectations and attitudes. The necessary expertise and spirit of independent inquiry can be found in University. The formulation of standards of judicial ethics is a task too important and complex to be left exclusively to the judges.²⁷⁵

Lorne Sossin and Meredith Bacal recommend that before drafting guidelines for judges about social media use, regulators should obtain judges' opinions on social media.²⁷⁶ This is a good idea that could help regulators to learn about what kinds of information might be most helpful to judges. The judges could also provide feedback on a draft of the changes before the amended version of the AIJA Guide is released.

The best sources of guidance to judges on this issue are most likely a range of people: senior judges, ethical bodies, academics and lawyers. Each would probably be able to contribute useful knowledge.

2.7 Conclusion

According to the Chief Justice of Victoria, '[t]he judiciary regards it as fundamental that judges be beyond reproach in [their] behaviour both in [their] judicial and private lives.'²⁷⁷ To ensure that Australian judges are 'beyond reproach'²⁷⁸ and to maintain confidence in the judiciary, ethical organisations, senior judges and academics should advise judges about social media use by modifying the AIJA Guide.

Black writes that '[s]ince sending [judges] back to 1990 in a time machine isn't an option, the wisest course of action [on judges' social media use] is to adopt reasonable standards that

²⁷⁵ Sackville, above n 16, 23.

²⁷⁶ See, eg, Lorne Sossin and Meredith Bacal, 'Judicial Ethics in a Digital Age' (2013) 46(3) *University of British Columbia Law Review* 629, 664.

²⁷⁷ Chief Justice Marilyn Warren, 'Public Confidence in the Judiciary — A Response to the Announcement by the Honourable the Attorney-General' (Speech delivered at the Judicial Conference of Australia Colloquium, Melbourne, 9 October 2009) 6.

²⁷⁸ *Ibid.*

reflect 21st century realities'.²⁷⁹ This chapter has attempted to find such reasonable standards while considering the importance of maintaining confidence in the judiciary. The American experience of judges' use of social media to date demonstrates that it is possible for judges to use social media inappropriately. Rather than wait for this to occur in Australia, it is recommended that senior judges, ethical organisations and academics act now to advise judges about social media use by amending the AIJA Guide. Lawyers are another stakeholder in the Australian legal system who are impacted by social media; their situation is addressed in the following chapter.

²⁷⁹ Black, above n 159, [11].

Chapter 3: Ethical Considerations Relating to Australian Lawyers' Social Media Use

3.1 Introduction

Social media has changed the way that millions of people communicate, including lawyers. A BRR Media survey of 80 Australian law firms found that 91.3 per cent of the firms used social media:¹ 55 per cent of firms used Twitter and 36.3 per cent used Facebook.² A study by *Business Review Weekly* found that one third of the law firms surveyed used a consultant or hired an employee to assist with social media issues. The study also found that 20 per cent of firms gave their employees social media training.³ Social media has had a major impact on how lawyers work.⁴ Lawyers worldwide use social media⁵ to advertise their business and to network.⁶ Australian lawyers, too, increasingly use social media.⁷

According to the Law Institute of Victoria, '[s]ocial media presents both opportunities and challenges for legal practitioners'.⁸ One of these challenges is the need for lawyers to understand and consider the ethical implications of their social media use.⁹ One commentator wrote that '[s]ocial networking requires concerted thinking about the adaptation of legal ethics rules to a dynamic world, where interactions between attorneys, clients, and communities of social network users can become quite complicated'.¹⁰

¹ The New Lawyer, 'Law Firms Ranked By Social Media Use', *Lawyers Weekly* (online), 3 August 2013, [3] <<http://www.lawyersweekly.com.au/the-new-lawYER/law-firms/law-firms-ranked-by-social-media-use>>.

² *Ibid* [4]–[5].

³ Georgina Dent, 'Lawyers Get Social', *BRW* (online), 2 August 2013, [1]

<http://www.brw.com.au/p/sections/features/lawyers_get_social_ZgXRolH1zEvHUmt7aCOVnO>.

⁴ Steve Mark, Tahlia Gordon and Rita Shackel, 'Regulation of Legal Services in the E-World: A Need to Short Circuit Hot Spots in Ethics and Novel Practices?' (Working Paper Part 1, Office of the Legal Services Commissioner, October 2011) 4

<http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/regulation_of_legal-services_working_paper_oct2011_part1.pdf>.

⁵ *Ibid* 7.

⁶ The Law Society, 'Social Media' (Practice Note, The Law Society, 20 December 2011), [1.2]

<<http://www.lawsociety.org.uk/advice/practice-notes/social-media/>>.

⁷ Steve Mark, 'New Technologies — Social Networking Sites' (February 2011) *Without Prejudice: The Office of the Legal Services Commissioner*, [1]

<http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/wp_issue53_feb11.pdf>.

⁸ Law Institute of Victoria, 'Guidelines on the Ethical Use of Social Media' (29 November 2012), [1]

<<http://www.liv.asn.au/PDF/For-Lawyers/Ethics/2012Guidelines-on-the-Ethical-Use-of-Social-Media.aspx>>.

⁹ ISBA Legal Ethics Committee, 'Need to Know: Legal Ethics Involved in Online Social Media and Networking: An Overview' (2011) 54 *Res Gestae* 64, 64.

¹⁰ Steven C Bennett, 'Ethics of Lawyer Social Networking' (2009) 73(1) *Albany Law Review* 113, 137.

This chapter provides a background on professional rules for lawyers. It then identifies the potential benefits and dangers to lawyers of using social media, as well as the the ethical guidelines on social media that staff of law societies and relevant professional bodies have provided to date. This is followed by an examination of three issues involving lawyers' professional ethical duties and social media: unintended and faulty retainers, the duty to the court and the duty of confidentiality. The question is posed whether written ethical guidelines are necessary for Australian lawyers on this topic. This chapter does not aim to examine lawyer-judge interactions. Instead, it focuses primarily on lawyers interacting with clients, with each other and with members of the public. This chapter ultimately argues that social media present new ethical challenges for lawyers, and that uniform, standalone ethical guidelines are necessary as a result. Model guidelines for legal regulators to use are offered in Appendix A. It is important that lawyers are able to face the ethical challenges that social media present, because if they do not, the public could lose confidence in the courts and the legal profession.

3.2 A Brief Background on Professional Conduct Rules for Lawyers

In Australia, the common law, court rules and professional conduct rules ("Professional Rules") advise lawyers about how to behave ethically.¹¹ The Professional Rules are a guide for 'proper behaviour' for lawyers.¹² Each Australian State and Territory has its own version of the Professional Rules.¹³ The Professional Rules implement most of the Australian Law Council's *Model Rules of Professional Conduct and Practice*, released in 2002;¹⁴ however, they vary in some aspects according to the jurisdiction.¹⁵ The Professional Rules exemplify the legal profession's commitment to upholding the integrity of its members,¹⁶ and 'have considerable force' on judicial officers' decisions.¹⁷ A lawyer may be disciplined if he or she

¹¹ Australian Law Reform Commission, 'Managing Discovery: Discovery of Documents in Federal Courts' (Report No 115, Australian Law Reform Commission, 25 May 2011) [12.5] <<http://www.alrc.gov.au/publications/12-professional-and-ethical-discovery/ethical-obligations>>.

¹² *Walter v Buckeridge [No 5]* [2012] WASC 495, [43] (LeMiere J).

¹³ Gino E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 4th ed, 2010) xi.

¹⁴ *Ibid* xii.

¹⁵ Australian Law Reform Commission, above n 11, [12.7].

¹⁶ Dal Pont, above n 13, 17.

¹⁷ *Re: Appn By The Law Society of the Australian Capital Territory and Tjakamarra-Forrest* [2000] ACTSC 119 (14 December 2000) [81] (Higgins, Crispin and Ryan JJ).

does not follow a Professional Rule.¹⁸ The public may have greater confidence in the legal profession because of the Professional Rules, which provide clear standards that permit the behaviour of lawyers to be measured and assessed, particularly from an ethical perspective.

In 2010, staff of the Law Council and the Australian Bar Association released a new uniform draft of the Professional Rules.¹⁹ The new rules are intended to ‘ensure all of Australia’s solicitors are bound by a common set of professional obligations and ethical principles when dealing with their clients, the courts, their fellow legal practitioners, regulators and other persons’.²⁰ The rules are entitled the *Legal Profession National Rules: Solicitors’ Rules 2011* (“Solicitors’ Rules”) and the *Legal Profession National Rules: Barristers’ Rules 2010* (“Barristers’ Rules”).²¹ Staff of the Law Council also released draft commentary on the Solicitors’ Rules.²² Staff at law societies nationwide are working to implement the Solicitors’ Rules and the Barristers’ Rules,²³ but only the law societies of Queensland and South Australia have adopted the Solicitors’ Rules to date.²⁴ The relevant barristers’ associations in New South Wales,²⁵ Western Australia,²⁶ Queensland²⁷ and South Australia²⁸ have adopted the Barristers’ Rules thus far. The public may have greater confidence in the legal profession because the profession’s regulators ensure that they consistently review the Professional Rules.

Some of the Solicitors’ Rules that will be considered in this chapter are: the duty to the court and the administration of justice, which is paramount; the duty of confidentiality; the duty to act with integrity; the duty for lawyers to supervise all employees working on a legal matter; and the duty not to publish comments about current legal proceedings that could result in an unfair trial or challenges to the administration of justice.

¹⁸ *Dale v Clayton Utz [No 2]* [2013] VSC 54 (26 March 2013) [168] (Hollingworth J); Law Council of Australia, *Australian Solicitors’ Conduct Rules* (at June 2011) r 2.3.

¹⁹ Law Council of Australia, *Australian Solicitors’ Conduct Rules* (at June 2011) r 1.

²⁰ *Ibid* r 3.

²¹ Australian Law Reform Commission, above n 11, [12.14].

²² Law Council of Australia, *Australian Solicitors’ Conduct Rules* (at June 2011) r 5.

²³ *Ibid* r 4.

²⁴ Law Society of South Australia, *Australian Solicitors’ Conduct Rules* (at 25 July 2011) r 3.

²⁵ See New South Wales Bar Association, *Barristers’ Rules* (at 8 August 2011).

²⁶ See Western Australian Bar Association, *Barristers’ Rules* (at 28 May 2011).

²⁷ See Bar Association of Queensland, *Barristers’ Conduct Rules* (at 23 December 2011).

²⁸ See South Australian Bar Association, *Barristers’ Conduct Rules* (at 2010).

Rules also govern lawyers' conduct in the United States,²⁹ Canada³⁰ and the United Kingdom.³¹ The rules regulating lawyers' conduct 'in all jurisdictions are predominantly black letter positive rules, and are also rather lengthy'.³²

3.3 Benefits to Lawyers of Using Social Media

There are several benefits for lawyers who use social media. Social media can be a 'potent marketing tool'³³ to lawyers for little or no cost.³⁴ Lawyers use social media to advertise to potential clients, to recruit new staff³⁵ and to network with many people in a short time.³⁶ Lawyers can also use social media to educate the public and other lawyers,³⁷ which can increase the public's confidence in the legal profession. Lawyers can easily promote themselves to clients outside their jurisdiction by using social media.³⁸ Lawyers can also use social media to provide news about their firm and about the law.³⁹ Journalists who read a law firm's social media profile page may contact the firm's lawyers for additional opinions about the lawyers' posts.⁴⁰

Lawyers may use social media to improve the profession's reputation. For example, staff of the Law Institute of Victoria are using social media in their Reputation Project to try to

²⁹ American Bar Association, *Model Rules of Professional Conduct* (at 2008).

³⁰ Canadian Bar Association, *Code of Professional Conduct* (at 2009).

³¹ Solicitors Regulation Authority, *Code of Conduct* (at 2011).

³² Dal Pont, above n 13, 20.

³³ US Chamber Institute for Legal Reform, *New Media Strategies, The Plaintiffs' Bar Goes Digital: An Analysis of the Digital Marketing Efforts of Plaintiffs' Attorneys & Litigation Firms* (January 2012) [3] <http://www.instituteforlegalreform.com/uploads/sites/1/The_Plaintiffs_Bar_Goes_Digital_2012_0.pdf>.

³⁴ Jeffrey I Silverberg, 'Hanging Out Your Virtual Shingle: A Look at How South Carolina's Ethics Rules Concerning Attorney Communications, Advertising and Solicitation Apply to Virtual Worlds' (2011) 62(4) *South Carolina Law Review* 715, 715.

³⁵ Office of the Legal Services Commissioner (NSW), 'A Guide on Practice Issues: Social Media' (Practice Guidelines, May 2013) [3] <http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/social_media_practice_guideline_may2013.pdf>.

³⁶ Shelley Dunstone, 'Online Social Media — Minefield or Goldmine?' (2010) 32(8) *Bulletin* 18, 18–19; Stephen Stine and Joshua Poje, 'The Good, the Bad and the Ugly of Blogging, Microblogging and Social Networking for Public Lawyers' (2009) 17(2) *The Public Lawyer* 13, 16.

³⁷ Dustin B Benham, 'Symposium, The Internet and the Law: The State Bar of Texas Provides New Guidelines to Attorneys Regarding the Proper Use of Social Media and Blogs for Advertising Purposes' (2010) 52 *Advocate* 13, 16.

³⁸ The Law Society, 'Social Media' (Practice Note, The Law Society, 20 December 2011), [1.2] <<http://www.lawsociety.org.uk/advice/practice-notes/social-media/>>.

³⁹ Dent, above n 3, [5].

⁴⁰ Briana Everett, 'Follow the Leaders: The Business Case for Social Media', *Lawyers Weekly* (online), 26 April 2011, [31] <<http://www.lawyersweekly.com.au/news/follow-the-leaders-the-business-case-for-social-me>>.

improve the public's perception of lawyers.⁴¹ To do this, they created a YouTube channel and a blog that posts positive stories about lawyers for the public.⁴² Initiatives like these may increase the public's confidence in the legal profession.

Lawyers may also find valuable evidence on social media that could assist them in trials. For example, a plaintiff in a personal injury case alleged that she could no longer play the piano. A lawyer found a recent video of the plaintiff playing the piano on Facebook.⁴³

This section has briefly examined how lawyers can benefit from using social media. Lawyers are likely to use social media as a result of the benefits that it offers them. As a result, uniform ethical guidelines for lawyers are necessary to assist them in making appropriate use of social media while maintaining the public's confidence in the legal profession.

3.4 Potential Problems for Lawyers Using Social Media

Many problems can result when lawyers use social media inappropriately. If such problems do occur, and the public learns about it, this could cause the public to lose confidence in the legal profession. One example of a problem that could occur is where a lawyer posts information on social media that contains a mistake about the legislation that applies to a matter. It may subsequently be difficult for the lawyer to fix the mistake, because the statement may have already been viewed by many people, including people whom the lawyer does not know.⁴⁴ The mistaken statement may permanently stay on social media, even if the lawyer deletes it.⁴⁵

Social media allow lawyers to communicate frequently, without many restrictions⁴⁶ and informally.⁴⁷ Because of this, some lawyers may not exercise the same discretion while using

⁴¹ Justin Whealing, 'The Lawyers Are Alright', *Lawyers Weekly* (online), 12 April 2013, [1] <<http://www.lawyersweekly.com.au/news/the-lawyers-are-alright>>.

⁴² *Ibid* [1], [13].

⁴³ Jordan B Yeager and Rosalyn K Sisson, 'The 2011 Tech Issue: User Beware: Maximizing the Possibilities, Minimizing the Risks of Using Social Media' (2011) 33 *Pennsylvania Lawyer* 26, 27 - 28.

⁴⁴ ISBA Legal Ethics Committee, above n 9, 66.

⁴⁵ Sharon D Nelson and John W Simek, 'Lawyers "Step In It" through Social Media Incompetence' (2010) 36(2) *Vermont Bar Journal & Law Digest* 38, 38.

⁴⁶ Tom Mighell, 'Symposium: The Internet and the Law: Avoiding a Grievance in 140 Characters or Less: Ethical Issues in Social Media and Online Activities' (2010) 52 *Advocate* 8, 8.

social media that they normally would in other contexts. This increases the chances that a lawyer may make a mistake on social media, such as writing something inappropriate⁴⁸ or that breaches Professional Rules.

Problems on social media may also result from social media's interactivity and the fact that users cannot control the actions of other users. For example, a non-lawyer social media friend could post on a lawyer's Facebook wall, 'I hope that court went well today. I also hope that the Judge you hate and who naps in court was not too hard on you.' Facebook friends of the lawyer's friends may be able to see this post. This could potentially lower the lawyer's reputation or point to a breach of the Solicitors' Rule to act with integrity.

A lawyer might also post a link to a friend's Twitter or Facebook page without properly examining the page. The lawyer's friend's page might, for example, contain a short note that includes sexist material. It would then be arguable that the lawyer's conduct breached the Solicitors' Rule not to 'bring the profession into dispute' in the 'course of practice or otherwise' or the Solicitor's Rule not to discriminate.

Lawyers may face problems on social media if they do not properly understand how to use them. For example, Julian Burnside QC, a prominent Australian human rights lawyer, tweeted that the then Opposition Leader Tony Abbott was part of a group who were '[p]aedos in speedos'.⁴⁹ Burnside's comment referred to paedophilia.⁵⁰ Burnside claimed that he thought that he sent the message to one person on Twitter, but he actually sent it to 5000 people.⁵¹ Burnside later apologised for his post and explained that he did not understand the technology that he was using.⁵² This incident shows that any lawyer, no matter his or her level of legal experience, can make a mistake while using social media if he or she does not know how to use it. Burnside's mistake also shows the importance of teaching lawyers how to use social media properly.

⁴⁷ Gino Dal Pont, 'Social Networking Sites Can Prove Ethically Dangerous' (2011) 49(5) *Law Society Journal* 46, 46.

⁴⁸ T Mighell, above n 46, 8.

⁴⁹ James Massola, 'Julian Burnside Apologises to Tony Abbott Over "Paedos in Speedos" Tweet', *The Australian* (online), 30 September 2011, [1] <<http://www.theaustralian.com.au/national-affairs/julian-burnside-apologises-to-tony-abbott-over-paedos-in-speedos-tweet/story-fn59niix-1226153967794>>.

⁵⁰ *Ibid* [2].

⁵¹ *Ibid* [3].

⁵² *Ibid* [3]–[4].

If a lawyer writes something inappropriate on social media, staff of a legal regulatory body may take action against him or her.⁵³ Sean Conway, a lawyer in Florida, wrote derogatory remarks about Judge Cheryl Aleman on a blog, stating that Her Honour was an ‘EVIL UNFAIR WITCH’, ‘seemingly mentally ill’ and ‘clearly unfit for her position’. Conway received a public reprimand as a result⁵⁴ and had to pay a \$1250 fine.⁵⁵ Comments like Conway’s have the potential to result in the public losing confidence in the courts and the legal profession. If social media did not exist, perhaps Conway would merely have made those comments personally to a few people. While this would still be a problem, and Conway’s comments would be considered unprofessional irrespective of the medium he used, they would likely not have reached as many people if not delivered using social media. Conway’s is admittedly an extreme example of a lawyer using social media inappropriately, but it shows the need for ethical guidelines for lawyers about social media. If Conway had read ethical guidelines about social media, perhaps he would not have made the relevant blog post.

If a lawyer uses social media inappropriately during a trial, it can have serious consequences for the trial and the accused. For example, in Florida, the family of an accused brought leopard-print underwear to court for the accused to wear.⁵⁶ The accused’s lawyer photographed the underwear and posted the picture on her Facebook page with a caption⁵⁷ mocking the parents of the accused for thinking that the underwear was ‘proper attire for trial’.⁵⁸ The lawyer for the accused did not act with integrity by posting the photograph of the underwear with the relevant caption. She also interfered with the administration of justice.

⁵³ Helen Hirschbiel, ‘Bar Counsel: A Word of Caution: Social Media for Lawyers’ (2009) 70(2) *Oregon State Bar Bulletin* 9, 9.

⁵⁴ *The Florida Bar v Conway*, 996 So 2d 213 (Fla, 2008).

⁵⁵ Steven J Venezia, ‘The Interaction of Social Media and the Law and How to Survive the Social Media Revolution’ (2012) 52(4) *New Hampshire Bar Journal* 24, 25.

⁵⁶ David Ovalle, ‘Lawyer’s Facebook Photo Causes Mistrial in Miami-Dade Murder Case’, *The Miami Herald* (online), 9 September 2012, [1], [3]
<<http://www.miamiherald.com/2012/09/12/2999630/lawyers-facebook-photo-causes.html>>.

⁵⁷ *Ibid* [3], [4].

⁵⁸ Ryan Sullivan, ‘Miami Lawyer Fired for Posting Photo of Client’s Underwear on Facebook’, *Fox News* (online), 13 September 2012 <<http://myfox8.com/2012/09/13/miami-lawyer-fired-for-posting-photo-of-clients-underwear-on-facebook/>>.

Someone who had seen the photograph on Facebook informed the judge, who declared a mistrial.⁵⁹ The accused's lawyer was also fired from her public defender role.⁶⁰ It is probably rare for such serious consequences for a trial to result from a lawyer's inappropriate use of social media; still, when it does occur, it is a significant waste of the court's time and resources. It is probably worse for the appearance of the administration of justice if the negative consequences for the trial occur as a result of a lawyer's behaviour, as opposed to a layperson's behaviour. The lawyer's actions just described could lower the status of the legal profession and the courts in the public's eyes; they could also have embarrassed the accused and his family. However, it is possible that if a journalist took the photographs, instead of the accused's lawyer, this would not have affected the public's confidence in the legal profession. Journalists using social media in the courtroom is explored in detail in Chapter Five of this thesis.

Confidentiality problems can occur when a lawyer uses social media inappropriately. If a lawyer does not log out of his or her social medium account after using it, then someone else accessing the same computer may be able to read what the lawyer wrote.⁶¹ Section 3.6.3 of this chapter discusses in detail the potential confidentiality problems that can arise from lawyers' use of social media. Coralie Kenny and Tahlia Gordon state that

[t]he use of social networking sites involves a fundamental change in the way legal practitioners communicate with their clients and consequently poses a greater risk of miscommunication. Although these approaches may involve more timely and better direct communication between client and practitioner, the nature of that communication also has the potential to create confusion, misunderstanding and unrealistic expectations, particularly where the service delivery crosses national and language barriers.⁶²

Kenny and Gordon make a good point: given how quickly messages can be sent on social media, clients may expect quick response times if they have open channels of communication with their lawyers via social media. On the other hand, email has existed for at least 15 years, so it is possible that clients will not increase their expectations from lawyers as a result of

⁵⁹ Ovalle, above n 56, [5].

⁶⁰ Ibid [6].

⁶¹ The Law Society, 'Social Media' (Practice Note, The Law Society, 20 December 2011), [5.2.2.1] <<http://www.lawsociety.org.uk/advice/practice-notes/social-media/>>.

⁶² Coralie Kenny and Tahlia Gordon, 'Social Media Issues for Legal Practice' (2012) 50(4) *Law Society Journal* 66, 68.

using social media more than they did as a result of using email. Some lawyers may choose not to use social media when communicating with their clients, though they may use social media personally. Kenny and Gordon are correct that social media can increase the risk of miscommunication between a lawyer and a client. Since people can post information on social media quickly, it is possible that a client or a lawyer will not think carefully before sending a message to the other, which could cause miscommunication.

Lawyers can be fired if they use social media inappropriately. In the United States, Aaron Brockler, a prosecutor in Ohio, created a fake Facebook profile and then initiated conversations with two witnesses in a trial in which he was appearing. He attempted to convince the women to change their testimony. Brockler acted dishonestly, and was later fired from his position.⁶³ As discussed earlier, a public defender in Florida was also fired for her actions on social media.⁶⁴

As a result of the problems that can occur when lawyers use social media inappropriately, Australian ethical bodies may want to implement a standard set of national ethical guidelines for lawyers regarding social media use. The following section will discuss the actions that staff of ethical bodies in Australia, Canada, the United Kingdom and the United States have taken to date to release ethical guidelines on this issue.

3.5 Actions that Legal Regulators Have Taken to Date

Staff of ethical bodies in Australia, Canada, the United Kingdom and the United States have taken various actions to advise lawyers about how they should use social media in ways that take account of their professional ethical obligations. In Australia, the Law Institute of Victoria was the first Australian law society to release guidelines for lawyers on social media⁶⁵ when it released its *Guidelines on the Ethical Use of Social Media*.⁶⁶ These guidelines were released in response to many lawyers' requests for help with ethical issues

⁶³ Ben Waldron, 'Ohio Prosecutor Posing As Woman Fired for Allegedly Facebooking Women', *ABC News* (online), 7 June 2013
<<http://abcnews.go.com/US/ohio-prosecutor-posing-woman-fired-allegedly-facebooking-witnesses/story?id=19350118>>.

⁶⁴ Ovalle, above n 56, [6].

⁶⁵ Law Institute of Victoria, above n 8.

⁶⁶ *Ibid.*

concerning social media use.⁶⁷ Some of the issues that the Law Institute of Victoria's guidelines deal with are confidentiality, unintended lawyer-client relationships and the administration of justice.⁶⁸

Officials in Victoria have introduced other initiatives to advise lawyers about their ethical obligations while using social media. The Law Institute of Victoria's executive created a Social Media Task Force to inform lawyers about best practices in social media use,⁶⁹ and the President of the Institute wrote his views about ethics and social media on his blog.⁷⁰ The Law Institute of Victoria also offers training for lawyers on social media use.⁷¹

In New South Wales, the Office of the Legal Services Commissioner ("Commissioner's Office") published draft ethical guidelines for lawyers on social media use.⁷² These draft guidelines are not binding on lawyers.⁷³ Staff of the Commissioner's Office also wrote about social media in their newsletter, *Without Prejudice*,⁷⁴ and released a paper about the issue.⁷⁵ Staff of the Law Society of New South Wales' Legal Technology Committee released 'Guidelines on Social Media Policies'.⁷⁶ Staff of the Queensland Law Society's Ethics Centre published brief ethical guidelines based on the Law Institute of Victoria's guidelines.⁷⁷

There are significant differences among the four sets of guidelines. For example, the Law Institute of Victoria's guidelines discuss the harm to a lawyer's reputation that can result

⁶⁷ Public Affairs Manager, 'LIV Provides Social Media Ethical Guidance and Establishes Taskforce' (Media Release, 6 December 2012) [3]

<<http://www.liv.asn.au/Practice-Resources/News-Centre/Media-Releases/2012-Media-Releases/LIV-Provides-Social-Media-Ethical-Guidance-and-Est.aspx?rep=1&glist=0&sdiag=0>>.

⁶⁸ Law Institute of Victoria, above n 8, [4]–[5].

⁶⁹ *Ibid* [6]–[7].

⁷⁰ Michael Holcroft, 'Risks of Social Media to Lawyers and How to Manage them' on *LIV President's Blog 2012* (2012)

<<http://www.liv.asn.au/LIVPresBlog2012/January-2012/Risks-of-social-media-for-lawyers---how-to-manage->>.

⁷¹ *Ibid*.

⁷² Office of the Legal Services Commissioner (NSW), above n 35.

⁷³ *Ibid* [1].

⁷⁴ Mark, above n 7.

⁷⁵ Mark, Gordon and Shackel, above n 4, 4.

⁷⁶ Legal Technology Committee, 'Guidelines on Social Media Polices' (Guidelines, Law Society of New South Wales, March 2012) 1

<<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/587803.pdf>>.

⁷⁷ Stafford Shepherd, *Seven Ethical Sins in Social Media*, Queensland Law Society Ethics Centre (11 March 2013)

<<http://ethics.qls.com.au/sites/all/files/HUB%20update%20-%20Seven%20ethical%20sins%20in%20social%20media%2011%20Mar%2013.pdf>>.

from using social media inappropriately, but the Queensland and New South Wales law societies' and Commissioner's Office's guidelines do not.

The law societies of the other Australian States and Territories have not released guidelines on this topic to date,⁷⁸ nor do any uniform guidelines on lawyers' social media use exist for all lawyers Australia-wide.⁷⁹ It is possible that lawyers in the Australian jurisdictions currently lacking ethical guidelines for social media use are less prepared for ethical challenges involving social media, and may be more likely to cause a decrease in public confidence in the legal profession in those jurisdictions as a consequence. These lawyers may breach some of the Solicitors' Rules, such as those mentioned at the beginning of this chapter: the duty to the court and the administration of justice that is paramount, the duty of confidentiality, the duty to act with integrity, the duty for lawyers to supervise all employees working on a legal matter, and the duty not to publish comments about current legal proceedings that could result in an unfair trial or challenges to the administration of justice.

Some Australian law societies may not release ethical guidelines on this issue until it becomes sufficiently important, which may not happen until society officials learn that an Australian lawyer has breached his or her ethical obligations while using social media. Legal regulators in Western Australia, South Australia and the Territories may currently be considering the guidelines released by the other states and planning to release guidelines themselves in the future. They may also believe that the existing Australian guidelines about this issue are sufficient and that lawyers in their States and Territories can refer to them. Nevertheless, the websites of the law societies in Western Australia, South Australia and the Territories do not currently provide links to the other states' guidelines; this may indicate that they do not intend to refer lawyers in their jurisdictions to them.

It is interesting to note that members of legal ethical bodies and judicial officers in Victoria generally employ a forward-thinking approach to social media. For example, staff of the Victorian Supreme Court were the first in Australia to release a policy permitting journalists to use social media in the courtroom (this issue is examined in more detail in Chapter Five).

⁷⁸ As per a search of the websites of the law societies of Queensland, Western Australia, Tasmania, Northern Territory and the Australian Capital Territory on 31 December 2013.

⁷⁹ Carl Olson, *Social Media in Law: Take Ownership or Risk the Consequences* (2 May 2013) Thomson Reuters, [3] <<http://www.thomsonreuters.com.au/about-us/news/social-media-in-law.aspx>>.

Australian academics⁸⁰ and lawyers⁸¹ have also contributed to the debate about lawyers using social media by conducting research and writing articles about this topic. Such research has not revealed why more action has been taken in the area of lawyers using social media than in other areas involving social media and the courts, such as judges using social media. Perhaps one reason is that there are more lawyers in Australia than judges, and accordingly there may be more demand from lawyers. It is also harder to become a judge than a lawyer, and accordingly judges may have received more training in ethics than lawyers, and possess the ability to apply their ethical training to the social media context.

In the United Kingdom, staff of the United Kingdom Bar Standards Board released a media comment in April 2013 about traditional and social media.⁸² The purpose of the comment was ‘to clarify the remaining ethical obligations in relation to media comment and to suggest some of the issues that the barrister should bear in mind while exercising professional judgment’.⁸³ Staff of the United Kingdom Law Society released a practice note on social media use⁸⁴ addressing how social media affects the lawyer-client relationship, privacy issues and the creation of a social media policy.⁸⁵ The same organisation also released a practice note titled ‘Protecting Your Online Reputation’⁸⁶ that addresses establishing and monitoring lawyers’ online profiles. The practice note states that lawyers are not required to follow their practice notes, but if they do, it might make it easier for them if an incident occurs and they must communicate with regulatory bodies.⁸⁷

In Canada, officials of the Ethics and Professional Responsibility Committee of the Canadian Bar Association released ‘Your Presence in the E-World Guidelines for Ethical Marketing Practices Using New Information Technologies’, which advises lawyers on the use of social

⁸⁰ See, eg, Dal Pont, above n 47, 46.

⁸¹ See, eg, Dunstone, above n 36, 18–19; Melissa Castan and Oyiela Litaba, ‘Lawyers’ Conduct and Social Media: Tips and Traps’ (2012) 110 *Precedent* 26, 28.

⁸² Bar Standards Board, ‘Media Comment Guidance’ (Code Guidance, Bar Standards Board, April 2013) <<https://www.barstandardsboard.org.uk/code-guidance/media-comment-guidance-april-2013/>>.

⁸³ *Ibid* [5].

⁸⁴ The Law Society, ‘Social Media’ (Practice Note, The Law Society, 20 December 2011), [4.5], [6] <<http://www.lawsociety.org.uk/advice/practice-notes/social-media/>>.

⁸⁵ *Ibid* [3.2], [4.5], [6].

⁸⁶ The Law Society, ‘Protecting Your Online Reputation’ (Practice Note, The Law Society, 7 March 2013) <<http://www.lawsociety.org.uk/advice/practice-notes/protecting-your-online-reputation/>>.

⁸⁷ *Ibid* [1.3].

media.⁸⁸ The Canadian Bar Association also released ‘Guidelines for Practising Ethically with New Information Technologies’, which supplements its Code of Professional Conduct.⁸⁹ The guidelines of the Canadian Bar Association discuss confidentiality, marketing and other important issues.⁹⁰ The Federation of Law Societies of Canada released guidelines about lawyers using electronic technology⁹¹ and some law societies modified their guidelines accordingly. The law societies or barristers’ societies of the following Canadian provinces have adopted modified guidelines: British Columbia,⁹² Newfoundland and Labrador,⁹³ New Brunswick,⁹⁴ Nova Scotia,⁹⁵ Manitoba,⁹⁶ Ontario⁹⁷ and Saskatchewan.⁹⁸ Some of the Canadian guidelines go back to 2008⁹⁹ and 2009.¹⁰⁰ A search of the relevant literature in this area could not find what encouraged staff of Canadian regulators to offer guidelines on this issue years before their counterparts in the United Kingdom and Australia did.

The United States Bar Association created the ABA Commission on Ethics 20/20 to examine ethical issues involving technology and lawyers.¹⁰¹ It was created in 2009 to review the ABA

⁸⁸ David Day et al, ‘Your Presence in the E-World Guidelines for Ethical Marketing Practices Using New Information Technologies’ (Guidelines, Canadian Bar Association, August 2009) <<http://www.cba.org/CBA/activities/pdf/ethicsguidelines-eng.pdf>>.

⁸⁹ Ethics and Professional Issues Committee, ‘Guidelines for Practising Ethically with New Information Technologies’ (Information to supplement the Professional Code of Conduct, Canadian Bar Association, September 2008) <www.cba.org/cba/activities/pdf/guidelines-eng.pdf>.

⁹⁰ Ibid 5, 12.

⁹¹ Federation of Law Societies of Canada, ‘Guideline on Ethics and the New Technology’ (Guidelines, Law Society of British Columbia, April 2002) <<http://www.lawsociety.bc.ca/page.cfm?cid=1505&t=Guidelines-on-Ethics-and-the-New-Technology>>.

⁹² Ibid.

⁹³ Federation of Law Societies of Canada, ‘Guidelines on Ethics and the New Technology’ (The Law Society of Newfoundland and Labrador) <http://www.lawsociety.nf.ca/reports/reports_1_2002.asp>.

⁹⁴ Federation of Law Societies of Canada, ‘Guidelines on Ethics and the New Technology’ (Appendix to the Law Society of New Brunswick’s Code of Professional Conduct, 18 August 2003) <http://www.lawsociety-barreau.nb.ca/assets/documents/CODEOFPROFESSIONALCONDUCT_February_2009.pdf>.

⁹⁵ Federation of Law Societies of Canada, ‘Guidelines on Ethics and the New Technology’ (Guidelines, Nova Scotia Barristers’ Society, November 1999) <http://nsbs.org/sites/default/files/ftp/tech_ethics_guidelines.pdf>.

⁹⁶ Federation of Law Societies of Canada, ‘Guidelines on Ethics and the New Technology’ (Guidelines, Law Society of Manitoba, February 2002) <http://www.lawsociety.mb.ca/lawyer-regulation/law-society-practice-notice/ethics_newtech.pdf/view>.

⁹⁷ Federation of Law Societies of Canada, ‘Guidelines on Ethics and the New Technology’ (Practice Management Topics, Law Society of Upper Canada, 2013) <<http://www.lsuc.on.ca/with.aspx?id=2147490139>>.

⁹⁸ Federation of Law Societies of Canada, ‘Guidelines on Ethics and the New Technology’ (Ethical and Liability Issues Arising from Use of Technology in Law Practice, Law Society of Saskatchewan, September 2001) <<http://redengine.lawsociety.sk.ca/inmagicgenie/documentfolder/ac0361.pdf>>.

⁹⁹ Ethics and Professional Issues Committee, above n 89, 16.

¹⁰⁰ See Day et al, above n 88.

¹⁰¹ Mark, above n 7.

Model Rules of Professional Conduct (“Model Rules”) while considering the impact of technology upon them and to recommend changes.¹⁰²

This section of this chapter has examined the actions that officials in four jurisdictions have taken to date to advise lawyers about their social media use. It appears that the United Kingdom is the only jurisdiction where legal regulators have released uniform, standalone ethical guidelines for lawyers. Australian regulators should consider following suit by adopting the guidelines suggested in Appendix A of this thesis.

3.6 Examining Specific Ethical Situations

3.6.1 Unintended or Faulty Retainers

The word ‘retainer’ describes a contract between a lawyer and a client for the provision of legal services.¹⁰³ If a retainer exists, then the lawyer owes fiduciary duties to the client,¹⁰⁴ including the duty of confidentiality.¹⁰⁵ A lawyer’s professional indemnity insurance normally applies to work that is completed pursuant to a retainer.¹⁰⁶ If a lawyer lacks the knowledge required to complete certain work, then the lawyer should refuse the retainer¹⁰⁷ and refer the work to another lawyer.¹⁰⁸ A lawyer cannot accept a retainer if it conflicts with his or her duties to other current or former clients or with his or her own interests.¹⁰⁹ If a lawyer acts in litigation without a proper retainer, then the lawyer may have to pay their client’s costs.¹¹⁰ It is possible that a lawyer may create an unintended retainer with a client in a jurisdiction in which the lawyer is not licensed to practise law.¹¹¹

Problems can arise when a lawyer uses social media in such a way that gives rise to an unintended retainer. Steve Mark, Tahlia Gordon and Rita Shackel argue that some clients

¹⁰² American Bar Association, *ABA Commission on Ethics 20/20, About the Commission* (2009) <http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html>.

¹⁰³ Dal Pont, above n 47, 47.

¹⁰⁴ Ibid 45, 47.

¹⁰⁵ Ibid 47.

¹⁰⁶ Ibid 46.

¹⁰⁷ *Un v Schroter* [2002] NTSC 2 [58] (Martin CJ); Dal Pont, above n 13, 61.

¹⁰⁸ Ibid.

¹⁰⁹ Law Council of Australia, *Australian Solicitors’ Conduct Rules* (at June 2011) rr 10.1, 11.1.

¹¹⁰ *AW & LM Forrest Pty Ltd v Beamish* (Unreported, Supreme Court of New South Wales Equity Division, Young J, 27 August 1998) 14.

¹¹¹ ISBA Legal Ethics Committee, above n 9, 65.

believe that a retainer exists simply because a lawyer and a potential client are friends on social media.¹¹² Common sense likely dictates that more communication than a simple social media friendship would be necessary for a client to believe that a retainer exists.

3.6.1.1 Asking a Lawyer a Question on Social Media

A non-lawyer may ask a lawyer questions on social media that the lawyer may answer. A non-lawyer may also ask the general public a legal question on his or her social media page, and a lawyer may decide to assist the non-lawyer by answering the question. This can create an unintended retainer.¹¹³ Some academics and staff of ethical bodies argue that if a lawyer posts an answer to a general hypothetical situation (as opposed to applying a client's specific facts while providing advice), then it is unlikely that a retainer is created.¹¹⁴ This situation can be contrasted with the practices of certain law firms whose members appear to genuinely intend to create a retainer while advising a client on social media.¹¹⁵ For example, lawyers of the British law firm Loyalty Law Solicitors offer free legal opinions on their Twitter page, *@thelegaloracle*, to anyone who tweets questions.¹¹⁶ The advice that Loyalty Law Solicitors' lawyers provide is 140 characters or less. In general, if a potential client asks a lawyer a question on social media and the lawyer answers the question generally, a client may still assume that a retainer was created by the lawyer's mere answering of the question; this means that if a lawyer provides general legal advice to a client on social media, it is important that in addition to answering the question, the lawyer clearly states that he or she does not intend to create a retainer.¹¹⁷ Even better, if the lawyer does not intend to create a retainer when a client requests legal advice on social media, the lawyer should not post any legal response. The lawyer could post, 'Why don't you email my firm at [insert email] to set up an appointment to discuss this?' The lawyer could also post, 'Sorry, I can't help you.' However, this response may disappoint a potential client. If that person makes negative posts about the lawyer as a result, it could negatively affect the lawyer's practice. People who are not lawyers often ask lawyers for advice in situations in which it is debatable whether a retainer is created

¹¹² Mark, Gordon and Shackel, above n 4, 8.

¹¹³ Kenny and Gordon, above n 62, 68.

¹¹⁴ See Jennifer Lewkowski, 'Special Feature: One Hour CLE Ethics Credit: Staying Ethical in the Digital Age: a Primer for Taking Advantage of Technology Within Ethical Guidelines' (2013) 21(3) *Nevada Lawyer* 27, 29; Bennett, above n 10, 122; G Di Stefano, 'Social Media Risks' (2011) 220 *Ethos* 12, 12; Mark, above n 7.

¹¹⁵ Mark, above n 7, [2].

¹¹⁶ *Ibid* [1].

¹¹⁷ Kenny and Gordon, above n 62, 68.

(e.g. at parties), and it is possible that non-lawyers regularly ask lawyers legal questions on social media. Consequently, it may be important to advise lawyers on this issue. This is particularly the case because the lawyer's insurance may not cover the lawyer where they give advice without the existence of a retainer. If a client believes that a retainer was created on social media, but a lawyer behaves otherwise, the client's confidence in the legal profession may decrease.

3.6.1.2 Asking a Question of a Lawyer Not Licensed to Practise in the Relevant Jurisdiction

A potential client may also post a question on a lawyer's social media page that the lawyer should not answer because he or she is not licensed to practise in the potential client's jurisdiction.¹¹⁸ The lawyer may answer the question because he or she does not believe that a retainer was created or the lawyer may not have considered the repercussions of giving legal advice to a client in a jurisdiction where he or she is not licensed to practise. Given how quickly one can post information on social media, the lawyer may not have checked the jurisdiction of the potential client who posted the question.

3.6.1.3 Having Different Ideas About the Scope of a Retainer

A retainer may exist on social media between a lawyer and a client, but the lawyer and client may have different ideas about the scope of the retainer because of the brevity of their social media exchanges. For example, a client may ask the lawyer a question on social media about whether it is worth suing his or her builder over a \$100 000 contractual dispute. The lawyer may reply on social media that the cause of action is worth pursuing and, if successful, the client may win costs. The lawyer may assume that this is the extent of the advice provided, but the client may assume that the lawyer will represent him or her in the litigation. It is possible for a lawyer and a client to have different ideas about the scope of a retainer if they meet in person, but this may be more likely to happen on social media because of its typical brevity and informality of communication. If a client and a lawyer have different ideas about the scope of a retainer, this could decrease the client's confidence in the legal profession.

¹¹⁸ ISBA Legal Ethics Committee, above n 9, 64; Michael H Rubin, 'The Social Media Thicket for Mississippi Lawyers: Surviving and Thriving in an Ethical Tangled Web' (2012) 31(2) *Mississippi College Law Review* 281, 286.

3.6.1.4 Not Taking Full Instructions on Social Media

If a lawyer answers another person's question on social media and the lawyer does not take full instructions, the lawyer may not have the necessary knowledge to properly advise the client. As a consequence, the lawyer may unintentionally provide inaccurate legal advice. The client could face many negative repercussions if they act upon inaccurate legal advice: the client could commence a frivolous lawsuit, or fail to commence a legitimate lawsuit because they do not believe that they have a good cause of action. A client's confidence in the legal profession could decrease as a result of receiving inaccurate legal advice.

3.6.1.5 Non-Clients Taking a Lawyer's Advice Given on Social Media

A lawyer may properly advise a client pursuant to a proper retainer on social media, but because the advice was given publicly, other people who are not the lawyer's clients might read the advice and decide that it applies to them when it does not.¹¹⁹ These other people may then face problems because they implemented legal advice that did not apply to them. An issue may arise about whether non-clients who read a lawyer's advice to others could hold the lawyer accountable for their implementation of the advice. These people may have lowered confidence in the legal profession as a result of taking the wrong advice. In this situation, a disclaimer may assist the lawyer to avoid being held accountable and prevent people from taking advice that was not meant for them. Disclaimers will be discussed in more detail in the following section.

3.6.1.6 Opinions in the Different Guidelines Regarding Retainers in the Context of Social Media

Several of the current guidelines discuss unintended retainers on social media. The Law Institute of Victoria's guidelines state that

[p]ractitioners should take particular care to avoid creating unintended solicitor-client relationships on social media channels. For example, if one of a practitioner's Facebook 'friends' posts a legal or quasi-legal question on the practitioner's Facebook wall, any answer

¹¹⁹ Law Institute of Victoria, above n 8, [1].

posted by the practitioner may be construed by the questioner or other ‘friends’ as legal advice for which the practitioner may become liable. However, there is nothing to stop practitioners engaging in general legal debate through social media.¹²⁰

The Commissioner’s Office’s draft guidelines and the Law Society of Upper Canada’s online document titled ‘Professional Responsibilities When Using Technology’ give a similar warning to lawyers. These documents add that lawyers should clearly communicate to social media users that they do not intend to provide legal advice on social media,¹²¹ and that any information posted should not be used as legal advice.¹²² The model ethical guidelines in Appendix A of this thesis include a recommendation that lawyers add a disclaimer if they do not intend to provide legal advice. A lawyer should tailor the disclaimer to the specific situation. The lawyer may include a disclaimer that the advice is not intended to be legal advice or that the advice applies for a certain jurisdiction only.¹²³ Perhaps a social media application can be created that adds a disclaimer to lawyers’ posts and requires clients to tick a box indicating that they accept the terms of the disclaimer. The fact that a lawyer adds a disclaimer does not necessarily mean that the potential client will read it, but it could potentially help the lawyer if litigation results from the advice. The disclaimer could also increase the chances that professional indemnity insurance would cover the lawyer in the event that the client sues them.

The New South Wales¹²⁴ and Queensland¹²⁵ law societies’ guidelines, the Canadian Bar Association’s ‘Guidelines for Practising Ethically with New Information Technologies’¹²⁶ and the Federation of Law Societies of Canada’s guidelines¹²⁷ all briefly mention this issue. The Canadian document ‘Your Presence in the E-World Guidelines for Ethical Marketing Practices Using New Information Technologies’ discusses this issue and adds that lawyers may be in a position of conflict where they hold a retainer with someone whose interests

¹²⁰ Ibid.

¹²¹ Law Society of Upper Canada, ‘Professional Responsibilities When Using Technology’ (Practice Management Topics, 2013) [6] <<http://www.lsuc.on.ca/ProfessionalResponsibilitiesWhenUsingTechnology/>>; Office of the Legal Services Commissioner (NSW), above n 70, [2].

¹²² Law Society of Upper Canada, ‘Professional Responsibilities When Using Technology’ (Practice Management Topics, 2013) [6] <<http://www.lsuc.on.ca/ProfessionalResponsibilitiesWhenUsingTechnology/>>; Office of the Legal Services Commissioner (NSW), above n 70, [2].

¹²³ Michael E Lackey Jr and Joseph P Minta, ‘Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging’ (2012) 28(1) *Touro Law Review* 149, 165.

¹²⁴ Legal Technology Committee, above n 76, 1.

¹²⁵ Shepherd, above n 77, [3].

¹²⁶ Ethics and Professional Issues Committee, above n 89, 16.

¹²⁷ Federation of Law Societies of Canada, above n 91.

conflict with their current or past clients.¹²⁸ The model guidelines in Appendix A contain a similar statement. Lawyers may forget about their responsibilities to avoid conflicts while communicating with clients or potential clients on social media. If lawyers provide advice while a conflict exists, then they may breach the Solicitors' Rules or the Barristers' Rules.¹²⁹ The Canadian document adds that a lawyer who makes an error while providing advice on social media could face a negligence claim.¹³⁰ The model ethical guidelines include a statement similar to this one. A lawyer may think more carefully about his or her social media use if he or she is concerned that a negligence claim could result.

The United Kingdom Law Society's guidelines on social media do not discuss unintended retainers created on social media. The United States ABA Commission on Ethics 20/20 recommend that existing model guidelines for lawyers be modified to address social media. For example, they should state that lawyers must consistently understand 'technology's benefits and risks'.¹³¹

3.6.2 Lawyers' Duty to the Court

A lawyer has a duty to the court that is 'paramount',¹³² even if a client gives contrary instructions.¹³³ A solicitor's duty to the court is similar to a barrister's duty to the court:¹³⁴ 'The essence of these duties is the requirement for lawyers (within the context of the adversarial system) to act professionally, with scrupulous fairness and integrity and to aid the court in promoting the cause of justice.'¹³⁵ A lawyer's duty to the court 'includes [acting with] candour, honesty and fairness'.¹³⁶ One of the purposes of a lawyer's duty to the court is to protect the administration of justice by allowing judicial officers to regulate lawyers'

¹²⁸ Day et al, above n 88, 7.

¹²⁹ See Law Council of Australia, *Australian Solicitors' Conduct Rules* (at June 2011) r 10; Australian Bar Association, *Australian Barristers' Conduct Rules* (at 1 February 2010) rr 108–112.

¹³⁰ Day et al, above n 88, 7.

¹³¹ ABA Commission on Ethics 20/20, *Introduction and Overview* (August 2012) <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf>.

¹³² *Giannerelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ); Law Council of Australia, *Australian Solicitors' Conduct Rules* (at June 2011) r 3.1.

¹³³ *Rondel v Worsley* [1969] 1 AC 191, 227.

¹³⁴ *Lemoto v Able Technical Pty Ltd & Ors* (2005) 63 NSWLR 300, 323.

¹³⁵ D A Ipp, 'Lawyers' Duties to the Court' (2012) 114 *Law Quarterly Review* 63, 65.

¹³⁶ *Surefire Holdings Pty Ltd v Oxley Sportsdrome Pty Ltd* [2001] QSC 085 (21 March 2001) [63].

behaviour to ensure that lawyers act appropriately.¹³⁷ The Chief Justice of the Supreme Court of Victoria states that there is also a duty to ensure that the public is aware of the lawyers' duty to the court and to the administration of justice.¹³⁸

The Solicitors' Rules state that a lawyer's 'duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty'.¹³⁹ The Solicitors' Rules also state that lawyers must act with integrity¹⁴⁰ and they must not, in their professional or personal lives, act in a way that lowers the public's confidence in the administration of justice or 'bring[s] the profession into disrepute'.¹⁴¹ The Solicitors' Rules also state that lawyers must not publish any comments about current legal proceedings that could prejudice a fair trial or the administration of justice.¹⁴² The Barristers' Rules are similar in their treatment of these areas.¹⁴³

It is possible for lawyers to breach their duty to the court while using social media inappropriately. Lawyers might write negative comments on social media about judicial officers or other lawyers, and the likelihood of their doing so is increased by the informal nature of social media.¹⁴⁴ These types of comments could decrease the public's confidence in the courts and the legal profession. An example of this kind of behaviour is a prosecutor in San Francisco who blogged that the opposing counsel was 'chicken' because she requested a continuance.¹⁴⁵ The presiding judge called the prosecutor's comments 'juvenile, obnoxious and unprofessional'.¹⁴⁶ Another example of this type of conduct occurred during the murder and assault trial of a Somali man in Hennepin County Court in Minnesota, United States.¹⁴⁷

¹³⁷ Ipp, above n 135, 64.

¹³⁸ Chief Justice Marilyn Warren, 'The Duty Owed to the Court — Sometimes Forgotten' (Speech delivered at the Judicial Conference of Australia Colloquium, Melbourne, 9 October 2009) 23.

¹³⁹ Law Council of Australia, *Australian Solicitors' Conduct Rules* (at June 2011), r 3.

¹⁴⁰ *Ibid* r 4.1.4.

¹⁴¹ *Ibid* r 5.1.

¹⁴² *Ibid* r 28.

¹⁴³ See, eg, Australian Bar Association, *Australian Barristers' Conduct Rules* (at 1 February 2010) rr 4, 5, 12, 25, 75(c).

¹⁴⁴ Law Institute of Victoria, above n 8, [1]

¹⁴⁵ Gina Slaughter and John G Browning, 'Feature: The Attorney and Social Media Social Networking Dos and Don'ts for Lawyers and Judges' (2010) 73(2) *Texas Bar Journal* 192, 193.

¹⁴⁶ Margaret M DiBianca, 'Ethical Risks Arising from Lawyers' Use of (and Refusal to Use) Social Media' (2011) 12 *Delaware Law Review* 179, 197.

¹⁴⁷ See, Eric Laplant, 'Information Shared on Facebook Leads Towards Mistrial in Hennepin County Courts' *Examiner.com* (online), 19 February 2010, [1] <<http://www.examiner.com/article/information-shared-on-facebook-leads-towards-mistrial-hennepin-county-courts>>.

The prosecutor wrote derogatory comments about Somalis on her Facebook page. After the accused was convicted, the defence applied for a mistrial because of the prosecutor's comments.¹⁴⁸ It is possible that the prosecutor's racist comments on social media would have lowered the public's confidence in the judicial process even more than if the prosecutor had written an insult about the competence of a judge or a fellow lawyer. Kristine Peshek, an Illinois lawyer, called a judge 'Judge Clueless' on her blog. Peshek was fired from her position as a result of her actions and her licence to practise law was suspended for 60 days.¹⁴⁹ If Australian lawyers acted in a fashion similar to these three aforementioned lawyers, they would be breaching the Solicitors' Rules, which require them to act with integrity and not in a way that brings the profession into disrepute.

While it would have been possible for lawyers to make comments of the nature made in these examples prior to the creation of social media, it is unlikely that the comments would be sent to such a large audience. Therefore, it is important that legal regulators in all Australian jurisdictions create ethical guidelines regarding social media use for lawyers, such as those in Appendix A of this thesis. After reading these guidelines, lawyers may be less likely to behave like the lawyers discussed above. This will be particularly the case if the ethical guidelines clearly state the negative consequences for lawyers who engage in such inappropriate use of social media.

3.6.2.1 Approach of the Law Institute of Victoria's Guidelines

The Law Institute of Victoria's guidelines provide details about how a lawyer's duty to the administration of justice may be challenged on social media. As mentioned above, the guidelines state that '[e]very practitioner owes a duty to the court and to the administration of justice which is paramount and prevails to the extent of inconsistency with any other duty.'¹⁵⁰ It then reminds lawyers not to say anything negative about judges or lawyers on social media and not to comment on the merits of their cases on social media.¹⁵¹ This comment is a useful reminder to lawyers. One might argue that the comment is unnecessary because this should

¹⁴⁸ Kathleen Elliott Vinson, 'The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It' (2010) 41(2) *University of Memphis Law Review* 355, 395.

¹⁴⁹ *In re Peshek*, No 09CH89 (Hearing B. Ill. Attorney Registration and Disciplinary Comm'n filed Aug. 25, 2009) <https://www.iardc.org/rd_database/rulesdecisions.html>.

¹⁵⁰ Law Institute of Victoria, above n 8, [1].

¹⁵¹ *Ibid.*

be obvious to lawyers. However, it clearly is not obvious; the examples mentioned have shown that some American lawyers could have benefitted from such advice. The Law Institute of Victoria's guidelines also state that lawyers should not post anything on social media that they would not feel comfortable saying in front of a crowd.¹⁵² This is helpful in that it provides a test that lawyers can apply to a comment prior to posting it on social media. A better test may be that lawyers should not post anything on social media that they would not be comfortable saying in front of a judge; this is likely a higher threshold. It is possible that a lawyer's post on social media could be brought to a judge's attention, despite a lawyer not intending it to be (e.g., a lawyer writes something that opposing counsel emails to a judge's associate). This supports the view that the appropriate test is whether a lawyer would feel comfortable saying the comment in front of a judge.

3.6.2.2 Lawyers Post Comments About the Merits of Cases

If lawyers post comments about the merits of cases that are before the court or may be before the court in the future, this can potentially interfere with the administration of justice.¹⁵³ It can also breach the Solicitors' Rules or professional conduct rules in other jurisdictions. For example, a prosecutor in Florida posted updates about an assault trial on Facebook based on the *Gilligan's Island* theme song. The prosecutor was disciplined for his actions.¹⁵⁴ In *Wilson*, Wilson, a lawyer, served as a juror, but did not inform the court that he was a lawyer.¹⁵⁵ While a juror, Wilson wrote about the trial on his blog¹⁵⁶ and included the defendant's and the judge's name.¹⁵⁷ He stated that the judge was 'a stern, attentive woman with thin red hair and long, spidery fingers that as a grandkid you probably wouldn't want snapped at you'.¹⁵⁸ Wilson was suspended for 45 days from practising law and was required to write an exam in ethics because of his actions.¹⁵⁹ In both these cases, the lawyers' behaviour appears quite

¹⁵² Ibid 2.

¹⁵³ Law Institute of Victoria, above n 8, [1].

¹⁵⁴ Kathryn K Van Namen, 'Facebook Facts and Twitter Tips — Prosecutors and Social Media: an Analysis of the Implications Associated with the Use of Social Media in the Prosecution Function' (2012) 81(3) *Mississippi Law Journal* 549, 568.

¹⁵⁵ California Bar Journal, *Discipline Summary of Frank Russell Wilson* (23 January 2009) State Bar of California, [2] <http://members.calbar.ca.gov/search/member_detail.aspx?x=185591>.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid [4].

¹⁵⁸ Ibid.

¹⁵⁹ Ibid [1].

extreme¹⁶⁰ and could have decreased the public's confidence in the courts and the legal profession.

While in the past lawyers who commented about the merits of a case in public could reach many people, it is unlikely that they could have easily reached as many people as is possible with social media. If a lawyer commented about a case to a journalist, the lawyer may have had sufficient time before the interview itself to carefully think about the ethical repercussions of what he or she would say. There might also have been time between the interview and publishing or broadcasting the interview for the lawyer to ask the journalist to retract his or her comments.

Social media may also reveal inappropriate behaviour that legal regulators may not have known about otherwise. For example, prior to social media, a lawyer may have simply orally told their friends information about a client that was confidential. Currently, if a lawyer tells their friends confidential information about a client on social media, the friends of the lawyer can show the recorded exchange of information to relevant legal regulators. The presence of such evidence could make it easier for legal regulators to decide how to deal with the situation.

3.6.2.3 Approaches of Other Existing Guidelines

The Commissioner's Office's draft guidelines,¹⁶¹ the New South Wales' Law Society's guidelines,¹⁶² the United Kingdom Bar Standards Board media guidelines,¹⁶³ the United Kingdom Law Society's social media guidelines¹⁶⁴ and the Canadian 'Your Presence in the E-World Guidelines for Ethical Marketing Practices Using New Information Technologies'¹⁶⁵ each briefly state that lawyers should be courteous and act with integrity while using social media. The Queensland Law Society's guidelines also briefly touch on this

¹⁶⁰ For another example of a lawyer posting very unprofessional comments about a trial on social media, see, eg, *Missouri v Polk*, (ED Mo, No 98946, 17 December 2013).

¹⁶¹ Office of the Legal Services Commissioner (NSW), above n 35, [1].

¹⁶² Legal Technology Committee, above n 76, 1.

¹⁶³ Bar Standards Board, above n 82, [6(d)].

¹⁶⁴ The Law Society, 'Social Media' (Practice Note, The Law Society, 20 December 2011), [3.1]

<<http://www.lawsociety.org.uk/advice/practice-notes/social-media/>>.

¹⁶⁵ Day et al, above n 88, 11.

issue and refer lawyers to the American *Peshek* case.¹⁶⁶ The United Kingdom Law Society's guidelines provide a hypothetical example of a lawyer who posts an anonymous comment about a client that the mainstream media publicises.¹⁶⁷ This comment could negatively impact upon the lawyer and potentially decrease confidence in the legal profession. The model guidelines in Appendix A of this thesis include real examples while describing this situation. They likely have a greater impact on readers than a hypothetical example. The Canadian Bar Association's 'Guidelines for Practising Ethically with New Information Technologies' goes further than the other guidelines, stating that lawyers' communications on social media should conform to the Code of Conduct¹⁶⁸ and that lawyers should 'be vigilant to avoid jeopardizing their professional integrity, independence or competence'.¹⁶⁹ It further states that

[i]n communicating online, lawyers should encourage public respect for, and try to improve, the administration of justice (Rule in Chapter XIII). Any criticism of, and proposals for improvements in, the legal system should be *bona fide* and reasoned (Guiding Principle 2 to Rule XIII).¹⁷⁰

It also reminds lawyers that they should be careful because their occupation can add authority to their social media posts (the model guidelines in Appendix A adopt this view)¹⁷¹ and that lawyers 'should be circumspect in their participation in online public discussions. Online public discussions should be conducted with the same respect for the administration of justice required of public statements that lawyers may make in other forums and media'.¹⁷² The model guidelines similarly state that lawyers should maintain their integrity online.

The model guidelines additionally state that lawyers should be careful about the photos that they post on social media or that others tag them in. This is because it is possible that some of these photos could breach the Solicitors' Rule not to bring the profession into disrepute and could lower the public's confidence in the legal profession. An example of this would be a photo of a lawyer wearing a wig and holding several beers in front of a court building. A

¹⁶⁶ Shepherd, above n 77, [1].

¹⁶⁷ The Law Society, 'Social Media' (Practice Note, The Law Society, 20 December 2011), [3.3] <<http://www.lawsociety.org.uk/advice/practice-notes/social-media/>>.

¹⁶⁸ Ethics and Professional Issues Committee, above n 89, 3.

¹⁶⁹ *Ibid* 17.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid*.

¹⁷² *Ibid*.

similar comment would apply to care taken about the videos that lawyers post on social media.

3.6.3 Lawyers' Duty of Confidentiality

Lawyers have a duty to keep their clients' information confidential.¹⁷³ That duty 'is fundamental to the relationship between solicitor and client'.¹⁷⁴ This duty encourages clients to tell their lawyers everything about their matter.¹⁷⁵ If a lawyer breaches the duty of confidentiality, it may be considered professional misconduct. Indeed, Justice John McKechnie of the Supreme Court of Western Australia refers to breached confidentiality as 'a cardinal sin'.¹⁷⁶ The duty of confidentiality is part of the fiduciary relationship between lawyers and their clients,¹⁷⁷ and as such has an important relationship with the public's confidence in the legal profession.

The Solicitors' Rules,¹⁷⁸ Barristers' Rules¹⁷⁹ and each Australian State and Territory's Professional Rules discuss the duty of confidentiality.¹⁸⁰ The rules generally state that a lawyer may not provide anyone outside his or her firm with any confidential information obtained from a client unless the client gives permission or the lawyer is required to provide the information by law. The Solicitors' Rules and the Barristers' Rules do not define what information is 'confidential',¹⁸¹ but the commentary to the Solicitors' Rules states that the following are classes of information that may be confidential:

¹⁷³ *Legal Practitioners Complaints Committee v Camp* [2010] WASC 188 (28 July 2010) [33] (Heenan, Blaxell and Beech JJ).

¹⁷⁴ *Legal Services Commissioner v Tampoe* [2009] LPT 14 (Atkinson J), quoted in Kenneth Martin J, 'Between the Devil and the Deep Blue Sea: Conflict Between Duty to the Client and Duty to the Court' (Speech delivered at the Bar Association of Queensland Annual Conference, 4 March 2012) 21.

¹⁷⁵ *Baker v Campbell* (1983) 153 CLR 52, 114 (Deane J).

¹⁷⁶ *Legal Practitioners Complaints Committee v Walton* [2006] WASC 213 (1 September 2006) [21] (McKechnie J).

¹⁷⁷ *Bride v Freehill Hollingdale & Page* [1996] ANZ Conv R 593.

¹⁷⁸ Law Council of Australia, *Australian Solicitors' Conduct Rules* (at June 2011) r 9.

¹⁷⁹ Australian Bar Association, *Australian Barristers' Conduct Rules* (at 1 February 2010) rr 108–112.

¹⁸⁰ *Barristers' Rules 2011* (Qld), rr 109–115; *Legal Profession (Solicitors) Rule 2007* (Qld) r 3; *South Australian Barristers Rules 2010* (SA) rr 108–114; *Australian Solicitors Conduct Rules 2011* (SA) r 9; *Professional Conduct and Practice Rules 2005* (Vic) r 3; *The Victorian Bar Practice Rules 2009* (Vic) rr 62–67; *Professional Conduct and Practice Rules 1995* (NSW) r 2; *Barristers' Rules 2011* (NSW) r 108–112; *Legal Profession Conduct Rules 2010* (WA) r 9; *Barristers Rules 2011* (WA) rr 108–112; *Legal Profession (Solicitors) Rules 2007* (ACT) r 2; *Legal Profession (Barristers) Rules 2008* (ACT) rr 103–110; *Rules of Professional Conduct and Practice 2002* (NT) r 2; *Barristers Conduct Rules 2003* (NT) rr 103–109; *Rules of Practice 1994* (Tas) r 11.

¹⁸¹ Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Consultation Draft Commentary* (at 19 October 2012) r 9.

- (a) information of a former client that is directly related to a matter for an existing client, for example information belonging to an insurer concerning a potential claim, in circumstances where the solicitor is asked to accept instructions to act for the claimant;
- (b) information of relevance to a competitor, such as product pricing or business models; and
- (c) in some circumstances, particularly intimate knowledge of a client, its business, personality and strategies, for example in [the] *Yunghanns* case.

Social media provide several new ways for lawyers to breach the duty of confidentiality, many accidental.¹⁸² If a lawyer writes on social media that he or she just met with a client, but does not name the client, other people who know who the lawyer met with can learn about the existence of the lawyer-client relationship between the two.¹⁸³ Lawyers can make other remarks about a client that may not mention the client's name, but nevertheless allow others to deduce who the client is. The client's confidence in the legal profession may then decrease. For example, if a lawyer's client has a retail shop, the lawyer could write on social media, 'The client who I saw today gave me a new pair of jeans. It's nice to be appreciated, for once!' Lawyers can breach the duty of confidentiality on social media by writing something confidential on other lawyers' social media pages. In particular, lawyers may not think of the ethical problems that can result when they write on the social media page of another lawyer at their firm. The other lawyer's privacy settings may permit people from outside his or her firm to see the posts, which could result in an unintended breach of confidentiality.

A lawyer may 'vent' about his or her job, clients or judges he or she appears before on social media, which could result in a breach of his or her duty of confidentiality.¹⁸⁴ For example, *In the Matter of Margrett A. Skinner* in the United States, one of Skinner's clients wrote negative comments about Skinner's conduct as a lawyer on a few websites. Skinner retaliated by writing confidential information about the client on blogs.¹⁸⁵ *In re Peshek*, Kristine A

¹⁸² Bennett, above n 10, 118.

¹⁸³ D Bruce, 'The Attorney and Social Media Ethically Navigating the Social Media Landscape' (2010) 73 *Texas Bar Journal* 196, 200.

¹⁸⁴ Carrie Pixler and Lori A Higuera, 'Special Feature: Lawyers and the Cloud: Social Media: Ethical Challenges Create Need for Law Firm Policies' (2011) 47 *Arizona Attorney* 32, 36.

¹⁸⁵ *In re Margrett A. Skinner*, No S13Y01015, 2 (Ga, March 18, 2013)

Peshek wrote her clients' names and gaol identification numbers on her blog. Judicial officers of the Supreme Court of Wisconsin suspended her licence to practise law for 60 days as a result.¹⁸⁶ Carrie Pixler and Lori Higuera state that 'Peshek's case is an extreme situation in which most attorneys would (hopefully) not find themselves.'¹⁸⁷ It is to be hoped that Pixler and Higuera are correct. Skinner and Peshek's actions may have decreased the public's confidence in the legal profession.

While some lawyers have vented inappropriately about their jobs and clients for as long as the profession has existed, the ability of social media to reach so many people quickly makes the situation arguably worse than in the previous contexts. Additionally, social media's ability to instantly show information to the public is relevant. Imagine if social media platforms had an approval process, whereby after someone types information, 24 hours would pass before the writer would have to provide final approval to post the information. Perhaps Skinner and Peshek could have avoided posting to the world what they likely wrote in a quick second of frustration. While a lawyer's duty of confidentiality is well known, lawyers may not recall this duty while using social media. If Skinner and Peshek had read ethical guidelines about social media use that examined the duty of confidentiality, perhaps they would not have acted as they did.

3.6.3.1 Using Social Media to Import Information

Some social media sites allow the user to import information, such as contacts, from his or her existing email accounts. In doing so, lawyers may accidentally post information about their clients or witnesses.¹⁸⁸ Lawyers may try to hide the names of all their friends from each individual friend using social media's privacy settings in order to prevent this from occurring. Lawyers should not rely on this; however, because privacy settings seem to change fairly often. This is also a situation that is likely unique to social media and shows how social media is a special case that is different from other ways of breaching client confidentiality.

<<http://www.gasupreme.us/sc-op/pdf/s13y0105.pdf>>.

¹⁸⁶ *In re Peshek*, No 09CH89 (Hearing B. Ill. Attorney Registration and Disciplinary Comm'n filed Aug. 25, 2009)

<https://www.iardc.org/rd_database/rulesdecisions.html>.

¹⁸⁷ Pixler and Higuera, above n 184, 36.

¹⁸⁸ Lackey Jr and Minta, above n 123, 155.

3.6.3.2 Posting Photographs on Social Media

Lawyers who post photographs on social media may reveal inappropriate information about one of their matters.¹⁸⁹ For example, as previously discussed, in Florida, an accused's lawyer posted a photograph of an accused's underwear on Facebook, and the judge in the matter declared a mistrial.¹⁹⁰ This example demonstrates how serious a lawyer using social media inappropriately can be: a mistrial can result.

3.6.3.3 'Friending' or Posting Links

The Law Institute of Victoria's guidelines state that lawyers can potentially breach client confidentiality even by simply becoming friends with a client on social media. After the lawyer and client connect on social media, members of the public may be able to identify who the lawyer's clients are.¹⁹¹ Bennett states that if a lawyer posts a link to a client's webpage on social media, the lawyer and client's confidential relationship may become public.¹⁹² One might argue that it depends on whether any words accompany the link. If the lawyer writes words beneath the link that state 'I have a meeting with the director of this business on Monday morning', then someone who views the link could easily assume that the lawyer acts for the business. If the lawyer simply posts the link on his or her Twitter or Facebook page, it is possible that people who see the link will simply assume that the lawyer likes the business.

3.6.3.4 Computer Security

Social media works by cloud computing, where a third party external to the lawyer's office hosts the lawyer's information. Storing information that is not within a lawyer's physical control could pose a problem because the client's confidential information can be lost.¹⁹³ Individual computers and cloud storage platforms are vulnerable to hacking, whereby someone can access more information than what is easily accessible on social media.¹⁹⁴ It is

¹⁸⁹ Ibid.

¹⁹⁰ Ovalle, above n 56, [1], [4].

¹⁹¹ Holcroft, above n 70, [5].

¹⁹² Bennett, above n 10, 119.

¹⁹³ Kenny and Gordon, above n 62, 68.

¹⁹⁴ Ibid.

important that all lawyers have a strategy to ensure that information on their computers is secure. If a lawyer's social media site is hacked and confidential information is taken, this could lower the public's confidence in the legal profession, in addition to causing other problems (e.g., a police investigation might be necessary).

3.6.3.5 Non-Lawyer Employees

The behaviour mentioned in this chapter also applies to a lawyer's non-lawyer employees, who may breach the duty of confidentiality in the same ways as a lawyer.¹⁹⁵ Interestingly, most of the guidelines on this issue (e.g., the guidelines of the Canadian Bar Association) do not remind lawyers that they should ensure that their non-lawyer employees follow them as well. The model guidelines offered in this thesis do make this recommendation. Something similar to rule 37 of the Solicitors' Rules, which states that lawyers must supervise all employees working on a legal matter, may be appropriate. Arguably, a lawyer's non-lawyer employees may be more likely to breach the relevant guidelines than a lawyer, because they may not have attended professional development seminars on ethics. At some law firms, there may be an information technology department, so lawyers may not consider the importance of ensuring that information on social media is kept confidential, instead simply leaving this responsibility to someone else. Lawyers should not solely rely on information technology professionals to ensure that they keep their client's information confidential because informational technology professionals may not always be available to assist.

3.6.3.6 Approaches to Confidentiality of the Existing Guidelines

All of the guidelines published about social media mentioned in this chapter discuss confidentiality. The model guidelines in Appendix A also discuss confidentiality to lessen the chance that a lawyer will breach his or her duty of confidentiality while using social media.

Some of the guidelines provide examples of mistakes that lawyers may make that result in a breach of their clients' confidentiality while using social media. The Queensland Law Society's guidelines briefly remind lawyers of their duty of confidentiality while using social

¹⁹⁵ Bennett, above n 10, 119.

media and provide *Peshek* as an example.¹⁹⁶ It is interesting that the Queensland Law Society's guidelines are the only Australian ethical guidelines that mention one of the American examples in which a lawyer breached the duty of confidentiality; recalling these American examples is valuable. The model guidelines provide a real example in this area. In general it would be preferable to use an Australian example instead of an American one, as Australian lawyers could potentially better relate to an Australian example. Research in this area did not reveal any Australian examples to date.

Some of the guidelines recommend actions for lawyers to take to prevent breaching their duty of confidentiality. The Commissioner's Office's draft guidelines recommend that lawyers be careful that their privacy settings on social media only permit appropriate people to see their social media pages, 'and that inadvertent access or disclosure of confidential information cannot occur'.¹⁹⁷ The comment in the Commissioner's Office's draft guidelines is a useful one, but in practice, lawyers may not be able to rely on their privacy settings to ensure that they maintain their duty of confidentiality on social media. People whom lawyers did not intend to see confidential information may then see it. Additionally, even if lawyers have very strict privacy settings, their friends on social media may not. This may result in friends of their friends being able to see confidential information on lawyers' social media pages. The Commissioner's Office draft guidelines also recommend that lawyers do not post confidential information on social media without obtaining their client's permission first.¹⁹⁸ Lawyers clearly need to think carefully before asking a client for permission to post confidential information on social media; such a request may offend a client. If the lawyer does not obtain the client's permission to post the confidential information on social media, then he or she must not post it.

Members of the ABA Commission on Ethics 20/20 amended the Model Rules to recommend that lawyers take 'reasonable efforts'¹⁹⁹ to ensure that they do not breach their duty of confidentiality. They do not define the words 'reasonable efforts'. The Law Society of Upper

¹⁹⁶ Shepherd, above n 77, 1.

¹⁹⁷ Office of the Legal Services Commissioner (NSW), above n 35, [2].

¹⁹⁸ Ibid.

¹⁹⁹ ABA Commission on Ethics 20/20, 'Revised draft resolutions for comment — technology and confidentiality' (Draft Resolutions for Comment, American Bar Association, 21 February 2012) 8 <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120221_ethics_20_20_revise_d_draft_resolution_and_report_technology_and_confidentiality_posting_final.authcheckdam.pdf>; American Bar Association, *Model Rules of Professional Conduct* r 1.6(7)(c), (Chicago: American Bar Association, 2008).

Canada's online document 'Professional Responsibilities When Using Technology' has a section titled 'Maintain Confidentiality'²⁰⁰ that similarly recommends that lawyers use the same standards of confidentiality that they use in other forms of communication in electronic communication. However, lawyers may want to consider approaching confidentiality on social media differently than they would other electronic communication because of how quickly and effortlessly confidential information can be sent to millions of people. The Canadian Bar Association's *Guidelines for Practising Ethically with New Information Technologies* state that lawyers need to ensure that their communication with or about a client is 'secure and not accessible to unauthorized individuals'.²⁰¹ More information should be given about what 'secure' means, because some lawyers may be unaware of how to ensure that the information that they post on social media is secure. Knowing how to use social media and knowing about online security are quite different. This document and the British Columbia, Newfoundland, Nova Scotia, Manitoba and Saskatchewan guidelines recommend that lawyers think critically about the risks of a specific type of technology prior to sharing confidential information on it.²⁰² This is a good recommendation and is included in the model guidelines. A cookie cutter approach to client confidentiality on social media may not be appropriate given that new types of technology emerge all the time.

3.6.3.7 Deciding What Information is Confidential

Canadian lawyer Michelle Allinotte recommends that when deciding whether information about a client is confidential, 'ask yourself if the client would know you are talking about them when they read it. If the answer is yes, you either need to get their consent or you need to change the content of the post so that they cannot identify themselves'.²⁰³ Allinotte's test is likely too narrow, because there may be situations where the client would not know whether the lawyer was talking about him or her, yet client confidentiality would still be breached. For example, for Australian lawyers, it may be better to think about whether they would post information of a kind listed in the Solicitors' Rules' explanation of the word 'confidential'. This includes information that directly concerns a client or could assist a client's rival. This helps to ensure that lawyers comply with their existing professional obligations. It is possible

²⁰⁰ Law Society of Upper Canada, above n 121, [4].

²⁰¹ Ethics and Professional Issues Committee, above n 89, 5.

²⁰² Ibid 6.

²⁰³ Michelle R J Allinotte, 'Social Media Networking for Lawyers: Finding Friends (and Clients) on Facebook' (2012) 38(1) *Law Practice* 31, 31.

that lawyers may have questions about whether they can post certain information on social media that is outside of the Solicitors' Rules' explanation of social media, yet which they may not instinctively feel right about posting. For example, if a judge delivered a judgment wherein a lawyer won a case, the lawyer may want to post on social media 'I won at court today! My client, the plaintiff, won three millions dollars! I love lawyering!' This comment does not appear to fall under the explanation of the word 'confidential' in the Solicitors' Rules. Due to the open justice principle, the public probably could attend the hearing to see the judge deliver the judgment first hand. This principle is examined in more detail in Chapter Five. It might be argued that the post breaches the Solicitors' Rule to avoid bringing the profession into disrepute.

3.6.3.8 Internal Law Firm Policy on Social Media

If a law firm has its own internal policy on social media, the policy can inform lawyers that they need to be careful that they do not disclose confidential information.²⁰⁴ Having an internal law firm policy on this issue is a good idea, because it reinforces that lawyers must take their duty of confidentiality seriously in the social media context. It also increases the possibility that lawyers will read a document about their ethical obligations while using social media (they can read the model guidelines and their law firm's policy). Lawyers can also try to use their social media privacy settings to reduce the chances that they will breach their duty of confidentiality.²⁰⁵ For example, they can ensure that they have very strict privacy settings for their clients, to make it less likely that other people can see the information that they exchange with clients. Lawyers can then have more flexible privacy settings with their friends. Lawyers should remember that their privacy settings can change frequently.

This section of the chapter has argued that written ethical guidelines for lawyers are necessary to advise lawyers about their duties of confidentiality while using social media. The following section will argue for the necessity of standalone national ethical guidelines on social media for Australian lawyers.

²⁰⁴ Pixler and Higuera, above n 184, 36; The Law Society 'Social Media' (Practice Note, The Law Society, 20 December 2011) [6.2] <<http://www.lawsociety.org.uk/advice/practice-notes/social-media/>>.

²⁰⁵ Lackey Jr and Minta, above n 123, 155.

3.7 Recommendation: Create Uniform National Ethical Guidelines on Social Media

Our brick and mortar world is receding into a virtual landscape. There is an online realm where hundreds of millions of people are conversing, networking, and logging the details of their lives. This new mode of human interaction does not fit neatly into any discovery statutes, case law precedents, or ethics codes. Indeed, the administration of justice is struggling to adapt to this emergent reality with little guidance. The social networking era, marked by the creation of instant communities and depots of personal information, is pushing legal practice towards the vanishing points for ethical and constitutional boundaries.²⁰⁶

It is disputed whether written ethical guidelines about lawyers' social media use are necessary. Some people believe that current ethical rules are sufficient and can be applied to social media use, while others believe that new ethical rules are necessary.²⁰⁷ Taylor states that rules of conduct for lawyers should not be amended to address social media because technology constantly changes. He adds that the new rules would 'become obsolete over a very short period of time.'²⁰⁸ Just as society and its views on ethical behaviour change over time, ethical guidelines for lawyers must change over time. This chapter argues that written ethical guidelines are necessary for Australian lawyers in relation to social media, despite how often technology changes. Technology does not change so quickly that general ethical guidelines about social media use would become obsolete overnight. For example, the New South Wales Law Society's guidelines are over a year old²⁰⁹ and do not appear outdated. The Canadian Bar Association's 'Guidelines for Practising Ethically with New Information Technologies' is over four years old,²¹⁰ yet it is still sufficiently relevant that that this chapter has referred to parts of it.

Some people may argue that model ethical guidelines about lawyers' social media use are not necessary because if lawyers experience ethical challenges while using social media, they

²⁰⁶ Ken Strutin, 'Social Media and the Vanishing Points of Ethical and Constitutional Boundaries' (2011) 31(1) *Pace Law Review* 228, 229.

²⁰⁷ Silverberg, above n 34, 715; see also Skinner's argument that current ethical rules are sufficient for lawyers to apply to situations with social media, but new rules are necessary to advise lawyers about potential 'unprofessional behaviour' due to social media use: Christina Parajon Skinner, 'The Unprofessional Sides of Social Media and Social Networking: How Current Standards Fall Short' (2012) 63(2) *South Carolina Law Review* 241, 266–267.

²⁰⁸ Andy Taylor, 'Friending and Following: Applying the Rules of Professional Conduct to Social Media' (2012) 34(3) *University of Arkansas at Little Rock Law Review* 551, 588–589.

²⁰⁹ Legal Technology Committee, above n 76, 1.

²¹⁰ Ethics and Professional Issues Committee, above n 89, 1.

should cease using it. Given how many lawyers already use social media and its previously mentioned benefits to them, it is unlikely that this would happen. A much better solution is to release model ethical guidelines about this issue such as the ones in Appendix A of this thesis.

Model ethical guidelines about social media use for Australian lawyers should be separate from the Solicitors' Rules, Barristers' Rules and other Professional Rules. Staff of Canadian and British ethical bodies, the Institute, the Commissioner's Office and the New South Wales and Queensland Law Societies have released standalone guidelines. The American Bar Association appears to be the only organisation that modified its existing professional conduct rules to apply to social media. Creating a separate set of ethical guidelines is recommended, as opposed to modifying the Solicitors' Rules and Barristers' Rules, because it would be easier to update a shorter, more specific set of guidelines every few years as necessary, than to update various parts of the lengthy Solicitors' Rules and Barristers' Rules. Given how busy lawyers are known to be, it may also be easier to encourage lawyers to read a three to seven page ethical document about social media than a lengthier document. Law societies in Australia offer many standalone ethical guidelines on various topics;²¹¹ standalone ethical guidelines on lawyers' social media use should be similarly available. Clear ethical standards for Australian lawyers regarding social media use will help prevent lawyers from breaching the Solicitors' Rules, the Barristers' Rules and other Professional Rules. As a result, the public's confidence in the legal profession will be maintained.

It is recommended that legal regulators create a uniform set of guidelines for lawyers nationwide (or that they adopt the model guidelines in this thesis) because of the profession's current stance towards uniformity. If legal regulators from some States' and Territories' law societies want to modify the uniform guidelines slightly, that could be provided for. Uniform ethical guidelines will also be useful for ensuring that the lawyers in each State and Territory have easy access to ethical guidelines on this issue. Single model guidelines may also signify to lawyers the importance of this issue; more lawyers nationally may read uniform national guidelines than when only a few states have guidelines. The drafters of such uniform guidelines may then receive more feedback about how to improve them.

²¹¹ See, eg, the Victorian Law Institute's guidelines on conflict of interest and letter of demand guidelines: <<http://www.liv.asn.au/For-Lawyers/Ethics/Ethics-Resources/Ethics-guidelines>>. See also, eg, the Law Society of New South Wales Information Barrier Guidelines, <<http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/Protocolsguidelines/index.htm>>.

Admittedly, the creation of national model guidelines for Australian lawyers such as the model guidelines in this thesis does not ensure that lawyers will read them. However, if single uniform national guidelines were created, lawyers could easily find them online. Furthermore, it would be possible to help more lawyers become aware of national model guidelines by offering professional development sessions about them. This would be preferable to the current situation, in which lawyers in the States and Territories that do not have guidelines have to make a comparatively large effort to examine the separate websites of the Law Institute of Victoria, the Commissioner's Office and the New South Wales and Queensland Law Societies to find those organisations' guidelines.

Of the respondents to the International Bar Association's survey on bar associations and social media, 80 per cent thought that ethical guidelines for lawyers should be modified to include social media.²¹² This adds further weight to the recommendation that model guidelines for Australian lawyers are necessary.

Jared Correia suggests that the reason for the lack of ethical standards for lawyers on social media use is that the people responsible for creating these ethical standards do not have sufficient knowledge of social media and similar technologies.²¹³ This may be true, because social media has only existed for approximately 10 years. If this is true, then the people who create ethical standards for the profession can consult lawyers who use social media or information technology professionals to acquire the relevant knowledge to prepare uniform national ethical guidelines or adapt the model guidelines in this thesis.

Since lawyers in Victoria requested guidelines about social media from the Law Institute of Victoria,²¹⁴ it is reasonable to assume that lawyers in the rest of Australia want guidelines on this issue also. Mark, Gordon and Shackel of the Commissioner's Office believe that flexible

²¹² Legal Projects Team, *The Impact of Online Social Networking on the Legal Profession and Practice* (February 2012) International Bar Association, 30 <http://www.ibanet.org/Committees/Divisions/Legal_Practice/Impact_of_OSN_on_LegalPractice/Impact_of_OSN_Home.aspx>.

²¹³ Jared D Correia, 'When is too Much Information Really TMI?' (2012) 38(1) *Law Practice* 53, 53.

²¹⁴ Public Affairs Manager, 'LIV Provides Social Media Ethical Guidance and Establishes Taskforce' (Media Release, 6 December 2012) [2] <<http://www.liv.asn.au/Practice-Resources/News-Centre/Media-Releases/2012-Media-Releases/LIV-Provides-Social-Media-Ethical-Guidance-and-Est.aspx?rep=1&glist=0&sdiag=0>>.

and educational guidelines are necessary for Australian lawyers.²¹⁵ In particular, they believe that ethical guidelines should address the security and confidentiality challenges that lawyers experience with social media.²¹⁶ They state that

existing approaches to ethical standards, professional responsibility and regulation of legal practices, which reflect the normative values and methodologies of traditional legal practice and legal professionalism, are in urgent need of recalibration. Confronting this challenge is necessary to maintain consumer confidence, ensure consumer protection, encourage appropriate competition practices in the legal services marketplace and provide appropriate guidelines to the profession on ethical dilemmas and questions of legal professional responsibility.²¹⁷

Mark, Gordon and Shackel appear to take a wide view of the implications of drafting ethical standards for lawyers. The existence of ethical standards for lawyers' social media use may increase public confidence in the legal profession. This idea accords with Mark, Gordon and Shackel's comments about consumer confidence increasing and ensuring consumer protection.²¹⁸

3.8 Conclusion

Representatives of the Law Society of England and Wales state that social media 'is an increasingly growing area and one that the whole legal profession should be aware of and be considering'.²¹⁹ This is particularly the case with lawyers using social media, because social media results in unique ethical situations that lawyers may not have experienced before.

Commentators note that 'the ethics of lawyer participation in social media outlets is and will remain a hot topic. As social networking continues to evolve, so too will ethical considerations unique to attorneys'.²²⁰ This chapter has examined some of these ethical considerations: unintended and faulty retainers, a lawyer's duty to the court and a lawyer's

²¹⁵ Mark, Gordon and Shackel, above n 4, 7.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Legal Projects Team, above n 212, 31.

²²⁰ Gina F Rubel, 'Social Media Symposium: Social Media and the Benefits to Lawyers of Adopting a Policy' (2010) 81(2) *Pennsylvania Bar Association Quarterly* 47, 57.

duty of confidentiality. Lawyers may want to consider ethical guidelines about social media use pertaining to jurisdictions besides those mentioned in this chapter.

As more lawyers use social media,²²¹ it is important to release uniform guidelines as soon as possible (such as the model guidelines in this thesis) to minimise the risk of inappropriate social media use by lawyers. Inappropriate use of social media by lawyers could decrease public confidence in the legal profession.

Until national standalone uniform ethical guidelines are created, Australian lawyers can read the guidelines issued by the Law Institute of Victoria, the Commissioner's Office and the New South Wales and Queensland Law Societies, as well as the model ethical guidelines in Appendix A of this thesis. If lawyers face an ethical challenge while using social media that existing guidelines do not address, they can consider seeking advice from senior lawyers or sending a query to the ethical committee of the law society or barrister association in their State or Territory. Lastly, lawyers should always consider their professional ethical obligations while using social media.

²²¹ Bennett, above n 10, 113.

Chapter 4: Why Australian Courts Should Have Social Media Accounts

4.1 Introduction

Judge Marilyn Huff of the District Court for the Southern District of California in the United States states that

(although I don't know how to do it) apparently I can put something on YouTube. Apparently it's pretty easy to do. In this election, President-elect Obama was able to energize the whole younger generation and get that information out. There's no reason why courts couldn't do the same.¹

Many courts are currently contemplating the idea that Her Honour raises here: using social media to inform and engage the public (the survey conducted in the present research provides examples of this). It is important that courts inform the public about their work and processes. Courts give information to the public primarily through websites and through providing information to members of the media, who then distribute the information. This has typically been the most important method for courts to provide information to the public. At the moment, the traditional media's provision of information to the public has decreased, while social media's role in this provision of information is increasing.²

The author wanted to find out whether courts are expanding the amount of information that they provide to the public. Between May and July 2013, she emailed a survey to 23 different staff of courts in Australia, Canada, the United Kingdom and the United States. The purpose of the survey was to find examples of whether courts had created social media accounts in order to engage the public. For those courts not using social media, the survey asked them why. The author received 15 completed surveys. Appendix C to this thesis contains the participants' consent information and the survey questions. Appendix D contains the information letter for participants that accompanied the survey. Appendix E contains the

¹ Reynolds National Center for Courts and Media et al, *FYI, LOL or OMG? Technology's Impact on the Courts and the Media* (17–18 November 2008) 11 <http://www.courtsandmedia.org/pdf/rnccm_fyi_book.pdf>.

² Karen Salaz, Thomas Hodson and Chris J Davey, *New Media and the Courts: The Current Status and a Look at the Future* (26 August 2010) Social Science Research Network, 25 <<http://ssrn.com/abstract=1666332>>.

survey questions with the answers received.³ Appendix B contains a list of the URLs for the social media accounts of the courts surveyed who stated that they have social media accounts.

This chapter discusses the relationship between the courts and the public and examines the benefits that using social media can bring to Australian courts. It also introduces the survey that was conducted to obtain examples of this relationship. It then discusses some of the reasons why some courts in Australia do not use social media. The chapter then goes on to examine which social media Australian courts can best use and what content they can post. Suggestions are offered as to how courts can start to use social media. Ultimately, it is argued that Australian courts that do not use social media would benefit from starting to use it as soon as possible, with the aim of improving the public's knowledge of and confidence in the courts and the judiciary.

The discussion in this chapter is limited to court staff using social media for work purposes in their capacity as court representatives, as opposed to court staff who use social media for personal reasons. The survey is also confined to this focus. The discussion of social media in this chapter is limited to three main social media: Twitter, Facebook and YouTube. This is in accordance with the thesis's primary focus on Twitter and Facebook (as explained in Chapter One). The survey also enquired about YouTube because it was found during preliminary research that some courts use YouTube to engage the public.

4.2 The Relationship Between the Courts and the Public

In the opinion of Patricia Seguin, the Community Outreach Director of the Superior Court of Arizona in Maricopa County, the public are often misinformed or uninformed about the work of the courts.⁴ Chief Justice Paul de Jersey of the Supreme Court of Queensland believes that some people think that judges are 'detached from the community', particularly regarding

³ The author modified some of the answers provided to take out information that was not relevant to the thesis.

⁴ Patricia Seguin, *The Use of Social Media in Superior Court of Arizona in Maricopa County* (2011) Superior Court of Arizona in Maricopa County, 67
<<http://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2011/Social%20Media.ashx>>.

giving offenders lenient sentences.⁵ The public often have negative ideas about the courts. Some think that court processes are expensive and unfair to different races and ethnicities.⁶ Others also believe that judicial officers take too long to make decisions.⁷

Some members of the public complain that the courts do not sufficiently inform the public about the work that they do.⁸ It is said that the judiciary are the ‘least understood’ part of the Government;⁹ the Chief Justice of Victoria, Marilyn Warren, believes that some people only read the headline and the first two paragraphs of a story about a court in the media and then criticise the judiciary.¹⁰ Word of mouth also affects people’s perceptions of the courts and the judiciary: people who interact with the court may tell other people about their experiences with it, and this information can spread and affect public opinion.¹¹

As a result, many Australian courts have information officers who communicate with the media and the public.¹² The information officers also try to increase the public’s confidence in the courts and the judiciary by publishing judges’ reasons for decisions, hosting open days and distributing educational information.¹³ Judges also speak to community organisations and on the radio from time to time.¹⁴ Increasing court communications using social media may increase the confidence that the public has in the courts and the judiciary, in addition to creating many other benefits.

4.3 Benefits of Courts Using Social Media

The Chief Justice of the Supreme Court of Victoria states that ‘[t]he courts are getting to a stage where they have had enough of the inappropriate criticism, the skewing of information in the media, and [they] really need to try and seize the day [themselves] and give some

⁵ Chief Justice Paul de Jersey, ‘The Courts and the Media in the Digital Era’ (Speech delivered at Bond University, Queensland, 12 February 2011) 1.

⁶ Seguin, above n 4, 8.

⁷ Ibid 8.

⁸ de Jersey, above n 5, 2.

⁹ Ibid.

¹⁰ Kellee Nolan, ‘Victorian Courts Look at Tweeting Rulings’, *The Sydney Morning Herald* (online), 31 August 2011, [2] <<http://news.smh.com.au/breaking-news-national/victorian-courts-look-at-tweeting-rulings-20110831-1jloc.html>>.

¹¹ de Jersey, above n 5, 6–7.

¹² Nolan, above n 10, [2].

¹³ Ibid.

¹⁴ Ibid.

information to the community'.¹⁵ This view of the Chief Justice is indicative of one approach to how court officials can use social media: the Output Only approach. This section establishes two categories of approaches to courts' use of social media: the Output Only approach and the Input Output approach.

The Output Only approach involves courts using social media to inform the public where the public cannot post or comment in reply on the courts' social media pages. The courts can easily provide information to the public this way. According to this method, the public would not be able to retweet a court's tweet, follow a court on Twitter, write on a court's Facebook wall or become friends with a court on Facebook. In contrast, the Input Output approach permits the public to post comments or replies to information that courts post. Under this approach, members of the public would be able to retweet the tweets of courts, follow courts on Twitter, write on courts' Facebook walls or become friends with courts on Facebook.

4.3.1 Benefits of the Output Only Approach

Applying the Output Only approach, a benefit to courts of using social media would be that courts could communicate directly with people with whom they would not normally communicate,¹⁶ for example, people who use social media but not traditional media such as newspapers and television.¹⁷ Social media users may gain new knowledge about the courts, which could help increase their confidence in them. Judge Gibson states that 'a vital part of courts communicating with and dispensing justice is interaction with the community, particularly with the shrinking role of the jury'.¹⁸ This makes sense: if judicial officers use juries less, then the public may come into contact with the judicial system less.

In particular, courts can provide information directly to the public when they choose to through social media, instead of waiting for journalists to write a story or for a webmaster to update the court's website.¹⁹ A consequence of this is that courts are able to provide

¹⁵ Ibid [3].

¹⁶ Laura Click, *From Sketch Pads to Smart Phones: How Social Media Has Changed Coverage of the Judiciary* (2011) National Center for State Courts, 48
<<http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctmedia/id/30>>.

¹⁷ Salaz, Hodson and Davey, above n 2, 40.

¹⁸ ABC Radio National, 'Justice Tweeted Is Justice Done', *The Law Report*, 9 July 2013 (Judith Gibson J).

¹⁹ Seguin, above n 4, 14.

information to the public without delay.²⁰ It has been found in the United States that when courts give information to the public immediately, fewer members of the public call the court and fewer journalists attend court.²¹ This conserves the court's resources. Courts can also put information into a proper context when they post information on social media, which the mainstream media may not do.²² It is suggested that courts may be better able to put information into context by using Facebook as opposed to Twitter, because of Twitter's 140-character limit on tweets.

It is also possible that courts' use of social media could support the open justice principle and increase the public's confidence in the judiciary.²³ When members of the public have the same information about a trial as a judge, they are more likely to agree with the sentence that the judge gave the offender.²⁴ If information that explains an offender's sentence or a link to a judgment that explains the sentence is posted on a court's social media page, then the public may find the sentence that the judge gave an offender more acceptable.

The use of YouTube is rare by Australian courts at this point in time. When courts upload videos to YouTube, the videos are saved externally, so the videos do not require space on courts' computer servers.²⁵ This also helps to conserve the court's resources.

4.3.2 Benefits of the Input Output Approach

Courts can also benefit from an Input Output approach to social media. For example, members of the public can ask the courts questions and receive immediate responses. This occurred on 31 July 2013, when a member of the public, Neil Conway, wrote '@SCVSupremeCourt I don't seem to be able to open your links on my iPad, is there an app other than a windows app for this[?]' on the Supreme Court of Victoria's Twitter page. On

²⁰ See Alysia Blackham and George Williams, 'Australian Courts and Social Media' (2013) 38(3) *Alternative Law Journal* 170, 174 for a discussion suggesting that if courts provide information to the public by social media instantly, it may be unfair to those people who do not use social media.

²¹ Seguin, above n 4, 14–15.

²² Reynolds National Center for Courts and Media et al, above n 1, 6.

²³ Blackham and Williams, above n 20. Note that Blackham and Williams argue in the same article that if the courts use social media it could lower confidence in the judiciary also.

²⁴ Dr Karen Gelb, *Predictors of Confidence: Community Views in Victoria* (August 2011) Sentencing Advisory Council <<https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Predictors%20of%20Confidence%20Community%20Views%20in%20Victoria.pdf>>.

²⁵ Salaz, Hodson, and Davey, above n 2, 57.

the same day the Court responded on the Court's Twitter page with '@1958noelconway Sorry, works best with Explorer, dictated by mothership.' The Court's staff's response to Conway may have increased Conway's confidence in the courts. It may also have given a sense of a human connection to the courts. Further, the people who read the response may have been impressed by the Court staff's response and their confidence in the courts may have increased.

If members of the public are able to comment on courts' social media pages, they may develop a sense that the courts listen to them, accompanied by an increased trust in the courts.²⁶ The public may also feel that the courts are more transparent. Users can appear anonymously on social media or change their name, so they may be more likely to provide courts with honest feedback.²⁷ By the same token, the anonymity that social media can provide may encourage some people to write negative comments. Staff of the Family Court of Australia did not find that the public tweeted negative comments to their Twitter account, despite their initial worries that this might occur.²⁸ It would be reasonable to assume that the public would similarly not post negative comments on other Australian courts' social media accounts.

It may be possible to design a social media application to help courts censor comments that are made on the courts' social media pages. Courts may also become aware of negative views that the public may have about aspects of the courts (e.g. if they think that a sentence was not long enough for a particular offender)²⁹ and thereby, if they choose to, address the criticism. Other online entities, such as news outlets, have allowed users to post comments underneath online articles for over a decade, and it is always possible that readers will write offensive comments about the articles. Courts that use social media may be able to learn from the experiences of news media about that issue.

²⁶ Travis Olson and Christine O'Clock, *The Role of Social-Networking Tools in Judicial Systems* (2010) National Center for State Courts, 165 <<http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctmedia/id/21>>.

²⁷ Social Media Subcommittee of the Judicial Outreach Committee, *Recommendations for the Court's Use of Social Media* (February 2012) Utah State Courts, 9 <<http://www.azcourts.gov/Portals/74/WIRE/06072012/6FinalReportUtah.pdf>>.

²⁸ Survey answers by email from the Media & Public Affairs Manager, Family Court of Australia to Marilyn Krawitz, 12 August 2013.

²⁹ For discussion about Australians' views that judges' sentences are too lenient, see Kate Warner et al, 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (2011) 407 *Trends and Issues in Crime and Criminal Justice* 1 and David Indermaur, 'Public Perception of Sentencing in Perth, Western Australia' (1987) 20(3) *The Australian and New Zealand Journal of Criminology* 163.

Users may learn from each other in an Input Output approach to court social media communication. For example, on 20 November 2013, staff of the Supreme Court of Victoria posted information on their Facebook page stating that the Chief Justice would speak at an event about female lawyers. A member of the public, Marissa Fay Chorn, reposted this information on her Facebook page. Then three other members of the public commented with their views about this issue under the post on the Supreme Court of Victoria's Facebook page.

Courts can also use Twitter to follow journalists³⁰ and check whether journalists are accurately commenting on court proceedings. There are some benefits and problems with this practice. Some benefits are that the court could ensure that correct information is provided to the public and find out if journalists are breaching any court orders (e.g., suppression orders). One problem with the practice is that there could be hundreds or even thousands of journalists reporting on the courts. The number of citizen journalists online would further inflate this number. The court may not have the time to follow and check all of the Twitter accounts of these journalists.

Courts can also use social media to easily and quickly communicate with other courts that use social media.³¹ Courts may obtain ideas about new ways to use social media, events to organise or information to provide to the public. Courts can also use social media to receive updates about the work of legal academics who use social media and apply this information or provide it to other courts. For example, if a court employee reads a tweet on an academic's Twitter page stating that the academic has published a new article about judges using social media, the court employee can then email judges' associates so that they can inform the judiciary.

Using an Input Output approach, the public can quickly and easily inform courts about mistakes that courts have made. This could result in several thousands of people acting as quality control for courts, which would be useful. For example, on 31 July 2013, a Twitter account called PracLawEmployment wrote on the JudiciaryUK Twitter account that a

³⁰ Survey answers by email from the Strategic Communication Manager, the Supreme Court of Victoria to Marilyn Krawitz, 21 June 2013.

³¹ Survey answers by email from the Manager, Magistrates' Support Services, Magistrates' Court of Victoria, to Marilyn Krawitz, 26 July 2013.

‘judgment on judiciary.gov.uk only contains odd-numbered pages’. The tweeter requested assistance with this. That same day, the JudiciaryUK Twitter account tweeted ‘[t]hanks, this has now been corrected <http://bit.ly/13ZqSD0>’. Thousands of people acting as quality control for the courts could have resource implications for courts. By the same token, courts may be expected to make more changes to their websites and its social media accounts than they normally would.

Whether courts take an Output Only approach or an Input Output approach to social media affects whether they follow other entities’ Twitter accounts. Courts in other jurisdictions address this situation differently. The Nova Scotia Courts’ and the Family Court of Australia’s Twitter accounts do not follow anyone, while the three Twitter accounts of the Supreme Court, County Court and Magistrates’ Court in Victoria do. Australian courts would benefit most from an Input Output approach because it affords the most advantages from using social media. The Input Output approach takes advantage of one of the most distinctive aspects of social media: its interactivity. If courts use an Output Only approach, then the court’s social media accounts may resemble ordinary websites rather than interactive social media accounts.

The Facebook page of the Superior Court of Arizona in Maricopa County does not allow users to comment on the Court’s posts because this ‘could lead to unwarranted criticism and the need to respond and comment in a timely manner’.³² The Supreme Court of the United Kingdom’s Twitter account takes an Input Output approach, and the social media policy on its website states that its staff cannot guarantee a response to all public comments to its Twitter accounts.³³ If Australian courts were to adopt an Input Output approach, they could use a disclaimer similar to the United Kingdom Supreme Court’s. This could assist in managing the expectations of the public who post on the account. A disclaimer for Australian courts’ social media presence could also state that third parties’ views do not reflect the court’s views.³⁴ This could assist if a member of the public was to write something rude or derogatory on the court’s social media pages.

³² Seguin, above n 4, 38.

³³ Supreme Court of the United Kingdom, *Twitter Policy for the UK Supreme Court* (February 2012) [3] <<http://www.supremecourt.gov.uk/twitter-policy.html>>.

³⁴ See, eg, the website of the Family Court of Australia, which states ‘[t]he Court does not endorse, and is not accountable for any views expressed by third parties using that site’, Family Court of Australia, *Official Use of*

4.3.3 Benefits of Both Approaches

Courts and the judiciary may receive additional benefits from using social media, irrespective of whether they take an Output Only or an Input Output approach. One benefit is maintaining control over their social media presence. It is possible for people who do not work for a court to create unofficial social media pages for the court.³⁵ These unofficial pages may state the court's name and appear to represent the court, even though they do not. They may mislead the public³⁶ or damage a judicial officer's reputation.³⁷ The simplest way to prevent the public from being misled by unofficial social media pages is for courts to create their own official social media accounts.³⁸ The official social media pages can contain the court's logo and URL to show that the pages are official, as well as specifically stating that they are the court's 'official' social media pages, like the Family Court of Australia's Twitter page.

Another potential benefit is that courts may use social media to assist self-represented litigants.³⁹ They can post informational videos to answer questions that self-represented litigants often ask.⁴⁰ Courts can also directly answer questions that self-represented litigants post on Twitter or Facebook. Admittedly, this may take a lot of time, but it could be worth it if self-represented litigants are then better prepared at court.⁴¹ If courts use social media to assist self-represented litigants, then potential self-represented litigants may feel less overwhelmed by the courts. This may affect their decision to pursue their matter in the courts as opposed to simply avoiding the process altogether because it is too difficult. Social media is usually free to use,⁴² so it should not directly require any of the courts' financial resources. This issue is explored in more detail in section 4.5.2.1.

Twitter by the Family Court, [17]

<http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Social_media/>.

³⁵ Katherine Bladow and Joyce Raby, *Using Social Media to Support Self-Represented Litigants and Increase Access to Justice* (2011) National Center for State Courts, 37

<<http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctmedia/id/29>>.

³⁶ *Ibid.*

³⁷ See, eg, Lorne Sossin and Meredith Bacal, 'Judicial Ethics in a Digital Age' (2013) 46(3) *University of British Columbia Law Review* 629, 637.

³⁸ Bladow and Raby, above n 35, 37.

³⁹ *Ibid.* 35.

⁴⁰ *Ibid.* 36.

⁴¹ *Ibid.* 36.

⁴² Social Media Subcommittee of the Judicial Outreach Committee, above n 27, 9.

Some of the court-run social media pages are popular. The public has viewed the Indiana Supreme Court's YouTube videos over 137 000 times.⁴³ The Magistrates' Court of Victoria's Twitter page has 1145 followers and the Supreme Court of Victoria's Twitter page has 2074 followers.⁴⁴ The large number of people who currently view or follow courts' social media pages likely indicates that the public is becoming more knowledgeable about the courts, which could potentially increase their confidence in them. It also shows that the public may be interested in journalists tweeting from the courtroom. The issue of journalists using social media from the courtroom will be explored in more detail in Chapter Five.

There is some encouraging research about responses to courts using social media. The Family Court of Australia received 'positive' comments about its social media use.⁴⁵ The Superior Court of Arizona in Maricopa County emailed a survey to 58 members of the media and posted a survey to its 512 Twitter followers. There were 24 responses. The people who responded to the survey stated that they 'frequently' checked the Court's Twitter page;⁴⁶ 27 per cent 'strongly agreed' and another 27 per cent 'agreed' that the Court's tweets 'help[ed] [them] to generate news stories'.⁴⁷ In addition, 17 per cent 'strongly agreed' and 25 per cent 'agreed' that the Court's Twitter page helped to 'guide [them] to more in-depth information on Court programs'.⁴⁸ Admittedly, due to its small sample size, the study may not be very reliable; additionally, because many of the people who answered the survey were part of the media, the results may not be applicable to the general public. Nevertheless, this supports courts continuing to update their Twitter pages. The survey indicates that the media use court Twitter pages and receive benefits from doing so.

A 2012 survey of 623 court employees by the staff of the Conference of Court Public Information Officers in the United States found that 15.6 per cent of people surveyed 'strongly agree[d]' and 23.9 per cent 'agree[d]' that '[n]ew media, such as Facebook, Twitter and YouTube, are necessary court tools for public outreach'.⁴⁹ It is significant that court employees are in favour of using social media, because they should know the best ways to

⁴³ Bladow and Raby, above n 35, 36.

⁴⁴ Based on the author's viewing the Twitter pages on 1 August 2013.

⁴⁵ Survey answers by email from the Media & Public Affairs Manager, Family Court of Australia to Marilyn Krawitz, 12 August 2013.

⁴⁶ Seguin, above n 4, 31.

⁴⁷ Conference of Court Public Information Officers, *2012 CCPIO New Media Survey* (31 July 2012) 66 <<http://ccpio.org/wp-content/uploads/2012/08/CCOIO-2012-New-Media-ReportFINAL.pdf>>.

⁴⁸ *Ibid* 68.

⁴⁹ *Ibid* 30.

engage the public. They should also be aware of how they can potentially improve the public's confidence in the courts.

Due to social media being relatively new, it is understandable that few studies exist about their benefits to the courts. To convince Australian courts that they should use social media, researchers could consider undertaking more studies about social media's benefits to the courts. To learn about the benefits that can result from courts using social media, it may be possible for courts to examine existing research about the benefits of using social media in similar contexts. For example, they could consider the success of Australian police with their social media use. While there may be differences between how Australian courts use social media and how the police use social media, there still may be some information that can be gained by the comparison. Staff of the Family Court of Australia implemented a pilot project in which they used social media for six months.⁵⁰ Afterwards the Court evaluated the project and decided to continue to use it.⁵¹ The report on the pilot project stated that the pilot 'should be considered a success' because (1) over 400 users followed its Twitter page, even though Family Court staff did little to promote it; (2) they did not experience any security problems;⁵² and (3) they received many benefits,⁵³ such as positive feedback from the media and the legal profession about the pilot project.⁵⁴

The survey conducted for this thesis revealed that courts that have used social media to date have experienced benefits from using it (see the comments made by some courts about this issue in Appendix E). For example, the Strategic Communication Manager of the Supreme Court of Victoria perceived that the public was more aware of the activities of the Court as a result of her social media use.⁵⁵ The Director of Communications of the Nova Scotia

⁵⁰ Family Court of Australia, 'Family Court of Australia Twitter Account' (2013) (12) *Family Court Bulletin* 11 <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Bulletin/FCOA_fcb_Jul_13>.

⁵¹ *Ibid.*

⁵² Twitter Pilot Review from Phil Hocking to CEO's Management Advisory Group Family Court of Australia, 10 April 2013, [4].

⁵³ *Ibid.*

⁵⁴ *Ibid* [3.2.2], [3.2.3].

⁵⁵ Survey answers by email from the Strategic Communication Manager, the Supreme Court of Victoria to Marilyn Krawitz, 21 June 2013.

Judiciary found that more people viewed the Nova Scotia Courts' website after he created Twitter pages for the Courts.⁵⁶

As time passes, the number of people who use social media will likely increase. Consequently, more people may expect that courts will use social media. The public may one day view social media accounts the same way they currently view websites: it will be expected that every court have one, and a lack of one may lower the public's confidence in the courts. It is inevitable that in the future new technology will be created that will afford different and improved forms of social media. It may help courts to adopt such new technology if they are already competent at using current technology.

4.4 Survey of Courts' Social Media Use

4.4.1 Procedure

As previously stated, the author sent a survey to 23 different courts between May and July 2013. The survey asked courts about whether they used social media to engage the public, and if not, why not. The Human Research Ethics Committee of Murdoch University approved the use of the survey.⁵⁷ The materials used included survey questions and consent information in a single Word document that was attached to an email that the author sent to each participant (see Appendix C for a copy of the survey questions). The email also contained an information letter as another Word attachment (see Appendix D for a copy of the information letter).

After the survey participants completed the survey, they emailed their answers to the author. The author did not offer any benefits to the participants in the survey, except that she would inform them of her findings. On 18 December 2013, the author emailed each person who participated in the survey a short description of her findings.

⁵⁶ Survey answers by email from the Director of Communications, the Nova Scotia Judiciary to Marilyn Krawitz, 30 May 2013.

⁵⁷ The survey was given approval number 2013/014 on 17 May 2013.

4.4.2 Participants

The author emailed the survey and the information letter to 12 Australian courts, nine Canadian courts, one American court and one British court.⁵⁸ These countries were chosen because they are all common law countries in which courts speak English. The majority of the surveys were sent to Australian courts because this thesis focuses on Australian courts; the rest of the courts were chosen randomly.

The survey was sent to the court staff who are usually responsible for the court's media activities, in anticipation that they would be the most likely to be able to provide information about the courts' social media activities. The author found the names and emails of these contact people by searching the websites of the relevant courts. If a court staff member did not respond to the email that the author sent within approximately a week, the author telephoned him or her to confirm that he or she had received the survey and to encourage him or her to complete it. Fifteen courts completed the survey: nine in Australia, four in Canada, one in the United Kingdom and one in the United States.

4.4.3 Confidentiality

The author felt that it was important to provide the name of the court where the participant worked and their position when she used information from the completed surveys. As a result, the information letter provided included the following paragraph:

You should be aware that this survey is anonymous and no personal details are being collected or used, though I will state the name of the relevant court and the position of the person who provided information to me in my thesis or other scholarly work.

The 'participant consent' document that accompanied the survey questions also stated 'I understand that the findings of this study may be published'. The author included this statement to ensure that she could use any information from the participants' answers to the survey in this thesis.

⁵⁸ Note, where the person who the author initially contacted did not fill in the survey, but recommended that the author send the survey to someone else, she did not include the initial contact.

4.5 Discussion of the Survey Results: Court's Social Media Use

Since 15 responses were received from the total of 23 surveys sent out, it can be inferred that the relevant courts are interested in the issue of engaging the public by using social media. All responses were included in the analysis of results, as it was found that something useful could be learned from each survey. One indication from the admittedly limited sample is that courts in Australia, Canada, the United Kingdom and the United States have embraced social media to varying degrees. This section will discuss the efforts (or lack thereof) that the courts have taken.

4.5.1 Courts Currently Using Social Media Accounts

4.5.1.1 Social Media in Australian Courts

Few courts in Australia have social media accounts. Four Australian courts out of nine surveyed by the author use social media.⁵⁹ The Magistrates' Court of Victoria has a Twitter account,⁶⁰ the County Court of Victoria has a Twitter account⁶¹ and the Supreme Court of Victoria has a Twitter account,⁶² a YouTube account⁶³ and a Facebook account.⁶⁴ The Supreme Court of New South Wales⁶⁵ and Family Court of Australia have Twitter accounts.⁶⁶ Alysia Blackham and George Williams state that Australian courts take a 'cautious' approach to social media as opposed to a proactive one.⁶⁷ This is accurate: few State Courts in Australia use social media and only one Federal Court in Australia uses social media. The Victorian Supreme Court YouTube account has two videos: one about directions to the jury and the other about an inaugural law library event in Victoria. It is interesting that the

⁵⁹ It's noted that the NSW Supreme Court stated in the survey that it did not use social media, but it commenced using social media whilst the author was finalising this thesis for submission.

See, New South Wales Supreme Court, *Twitter Account* <<https://twitter.com/NSWSupCt>>.

⁶⁰ Survey answers by email from the Manager, Magistrates' Support Services to Marilyn Krawitz, 26 July 2013; see Magistrates' Court of Victoria, *Twitter Account*, <<https://twitter.com/magcourtvic>>.

⁶¹ See County Court of Victoria, *Twitter Account*, <<https://twitter.com/CCVMedia>>.

⁶² See Supreme Court of Victoria, *Twitter Account*, <<https://twitter.com/SCVSupremeCourt>>.

⁶³ Survey answers by email from the Strategic Communication Manager, the Supreme Court of Victoria, 21 June 2013; see Supreme Court of Victoria, *Twitter Account* <<https://twitter.com/SCVSupremeCourt>>; Supreme Court of Victoria, *YouTube Channel* <<http://www.youtube.com/user/SupremeCourtVictoria?feature=guide>>.

⁶⁴ Supreme Court of Victoria, *Facebook Account*, <https://www.facebook.com/SupremeCourtVic?ref=br_tf>.

⁶⁵ New South Wales Supreme Court, *Twitter Account*, <<https://twitter.com/NSWSupCt>>.

⁶⁶ See Family Court of Australia, *Twitter Account*, <<https://twitter.com/FamilyCourtAU>>; survey answers by email from the Media & Public Affairs Manager, Family Court of Australia to Marilyn Krawitz, 12 August 2013.

⁶⁷ Blackham and Williams, above n 20, 170.

Victorian Supreme Court has videos on YouTube, as opposed to the lower courts in Victoria. In particular, many self-represented litigants could probably benefit if the Magistrates' Court of Victoria had a YouTube account that posted useful videos. It is also worth noting that each level of State Court in Victoria appears to have a social media account.

4.5.1.2 Social Media in American Courts

As of April 2013, courts in at least 24 states in the United States use at least one type of social media.⁶⁸ Nine of these states have courts that use Facebook, 22 that use Twitter and nine that use YouTube.⁶⁹ The United States Supreme Court's staff use Twitter.⁷⁰ The relatively large number of courts in the United States that use social media is not surprising due to the system of electing judges.⁷¹ Social media are helpful to judicial candidates in influencing the public to vote for them. The American Bar Association states that websites and social media involved with 'promoting the candidacy of a judge or judicial candidate may be established and maintained by campaign committees'. It further states that some American judges use social media to share information about themselves during elections and to raise money.⁷²

4.5.1.3 Social Media in Canadian Courts

In Canada, the Saskatchewan Law Courts' staff currently use Twitter and YouTube.⁷³ Nova Scotian Courts were the first in the country to use social media,⁷⁴ and currently maintain five Twitter accounts.⁷⁵ The Nova Scotia Twitter accounts are: 'news of the courts', 'notices to

⁶⁸ Knowledge and Information Services Division, *AOCs and High Courts Using New Media* (24 April 2013) National Center for State Courts <<http://www.ncsc.org/Topics/Media/Social-Media-and-the-courts/~media/Files/PDF/Information%20and%20Resources/State%20List%20April%2024%202013.ashx>>.

⁶⁹ *Ibid.*

⁷⁰ Brian Fitzgerald, Cheryl Foong and Megan Tucker, 'Web 2.0, Social Networking and the Courts' (2011) 35(3) *Australian Bar Review* 281, 281.

⁷¹ Larry C Berkson, *Judicial Selection in the United States*, American Judicature Society <http://judicialselection.com/uploads/documents/berkson_1196091951709.pdf>.

⁷² Judge's Use of Electronic Social Networking Media, 462 American Bar Association Formal Opinion 2 (2013).

⁷³ Survey answers by email from the Courts Communications Officer, Saskatchewan Law Courts to Marilyn Krawitz, 14 June 2013.

⁷⁴ The Courts of Nova Scotia, 'Courts of Nova Scotia Enter the "Twitterverse"' (Media Release, undated) [2] <http://www.courts.ns.ca/news/courts_on_twitter.htm>.

⁷⁵ Survey answers by email from the Director of Communications, the Nova Scotia Judiciary to Marilyn Krawitz, 30 May 2013.

the legal profession’, ‘amendments to the civil procedure rules’, ‘changes to the online dockets’, ‘decisions of the court of appeal’, ‘decisions of the supreme court’, ‘decisions of the provincial court’ and ‘decisions of the small claims court’.⁷⁶ It may take up a lot of time to manage five different Twitter accounts. However, these separate accounts likely make it easier for people who visit the Twitter accounts to find the information that they seek. In particular, the Nova Scotian Courts’ organisation of their Twitter accounts probably makes it easy for three common stakeholders who visit the Twitter accounts to find information. These stakeholders are journalists, lawyers and the public. So, for example, lawyers only need to check the ‘notices to the legal profession’ Twitter account to find notices for them, as opposed to scrolling down a single Twitter account to find the notices among judgments and other notices. In the United Kingdom, staff of the Supreme Court use Twitter.⁷⁷

4.5.2 Courts not Currently Using Social Media Accounts

It appears that there are two main reasons why courts that responded to the survey do not use social media: (1) a lack of resources; and (2) uncertainty about the benefits that they may receive from using it. This section of the chapter deals with resource-related issues, including strategies for mitigating resource issues. The survey response reporting uncertainty about the benefits of social media is briefly addressed.

4.5.2.1 Lack of Resources: Information from the Survey

The Social Media Subcommittee of the Judicial Outreach Committee of the Utah State Courts states that

[e]ffective use of social media requires resources and a strong commitment to increasing judicial outreach through technology. In the age of austere budgets, it is a challenge to fund all but the essentials of administering justice. It is the subcommittee’s view, however, that adapting to the new mobile, social media-driven world is essential to maintaining public trust and confidence in the judiciary.⁷⁸

⁷⁶ The Courts of Nova Scotia, above n 74, [4] - [6].

⁷⁷ Supreme Court of United Kingdom, *Twitter Account* <<https://twitter.com/UKSupremeCourt>>.

⁷⁸ Social Media Subcommittee of the Judicial Outreach Committee, above n 27, 4.

Five courts out of the 15 that answered the survey do not use social media because of a lack of resources. The Children’s Court of Victoria,⁷⁹ South Australian Courts⁸⁰ and the Supreme Court of Western Australia stated in their surveys that they do not use social media due to a lack of resources,⁸¹ but did not state the type of specific resources that they lack. The survey answered by the Manager of Media and Public Liaison for the Courts at the Supreme Court of Western Australia stated that the Court does not have social media accounts because of ‘the practical issues of constant maintenance of the sites’.⁸² The Court of Queen’s Bench in Alberta, Canada does not use social media because of a lack of staff to administer it.⁸³ Given that both the Supreme Court of Western Australia and the Court of Queen’s Bench in Alberta have websites, it is possible that their staff may not require much more effort to maintain a social media site. They might be able to simply cut and paste links onto Twitter.

Since some courts state that they lack the resources to use social media, one should consider what resources creating social media accounts would require. The report by staff of the Family Court of Australia about its pilot project involving Twitter use stated that staff members were ‘able to cope with the additional work generated by the creation of tweets without any impact on their other duties’.⁸⁴ It also stated that the ‘costs associated with the creation and maintenance of a new Twitter account are the time and effort of the content management group in developing new materials for tweeting, and a minor cost (\$120 per annum) to license Hootsuite to assist in managing the account’.⁸⁵ Courts could potentially benefit from economies of scale if their staff purchase several Hootsuite licences. This comment provides support that Australian courts would not need to use many resources to commence and maintain a social media account.

⁷⁹ Survey answers by email from the Media and Communications Manager at the Children’s Court of Victoria to Marilyn Krawitz, 24 June 2013.

⁸⁰ Survey answers by email from the Media and Communications Manager at the South Australian Courts Administration Authority to Marilyn Krawitz, 25 June 2013; Blackham and Williams, above n 20 , 174–5, note that South Australian Courts have a YouTube account.

⁸¹ Survey answers by email from the Manager, Media & Public Liaison, WA Supreme Court to Marilyn Krawitz, 5 June 2013.

⁸² Ibid.

⁸³ Survey answers by email from the Media Relations Officer, Alberta Court of Queen’s Bench to Marilyn Krawitz, 9 July 2013.

⁸⁴ Twitter Pilot Review from Phil Hocking to CEO’s Management Advisory Group Family Court of Australia, 10 April 2013, [3.3].

⁸⁵ Ibid [3.9]. It is noted that the report does not state how much time the court spent creating or updating the court’s Twitter account. Hootsuite is an online tool that assists people in managing their social media accounts. For example, it can help to remind them when they should make a social media post. See Hootsuite Media Inc, *Social Media Management* (2014) <<https://hootsuite.com/>>.

4.5.2.2 Resources That Other Courts Have Used to Commence Using Social Media

A survey of clerks in the American Federal Court system revealed that it took staff one or two days to create a social media site for the Court and that staff update the site daily or else once a week.⁸⁶ Australian courts may find that there are other time-consuming aspects of creating a social media site, such as creating a policy for the staff who use social media, obtaining approval from senior staff for the policy, and obtaining feedback from other staff about the policy. Nevertheless, courts can save time by seeking guidance about these policies from employees at other courts who already use social media.

Courts would want to consider maintaining a court's social media page after creating it, which would result in ongoing consumption of staff's time. Travis Olsen and Christine O'Clock state that the public become more engaged with the courts when courts post content on social media often,⁸⁷ and recommend that courts post on social media daily.⁸⁸ If courts create a social medium account and then rarely maintain it, this might create a poor public impression. Courts that currently have social media pages differ regarding how often they update them. Staff at the following Courts update their pages quite regularly: the New Jersey Courts, who update the Courts' Facebook page daily,⁸⁹ and the Superior Court of Arizona in Maricopa County, who tweet several times daily.⁹⁰ Staff at the following courts update their pages less regularly: the Family Court of Australia staff tweet a minimum of three times weekly,⁹¹ staff at the United Kingdom Supreme Court tweet two to three times weekly,⁹² and staff at the Saskatchewan Law Courts normally update their Twitter account three to four times a week and rarely update their YouTube account.⁹³

⁸⁶ National Center for State Courts, *Social Media Use in the US Federal Courts* (May 2013) [4] <<http://www.ncsc.org/Newsroom/Connected/2013/May.aspx>>.

⁸⁷ Olson and O'Clock, above n 26, 168.

⁸⁸ *Ibid.*

⁸⁹ Winnie Comfort and Tammy Kendig, 'Judiciary Uses Social Media to Keep Court Users Informed' (Media Release, 18 August 2009) [6] <<http://www.judiciary.state.nj.us/pressrel/2009/pr090818a.htm>>.

⁹⁰ Seguin, above n 4, 38.

⁹¹ Family Court of Australia, above n 50, [2]

⁹² Supreme Court of the United Kingdom, above n 33, [2].

⁹³ Survey answers by email from the Courts Communications Officer, Saskatchewan Law Courts to Marilyn Krawitz, 14 June 2013.

4.5.2.3 How to Lower the Amount of Resources Required for Courts to Use Social Media

Maintaining social media accounts may not take as much time as the courts surveyed believe. As already mentioned, courts can copy and paste relevant information that would normally go onto the court's webpage and post it to social media as well. This would probably only take seconds to do. Courts can also update the court's social media accounts on a weekly, as opposed to daily, basis. Staff of courts that lack resources might start with a Twitter account, for example, because of Twitter's 140-character limit, and tweet once every week. Admittedly, staff would need to be extra careful that they post correct information. If they make a significant mistake while using social media, millions of people would quickly be able to see it. Staff of courts with additional resources might create a Facebook page, which would allow staff to post more information and photos. Courts that have access to even more resources could create and maintain a Twitter account, a Facebook account and a YouTube account. The YouTube account would likely take the most time of the three accounts to maintain, because it would involve obtaining or creating videos. Videos are possibly the most beneficial medium for self-represented litigants, who would benefit from both visual and audio aids as opposed to only visual ones. In particular, self-represented litigants who are visual learners would receive great benefit from watching a court's YouTube videos. Courts might be able to outsource the creation of their YouTube videos; for example, they might ask an academic in drama to ask his or her students to make videos for the court as an assessment task.

Another way that courts can save resources is to establish social media accounts that are Output Only. This could save courts time in that they would not need to monitor the public's response to their posts.

Twitter currently offers an option for users to have their tweets 'protected'.⁹⁴ This means that the owner of a Twitter account would need to approve each Twitter user who wanted to follow him or her, and only people whom the account holder selected could see the tweets. Other users could not retweet the tweets.⁹⁵ This may not be a good idea, because one of the

⁹⁴ Twitter Inc., *About Public and Protected Tweets* (2013) [2] <<https://support.twitter.com/groups/51-me/topics/205-account-settings/articles/14016-about-public-and-protected-tweets#>>.

⁹⁵ *Ibid* [4].

most important aspects of courts having social media accounts is ease of public access. It would also create extra work for courts to have to approve each person who wanted to follow their Twitter page.

Staff at the British Columbia Court of Appeal have stated that they do not use social media because of a lack of financial resources.⁹⁶ However, signing up and using social media is usually free,⁹⁷ so a lack of financial resources should not be a barrier. Indeed, courts could save resources by using social media. For example, if a court is holding an open day, staff can simply post information about the event on social media, reaching many people quickly and for free. The interactive nature of social media also means that users reading about the event can instantly notify others about the event by re-tweeting or re-posting the event's details. This is in contrast to courts spending money on placing advertisements in newspapers, radios, on billboards and on television about the event.

Courts can conserve resources by creating a single social medium account for a few courts in a single jurisdiction. An alternative to different courts in a single state each having individual social media accounts would be for there to be a single Twitter account for all the courts in a state, similar to the system used in the province of Saskatchewan, Canada. This would require staff from different courts to work together. Nevertheless, it is probably easy for the public to find the information that they seek by being able to visit the social medium account of a specific court, as opposed to a few courts combined.

4.5.2.4 Uncertainty of Benefits

The Children's Court of Victoria would 'need to be convinced that there is a good case to support any decision to start [using social media]'.⁹⁸ It makes sense that courts would want more information about the benefits of using social media before starting to use it. This Chapter looked at the benefits that courts can receive as a result of using social media. As

⁹⁶ Survey answers by email from the Law Officer, British Columbia Court of Appeal to Marilyn Krawitz, 4 July 2013.

⁹⁷ Queensland Government Business and Industry Portal, *Using Social Media to Market Your Business: The Basics* (22 August 2013) [5] <<http://www.business.qld.gov.au/business/running/marketing/online-marketing/social-media-business>>.

⁹⁸ Survey answers by email from the Media and Communications Manager, Children's Court of Victoria to Marilyn Krawitz, 24 June 2013.

time passes and new social media are created, it is possible that social media will offer even more benefits to courts than they currently do.

4.5.3 Courts not Currently Using Social Media, but Thinking About It

In a survey provided to representatives from 135 American Federal Courts, 15.6 per cent of respondents stated that they used social media, and 12.6 per cent stated that they would use social media in the future.⁹⁹ Staff at the following Australian courts are considering whether they should create social media accounts for their Court in the future: the Children's Court of Victoria,¹⁰⁰ the Federal Magistrates' Court¹⁰¹ and the Northern Territory Supreme Court.¹⁰² Staff at the Federal Court of Australia do not use social media, but are part of a working group considering this issue.¹⁰³ Outside of Australia, staff at the Massachusetts Court System¹⁰⁴ and the British Columbia Court of Appeal¹⁰⁵ are considering using social media. A recent survey of 62 judicial officers, court staff and academics in Australia found that there was 'strong interest in using social media to communicate court decisions and engage with the community'.¹⁰⁶

Australian courts may be persuaded to use social media if more information about the benefits of social media is made available. While it is good that courts take a cautious approach to social media, it is hoped that they will not spend too long considering the issue. If they do, they risk failing to capitalise on a significant opportunity to improve the public's confidence in the courts with little or no financial cost. If courts do decide to use social

⁹⁹ National Center for State Courts, above n 86.

¹⁰⁰ Survey answers by email from the Media and Communications Manager, Children's Court of Victoria to Marilyn Krawitz, 24 June 2013.

¹⁰¹ Family Court of Australia, above n 50, 16.

¹⁰² Survey answers by email from the Courts Liaison and Education Officer, Northern Territory Supreme Court to Marilyn Krawitz, 21 June 2013. It is noted that the Staff of the Supreme Court of New South Wales stated in their survey that they were considering using social media; after they had answered the survey and this thesis was already finalised for submission, they commenced using Twitter. See New South Wales Supreme Court, *Twitter Account* <<https://twitter.com/NSWSupCt>>.

¹⁰³ Survey answers by email from the Director of Public Information, Federal Court of Australia to Marilyn Krawitz, 22 May 2013. Blackham and Williams, above n 20, 173 state that the Federal Court of Australia and the Federal Circuit Court of Australia have Twitter pages. The author could not find the pages in her research.

¹⁰⁴ Survey answers by email from the Public Information Officer, Massachusetts Supreme Judicial Court to Marilyn Krawitz, 11 July 2013.

¹⁰⁵ Survey answers by email from the Law Officer, British Columbia Court of Appeal to Marilyn Krawitz, 4 July 2013.

¹⁰⁶ Patrick Keyzer et al, 'The Courts and Social Media: What Do Judges and Court Workers Think?' (2013) 25(6) *Judicial Officers' Bulletin* 47, 50.

media, they will need to decide what types of information they may post; this question will be discussed in the following section.

4.6 Types of Information Courts May Post on Social Media

The information that courts post on social media can be categorised into urgently required information and static information. Urgently required information is information that the public needs to know as soon as possible. Static information is information that the public does not need to know immediately.

4.6.1 Urgently Required Information

Examples of urgently required information are sentences and judgments, which would normally appear on a court's website, but may be communicated more immediately using Twitter.¹⁰⁷ Staff of the Supreme Court of New South Wales tweeted the following on 13 December 2013: 'Justice Schmidt sentences Jonathon Stenberg to 25 years 4 months for murder, 19 years non-parole. Remarks posted once available'. Other examples of urgently required information are media releases and practical matters, such as court closures due to bad weather¹⁰⁸. Tennessee Courts use Twitter to share links to documents that are posted at the last minute during public executions.¹⁰⁹ This timely information is very helpful to journalists.

Courts can also use social media to inform the public about problems with a court's website. For example, the Family Court of Australia's Twitter account informed the public that the Court's website did not work on 29 July 2013. When urgently required information is added to courts' social media accounts quickly, it can improve the public's confidence in the courts and help demonstrate that courts are efficient. Courts that use social media to inform the public about court closures can make the public's lives easier by saving them a trip to the court. This could increase general public confidence in the courts.

¹⁰⁷ Survey answers by email from the Strategic Communication Manager, Supreme Court of Victoria to Marilyn Krawitz, 21 June 2013.

¹⁰⁸ Olson and O'Clock, above n 26, 167.

¹⁰⁹ Click, above n 16, 48.

4.6.2 Static Information

There are many different kinds of static information that courts may need to share. Staff of the County Court of Victoria post job opportunities and practice notes. For example, on 14 June 2013 the County Court tweeted ‘[g]ood job available at the County Court working with the Chief Judge: <http://www.countycourt.vic.gov.au/news-and-alerts>’. On 26 June 2013, staff tweeted ‘[p]ractice note for operation of new County Koori Court in Melbourne now online’.

The New Jersey Court posts photos of events and general information about courts on Facebook.¹¹⁰ Photos of court events could make the courts’ environment seem more familiar to the public. They could become less apprehensive about the courts should they need to enter them. Courts may post information about jury duty and state that jurors cannot use social media to discuss a trial. The issue of jurors using social media inappropriately during a trial is examined in Chapter Six.

Staff of the Supreme Court of Victoria also tweet information about upcoming court events. For example, on 26 July 2013, they tweeted ‘[d]on’t forget to visit Court of Appeal tomorrow 10am–4pm as part of @OpenHouseMelb #loveOHM.’ Staff of the Magistrates’ Court of Victoria tweet information about new Magistrates.¹¹¹

Courts can use social media to inform the public about volunteer opportunities at the court. Staff at the Superior Court of Arizona in Maricopa County do so on Facebook.¹¹² Courts can also inform the public about future judgments on social media. For example, the Supreme Court of the United Kingdom tweeted the following on 16 May 2013: ‘[j]udgment next Weds 0945: Vestergaard Frandsen v Bestnet Europe re confidence and trade secrets’.

Courts can post videos on YouTube that have information for the public that is not urgently required. For example, the New Jersey Courts’ YouTube page has a video about the Courts’ mediation program for mortgage foreclosures.¹¹³ Courts can also post videos that show past

¹¹⁰ Comfort and Kendig, above n 89, [6].

¹¹¹ Survey answers by email from the Manager, Magistrates’ Support Services to Marilyn Krawitz, 26 July 2013; see Magistrates’ Court of Victoria, *Twitter Page* (20 May 2013) <<https://twitter.com/magcourtvic>>.

¹¹² Seguin, above n 4, 22.

¹¹³ Comfort and Kendig, above n 89, [7].

events that occurred.¹¹⁴ Staff at the United Kingdom Supreme Court also post YouTube videos of the Court's events on the Court's Twitter account. For example, on 22 July 2013 they tweeted 'UK Supreme Court @UKSupremeCourt 22 Jul Watch back this morning's swearing-in of Lady Hale as Deputy President of the Supreme Court'. Underneath was posted an eight-minute and 24-second video from YouTube that contained part of the ceremony. The United Kingdom Supreme Court's Twitter page has over 80 videos. The majority of the videos are of new judges' swearing-in ceremonies and judicial officers delivering judgments. There is one video about the Supreme Court itself that has received over 6000 views. Most of the Supreme Court's videos have been viewed over a hundred times, and some videos have received over 100 views on YouTube.

It is worth considering why staff of the United Kingdom Supreme Court posted so many videos on the Court's YouTube page but their Australian and Canadian counterparts have not. The United Kingdom Supreme Court already has video cameras in each courtroom.¹¹⁵ As a result, it is probably very easy to video what takes place in the courtrooms and post the videos onto YouTube. The attitude of the Supreme Court towards video cameras indicates that it is open-minded about technology.

The Supreme Court of Victoria's YouTube page has two videos: one about jury directions and the other about an event at the law library of Victoria.¹¹⁶ At the time of writing, the jury video had received 311 views and the law library video had received 461 views.¹¹⁷ The Saskatchewan Courts' YouTube channel has one video about attending court (e.g., it states that one needs to be quiet while in the courtroom), and the video also directs viewers to the Courts' website. It has received 334 views.¹¹⁸ The Saskatchewan video has the potential to be very helpful to members of the public who attend court for the first time. There is considerable potential for Australian courts to post YouTube videos, particularly informational videos for self-represented litigants. Videos for lawyers who are just starting their careers might also be useful. The videos could show new lawyers common errors that

¹¹⁴ Olson and O'Clock, above n 26, 166.

¹¹⁵ Joshua Rozenberg, 'The Media and the UK Supreme Court' (2012) 1(2) *Cambridge Journal of International and Comparative Law* 44, 45.

¹¹⁶ Supreme Court of Victoria, YouTube, *Simplifying Jury Directions in the Victorian Courts* (2012) <<http://www.youtube.com/user/SupremeCourtVictoria?f>>.

¹¹⁷ Supreme Court of Victoria, YouTube, *Launch of the Law Library of Victoria* (2012) <<http://www.youtube.com/user/SupremeCourtVictoria?f>>.

¹¹⁸ Saskatchewan Courts, YouTube, *Attending Court in Saskatchewan* (3 January 2013) <<http://www.youtube.com/watch?v=l4rXEDVm6RE>>.

lawyers make in the courtroom or basic examples of good advocacy. Admittedly, some may say that the staff of law societies or bar associations should be responsible for imparting this knowledge. Nevertheless, it could be helpful to receive this information from a judge's point of view, as imparted to courts.

It is also possible that courts provide information to potential jurors and witnesses on social media. The information to jurors could inform them about what jury duty is like and warn them, for instance, that they must never discuss the trial that they are attending on social media. Information for witnesses could inform them about the trial process and that they should not discuss the case with other witnesses. This type of information could also be shared using videos. The Indiana Supreme Court, New Jersey Supreme Court and the American Federal Courts share videos on YouTube for the public about how courts function.¹¹⁹

It is more likely that courts would be able to share static, as opposed to urgently required information. The Saskatchewan Courts' Twitter page currently posts judgments only. Certainly this means that Saskatchewan courts do not use social media to its fullest extent. Nevertheless, it is better than no social media presence at all. Their posting of judgments could be helpful to people who urgently need or want to know when judgments are handed down.

A survey of 25 people who visited the Facebook page of the Superior Court of Arizona in Maricopa County stated that information that they would like to be able to read on the Court's Facebook page includes events, current news, job openings and emergency information.¹²⁰ Admittedly, this is a small sample, and a bigger sample may provide different responses.

Katherine Bladow and Joyce Raby recommend that courts 'consider using Twitter as an online help desk. This has been extremely successful for businesses, such as Comcast, Home Depot, and Southwest Airlines'.¹²¹ One assumes that this would mean that the public could post as many questions as they wanted on a court's social medium account and that the court

¹¹⁹ Click, above n 16, 48.

¹²⁰ Seguin, above n 4, 29.

¹²¹ Bladow and Raby, above n 35, 38.

would answer all of them. This would likely take a lot of the court's time. Nevertheless, courts have a greater need to answer questions than a typical business. One could argue that it is more important that the public are satisfied with a court's service than that of an everyday business. If the public can ask courts questions by posting them on social media, they may become more satisfied with their court experience. The public may find this more convenient than calling or visiting the court to ask questions; courts' telephone lines can be busy and there can be long lines at the court's registry.

Staff at the Children's Court of Victoria expressed concern that they would not have a sufficient amount of content to post on social media because they publish few written decisions.¹²² However, there would still be plenty of static information that they could post, such as new court rules, public court events and job openings.

In deciding what information to post on social media, courts must consider which stakeholders they most want to appeal to (e.g., the public, lawyers, journalists) and then post content accordingly. The most important stakeholder is the public. It is important to engage them and do whatever possible (within reason) to ensure that they have confidence in the courts. While journalists and lawyers are also important stakeholders, they likely know where to find information about the courts for themselves, in contrast to an average member of the public. Besides deciding what kind of information courts will post on social media, courts will also need to decide which types of social media they will use; this will be the topic of the following section.

4.7 Types of Social Media Courts May Use

An important question that courts should consider if they decide to use social media is which social media they could use. Twitter is the most common social medium that courts in Australia, Canada and the United Kingdom currently use. Some of the courts also use Facebook and YouTube. It is expected that the social media that courts use will change as new social media are created.

¹²² Survey answers by email from the Media and Communications Manager, Children's Court of Victoria to Marilyn Krawitz, 24 June 2013.

4.8 Court Staff Who Could Be Responsible for the Social Media Account

Another issue that court staff need to consider if they decide to start using social media is who will be in charge of the social medium account. Currently, a number of different staff working in different roles are responsible for courts' social media accounts. Two members of staff at the Magistrates' Court of Victoria are responsible for its social media: the Manager of Magistrates' Support Services and the Court Advice Officer (Operations).¹²³ Three members of staff at the Family Court of Australia are responsible for its Twitter account.¹²⁴ The Courts Communication Officer of the Saskatchewan Courts is responsible for maintaining the Courts' social media accounts.¹²⁵ The Manager of Publications (Decisions) and the Director of Communications at Nova Scotia Courts are responsible for the Courts' social media activities.¹²⁶ The Maricopa County Superior Court has a full-time staff member who works on videos to post on YouTube.¹²⁷

If two people are responsible for a court's social media account, one person could work in the court's media department and the other could work on the court's public engagement. Both staff members' perspectives would be useful. It is valuable to have more than one staff member responsible for the account, for the sake of maintaining consistency if, for example, one of the staff members takes leave.¹²⁸ If courts decide to use social media, there are some important actions that they can consider taking to start the process.

4.9 How to Get Started

If courts decide to use social media, they must first learn about it. They may find it valuable to discuss their upcoming use of social media with staff from other courts, and to think about their communication goals generally and how using social media could help to accomplish

¹²³ Survey answers by email from the Manager, Magistrates' Support Services, Magistrates' Court of Victoria to Marilyn Krawitz, 26 July 2013.

¹²⁴ Survey answers by email from the Media and Public Affairs Manager, Family Court of Australia to Marilyn Krawitz, 12 August 2013.

¹²⁵ Survey answers by email from the Courts Communications Officer, Saskatchewan Law Courts to Marilyn Krawitz, 14 June 2013.

¹²⁶ Survey answers by email from the Director of Communications, Nova Scotia Judiciary to Marilyn Krawitz, 30 May 2013.

¹²⁷ Arizona State University, School of Criminology and Criminal Justice, *Social Media: Important Tool for Police and Courts*, [7] <<http://ccj.asu.edu/news-events/news/social-media-important-tool-for-police-and-courts>>.

¹²⁸ Survey answers by email from the Media and Public Affairs Manager, Family Court of Australia to Marilyn Krawitz, 12 August 2013.

them.¹²⁹ Bladow and Raby recommend that, when courts decide to implement a social media strategy, they first establish a small goal that they want to accomplish, then pick the correct social platform, then ‘pilot the project’. This involves choosing the appropriate staff for the project, drafting a policy, creating the social media account, then reviewing the process and repeating these steps.¹³⁰

Staff of the Superior Court of Arizona in Maricopa County have a policy on Facebook and Twitter use for employees who create and use social media on behalf of the Court.¹³¹ Australian courts could examine this policy and those of Australian courts who currently use social media as starting points for creating their own. Court policies on social media use should anticipate any problems that might occur and suggest solutions.¹³²

Having established a social media presence, courts should post a link from the homepage of their website to their social media account. They could also use email to inform the court’s stakeholders of the new account to ensure that they are aware of it as soon as possible. The public may assume that each court has a webpage, but they may not assume that each court has a social media account. This is especially because few Australian courts have social media accounts.

Courts should ensure that they have proper technological security in place so that it is difficult for someone to hack into their social media accounts.¹³³ One would assume that courts have strong security in place for their existing websites; this experience could provide a useful basis for similarly securing social media accounts.

4.10 Key Recommendations of this Chapter

Ideally, courts could use all three types of social media that this chapter discusses — Twitter, Facebook and YouTube — to engage as many people as possible. Twitter would probably be

¹²⁹ Olson and O’Clock, above n 26, 167.

¹³⁰ Bladow and Raby, above n 35, 39.

¹³¹ Seguin, above n 4, 7.

¹³² Michael S Sommermeyer, *All-A-Twitter: Harnessing New Media for Judicial Outreach and Communication* (2011) National Center for State Courts, 53
<<http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctmedia/id/28>>.

¹³³ For a discussion of court security in the context of social media, see Blackham and Williams, above n 20, 173.

the best social network for courts to use if they only decide to use one, because it requires few resources. The Twitter account should use the Input Output approach to take full advantage of the interactivity of social media. Lastly, ideally at least two staff members should be responsible for the social media accounts, so that one staff member can manage the accounts while the other is on leave. However, if two staff members are not available, one staff member would suffice.

4.11 Conclusion

‘Courts are notoriously slow to adapt to change, but it is imperative to understand the growing phenomenon of social media’.¹³⁴ If courts do not embrace the use of social media, then they are missing a wonderful opportunity to engage the public and potentially increase the public’s confidence in them. This chapter has examined many benefits that courts and courts’ stakeholders can accrue in using social media. It has also examined reasons why some courts have not yet adopted social media. The main reasons appear to be a lack of resources and a lack of appreciation by courts of the potential benefits of using social media.

Regardless of whether or not courts adopt social media, ‘the spread of these tools will not make them disappear or diminish their impact in society’.¹³⁵ Rather, social media will only become more widely used. The public may begin to perceive that courts are out of touch if they fail to adopt contemporary means of communication. On the other hand, if courts take a generally positive attitude towards social media, they may be more likely to permit journalists to use social media in the courtroom. The next chapter of this thesis discusses the use of social media by journalists in the courtroom.

¹³⁴ Click, above n 16, 49.

¹³⁵ Sommermeyer, above n 132, 55.

Chapter 5: Why Australian Judicial Officers Should Permit Journalists to Use Social Media in the Courtroom

5.1 Introduction

People living in Western countries expect to be able to obtain information instantly.¹ If someone is driving and wants to find out if there is a traffic jam ahead that could delay them in reaching their destination, he or she can check social media and find out right away.² If someone wants to learn if his or her favourite store is having a sale, he or she can just browse the store's Twitter page to find out.³ In this context, people may also expect to obtain information just as quickly on what occurs during court proceedings. In Australia, '[t]he media's right to contemporaneously and fully report proceedings in [its] courts is properly regarded as a significant element of [its] legal system.'⁴

Jane Johnston communicated with seven different Australian court information officers about their courts' current social media policies.⁵ Five of the seven court information officers said that 'they were aware of the use of Twitter by the news media in the coverage of courts in their jurisdiction.'⁶ This is an issue that presents some challenges and opportunities.⁷

This chapter discusses the issue of journalists using social media in the courtroom. After a short description of the relationship between courts and the media, and how social media has changed the media industry, it looks at several important issues regarding journalists using social media in the courtroom. It then considers the actions that courts in four common law jurisdictions have taken on this issue. This chapter ultimately concludes that Australian courts should release a standard policy that permits journalists to use social media in the courtroom

¹ David Isaacson, 'On My Mind: Instant Information Gratification' (2002) 33(2) *American Libraries* 39, 39.

² Desiree Hill, *Twitter: Journalism Chases the Greased Pig* (MA Thesis, University of North Texas, 2010) 2.

³ *Ibid.*

⁴ *Director of Public Prosecutions v Theophanous* (2009) 27 VR 295, 38 (Osborne J).

⁵ Jane Johnston, 'Courts' New Visibility 2.0' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2012) 41, 49.

⁶ *Ibid.* 51.

⁷ Bruce Phillips, 'The Federal Court: Breaking New Ground' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2012) 79, 81.

in support of the open justice principle. A draft of such a policy is provided in Appendix F. Pre-trial publicity is beyond the scope of the issues considered in this thesis.⁸

5.2 The Relationship Between Courts and the Media

The relationship between courts and the media is complex, and has changed over time. At the heart of this relationship is the open justice principle, which states that ‘judicial proceedings must be conducted in an open court to which the public and press have access’.⁹

Courts and the media have an interdependent relationship. Courts depend on the media to inform the public about court matters.¹⁰ The media provides courts with ‘the means by which justice is seen to be done’.¹¹ When a judge imposes a sentence on an accused to try to deter others from committing a similar crime, the deterrence only works if the public is aware of the sentence. Judicial officers depend on the media to inform the public about the sentence, thereby implementing the deterrent effect.¹² Journalists depend on courts to provide them with information that they can report to the public.

The relationship between judicial officers and the media has some challenges. Judicial officers sometimes find that media reports about court proceedings are very different from what actually occurred. They become concerned that the public may not know the truth about what actually happened or that they may receive a biased view.¹³ Journalists have also criticised courts for not providing them with sufficient access to court documents and proceedings.¹⁴ To prevent this from occurring, most Australian courts now have a media or public information officer. The media or public information officer’s work ‘involves bridging

⁸ For a discussion of social media’s impact upon pre-trial publicity, see: Kristin R Brown, ‘Somebody Poisoned the Jury Pool: Social Media’s Effect on Jury Impartiality’ (2013) 19(3) *Texas Wesleyan Law Review* 809.

⁹ *Scott v Scott* [1913] AC 417, quoted in *McJannett v Daley [No 2]* [2012] WASC 386 (25 October 2012) [4] (Le Miere J).

¹⁰ Chief Justice Beverley McLachlin, ‘The Relationship Between the Courts and the Media’ (Speech delivered at Carleton University, Ottawa, Canada, 31 January 2012) <<http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2012-01-31-eng.aspx>>.

¹¹ Chris McLeod, ‘Wrestling with Access’ (2004–2005) (85) *Reform* 15, 15.

¹² Chief Justice Paul de Jersey, ‘Courts and the Media in the Digital Era: A Judicial Perspective’ in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2012) 35, 36.

¹³ Justice Michael Kirby, ‘Improving the Discourse Between Courts and the Media’ (2008) 35(6) *Brief* 20, 20.

¹⁴ Jane Johnston, ‘The Court-Media Interface: Bridging the Divide’ (2005) 30(1) *Australian Journalism Review* 27, 27.

the gap between the judiciary and the media'.¹⁵ He or she provides court documents to journalists (e.g., transcripts) and he or she liaises between the media and the judiciary.¹⁶ Judicial officers hope that media or public information officers help to improve the accuracy of articles about court proceedings.¹⁷

*John Fairfax Group Pty Ltd v Local Court of New South Wales*¹⁸ (“Fairfax”) provides exceptions to the open justice principle that are mentioned or applied in subsequent cases.¹⁹ One of the exceptions occurs when open justice would negatively impact the attainment of justice in a specific case or generally. For example, if open justice is permitted when a police informant testifies in court, this may discourage police informants from providing evidence. The second exception occurs when open justice could hurt the public interest, such as when a journalist informs the public about secret matters of national security discussed in a court proceeding.²⁰

Judicial officers therefore can decide that traditional media cannot report on cases that involve an exception to the open justice principle.²¹ Similarly, judicial officers can decide that journalists cannot use social media when the proceedings involve an exception to the open justice principle.

5.3 How Social Media Has Changed the Media Industry

The creation of and significant worldwide use of the internet and social media has had an impact on print media.²² The circulation of newspapers has decreased since the mid-2000s. Some newspapers have ceased operation,²³ while others have stopped publishing their paper

¹⁵ Ibid 28.

¹⁶ Ibid 29.

¹⁷ Ibid 31.

¹⁸ *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131, 141 (Kirby P).

¹⁹ See, eg, *Rinehart v Welker* [2011] NSWCA 403 (19 December 2011) [36] (Bathurst CJ, McColl, Young JJA); *R v Goldman [No 3]* [2004] VSC 167 (9 Mar 2004) [17] (Redlich J); *V v M* [2009] NSWSC 1084 (9 October 2009) [20] (Brereton J); *Western Australia v Heijne* [2009] WASC 162 (10 May 2009) [9] (McKechnie J).

²⁰ *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131, 141 (Kirby P).

²¹ Ibid.

²² Brian Fitzgerald, Cheryl Foong and Megan Tucker, ‘Web 2.0, Social Networking and the Courts’ (2011) 35(3) *Australian Bar Review* 281, 286.

²³ Lili Levi, ‘Social Media and the Press’ (2012) 90(5) *North Carolina Law Review* 1531, 1537.

version and started publishing a small online version instead.²⁴ Print newspapers' advertising revenue has decreased, while online newspaper advertising has increased.²⁵ The staff at many online newspapers are experienced journalists who have left their previous print or broadcast news occupations.²⁶ Mainstream news media use social media as a way to quickly release breaking news.²⁷ The number of journalists who use social media as part of their reporting has increased internationally.²⁸ In 2009 a survey co-researched by George Washington University in the United States revealed that over half of the 371 journalists who participated in the survey believed that social media was important to the stories that they created. A survey by the Society for New Communications Research of over 200 journalists in 2011 revealed that 75 per cent use Facebook when they report news and over 69 per cent use Twitter. Of the journalists surveyed, 90 per cent were American and 96 per cent were from North America; information about the survey did not state where the other 4 per cent were located.²⁹ Given that social media is an increasingly common way of providing news to the public in general, journalists should be able to use social media in the courtroom to provide courtroom news and information to social media users.

The rise of social media can mean that journalists are pressured to submit articles as quickly as possible, which can result in mistakes.³⁰ Jordaan observes that journalists use social media to add to their personal research and writing, to obtain story ideas or to obtain readers' opinions about various topics.³¹ Using social media is an easy way for journalists to quickly obtain their readers' opinions; indeed, journalists may receive so many of such opinions that they do not have sufficient time to read them all.

Citizen journalists are a new type of journalist that has emerged recently on the internet and social media. Citizen journalists may write for online newspapers with few staff that depend

²⁴ John Kostouros, *Who Are These Guys? Courts Face a Rapidly Changing News Industry* (2011) National Center for State Courts, 41 <<http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctmedia/id/32>>.

²⁵ Marenet Jordaan, *Social Media in the Newspaper Newsroom: The Professional Use of Facebook and Twitter at Rapport and the Mail & Guardian* (MPhil (Journalism) Thesis, Stellenbosch University, 2012) 3 <<http://scholar.sun.ac.za/handle/10019.1/20101>>.

²⁶ Kostouros, above n 24, 42.

²⁷ Mark L Tamburri, Thomas M Pohl and M Patrick Yingling, 'A Little Bird Told Me About the Trial: Revising Court Rules to Allow Reporting from the Courtroom Via Twitter' (2010) 15 *Electronic Commerce & Law Report* 1415, 1416.

²⁸ Jordaan, above n 25, 13.

²⁹ *Ibid* 18.

³⁰ Kostouros, above n 24, 44.

³¹ Jordaan, above n 25, 11.

on articles from contributors, who are often community activists or advocates for a specific cause. Community foundations often finance citizen journalists. The quality and accuracy of citizen journalism varies.³² Because of this increase in citizen journalism, the scope of the term ‘journalist’ has become uncertain.³³ Citizen journalists may not know the law that affects what they can report, and may not receive proper training or supervision.³⁴

Traditional court reporters used to write notes while they were in the courtroom, and later filed their writing outside the courtroom.³⁵ Technology has removed court reporters’ need to leave the courtroom to file their writing.³⁶ Prior to the internet and social media, people who were not professional journalists would find it challenging to disseminate their own articles about court proceedings. Social media have changed the ease with which articles can be disseminated widely. Social media and the internet enable any person to sit in a courtroom and post information for the public to read, provided that a judicial officer permits it.³⁷ This could potentially increase the public’s level of engagement with the courts.

By the same token, social media has caused some challenges for courts. When a high-profile trial occurs, courts must decide which journalists will receive reserved seating, and whether citizen journalists should be allowed to sit in the area reserved for journalists. Courts must decide whether or not to provide citizen journalists with the court records that they request.³⁸ Courts may not know how much journalists understand about court etiquette or suppression orders. Some citizen journalists may have few readers while others may have many. In that case, it is arguable that the more popular citizen journalists should receive priority seating in a courtroom over less popular citizen journalists.

³² Kostouros, above n 24, 42.

³³ Nic Newman, *Mainstream Media and the Distribution of News in the Age of Social Discovery* (2011) Reuters Institute for the Study of Journalism, Department of Politics and International Relations, University of Oxford, 10 <<http://ora.ox.ac.uk/objects/uuid:94164da6-9150-4938-8996-badfddef6b507>>.

³⁴ Patrick Keyzer et al, ‘The Courts and Social Media: What Do Judges and Court Workers Think?’ (2013) 25(6) *Judicial Officers’ Bulletin* 47, 47.

³⁵ Lord Chief Justice of England and Wales, *A Consultation on the Use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting* (7 February 2011) Judiciary of England and Wales, 3 <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/cp-live-text-based-forms-of-comms.pdf>>.

³⁶ *Ibid.*

³⁷ Fitzgerald, Foong and Tucker, above n 22, 286.

³⁸ Kostouros, above n 24, 43.

The entry of many inexperienced journalists into online reporting has caused courts to consider how they can ensure the accuracy of articles about court proceedings.³⁹ Some courts distribute their media releases to citizen journalists. Several courts prepare materials in the form of news stories that inexperienced journalists can easily understand. Some court agencies, such as the Minnesota Court Information Office in the United States, allow citizen journalists to attend the same training that they provide to professional journalists.⁴⁰ Courts also post media guides on their websites to help inexperienced journalists.⁴¹ Since courts have adapted their procedures to include citizen journalists, they should consider similarly adapting their procedures to permit journalists to use social media in the courtroom.

5.4 Journalists Can Engage with the Public and Improve Their Accuracy by Using Social Media

The Utah Judicial Council Study Committee on Technology into the Courtroom states that

the potential public benefits flowing from electronic media coverage of open judicial proceedings are substantial. While relatively few judicial proceedings are likely to attract electronic media coverage, those that do are likely to be of significant public interest and concern. Permitting electronic media coverage will allow the public to actually see and hear what transpires in the courtroom, and to become better educated and informed about the work of the courts.⁴²

When journalists tweet from the courtroom, they can inform the public of what occurs at court more quickly than traditional media.⁴³ This may raise levels of public engagement with the courts,⁴⁴ which in turn may increase confidence in the judiciary. When journalists can access social media from inside the courtroom, they do not miss any of the court proceedings

³⁹ Ibid 44.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Utah Judicial Council Study Committee on Technology Brought into the Courtroom, *Final Report* (10 April 2012) Reporters Committee for Freedom of the Press, 11
<http://www.rcfp.org/sites/default/files/docs/20121120_133113_cameras_in_court.pdf>.

⁴³ Sally Jackson, 'Judges Have Final Decision on Twitter', *The Australian* (online), 19 October 2009
<<http://www.theaustralian.com.au/news/judges-have-final-decision-on-twitter/story-e6frgal6-1225788184795>>.

⁴⁴ Levi, above n 23, 1533.

due to having to leave to access social media or submit a story.⁴⁵ This could potentially make journalists' stories more accurate. Journalists who use social media in the courtroom cause less disruption in the courtroom than journalists who must constantly leave the courtroom to access social media and re-enter it afterward.⁴⁶

It may well be that many people enjoy reading news from the courtroom on social media. For example, in Wichita, Kansas, journalist Ron Sylvester of *The Wichita Eagle* was allowed to use Twitter while he sat in the courtroom during Theodore Burnett's trial.⁴⁷ Burnett was accused of being paid to murder a pregnant 14-year-old girl.⁴⁸ At the end of the first day of the trial, many people who read Sylvester's tweets from inside the courtroom sent him emails and tweets stating that they enjoyed reading his tweets.⁴⁹

Using social media in the courtroom can ensure that courts face 'greater scrutiny'.⁵⁰ Dean argues that the more the public can access a trial, the better it is for the accused, because this increased scrutiny lessens the likelihood of perjury or misconduct occurring.⁵¹ People may be deterred from committing perjury or misconduct by the increased probability that they will be found out. It would also be better for the prosecution. These effects suggested by Dean may not actually occur when journalists use social media in the courtroom if trial participants do know that journalists are using social media; trial participants may assume that journalists are simply using their laptops or texting work colleagues.

5.5 An Example of Journalists Using Social Media in the Courtroom Successfully

Journalists who use social media in the courtroom can help people who want to attend court to watch a trial, but who cannot handle the emotional repercussions of being in court. They

⁴⁵ 'Opening Courts to Social Media Proposed by Panel', *CBC* (online), 26 October 2012

<<http://www.cbc.ca/m/rich/technology/story/2012/10/26/tec-social-media-courts.html>>.

⁴⁶ Newsgathering Committee, Defense Counsel Section, Media Law Resource Center, *Model Policy on Access and Use of Electronic Portable Devices in Courthouses and Courtrooms & Memorandum in Support for MLRC's Model Policy on Electronic Devices* (2010) Supreme Court of Arizona, 13.

⁴⁷ Debra Cassens Weiss, 'Capital Murder Trial Chronicled Via Twitter' (15 May 2008) *ABA Journal*, [2]

<http://www.abajournal.com/news/article/reporter_covers_murder_trial_on_twitter>.

⁴⁸ *Ibid* [1].

⁴⁹ Ron Sylvester, 'A Community Watches a Story Unfold' (2011) *Nieman Reports*, [6]

<<http://www.nieman.harvard.edu/reports/article/102627/A-Community-Watches-a-Story-Unfold.aspx>>.

⁵⁰ David Banks, 'Tweeting in Court: Why Reporters Must Be Given Guidelines', *The Guardian* (online), 15 December 2010 <<http://www.guardian.co.uk/law/2010/dec/15/tweeting-court-reporters-julian-assange>>.

⁵¹ Jacob E Dean, 'To Tweet or Not to Tweet: Twitter, "Broadcasting," and Federal Rule of Criminal Procedure 53' (2010) 79(2) *University of Cincinnati Law Review* 769, 787.

can also help people who want to attend a trial, but cannot because the court is too far away.⁵² *US v WR Grace*⁵³ is an example of this. The trial involved asbestos contamination in Libby, Montana. The prosecution submitted that the defendant's employees knew that their mine released toxic mine dust into the town. About 18 per cent of the people who lived in Libby who were x-rayed had asbestos in their lungs. Libby is a four hour drive from Missoula, where the trial occurred; therefore, some Libby residents could not travel to Missoula to attend the trial. Thirty-one law and journalism students tweeted about the case consistently during the trial and also blogged about the trial every few hours.⁵⁴ For some of the people affected by the asbestos in Libby, it was too hard to attend court, and these people were quite pleased to read updates about the trial on social media.⁵⁵ If journalists are able to use social media in the courtroom, they can also help people who cannot attend court for work or other personal reasons to know immediately what is occurring in a trial.

5.6 Some Examples of Journalists Using Social Media in the Courtroom Inappropriately

Some people believe that journalists should not be allowed to use social media in the courtroom because they may decide to take photos or record the proceedings, which may disrupt a trial.⁵⁶ The trial may be disrupted because a judge needs to tell a journalist to cease his or her behaviour and examine the effect of the journalist's actions on the trial. Journalists may also post information that they are not allowed to. For example, Jamie Jackson, a sports reporter for British newspaper the *Guardian*, tweeted from the Southwark Crown Court during a trial.⁵⁷ Jackson was allowed to tweet because the Lord Chief Justice had previously released a practice guidance that permitted journalists to use social media in court.⁵⁸ After the jury was chosen, Jackson tweeted the name of a juror in the trial.⁵⁹ In the United Kingdom

⁵² Nadia White, 'Cover Story: UM's Grace Case Project: Experiment in Live Trial Coverage Keeps the Faith in Justice' (2010) 36 *The Montana Lawyer* 6, 7.

⁵³ *US v WR Grace*, 504 F 3d 745 (9th Cir, 2007).

⁵⁴ White, above n 52, 7.

⁵⁵ *Ibid* 8.

⁵⁶ Dean, above n 51, 787.

⁵⁷ Sportsmail Reporter, 'Journalist Faces Jail After Naming Redknapp Juror on Twitter', *The Daily Mail* (online), 28 January 2012, [1], [7] <<http://www.dailymail.co.uk/sport/football/article-2093280/Harry-Redknapp-trial-journalist-faces-jail-naming-juror.html>>.

⁵⁸ Andrew Pugh, 'Law Refreshers for Guardian Staff in Wake of Juror Tweet', *Press Gazette* (online), 15 February 2012, [3] <<http://www.pressgazette.co.uk/node/48751>>.

⁵⁹ Sportsmail Reporter, above n 57, [1].

jurors' names are not provided to the public or the parties.⁶⁰ Judge Anthony Leonard QC of the Southeastern Circuit Court dismissed the juror who Jackson named and replaced him or her.⁶¹ The Attorney General also investigated Jackson's actions to decide whether to prosecute him for his tweets.⁶² Jackson's mistake may have been because he was a sports reporter, as opposed to being professionally trained in court rules. Citizen journalists who are similarly untrained in court rules may make mistakes similar to Jackson's.

In Kansas, United States, Austin Tabor was on trial for allegedly shooting two people, one of whom died.⁶³ The judge at the trial allowed journalists to use camera phones and to tweet in the courtroom, provided that they did not photograph the jury.⁶⁴ Ann Marie Bush, a journalist for the *Topeka Capital-Journal*, accidentally photographed a juror in the courtroom and tweeted the photo.⁶⁵ The Judge declared a mistrial as a result.⁶⁶

Despite these occurrences, it is not necessarily the case that, if judicial officers permit journalists to use social media in the courtroom, journalists will take photographs or publish information that they should not. Judicial officers should release official policies clarifying that journalists cannot take photographs in court or publish jurors' names. National uniform guidelines can state that judicial officers will not permit journalists to use social media in the courtroom if it will infringe upon the exceptions to the open justice principle. If some journalists occasionally fail to follow these guidelines, judicial officers can punish them accordingly. Judicial officers can also forbid journalists who do not follow court rules from entering courtrooms in the future. Admittedly, some professionally trained journalists may breach court guidelines accidentally (such as Ann Marie Bush), but these cases would be rare.

⁶⁰ Ibid [8].

⁶¹ PA Media Lawyer, 'AG Investigates Guardian Over Reporter's Juror Tweet', *Press Gazette* (online), 3 February 2012, [8] <<http://www.pressgazette.co.uk/node/48681>>.

⁶² Ibid [4].

⁶³ Beth Stebner, 'Reporter Causes MISTRIAL in Murder Case by Tweeting Photos of Juror — After Judge Warned Against It', *The Mail* (online), 12 April 2010, [3] <<http://www.dailymail.co.uk/news/article-2128556/Reporter-causes-MISTRIAL-murder-case-tweeting-photo-including-grainy-profile-juror--judge-warned-it.html>>.

⁶⁴ Ibid [9].

⁶⁵ Ibid [10].

⁶⁶ Ibid [1].

5.7 Problems for Victims of Crime

Journalists tweeting from the courtrooms of criminal trials can cause problems for victims of crimes.⁶⁷ According to South Australian Victims of Crime Commissioner Michael O'Connell, 'tweets are only 140 characters, and that carries with it the risk of making a case sound more sinister'.⁶⁸ Journalists can make a case appear worse than it actually is in any kind of media, no matter the length. Victims also have the choice to refrain from reading about a trial on social media if it disturbs them. If journalists are properly trained, this might lessen the chance that they make a case sound 'more sinister'.

5.8 Problems with the Length of a Tweet

Similarly, since a tweet is only 140 characters, some argue that it may be difficult for a journalist to include the context of a case.⁶⁹ If a journalist wants to inform readers about the context of a case that he or she has tweeted about, the journalist can tweet links to webpages containing additional information that is not restricted to 140 characters.⁷⁰ It is also possible that a reader might already know the context of a case in great detail, which is why he or she wants to read tweets about it. In this situation, the reader would not require the journalist to provide the context of the tweets.

Some people think that the public may find it difficult to understand journalists' short posts and tweets.⁷¹ It is true that some members of the public may have problems understanding court proceedings from a single tweet. These people can obtain additional information if they choose to, from online articles. Reading a tweet about a trial can still be helpful to these people if they are looking for a short update on what has occurred in the courtroom very

⁶⁷ Sean Fewster, 'South Australian Lawyers Say Live Tweeting from the Court Room is OK', *Adelaide Now* (online), 17 July 2012, [4]

<<http://www.news.com.au/technology/south-australian-lawyers-say-live-tweeting-from-the-court-room-is-ok/story-e6frfro0-1226428526187>>.

⁶⁸ *Ibid* [5].

⁶⁹ Afua Hirsch, 'Can Live-Blogs and Twitter Take Court Reporting into the 21st Century?' on Afua Hirsch, *Afua Hirsch's Law Blog* (28 July 2010)

<<http://www.guardian.co.uk/law/afua-hirsch-law-blog/2010/jul/28/live-blogging-tweeting-court-reporting>> [9].

⁷⁰ Banks, above n 50, [5].

⁷¹ Maria Babbage, 'Time for Debate on How Twitter, Facebook Affect Courts Says Ontario's AG', *The Globe and Mail* (online), 23 August 2012, [14] <<http://m.theglobeandmail.com/technology/tech-news/time-for-debate-on-how-social-media-affect-courts-says-ontarios-ag/article572918/?service=mobile>>.

recently. Journalists can also tweet several times about the same topic when they want to avoid being constrained by Twitter's 140-character limit.

5.9 The Immediacy of Journalists' Posts or Tweets

Other problems with journalists using social media in the courtroom relate to the immediacy of the journalists' posts or tweets. Lili Levi claims that when journalists post news on social media, the news may not be accurate⁷² because they post information so quickly.⁷³ For example, in Kansas in the United States, reporter Jared Cerullo tweeted from the courtroom that an accused pleaded guilty to a murder charge. This was incorrect. The accused had entered a plea of not guilty. Cerullo's employer fired him as a result and Cerullo sued his employer for defamation and breach of contract.⁷⁴ Cerullo's lawsuit may set precedent in this area in the United States.

5.10 Additional Fact Checking and Defamatory Content

Lawyers rarely, if ever, check the content that journalists post on social media prior to posting, so journalists may risk posting content that is defamatory and results in litigation.⁷⁵ The content may also require fact checking, but journalists may not go through this process because it can be challenging or inconvenient in the immediate environment of social media.⁷⁶ On the other hand, simply because a journalist posts information immediately on social media, does not necessarily mean that it is inaccurate or is defamatory. Staff of media outlets can teach journalists how to increase the chances that their social media tweets and posts are accurate. It may be necessary for staff of media organisations to try to choose more experienced journalists to use social media in the courtroom. While more experienced journalists may be more likely to post or tweet accurate information, it is also possible that more experienced or older journalists might not be as knowledgeable about using social media as younger journalists.

⁷² Levi, above n 23, 1533.

⁷³ Ibid 1556.

⁷⁴ Merrill Knox, 'Fired Reporter Sues KAKE for Defamation, Breach of Contract', *TVSpy* (online), 29 August 2013, [1] <<http://www.mediabistro.com/tvspy/tag/jared-cerullo>>.

⁷⁵ Jackson, Sally, 'Judges Have Final Decision on Twitter', *The Australian* (online), 19 October 2009 <<http://www.theaustralian.com.au/news/judges-have-final-decision-on-twitter/story-e6frgal6-1225788184795>>.

⁷⁶ Levi, above n 23, 1557.

5.11 Suppression Orders

A judicial officer may decide that information at court should be subject to a suppression order after a journalist has already posted or tweeted that information on social media. Consequently, the suppression order would not be effective. In November 2011, Magistrate Peter Mealy of the Melbourne Magistrates' Court forbade journalists from using Twitter during Simon Artz's committal hearing.⁷⁷ Artz was accused of leaking police information about an organised anti-terror raid⁷⁸ to *The Australian*.⁷⁹ His Honour stated that using Twitter at court was 'inappropriate' because at Artz's committal hearing tweets might contain information that he would later order to be suppressed.⁸⁰ If a judicial officer believes that information in a court proceeding will need to be suppressed, he or she should inform journalists as early as possible that they cannot use social media during the hearing. He or she can also instruct court officers to take journalists' electronic devices from them while they are in the relevant courtroom. Judicial officers can also require journalists to wait for a certain period (for example, 20 minutes) after evidence is tendered or a witness finishes testifying before permitting journalists to write about the evidence or testimony on social media.⁸¹

5.12 Disruption

Some judicial officers think that journalists using social media in the courtroom can be disruptive. Judge Charles Burns of the Cook County Court in Illinois, United States, forbade anyone, including journalists, from using social media during William Balfour's trial. Balfour

⁷⁷ Pia Akerman, 'Magistrate Hearing Evidence Against Simon Artz Bans Twitter from Court', *The Australian* (online), 4 November 2011, [2]
<<http://www.theaustralian.com.au/media/magistrate-hearing-evidence-against-simon-artz-bans-twitter-from-court/story-e6frg996-1226185500720>>.

⁷⁸ Chip Le Grand and Pia Akerman, 'With Court a'Twitter, Magistrate Bans Tweets', *The Australian* (online), 4 November 2011, [1]
<<http://www.theaustralian.com.au/media/with-court-atwitter-magistrate-bans-tweets/story-e6frg996-1226185137003>>.

⁷⁹ Akerman, above n 77, [2].

⁸⁰ Nic Christensen and Pia Akerman, 'No Tweeting Edict "a Timely Reminder" for Journalists', *The Australian* (online), 5 November 2011, [2]
<<http://www.theaustralian.com.au/media/no-tweeting-edict-a-timely-reminder-for-journalists/story-e6frg996-1226186217464>>.

⁸¹ See, eg, *Supreme Court Civil Rules 2006* (SA) r 9B(5); *District Court Criminal Rules 2013* (SA) r 38(5); *District Court Civil Rules 2006* (SA) r 9B(5).

was accused of killing Oscar winner Jennifer Hudson's family.⁸² Judge Burns' media liaison, Irv Miller, stated that '[t]weeting takes away from the dignity of a courtroom'⁸³ and that Burns J thought that journalists constantly tweeting would be disruptive.⁸⁴ Judge Burns may have thought that journalists tweeting 'takes away from the dignity of the courtroom' because Twitter has a reputation for providing inaccurate information.⁸⁵ Journalist Tim Leberecht said that Twitter is 'prone to propaganda and misinformation'.⁸⁶ Any type of media can provide information that is inaccurate, whether in print or online. As long as it is professional journalists who tweet from inside the courtroom (as opposed to people without proper journalistic training or citizen journalists), the information tweeted should usually be accurate. This accuracy is expected because Australian journalists follow ethical codes that stress the importance of reporting accurately.⁸⁷

Journalists tweeting in the courtroom need not be disruptive. In courtrooms where judicial staff already permit journalists to type notes on their laptops, the sounds created by posting on social media are no different. It is possible for journalists to adjust the settings on their technological devices so that they do not make noise while typing. The benefits of journalists using social media in the courtroom appear to outweigh the potential risks involved. Nevertheless, only some courts already permit journalists to use social media in the courtroom; the next section discusses this in depth.

5.13 Judicial Officers Already Using or Requesting Permission to Use Social Media

Canadian, American, British and Australian courts currently have different approaches to permitting journalists to use social media in the courtroom. Justice Frances Kitley, of the Ontario Superior Court of Justice in Canada, stated that the courts in Canadian 'provinces are

⁸² 'High Court Justice Weighs in on Tweeting Ban at Hudson Murder Trial', *CBS Chicago* (online), 30 April 2012, [1] <<http://chicago.cbslocal.com/2012/04/30/high-court-justice-weighs-in-on-tweeting-ban-at-hudson-murder-trial/>>.

⁸³ *Ibid* [5].

⁸⁴ Michael Tarm, 'Ringling Prompts Phone Ban at Hudson-Related Trial', *Fox News* (online), 2 May 2012, [5] <<http://www.foxnews.com/us/2012/05/02/hudson-family-murders-judge-bars-phones-in-court/>>.

⁸⁵ Hill, above n 2, 16.

⁸⁶ *Ibid*.

⁸⁷ See, eg, Media Entertainment and Arts Alliance, *Journalists' Code of Ethics* (2013) [4] <<http://www.alliance.org.au/code-of-ethics.html>>. For a discussion of the potential security problems that could result if journalists use social media in the courtroom, see Cathy Packer, 'Should Courtroom Observers Be Allowed to Use their Smartphones and Computers in Court? An Examination of the Arguments' (2013) 36(3) *American Journal of Trial Advocacy* 573, 581.

struggling with what to do with this'.⁸⁸ Still, Canadian, British and Welsh judicial officers made the earliest efforts to address this issue.

This section will examine judicial officers' actions, or lack thereof, on this issue to date in the four jurisdictions mentioned. On a micro level, judicial officers decide the issue for specific cases. On a macro level, judicial officers or the government make decisions about this issue for entire courts or jurisdictions.

5.13.1 Micro Level

5.13.1.1 Allowing Social Media Use for Individual Cases

Judicial officers may decide that they will allow journalists to use social media in the courtroom for a specific trial because journalists have already begun or have requested permission to do so. In these situations, they do not apply existing law about other media to the case. An example of this is *Roadshow Films Pty Ltd v iiNet Limited [No 3]*,⁸⁹ a Sydney Federal Court case about whether an internet service provider breached copyright laws when its subscribers illegally downloaded movies.⁹⁰ Two technology journalists, Andrew Colley from *The Australian* and Liam Tun from *ZDNet Australia*, tweeted from the courtroom using their laptops.⁹¹ Their Twitter pages stated their names and the media companies that they worked for.⁹² Hundreds of people followed Colley and Tun's tweets.⁹³ When Justice Dennis Cowdroy discovered that the two men were tweeting in the courtroom, he did not stop them.⁹⁴ Justice Cowdroy stated

[t]his proceeding has attracted widespread interest both here in Australia and abroad, and both within the legal community and the general public. So much so that I understand this is the first Australian trial to be twittered or tweeted. I granted approval for this to occur in view of the

⁸⁸ Richard J Brennan, 'Tweets from the courtroom Should Be Allowed in All Provinces Say Legal Experts', *The Toronto Star* (online), 14 November 2012, [14] <<http://www.thestar.com/news/canada/article/1287606--tweets-from-the-courtroom-should-be-allowed-in-all-provinces-say-legal-experts>>.

⁸⁹ *Roadshow Films Pty Ltd v iiNet Limited [No 3]* [2010] FCA 24 (4 February 2010).

⁹⁰ *Ibid* [3].

⁹¹ Jackson, above n 75, [2], [6].

⁹² *Ibid* [5].

⁹³ *Ibid* [14].

⁹⁴ *Ibid* [7].

public interest in the proceeding, and it seems rather fitting for a copyright trial involving the internet.⁹⁵

Staff of the High Court later stated that they would ban all live tweeting during the final appeal of the case, because they ban social media from the courtroom in general.⁹⁶ It is possible that High Court judicial officers might make a different decision about tweeting in the courtroom if this case were to come before the High Court today, because the High Court has been more openly receptive to using electronic media recently.⁹⁷

At Julian Assange's bail hearing at the City of Westminster Magistrates' Court, journalists requested Judge Howard Riddle's permission to use social media in the courtroom.⁹⁸ Judge Riddle permitted the journalists to use social media from inside the courtroom,⁹⁹ provided that they were 'quiet and did not interfere with court business'.¹⁰⁰ Later that week, Assange had another bail hearing at the High Court.¹⁰¹ At the High Court Justice Duncan Ouseley refused to let the journalists use social media in the courtroom.¹⁰² He stated that 'the issues involving Twitter go beyond the possible relationship to sound recording, and may include the potential for distraction and disruption to the appropriate atmosphere of the court — what might be termed, perhaps a bit pompously, its dignity.'¹⁰³ Justice Ouseley also stated that 'a considered policy decision' on the issue was required.¹⁰⁴ The Lord Chief Justice for England and Wales subsequently published a policy on social media in the court.¹⁰⁵ As previously stated, the use of social media by journalists in the courtroom need not be distracting. Journalists can sit at the back of the courtroom, if necessary.

⁹⁵ *Roadshow Films Pty Ltd v iiNet Limited* [No. 3] [2010] FCA 24 (4 February 2010), [4].

⁹⁶ Nic Christensen, 'Reporters' Live Tweeting from Court Risks Mistrials', *The Australian* (online), 5 December 2011, [8] <<http://www.theaustralian.com.au/media/digital/reporters-live-tweeting-from-court-risks-mistrials/story-fna03wxu-1226213631453>>.

⁹⁷ See, eg, AAP, 'High Court Footage to Go Online', *The Sydney Morning Herald* (online), 13 September 2013 <<http://news.smh.com.au/breaking-news-national/high-court-footage-to-go-online-20130913-2tout.html>>.

⁹⁸ 'Lord Chief Justice Allows Twitter in Court', *BBC* (online), 20 December 2010, [9] <<http://www.bbc.co.uk/news/uk-12038088>>.

⁹⁹ *Ibid* [10].

¹⁰⁰ Associated Press, 'U.K. Judge Allows Tweeting at Assange Hearing', *CBC News* (online), 16 December 2010, [5] <http://www.cbsnews.com/2100-202_162-7152649.html>.

¹⁰¹ 'Lord Chief Justice Allows Twitter in Court', above n 98, [11].

¹⁰² *Swedish Judicial Authority v Assange* [2010] EWHC 3473 (Admin) (16 October 2010) [1] (Ouseley J).

¹⁰³ *Ibid* [3].

¹⁰⁴ *Ibid* [4].

¹⁰⁵ 'Lord Chief Justice Allows Twitter in Court', above n 98, [3].

Some American judges release decorum orders relating to a specific trial and state various requirements for that trial in particular, such as whether the media are permitted to use social media in the courtroom.¹⁰⁶ Releasing individual decorum orders is not the ideal way to decide whether journalists can use social media in the courtroom. It is not sufficiently predictable for the journalists who cover trials. A better solution is for courts to release a standard policy, which is a macro level solution.

5.13.1.2 Applying Existing Law to Decide Whether to Allow Social Media Use

There are few reported cases on this issue to date. Three American judgments on the topic involve applying existing law. In *United States v Shelnett*,¹⁰⁷ a journalist at the *Columbus Ledger-Enquirer* newspaper requested permission from Judge Clay Land to tweet during a criminal trial.¹⁰⁸ The prosecution did not argue the issue.¹⁰⁹ Judge Land applied Rule 53 of the Federal Rules of Criminal Procedure¹¹⁰ to make his decision. Rule 53 states, '[t]he court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.'¹¹¹ His Honour used a dictionary definition to define the word 'broadcast': 'casing or scattering in all directions' and 'the act of making widely known'.¹¹² Judge Land felt that tweeting would 'cast' information from the trial to the public and cause the trial to be widely known.¹¹³

Rule 53 was originally drafted to apply to television and radio broadcasts of trials. Prior to 2002, the rule stated that the 'taking of photographs' and 'radio broadcasting' were not allowed. In 2002, Rule 53 was amended and the word 'radio' was deleted from broadcasting. The Rule simply stated that broadcasting was forbidden. The change was made to create a wider interpretation of the word 'broadcasting'.¹¹⁴ Adriana Cervantes states that Land J in *Shelnett*

¹⁰⁶ *Commonwealth of Pennsylvania v Sandusky*, 25 Pa. D. & C. 5th Common Pleas Court of Centre County, Pennsylvania, Criminal Division 429, 442.

¹⁰⁷ *United States v Shelnett* 37 Media L Rep 2594, 2594 (MD Ga, 2009).

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid* 2595.

¹¹⁰ Fed. R. Crim. P. 53 (1999).

¹¹¹ *United States v Shelnett*, 37 Media L Rep 2594, 2595 (MD Ga, 2009).

¹¹² *Ibid.*

¹¹³ *Ibid* 2596.

¹¹⁴ *Ibid.*

did not properly discuss why tweeting is unlike the broadcasting of audio or visual information in reaching its decision to include Twitter under the blanket prohibition of Criminal Procedure Rule 53. Hopefully, subsequent courts will make this distinction since the coverage that each type of broadcasting provides differs.¹¹⁵

Susan Brenner also believes that Land J in *Shelnutt* erred in refusing to permit journalists to tweet during the trial.¹¹⁶ She states that the goal of Rule 53¹¹⁷ was to prevent journalists from disrupting trials,¹¹⁸ adding that ‘there seems to be no reason why a reporter tweeting during a criminal trial is any more disruptive than letting a reporter take notes by hand or on a laptop during a trial or letting an artist create sketches that will later be broadcast to the public via television.’¹¹⁹ Brenner’s view is similar to the views already stated in this section that journalists who use social media in the courtroom can be relatively quiet. Dean states that the definition that Land J used in *Shelnutt* was ‘over-inclusive’ because, if one uses his dictionary definition of broadcasting,

any form of press would be broadcasting because it takes facts and disseminates them to the population at large. Under this interpretation, newspaper, magazine, and television reporting would all be prohibited under Rule 53. Any individual who attended a criminal trial and talked to others about his or her experience would be broadcasting. The result is untenable; therefore, broadcasting cannot be defined so broadly as to prohibit anything that casts or scatters in all directions, or makes information more widely known.¹²⁰

Dean’s statement is too broad. A small local paper, which is a type of press, would probably not ‘scatter in all directions’,¹²¹ but an online article might. Using Land J’s definition of broadcasting, online articles about trials would not be allowed. If online articles about trials were not allowed, it would be a disaster for the staff of news organisations that had shifted their efforts from print to online, and for the millions of people who read the news online.

¹¹⁵ Adriana C Cervantes, ‘Will Twitter Be Following You in the Courtroom?: Why Reporters Should Be Allowed to Broadcast During Courtroom Proceedings’ (2010) 33(1) *Communications and Entertainment Law Journal* 133, 149–150.

¹¹⁶ Susan W Brenner, ‘Internet Law in the Courts’ (2010) 13(9) *Journal of Internet Law* 30, 34.

¹¹⁷ Fed. R. Crim. P. 53 (1999).

¹¹⁸ Brenner, above n 116, 34.

¹¹⁹ *Ibid.*

¹²⁰ Dean, above n 51, 784–785.

¹²¹ *United States v Shelnutt*, 37 Media L Rep. 2594, 2595 (MD Ga, 2009).

In *Connecticut v Komisarjevsky*, the accused was charged with capital felony and sexual assault in the first degree. The accused applied to Judge Jon Blue to forbid journalists from using Twitter at his trial. Judge Blue applied Connecticut Rules of Court §1–11(b) (2008), which stated that when an accused is charged with sexual assault, ‘[n]o broadcasting, television, recording or photographing’ of the trial is allowed.¹²²

Judge Blue stated that this law clearly forbids journalists from using television and radio at trials, but it was ‘not clear whether new electronic forms of communication, particularly communication by the real-time information network known as Twitter, are similarly prohibited’.¹²³ His Honour then attempted to find a definition for the term ‘broadcast.’ He found dictionary and legal definitions for the word out of date and unhelpful.¹²⁴ He stated that he would interpret the word ‘broadcast’ by constructing ‘an interpretation that comports with the primary purpose of the rule in question and does not lead to anomalous or unreasonable results’.¹²⁵

Judge Blue explained that the purpose of §1–11(b) was to protect a victim of sexual assault from having to contend with ‘the indignity of having his or her ordeal vividly conveyed to the world by the use of actual voices and photographic or televised images from the courtroom’. However, this protection ‘cannot sensibly extend beyond voices and photographic or televised images to the actual words spoken in court or descriptions of courtroom events’.¹²⁶ Judge Blue stated that judicial officers usually act cautiously when they apply existing legislation to new technology,¹²⁷ but held that §1–11(b) did not apply to Twitter and journalists could use it at Komisarjevsky’s trial. Nevertheless, if journalists were ‘disruptive of the court proceeding’ while tweeting in court, then he would forbid them from doing so. For example, if a journalist was noisy while typing in court, Blue J would forbid him or her from using social media in the courtroom.¹²⁸

Judge Blue’s decision that §1–11(b) did not apply to Twitter is reasonable, given that journalists tweeting from court need not take photographs at court or record voices or images.

¹²² *Connecticut v Komisarjevsky*, 2011 Conn Super LEXIS 403, 403 (2011).

¹²³ *Ibid.*

¹²⁴ *Ibid* 406–7.

¹²⁵ *Ibid* 407.

¹²⁶ *Ibid.*

¹²⁷ *Ibid* 408.

¹²⁸ *Ibid* 413.

It is interesting that Blue J could not find a definition of the word broadcast that was not out of date, while Land J did not find this to be a problem. Judge Land used his definition of broadcast approximately two years before Blue J stated that he could not find a definition for broadcast that was not out of date. Judge Blue most likely would have known about Land J's judgment and rejected Land J's definition of broadcast. This adds further weight to the idea that there were problems with Land J's definition. If the two cases had appeared in an Australian jurisdiction, the judicial officer may have applied the open justice exceptions to the case and found that neither case would have fallen under an exception to open justice, because neither would have had a negative impact on 'the attainment of justice' or the public interest.¹²⁹

In Pennsylvania, Centre County Court judicial officers forbade electronic communications from being used in the courtroom.¹³⁰ Judge John Cleland overturned this rule for the preliminary hearing in *Commonwealth of Pennsylvania v Sandusky*.¹³¹ Sandusky was a former football defensive coordinator for Pennsylvania State University, charged with sexually abusing children.¹³² Judge Cleland met with print and electronic journalists to 'anticipate and resolve media coverage issues that might arise during the trial'.¹³³ On 30 May 2012 Judge Cleland released a 'Decorum Order Governing Jury Selection and Trial' ("Order"). The Order laid out policies for the public and press who attended court to follow. Paragraph 7 of the Order stated:

7. Electronic Devices:

- a. No member of the public will be permitted to possess in Courtroom 1 any cell phone, laptop computer, smart phone, or similar electronic device. Anyone possessing such a device will not be permitted to pass security and enter the Courthouse.
- b. Only reporters with proper credentials, as determined by the Sheriff, will be permitted to possess or use in Courtroom 1 or the satellite courtroom any cell phone, laptop computer, smart phone, or similar electronic device. Such devices may be used during trial for electronic based communications.

¹²⁹ *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131, 141 (Kirby P).

¹³⁰ Nicole Auerbach, 'Judge OKs Tweets, Texts for Hearing', *USA Today* (Arlington), 13 December 2011, C3.

¹³¹ 25 Pa. D. & C. 5th Common Pleas Court of Centre County, Pennsylvania, Criminal Division 429, 442.

¹³² Auerbach, above n 130, C3.

¹³³ *Commonwealth of Pennsylvania v Sandusky*, 25 Pa. D. & C. 5th Common Pleas Court of Centre County, Pennsylvania, Criminal Division 429, 442.

However, the devices may not be used to take or transmit photographs in Courtroom 1 or the satellite courtroom; or to record or broadcast any verbatim account of the proceedings while court is in session. ¹³⁴

At issue was whether journalists could publish direct quotations from court using ‘electronic based communications’¹³⁵. Journalists requested that Cleland J clarify paragraph 7 of the Order to state whether they could use direct quotations from the courtroom using electronic based communications.¹³⁶ Judge Cleland stated that the relevant law was Criminal Procedure Rule 112 of the Supreme Court of Pennsylvania.¹³⁷ Paragraph (A) of the Rule states:

The court or issuing authority shall:

prohibit the taking of photographs, video or motion pictures of any judicial proceedings or in the hearing room or courtroom or its environs during the judicial proceeding; and
prohibit the transmission of communications by telephone, radio, television, or advanced communication technology from the hearing room or the courtroom or its environs during the progress of or in connection with any judicial proceeding, whether or not the court is actually in session.¹³⁸

Paragraph © of Rule 112 states:

Except as provided in paragraph (D), the stenographic, mechanical, or electronic recording, or the recording using any advanced communication technology, of any judicial proceedings by anyone other than the official court stenographer in a court case, for any purpose, is prohibited.¹³⁹

¹³⁴ Ibid.

¹³⁵ Ibid 446.

¹³⁶ Ibid 447.

¹³⁷ Ibid 446.

¹³⁸ Ibid 441.

¹³⁹ Ibid 444.

Additionally, Canon 3(A)(7) of the Pennsylvania Code of Judicial Conduct states:

Unless otherwise provided by the Supreme Court of Pennsylvania, judges should prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions.¹⁴⁰

Both pieces of legislation use the word ‘broadcasting’, so Cleland J interpreted this term. His Honour interpreted the term to mean ‘that it prohibited the simultaneous transmission of a verbatim account of the proceeding and, therefore, the Rule would not prohibit tweeting or texting as long as the communication did not include a verbatim account’.¹⁴¹

Around the same time that Cleland J released his Order, the Pennsylvania Rules Committee released a report¹⁴² stating that Pennsylvania trial judges who interpreted the word ‘broadcast’ in Rule of Criminal Procedure 112¹⁴³ and Canon 3(A)(7) of the Code of Judicial Conduct¹⁴⁴ to permit using electronic communication from the courtroom misunderstood the law.¹⁴⁵ Judge Cleland said that his interpretation of the word broadcasting was ‘confusing to reporters, unworkable, and therefore, likely, unenforceable’.¹⁴⁶ Judge Cleland then modified paragraph 7 of the Order to state that

while credentialed reporters admitted to Courtroom 1 or the satellite courtroom may possess and use specified electronic devices as ‘tools of the trade’ such devices shall not be set in a mode that permits transmission of any form of communication to any person or device either in or out of the Courthouse or Courthouse Annex.¹⁴⁷

Criminal Procedure Rule 112(A)(2) of the Supreme Court of Pennsylvania¹⁴⁸ appears to clearly state that people (which would include journalists) cannot use social media in the courtroom. Therefore, it is interesting that Cleland J and other judges misinterpreted the rule. It is hard to understand why Cleland J originally permitted journalists to post or tweet general

¹⁴⁰ Ibid 444–5.

¹⁴¹ Ibid 445.

¹⁴² Ibid.

¹⁴³ Pa. R. Crim. P. 112 (2002).

¹⁴⁴ Pa. Code of Judicial Conduct Canon 3(A)(7)(2005).

¹⁴⁵ *Commonwealth of Pennsylvania v Sandusky*, 25 Pa. D. & C. 5th Common Pleas Court of Centre County, Pennsylvania, Criminal Division 429, 445.

¹⁴⁶ Ibid 447.

¹⁴⁷ Ibid 448.

¹⁴⁸ Pa. R. Crim. P. 112 (2002).

comments from the courtroom, but not direct quotations. Judicial officers should allow journalists to post or tweet both general comments and direct quotations. If this case had been tried in Australia and the exceptions to the open justice principle¹⁴⁹ were applied to the subject matter, it is possible that the judicial officer would have found posting or tweeting neither general comments nor direct quotes from the case to be a problem. This could have prevented the confusion that resulted from Cleland J originally stating that journalists could post general comments from the courtroom on social media, but not direct quotes.

In Wichita, Kansas, Thomas Marten J of the US District Court permitted journalist Ron Sylvester of *The Wichita Eagle* to tweet from the Federal Court at the trial of six gang members.¹⁵⁰ Judge Marten permitted Sylvester to tweet from the courtroom by applying Federal Rule of Criminal Procedure 57(b).¹⁵¹ This rule states

[a] judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.¹⁵²

Since the Federal Rule of Criminal Procedure 57(b) is so wide, it makes sense that Marten J could permit Sylvester to tweet from the courtroom as a result.

5.13.2 Macro Level

5.13.2.1 Consolidated Practice Directions and Court Rules

The consolidated practice directions of the Supreme Courts of Western Australia and Queensland generally address the question of whether journalists are allowed to use social

¹⁴⁹ *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131, 141 (Kirby P).

¹⁵⁰ Larry Magid, 'Twitter in the Court: Federal Judge Gets It', *CNet* (online), 9 March 2009, [1], [3] <http://news.cnet.com/8301-19518_3-10191261-238.html>.

¹⁵¹ Dean, above n 51, 770; Fed. R. Crim. P. 57(b) (1999).

¹⁵² Fed. R. Crim. P. 57(b) (1999).

media in the courtroom.¹⁵³ The Queensland practice directions state that ‘laptop computers that do not communicate via a cellular network may be used during court proceedings provided doing so does not interrupt proceedings’.¹⁵⁴ Queensland Chief Justice Paul de Jersey states that ‘tweeting is permitted [in the courtroom], though not by jurors’.¹⁵⁵

Even though it appears that journalists are permitted to use social media in the courtroom in Queensland, courts in Queensland should consider releasing a policy on the issue so that journalists learn the limitations on their social media use in the courtroom. The Western Australian practice directions forbid anyone from using a mobile telephone in its courtrooms because it causes difficulties for the Court’s electronic recording devices.¹⁵⁶ As a consequence of this and the prohibition of internet-connected laptops, social media use is not possible.

The *Court Security Regulations 2011* (NSW) permit journalists to use social media in the courtroom ‘for the purposes of a media report on the proceedings concerned’.¹⁵⁷ The regulations do not define ‘journalist’ or ‘proceedings concerned’. The lack of definition of ‘journalist’ is problematic, because citizen journalists may try to argue that they are included in this term. Members of the public who use social media to comment about court proceedings may submit that they are also included. It is still a positive step that this regulation exists in New South Wales, because it permits journalists to use social media in the courtroom without requiring a judicial officer’s permission to do so.

In South Australia, the *Supreme Court Civil Rules* and *District Court Rules* state that ‘a *bona fide* member of the media’ may use social media.¹⁵⁸ The rules do not define ‘a *bona fide* member of the media’, which could pose a problem similar to the one discussed above in

¹⁵³ Supreme Court of Western Australia, *Practice Direction No 3.1 — Video and other Cameras, Tape Recorders, Two-way Radios and Mobile Telephones* (2009); Supreme Court of Queensland, *Practice Direction No 1 of 2009 — Recording Devices in Courtrooms: Supreme Court*, 10 March 2009.

¹⁵⁴ Supreme Court of Queensland, *Practice Direction No 1 of 2009 - Recording Devices in Courtrooms: Supreme Court*, 10 March 2009, [4].

¹⁵⁵ Paul Weston, ‘Judge Backs Social Media in Courts’, *The Sunday Mail* (online), 13 February 2011, [5] <<http://www.couriermail.com.au/ipad/courts-to-allow-in-social-media/story-fn6ck51p-1226005089785>>.

¹⁵⁶ Supreme Court of Western Australia, *Practice Direction No 3.1 — Video and other Cameras, Tape Recordings, Two-way Radios and Mobile Telephones* (2009) 35. It is noted that after this thesis was finalised, it was announced that journalists may now use social media in Western Australian courtrooms: see Buchanan, Val Buchanan, ‘Live Tweeting from WA Courts Allowed’ (Media Release, 31 January 2014).

¹⁵⁷ *Court Security Regulations 2011* (NSW) r 6B(a).

¹⁵⁸ *Supreme Court Civil Rules 2006* (SA) r 9B(3); *District Court Criminal Rules 2013* (SA) r 38(3); *District Court Civil Rules 2006* (SA) r 9B(3).

regards to the New South Wales regulation. If journalists in the South Australian Supreme Court want to write about evidence tendered or submissions made at court on social media, they must wait for 15 minutes after the tender or submissions are made, or until a judicial officer rules on any suppression orders or objections related to the evidence or submissions, whichever occurs later.¹⁵⁹ This requirement is unique: no other court policy or rule in the jurisdictions researched has one similar. This rule could be an effective way to deal with one of the major criticisms of allowing journalists to use social media in the courtroom: that journalists will comment on social media about information that a judge later suppresses. Perhaps courts in other jurisdictions that implement policies and rules about journalists using social media in the courtroom could do well to consider following the South Australian Supreme Court's lead on this issue.

5.13.2.2 Unofficial Court Policies

The Federal Court of Australia has an unofficial policy that individual Judges of the Court can decide whether they will allow journalists to use social media in the courtroom.¹⁶⁰ The Federal Court of Australia could consider publishing an official policy on this issue. Other Australian courts could also consider publishing official policies on this issue, if they have not done so already. Publishing official policies would give journalists clarity on whether they can use social media in the courtroom and whether there are any limitations on such use. It could also make it easier for judicial officers to punish journalists who violate their instructions on this issue, because the policy could clearly lay out the sanctions that journalists will face if they breach the policy. It would also help to uphold the open justice principle.

5.13.2.3 Official Court Social Media Policies and Model Policies

Johnston recommends that courts give journalists 'clear guidelines' about social media use in the courtroom and that courts update those guidelines regularly.¹⁶¹ Courts could consider their own specific requirements in drafting these guidelines. It may not be appropriate for courts to allow journalists to use social media in some courts. For example, family courts

¹⁵⁹ *Supreme Court Civil Rules 2006 (SA) r 9B(5); District Court Criminal Rules 2013 (SA) r 38(5); District Court Civil Rules 2006 (SA) r 9B(5).*

¹⁶⁰ Phillips, above n 7, 81.

¹⁶¹ Johnston, above n 14, 54.

may not want to allow journalists to use social media in their courtrooms because of the sensitive nature of their cases. Lower courts could permit journalists to use social media in courtrooms because it shows the public that ‘minor crimes are being dealt with’.¹⁶² On the other hand, though reassuring, the public may not find tweets about minor crimes sufficiently interesting to read. Former New South Wales Attorney General John Hatzistergos recommends that when considering whether courts should allow electronic media to be used in the courtroom, one must also consider ‘any adverse impact on the rights of victims of crime and the protection of witnesses’.¹⁶³ These are practical considerations for criminal trials in particular.

Australian courts could consider adopting an official model policy that allows journalists to use social media in the courtroom. A model policy would be better than a court rule, because a policy is a document that stands on its own, so it is likely easier to modify. Since social media is so new, courts may want the flexibility to change the policy easily over the next few years while they experiment to create the best policy. Australian courts can examine the policies of other jurisdictions to decide on a model policy; they can also consider using the model policy found in Appendix F of this thesis, or parts thereof. While courts in the Australian jurisdiction of Victoria have an official policy that expressly permits journalists to use social media in the courtroom,¹⁶⁴ courts in the other states may not want to adopt it because it requires journalists to obtain permission prior to using social media in the courtroom.

All Courts in Quebec, Canada have released a policy that forbids journalists from using social media in all courtrooms.¹⁶⁵ A spokesperson for the Courts stated that ‘the guidelines were

¹⁶² Bernard Lagan, ‘Evidence in 140 Characters or Less’, *The Global Mail* (online), 30 August 2012, [23] <<http://www.theglobalmail.org/feature/evidence-in-140-characters-or-less/361>>.

¹⁶³ Chris Merritt, ‘ABC Doco Opens Door to More Media Access to Courtrooms’, *The Australian* (online), 10 September 2012, [24] <<http://www.theaustralian.com.au/business/legal-affairs/abc-doco-opens-door-to-more-media-access-to-courtrooms/story-e6frg97x-1225916772123>>.

¹⁶⁴ Supreme Court of Victoria, *Media Policies and Practices* (26 August 2010) Supreme Court of Victoria, 6 <http://www.supremecourt.vic.gov.au/resources/52d4064b-f5c1-408b-ad06-5f62d2bda4fc/media_procedure_policy.pdf>.

¹⁶⁵ Nicole Duval Hesler CJ, Francois Rolland CJ and Elizabeth Corte CJ, *Guidelines Concerning the Use of Technological Devices in Courtrooms* (15 April 2013) Courts of Quebec, [12] <http://www.tribunaux.qc.ca/mjq_en/c-superieure/avis/pdf/utli_techno15042013-a.pdf>.

drafted after careful consideration, with the issue of decorum in mind'.¹⁶⁶ The Quebec judiciary's stance is surprising, because courts in several other Canadian provinces have released policies permitting social media in the courtroom.¹⁶⁷ Additionally, the Quebec policy was released after courts in the other Canadian provinces had released their policies, implying that the Quebecois court considered the other provinces' policies and rejected them. Under this policy, the Quebecois people cannot enjoy the benefits of journalistic use of social media in the courtroom. The words 'decorum in mind' appear to be vague. It would be helpful if the Quebecois court gave more concrete reasons about why they do not permit journalists to use social media in the courtroom to enable those affected to better understand their decision.

Common law jurisdictions that currently have policies on electronic media in the courtroom permitting its journalistic use include: Victoria, Australia;¹⁶⁸ England and Wales;¹⁶⁹ the Federal Court of Canada¹⁷⁰ and the following Canadian provinces: British Columbia,¹⁷¹ Ontario,¹⁷² Saskatchewan,¹⁷³ Nova Scotia,¹⁷⁴ New Brunswick¹⁷⁵ and Alberta.¹⁷⁶ Staff of the Canadian Centre for Court Technology ("CCCT")¹⁷⁷ and the American Media Law Resource

¹⁶⁶ The Canadian Press, 'Quebec Courtrooms to Become Twitter Free Zones', *Macleans* (online), 14 April 2013 <<http://www2.macleans.ca/2013/04/14/quebec-courtrooms-to-become-twitter-free-zones/>>.

¹⁶⁷ See, eg, Provincial Court of British Columbia, *Policy on Use of Electronic Devices in Courtrooms* (17 September 2012) 2

<http://www.courts.gov.bc.ca/supreme_court/media/PDF/Policy%20on%20Use%20of%20Electronic%20Devices%20in%20Courtrooms%20-%20FINAL.pdf>; Ontario Superior Court of Justice, *Protocol on the Use of Electronic Devices in the Courtroom* (1 February 2013) [4] <<http://www.ontariocourts.ca/scj/en/notices/protocols/>>.

¹⁶⁸ Supreme Court of Victoria, above n 164, 6.

¹⁶⁹ Judiciary of England and Wales, *Practice Guidance: The Use of Live Text-Based Forms of Communication (including Twitter) from Court for the Purpose of Fair and Accurate Reporting* (14 December 2011) 3 <<http://www.judiciary.gov.uk/publications-and-reports/guidance/2011/courtreporting>>; Supreme Court of the United Kingdom, *Policy on the Use of Live Text-Based Communications from Court* (February 2011) [5] <<http://supremecourt.gov.uk/docs/live-text-based-comms.pdf>>.

¹⁷⁰ Federal Court of Canada, *Policy on Public and Media Access* (23 August 2012) <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/MediaPolicy>.

¹⁷¹ Provincial Court of British Columbia, above n 167.

¹⁷² Ontario Superior Court of Justice, above n 167 [4].

¹⁷³ Courts of Saskatchewan, *Twitter and Other Text-Based Forms of Media Communication from Saskatchewan Courtrooms* (2010) 1 <http://www.sasklawcourts.ca/docs/Twitter_Protocol_2012.pdf>.

¹⁷⁴ Courts of Nova Scotia, *Use of Electronic Devices in Nova Scotia Courthouses* (2007) <http://www.courts.ns.ca/media_access/electronic_devices_policy_08_03.htm>.

¹⁷⁵ Drapeau CJ, Smith CJ and Jackson CJ, *Directive Respecting Electronic Devices in the Courtroom* (June 2012) CBC, [7]

<<http://www.cbc.ca/news/canada/new-brunswick/story/2012/07/16/nb-courtroom-electronic-devices.html>>.

¹⁷⁶ Court of Queens Bench of Alberta, *Electronic and Wireless Devices Policy* (January 2012) [2] <www.albertacourts.ab.ca/qb/Electronic_Policy_FINAL.pdf>.

¹⁷⁷ Canadian Centre for Court Technology, *Guidelines Regarding the Use of Electronic Communication Devices in Court Proceedings* (November 2012) 2 <<https://modern-courts.ca/documentation/Use%20of%20Electronic%20Communication%20Devices%20in%20Court%20Proceedings.pdf>>.

Center (“MLRC”) also proposed policies that allow journalists to use social media in the courtroom.¹⁷⁸

Most of the policies have similar definitions for electronic communication devices. For example, the CCCT defines electronic communication devices as ‘all forms of computers, personal electronic and digital devices, and mobile, cellular and smart phones’.¹⁷⁹ The Albertan policy has a definition of electronic and wireless devices that ‘includes computers, laptops, tablets, notebooks, cellular phones, smartphones, PDAs, iPhones, iPads, iPods, and any other cellular device’.¹⁸⁰

The CCCT¹⁸¹ and MLRC policies¹⁸² and the policies of the Federal Court of Canada,¹⁸³ Ontario,¹⁸⁴ Saskatchewan,¹⁸⁵ New Brunswick,¹⁸⁶ Alberta,¹⁸⁷ British Columbia¹⁸⁸ and England and Wales¹⁸⁹ permit journalists to use social media in the courtroom without requesting the judicial officer’s permission. The English and Welsh policy (which covers all courts except the United Kingdom Supreme Court) explains why its judicial officers do not require journalists to seek judicial officers’ permission as follows:

[i]t is presumed that a representative of the media or a legal commentator using live, text-based communications from court does not pose a danger of interference to the proper administration of justice in the individual case. This is because the most obvious purpose of permitting the use of live, text-based communications would be to enable the media to produce fair and accurate reports of the proceedings.¹⁹⁰

¹⁷⁸ Newsgathering Committee, Defense Counsel Section, Media Law Resource Centre, above n 46, 3.

¹⁷⁹ Canadian Centre for Court Technology, above n 177, [2].

¹⁸⁰ Court of Queens Bench of Alberta, above n 176, [2].

¹⁸¹ Canadian Centre for Court Technology, above n 177, 2 <<https://modern-courts.ca/documentation/Use%20of%20Electronic%20Communication%20Devices%20in%20Court%20Proceedings.pdf>>.

¹⁸² Newsgathering Committee, Defense Counsel Section, Media Law Resource Centre, above n 46, 3.

¹⁸³ Federal Court of Canada, above n 170.

¹⁸⁴ Ontario Superior Court of Justice, above n 167, [4].

¹⁸⁵ Courts of Saskatchewan, above n 173, 1.

¹⁸⁶ Drapeau CJ, Smith CJ and Jackson CJ, above n 175, [7].

¹⁸⁷ Court of Queens Bench of Alberta, above n 176, 1.

¹⁸⁸ Provincial Court of British Columbia, above n 923, 2.

¹⁸⁹ Judiciary of England and Wales, *Practice Guidance: The Use of Live Text-Based Forms of Communication (including Twitter) from Court for the Purpose of Fair and Accurate Reporting* (14 December 2011) 3 <<http://www.judiciary.gov.uk/publications-and-reports/guidance/2011/courtreporting>>.

¹⁹⁰ *Ibid.*

This explanation appears to be forward thinking. It also assumes that most journalists who use social media in the courtroom have good intentions, since they are using social media to provide the public with honest reports. The present research in this area supports this idea. After searching academic databases and the internet, the author could not find any reports of journalists using social media from the courtroom for any reason other than providing the public with honest reports.

The Saskatchewan and British Columbian policies refer to ‘accredited’¹⁹¹ media being able to use social media in the courtroom without seeking the courts’ permission. The Saskatchewan policy states that media ‘who have been accredited by the Court Services Division of the Ministry of Justice’ can use social media in court.¹⁹² Similarly, the British Columbian policy states that accredited media ‘means media personnel who are accredited pursuant to the Courts’ Media Accreditation Policy’.¹⁹³ There is a separate British Columbian policy that relates to journalists becoming accredited.¹⁹⁴ The policy states that the relevant journalist has read and will follow the Court’s *Policy for the Use of Electronic Devices in Courtrooms* and the publication *The Canadian Justice System and the Media*.¹⁹⁵ A committee of professional journalists decide whether journalists can become accredited.¹⁹⁶ Australian courts could implement an accreditation system for journalists who use social media in the courtroom similar to the one used in British Columbia. This would help to ensure that only journalists who have a basic knowledge of courtroom etiquette can use social media in Australian courts.

The MLRC model policy is broader than the other policies regarding which journalists may use social media in the courtroom. It states that ‘bloggers and other observers seated in the courtroom may use electronic devices to prepare and post online news accounts and commentary during the proceedings’, provided that they do not ‘interfere with the administration of justice, pose any threat to safety or security, or compromise the integrity of

¹⁹¹ Courts of Saskatchewan, above n 173, [5]; Provincial Court of British Columbia, above n 167, [5a].

¹⁹² Courts of Saskatchewan, above n 173, [5].

¹⁹³ Provincial Court of British Columbia, above n 167, [1a].

¹⁹⁴ Courts of British Columbia, *Media Accreditation Policy*
<http://www.courts.gov.bc.ca/supreme_court/media/PDF/Media%20Accreditation%20Policy%20-%20FINAL.pdf>.

¹⁹⁵ Ibid 2.

¹⁹⁶ Court of Appeal of British Columbia, Supreme Court of British Columbia and Provincial Court of British Columbia, ‘New Policy on Use of Electronic Devices in the Courtroom’ (Media Release, 1 August 2012)
<<http://www.provincialcourt.bc.ca/downloads/pdf/Press%20release%20%201%20August%202012.pdf>>.

the proceeding'.¹⁹⁷ Research for this chapter, which involved searching academic databases and the internet, could not find that individual bloggers or any other observers in Australian courts belong to a professional society that can provide them with training about court rules. If bloggers and other observers can find some way to join a relevant professional society and receive the requisite training, then courts may also decide to allow them to use social media in the courtroom, as part of the open justice principle.

The British Columbian policy states that it is within the individual judge's discretion not to permit journalists to use social media in their courtroom.¹⁹⁸ If this statement is included in a model policy for Australian courts, it will ensure that judicial officers can forbid journalists from using social media in the courtroom where it would infringe upon the exceptions to the open justice principle mentioned in *Fairfax*.¹⁹⁹ Some existing court rules and court policies in Australian jurisdictions already provide judicial officers with an overarching ability to forbid journalists from using social media in the courtroom.²⁰⁰

Some of the policies state limitations on journalistic use of social media in the courtroom. The British Columbian policy states that

an electronic device may not be used in a courtroom:

- (a) in a manner that interferes with the court sound system or other technology;
- (b) in a manner that interferes with courtroom decorum, is inconsistent with the court functions, or otherwise impedes the administration of justice;
- (c) in a manner that generates sound or requires speaking into the device;
- (d) to take photographs or video images;
- (e) to record or digitally transcribe the proceedings except as permitted by this policy.²⁰¹

The Albertan and Ontarian policies²⁰² and the South Australian Supreme Court Rules²⁰³ list similar limitations. The British and Welsh policy (for all courts except the United Kingdom

¹⁹⁷ Newsgathering Committee, Defense Counsel Section, Media Law Resource Centre, above n 46, 3.

¹⁹⁸ Provincial Court of British Columbia, above n 167, [2].

¹⁹⁹ *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131, 141 (Kirby P).

²⁰⁰ See, e.g., *Supreme Court Criminal Rules 2013 (SA)* r 38(1) and *District Court Criminal Rules 2013 (SA)* r 38.01.

²⁰¹ Provincial Court of British Columbia, above n 167, [3].

²⁰² Court of Queens Bench of Alberta, *Electronic and Wireless Devices Policy* (January 2012) 2 <www.albertacourts.ab.ca/qb/Electronic_Policy_FINAL.pdf>; Ontario Superior Court of Justice, above n 923 [4] <<http://www.ontariocourts.ca/scj/en/notices/protocols/>>.

²⁰³ *Supreme Court Civil Rules 2006 (SA)* r 9B(4).

Supreme Court) prohibits taking photographs in the courtroom.²⁰⁴ It also prohibits recording the proceedings without permission.²⁰⁵ Similar limitations could be inserted into the Australian policy because taking photographs and recording proceedings without permission would negatively affect the court's decorum. It could also make jurors' identities public, which would be a serious problem.

Some of the policies include penalties that journalists may face if they do not follow them. The British Columbian policy states that if the policy is violated then the relevant person may be subject to various sanctions, which may include a direction to turn off his or her electronic device, to leave the courtroom, or be found in contempt of court.²⁰⁶ The Albertan policy has a similar penalties section.²⁰⁷ Potential sanctions could put pressure on journalists to abide by the policy and help ensure that the exceptions to the open justice principle are not breached.

Appendix F of this thesis contains a model policy on journalistic use of social media in the courtroom that the author created for Australian courts to consider using. Australian courts could also consider developing an accompanying accreditation policy for journalists who may use social media in the courtroom that is similar to the one used by British Columbia's courts. The model policy in this thesis is based on the other courts' existing policies, which respect the open justice principle and its exceptions.

The Chief Justice of Victoria's positive stance towards social media may be the reason why the Victorian Supreme Court was the first in Australia to permit journalists to use social media in the courtroom. The Chief Justice is 'committed to accelerating the use of social media as a vehicle to communicating the work of the court'.²⁰⁸

It is noteworthy that Canadian, English and Welsh courts took actions on this issue ahead of Australian courts. Judicial officers in some other common law jurisdictions are currently considering whether they should draft social media policies for journalists attending their

²⁰⁴ Judiciary of England and Wales, above n 169, 1.

²⁰⁵ Ibid.

²⁰⁶ Provincial Court of British Columbia, above n 167, [10].

²⁰⁷ Court of Queens Bench of Alberta, above n 176, [9].

²⁰⁸ Kerry O'Shea, 'Social Media — Its Impact and Challenges on Court Reporters, Juries and Witnesses' (Paper presented at Australasian Institute of Judicial Administration Criminal Justice in Australia and New Zealand — Issues and Challenges for Judicial Administration Conference, Sydney, 9 September 2011) 2 <<http://www.aija.org.au/Criminal%20Justice%202011/Papers/O'Shea.pdf>>.

courts. For example, the Lord President of Scotland is considering the English and Welsh guidelines on this issue and intends to create similar guidelines for Scotland.²⁰⁹ The fact that many different organisations are considering this issue likely increases the research and publications available on this topic. This is a good outcome for all.

5.14 Safeguards that Judicial Officers Can Use if they Permit Journalists to Use Social Media in Court

Some judicial officers and politicians are taking additional steps to ensure that they make the right decision for their court or jurisdiction on this issue, as opposed to simply drafting policies about this issue and publishing them. If judicial officers consider organising committees to discuss this issue it could ensure that judicial officers make the best decisions for their courts. Additionally, judicial officers could consult with journalists to understand journalists' point of view.

Members of the Supreme Court Criminal Procedure Rules Committee in Pennsylvania, United States, have announced that they will evaluate whether they will allow journalists to tweet in court.²¹⁰ In the United Kingdom, the Lord Chief Justice of England and Wales published an interim practice guidance about using social media in the courtroom on 20 December 2010.²¹¹ After issuing the interim guidelines, the Lord Chief Justice consulted many stakeholders about the issue between February and May 2011.²¹² The stakeholders included the judiciary, the Attorney General, the Director of Public Prosecutions, the Bar Council and the Society of Editors.²¹³ In December 2011, the Lord Chief Justice provided new guidelines that replaced the interim practice guidelines.²¹⁴

The Chief Justice of the Supreme Court of Canada also recommends that courts share best practices with each other.²¹⁵ Australian courts may find it useful to consult with courts in Canada and the United Kingdom about this issue. Australian courts could benefit from what

²⁰⁹ Lord President of Scotland, 'Use of Live Text Based Communications from Court' (Media Statement, 14 December 2011) 2

<<http://www.scotland-judiciary.org.uk/24/839/Use-of-live-text-based-communication-from-court>>.

²¹⁰ Tamburri, Pohl and Yingling, above n 27, 1415.

²¹¹ Judiciary of England and Wales, above n 169, 2.

²¹² Ibid 1.

²¹³ Ibid.

²¹⁴ Ibid 2.

²¹⁵ McLachlin, above n 10, [32].

courts in those countries have learned so far from implementing their policies. Even after such consultation, however, it is possible that Australian court officials may still be hesitant about permitting journalists to use social media in the courtroom. They may want to consider taking action similar to that taken by Burns J in the United States, especially if they are presiding over a trial where it would not be appropriate for journalists to use social media. Judge Burns of the Cook County Court, forbade anyone, including journalists, from using social media during the trial of the man accused of killing Oscar winner Jennifer Hudson's family.²¹⁶ To ensure that the media did not use social media in court, he had a member of the sheriff's department follow journalists' Twitter accounts while the court was in session. Judge Burns required journalists to provide their Twitter names to the court.²¹⁷

Staff of news organisations can also take steps to ensure that journalists properly follow court policies on social media use. Staff of the *Guardian* newspaper in the United Kingdom provided media law revision sessions to their journalists after their sports reporter Jamie Jackson tweeted a juror's name during a trial.²¹⁸ Staff of Australian newspapers could consider offering information sessions about social media to their staff. Journalists who use social media in the courtroom could attend all relevant training sessions offered to them.

5.15 Options

If judicial officers decide not to allow journalists to use social media in any courtroom proceedings, they may provide alternative options to journalists. For example, some judicial officers allow journalists to use social media in a courtroom that is separate from where a trial takes place. For example, in Edmonton, Canada, Justice Terry Clackson of the Court of Queen's Bench forbade electronic devices from being used during the first degree murder trial of Mark Twitchell.²¹⁹ Instead, Clackson J allowed journalists to use computers and social media in a separate courtroom that received a delayed audio recording of the proceedings.²²⁰ Judge Land in *Shelnutt* would not permit journalists to use social media in the courtroom, but

²¹⁶ Michael Tarm, 'Judges, Journalists Clash Over Courtroom Tweets', *Yahoo News* (online), 16 April 2012, [3] <<http://news.yahoo.com/judges-journalists-clash-over-courtroom-tweets-185319151.html>>.

²¹⁷ *Ibid* [16].

²¹⁸ Pugh, above n 58.

²¹⁹ Alexandra Zabjek, 'Fairness Cited in Courtroom Electronic Ban for Twitchell Trial', *Canada.com* (online), 16 March 2011, [1] <<http://www2.canada.com/story.html?id=4450407>>.

²²⁰ *Ibid* [5].

he made a room near the courtroom available to journalists for social media use.²²¹ However, there may be technical problems with a delayed audio recording. This alternative also requires courts to give additional space to journalists, when the additional space may not be available.

Federal Judge Federico Moreno of the United States District Court of the Southern District of Florida does not allow journalists to use social media in the courtroom, but he allows them to use social media in the court's halls outside the courtroom.²²² If journalists can use social media in the court's halls, but not in courtrooms, journalists may need to frequently run in and out of court. The court's halls may become very crowded. The journalists may also disrupt court proceedings with their frequent movements.

It is also possible for judicial officers to permit court proceedings to be webcast. This involves courts recording their own proceedings and posting the proceedings on their website. Webcasting can provide the public with access to images very quickly, to the point that it is almost live.²²³ Stepniak argues that providing webcasts to the media results in more accurate articles about court proceedings because journalists are able to check what they wrote against the webcast.²²⁴ Some Australian courts webcast their trials and hearings and stream them on their websites,²²⁵ though most do not.²²⁶ For example, the Victorian Supreme Court tapes the audio of sentences and civil judgments and then uploads them, sometimes within half an hour of the hearing.²²⁷ Some Australian courts do not webcast proceedings due to insufficient resources.²²⁸ This has resulted in the media giving proceedings that are webcast more attention than they would have received otherwise.²²⁹ The High Court of Australia will post audio and visual recordings from the Court on their website.²³⁰ The

²²¹ *United States v Shelnett*, 37 Media L Rep 2594, 2598 (MD Ga, 2009).

²²² Cervantes, above n 871, 156; Federico A Mareno CJ, *In Re: Prohibition on Electronic Transmissions and Cellular Phone Use Inside Courtrooms* (23 March 2009) United States District Court Southern District of Florida, 1 - 2 <<http://www.flsd.uscourts.gov/wp-content/uploads/adminOrders/2009/2009-12.pdf>>.

²²³ Wayne Martin CJ, 'Managing Change in the Justice System' (Speech delivered at the 18th Australasian Institute of Judicial Administration Oration, Brisbane, 14 September 2012) .

²²⁴ Daniel Stepniak, 'Cameras in Court: Reluctant Admission to Proactive Collaboration' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2012) 66, 74.

²²⁵ *Ibid* 72.

²²⁶ *Ibid* 74.

²²⁷ *Ibid* 72.

²²⁸ *Ibid* 74.

²²⁹ *Ibid* 72.

²³⁰ AAP, 'High Court Footage to Go Online', *The Sydney Morning Herald* (online), 13 September 2013 <<http://news.smh.com.au/breaking-news-national/high-court-footage-to-go-online-20130913-2tout.html>>.

Florida Supreme Court in the United States has webcast their court proceedings online since 1997.²³¹

Webcasting trials is an excellent idea. It allows courts to have control over what journalists and the public can see, and helps ensure that journalists receive accurate information. However, webcasting trials, on its own, is probably insufficient to replace journalists using social media in the courtroom, because it does not provide the public with instant written information online about the relevant proceeding. It can take a reader seconds to read a tweet, but it can take several minutes to find the correct part of a webcast to watch.

5.16 Key Recommendations of this Chapter

Australian judicial officers may want to consider drafting a policy that permits journalists to use social media in the courtroom, or else use the model policy provided in Appendix F of this thesis, or any parts of it that they find relevant. This would support the open justice principle while also giving journalists a clear understanding of judicial officers' expectations of their social media use in the courtroom. Important aspects of the policy are: (1) no photographs or recordings are permitted in court; (2) judges can apply their discretion to whether they permit journalists to use social media in the courtroom; (3) penalties are laid out for violation of the policy; and (4) a definition of 'journalist' is provided that excludes citizen journalists unless they receive proper training about court rules.

Australian judicial officers may also want to consider drafting an accreditation policy for journalists to follow in order to be permitted to use social media in the courtroom. This could help to ensure that journalists who use social media in the courtroom have certain minimum knowledge of court rules.

5.17 Conclusion

According to the Chief Justice of the Supreme Court of Canada, Beverley McLachlin, 'as the media invent and re-invent themselves, so must judicial understanding evolve of how we

²³¹ Florida Supreme Court, *Public Information*, (undated) [6]
<http://www.floridasupremecourt.org/pub_info/press.shtml>.

relate to the media. We must look forward; we dare not hang back'.²³² For Australian courts to move forward, their judicial officials should consider releasing a policy that permits journalists to use social media in the courtroom. Besides supporting the principle of open justice, it can give journalists a clear understanding of judicial officials' expectations of their social media use in the courtroom.

While '(c)riticism of the courts, like death and taxes, is guaranteed',²³³ it does not need to be on this issue. Australian judicial officials can examine the success of the Canadian and the English and Welsh policies mentioned in this chapter, if possible, prior to releasing their final policy about journalists using social media in the courtroom. Australian judicial officials can also consider consulting Australian journalist organisations prior to releasing their final policy to better understand journalists' point of view. Finally, Australian judicial officials can consider using the model policy provided in Appendix F of this thesis, or any parts of it that they find helpful.

²³² Mike Blanchfield, 'Tweet Justice Looms Large for Judges', *The Globe and Mail* (Toronto), 2 January 2012, A5.

²³³ de Jersey, above n 12, 39–40.

Chapter 6: Jurors Using Social Media Inappropriately During the Trial Process

6.1 Introduction

Consider the following situation: you are a criminal lawyer. You have worked night and day for several months to represent your client, who has been charged with conspiracy to supply heroin and amphetamines. Eight co-accused have also been charged with similar offences. At the beginning of the trial, the judge instructs the jury not to use the internet to read about anything connected with the trial. He also instructs them that they are forbidden from basing their verdict on information that they hear outside of court. The judge repeats these instructions consistently during the trial.

The jury subsequently deliver verdicts for some of your client's co-accused: some are found guilty and some are found innocent. A verdict has not yet been delivered for your client. You then receive some startling news: one of the jurors in the trial chatted with a co-accused who was found innocent yesterday. Their conversation occurred entirely on Facebook messenger and they discussed the trial.

You are outraged on behalf of your client about what the juror did. You are left wondering about what you should do as a result of the juror's actions. You also wonder what the judge will do if he finds out.

The above scenario is based on a real trial in the United Kingdom: *Attorney General v Fraill*.¹ In this case, Ouseley J sentenced the juror to eight months' imprisonment because she used social media inappropriately to contact one of the co-accused in the matter.²

Modern-day juries are 'a touchstone of the democratic administration of justice'³ and require 'twelve good citizens and true, selected at random, coming to court and listening to the case'⁴. Juries are said to allow the public to be part of the 'administration of justice'⁵. There

¹ [2011] EWHC 1629 (Admin) (16 June 2011) [12] (Ouseley J).

² *Attorney General v Fraill* [2011] EWHC 1629 (Admin) (16 June 2011) [57] (Ouseley J).

³ Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006) [18.6].

⁴ Lord Chief Justice of England and Wales, The Rt. Hon The Lord Judge, 'Jury Trials' (Speech delivered at the Judicial Studies Board Lecture, Belfast, 16 November 2010) 3.

were over 4300 jury trials in Australia in 2011–2012.⁶ More than 150 000 trials by jury occur in the United States annually. Tens of thousands more trials by jury occur annually worldwide.⁷

The circumstances of the jury have changed many times since its origin. The availability of social media to jurors is another one of these changes. A Reuters Legal study demonstrates that jurors are among the millions of people who use social media. Over three weeks during November and December 2010, a Reuters Legal staff member regularly visited Twitter. He typed the words ‘jury duty’ into the Twitter search engine and found tweets from people in the United States regarding their prospective or actual jury service at the rate of one almost every three minutes.⁸ While some of the tweets were complaints about people being called for jury duty or jury duty being boring, ‘a significant number’ tweeted about the accused’s guilt or innocence. For example, one wrote ‘looking forward to a not guilty verdict regardless of evidence’. Admittedly, Reuters Legal staff were unlikely to know for certain whether the tweeters were actual jurors or not. Assuming that actual jurors wrote all the tweets that Reuters Legal staff found, the frequency of tweets about jury duty appears high. The study did not state the location from which the tweets were tweeted.⁹

A survey in the United Kingdom of 239 jurors who participated in 20 different trials in the Crown Courts in Greater London found that three per cent of jurors discussed their jury duty on social media. One per cent of those surveyed blogged about their jury service or discussed it with other people on the internet.¹⁰ One of the positive features of this study is that actual jurors participated in it. This survey shows that some jurors in the United Kingdom use social media, although not many.

Johnston et al’s survey in February 2013 of 62 Australian judges, magistrates, court administrators and others working in Australian courts found that survey participants believed that jurors using social media inappropriately was the biggest ‘challenge’ involving

⁵ Lorana Bartels and Jessica Lee, ‘Jurors Using Social Media in Our Courts: Challenges and Responses’ (2013) 23(1) *Journal of Judicial Administration* 35, 37.

⁶ *Ibid* 45.

⁷ Dennis J Devine et al, ‘Jury Decision Making’ (2001) 7(3) *Psychology, Public Policy and Law* 622, 624.

⁸ Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track* (9 December 2010) *Reuters*, [10] - [11] <<http://www.reuters.com/article/2010/12/08/us-internet-jurorsidUSTRE6B74Z820101208>>.

⁹ Bartels and Lee, above n 5, 41.

¹⁰ Cheryl Thomas, ‘Avoiding the Perfect Storm of Juror Contempt’ [2013] (6) *Criminal Law Review* 483, 491.

social media that courts face.¹¹ It is noteworthy that the survey participants believed this, because there have been few published reports of Australian jurors using social media inappropriately to date. It is positive that the survey participants were aware that the inappropriate use by jurors of social media is a problem, since it can pose significant problems for a fair trial. Social media provides today's jurors with more temptation to contact third parties than ever before.¹² The issue is so serious that some judicial officers have modified their instructions to jurors to discuss social media, though there is disagreement about how effective this is.¹³

There is nothing new about jurors acting inappropriately. Historically, if a judge told jurors not to discuss their case, then there was little chance that a juror would be caught talking to others about it. Social media is different.¹⁴ Many people, including jurors who use social media, treat social media as if it were their own private conversation with others. In reality, many people can view these conversations and other personal information.¹⁵ According to Leonard Niehoff, 'the faux intimacy of social media seduces users into believing that their communications are like hushed confessionals when they are actually more like full-throated shouts.'¹⁶

The author found three cases of jurors using social media inappropriately in Australia,¹⁷ one in Canada,¹⁸ three in the United Kingdom¹⁹ and 17 in the United States.²⁰ It is possible that many jurors are inappropriately using social media in Australia, but judicial officers do not know about it because no one reports it. The problem may continue to grow in the future due to the increasing number of Australians who use social media.

¹¹ Jane Johnston et al, *Juries and Social Media* (2013) Victorian Department of Justice, 9 - 10 <<http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/juries%20and%20social%20media%20-%20final.pdf>>.

¹² Ralph Artigliere, Jim Barton and Bill Hahn, 'Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers' (2010) 84(1) *Florida Bar Journal* 8, 8.

¹³ See, eg, Caren Myers Morrison, 'Jury 2.0' (2011) 62(6) *Hastings Law Journal* 1579, 1608; Judge Amy J St Eve and Michael A Zuckerman, 'Ensuring an Impartial Jury in the Age of Social Media' (2012) 11(1) *Duke Law & Technology Review* 1, 25.

¹⁴ Laura Whitney Lee, 'Comment: Silencing the "Twittering Juror": The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age' (2010) 60(1) *DePaul Law Review* 181, 202.

¹⁵ Leonard M Niehoff, 'Of Tweets and Trials' (2010) 27(3) *Communications Lawyer* 3, 12.

¹⁶ *Ibid* 7.

¹⁷ Two cases are discussed in judgments and one is mentioned in a newspaper article.

¹⁸ It is mentioned in a newspaper article.

¹⁹ Two cases are mentioned in judgments and one case is mentioned in a newspaper article.

²⁰ Six cases are mentioned in articles and 11 cases are mentioned in judgments.

Jurors using social media inappropriately is the most written about ethical social media issue that courts currently face. This could be because jurors are people who are not trained in the law, as opposed to judicial officers (discussed in Chapter Two) or lawyers (discussed in Chapter Three). Jurors may be more likely to use social media inappropriately than other people involved in the courts.

The main purpose of this chapter is to discuss the current knowledge surrounding jurors using social media inappropriately, because of the impact that this behaviour can have on providing a fair trial to an accused.²¹ After a short discussion of the problems associated with jurors using social media inappropriately, this chapter will examine why jurors engage in this behaviour, and provide recommendations on how to prevent this from occurring. The chapter will also examine how judicial officers can respond when they learn that a juror has used social media inappropriately.

6.2 Why Jurors Who Use Social Media Inappropriately Are a Problem

There are several reasons why jurors create problems if they use social media inappropriately to communicate about a trial.²² The first reason is that a juror's verdict is required to be based on the evidence and argument that the juror saw at court, during the trial.²³ At trial, the judge and lawyers can ensure that the rules of evidence are applied to all evidence tendered. When jurors use social media, the rules of evidence are not applied to the information or comments that jurors read.²⁴ When one juror uses social media to access additional evidence, it means that all jurors do not have access to all of the same evidence to reach a verdict.²⁵

Jurors must also be 'indifferent' to the trial before them.²⁶ Social media may give jurors access to information that could affect their impartiality and ability to be 'indifferent'.²⁷

²¹ *Attorney General v Fraill* [2011] EWHC 1629 (Admin) (16 June 2011) [29] (Ouseley J).

²² For a discussion of why jurors should be able to use social media because of their right to freedom of speech, see Porsha M Robinson, 'Yes, Jurors Have a Right to Freedom of Speech Too!...Well, Maybe, Juror Misconduct and Social Networks' (2013) 11(3) *First Amendment Law Review* 593.

²³ *Patterson v Colorado*, 205 US 454, 462 (1907); *Glennon v R* (1992) 173 CLR 592, 614 (Brennan J).

²⁴ Leslie Ellie, 'Friend or Foe? Social Media, the Jury and You' (2011) 23(5) *The Jury Expert* 1, 3.

²⁵ David E Aaronson and Sydney M Patterson, 'Modernizing Jury Instructions in the Age of Social Media' (2013) 27(4) *ABA Criminal Justice* 4, 4.

²⁶ *Irvin v Dowd*, 366 US 717, 722 (1961).

Jurors may then form an opinion about a case prior to seeing all of the evidence in the trial.²⁸ Once jurors form the opinion, it may be difficult to change. Jurors may also form an opinion about one of the parties in the trial or one of the witnesses. This could ultimately affect their opinion about the outcome of the trial.

Jurors should not communicate with any third party about the trial they are involved in²⁹ in case the third party affects the juror's decision.³⁰ This type of juror behaviour can result in a presumption that the juror is prejudiced.³¹ Jurors can easily communicate with a huge number of third parties on social media about the trial, whether they know those third parties or not. If jurors are able to use social media while in the courtroom, it is also possible that they may not pay sufficient attention to the trial.³²

Juror comments about a trial on social media can also breach the confidentiality required of them.³³ Such actions challenge 'the confidential nature of jury deliberations, may inhibit robust and free-flowing discussion and may have an adverse effect upon the deliberative process'.³⁴ Jurors may not participate as much as they normally would in conversations in the jury room if they feel that another juror might write their comments on social media.³⁵ Also, 'freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world'.³⁶

It is also possible that social media could affect a juror's conscious or subconscious mind and counsel at trial would not be able to question the juror about it.³⁷ The information that jurors

²⁷ Marcy Zora, 'Note: The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects a Defendant's Sixth Amendment Rights' [2012] (2) *University of Illinois Law Review* 577, 587.

²⁸ *Ibid.*

²⁹ *Washington v Depas*, 165 Wn 2d 842, 18 (Wash, 2009).

³⁰ Thaddeus Hoffmeister, 'Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age' (2012) 83(2) *University of Colorado Law Review* 409, 430.

³¹ *Washington v Depas*, 165 Wn 2d 842, 18 (Wash, 2009).

³² J Paul Zimmerman, 'A Practical Guide to the Development of Jury Charges Regarding Social Media' (2013) 36(3) *American Journal of Trial Advocacy* 641, 645.

³³ *Attorney General v Fraill* [2011] EWHC 1629 (Admin) (16 June 2011) [62] (Ouseley J).

³⁴ David Harvey J, 'The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm' (Paper presented at the 13th International Criminal Law Congress, Queenstown, New Zealand, 13 September 2012) 5.

³⁵ Myers Morrison, above n 13, 1600.

³⁶ *Clark v United States*, 289 US 1, 13 (1933).

³⁷ Hoffmeister, above n 30, 417.

read on social media may be inaccurate or wrong, so it is arguably even more unfair to the accused that a juror uses social media during a trial.³⁸

6.2.1 Problems Due to the Nature of Social Media Itself

Other reasons that jurors' use of social media can be problematic involve the nature of social media itself: such remarks can be preserved permanently online.³⁹ If the court deletes the remarks, future jurors may still be able to find them and be influenced by them. The United States Library of Congress has kept a copy of all public tweets since Twitter's inception in 2006. It is easy for any member of the public to read these tweets, even if a Twitter user thought that he or she had deleted them.⁴⁰ If a juror tweets during a trial, and a judicial officer decides to hold a new trial as a result, it might even be possible for a new juror to visit the Library and read the tweets of the juror in the original trial.⁴¹ Social media also provides jurors with an ability to easily contact more people than has been possible in the past.⁴² If a juror writes about a trial on social media, there is a greater probability that someone will read it than if a juror discusses a trial through other means (e.g., talks to his or her family about it).⁴³ Since social media is accessible worldwide, it would be futile if a judicial officer tried to move a trial to another jurisdiction to avoid any consequences arising from a juror in the original jurisdiction commenting inappropriately about a trial on social media.

Social media can also help a juror to find the accused or a witness and contact him or her. Social media provides a far easier method than trying to contact the accused or a witness by traditional means.⁴⁴ The impartiality of a juror can be affected by his or her contacting an accused or a witness in a trial.⁴⁵ Since social media can make finding an accused or a witness easy, jurors may be more tempted to make contact than they would be otherwise. Otherwise, jurors may simply look at an accused's or a witness' social media page and not actually

³⁸ Lord Chief Justice of England and Wales, above n 4, 4–5.

³⁹ Editorial, 'Jurors and the Internet' (2011) (8) *Criminal Law Review* 591, 591.

⁴⁰ Kathryn K Van Namen, 'Facebook Facts and Twitter Tips — Prosecutors and Social Media: an Analysis of the Implications Associated with the Use of Social Media in the Prosecution Function' (2012) 81(3) *Mississippi Law Journal* 549, 568.

⁴¹ Lord Chief Justice of England and Wales, above n 4, 6.

⁴² Justice Amy St Eve and Michael A Zuckerman, 'Ensuring an Impartial Jury in the Age of Social Media' (2012) 11(1) *Duke Law & Technology Review* 1, 10.

⁴³ *Ibid.*

⁴⁴ Peter Lowe, 'Challenges for the Jury System and a Fair Trial in the Twenty-First Century' [2011] *Journal of Commonwealth Criminal Law* 175, 189.

⁴⁵ Myers Morrison, above n 13, 1604.

contact him or her, thinking that no one will know if they do so. However, if jurors do this they may obtain information that could affect their impartiality. There have been a handful of cases in the relevant jurisdictions to date in which a juror contacted the accused or a witness online.⁴⁶ If a juror simply looks at an accused's or a witness's social media page and does not contact him or her, it could be harder for a judicial officer to find out, if the accused or witness does not inform the judicial officer. The judicial officer would probably have to rely upon the juror informing him or her.

6.2.2 Waste of Court Resources

The inappropriate use of social media by jurors can waste court resources. Judicial officers need to spend time carefully considering how they will handle the juror and the consequences for the trial. The judicial officers can declare a mistrial if the trial is still in progress, or they can grant an appeal if a verdict has already been delivered.⁴⁷ This can waste considerable public resources and force many of the people involved in the first trial to undergo the headache of another trial.⁴⁸ If jurors use social media inappropriately, this can result in a longer trial or a delayed trial,⁴⁹ which can be problematic for victims who must attend the trial. Criminal trials cause the victims involved psychological damage. In particular, providing testimony and seeing the accused with the public watching can be very stressful for them.⁵⁰ It is in the interests of victims of crime to avoid delaying or increasing the length of a trial. Jurors who use social media inappropriately may have no idea about the repercussions on court resources or victims that can result from their actions. If they were aware, perhaps they would not use social media inappropriately.

Of the people affected when jurors use social media inappropriately, the accused is arguably affected the most. The lawyers for both sides are also affected in that they may need to prepare for additional court proceedings as a result of the juror's behaviour. Lawyers for an accused who work pro bono may have to work many more hours without pay preparing for

⁴⁶ See, eg, *Tennessee v Smith* (Tenn, No M2010-01384-SC-R11-CD, 10 September 2013) and *Attorney General v Fraill* [2011] EWHC 1629 (Admin) (16 June 2011) (Ouseley J).

⁴⁷ Editorial, above n 39, 591.

⁴⁸ *Attorney General v Fraill* [2011] EWHC 1629 (Admin) (16 June 2011) [54] (Ouseley J).

⁴⁹ Grant Amey, 'Student Commentary: Social Media and the Legal System: Analyzing Various Responses to Using Technology from the Jury Box' (2010) 35(1) *Journal of the Legal Profession* 111, 119.

⁵⁰ Uli Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings' (2002) 15(4) *Social Justice Research* 313, 314.

court and appearing at court as a result of the juror's actions. If an accused must spend more time in gaol while he or she awaits a new trial date, then prison officers may be indirectly affected by the juror's actions.

If courts have learned that a juror has used social media inappropriately, the public will probably also become aware of the occurrence fairly quickly due to social media. This is especially the case if journalists are permitted to use social media in the courtroom, as is recommended in Chapter Five of this thesis. The public may lose confidence in the judiciary and the courts if they learn about an accused who did not receive a fair trial because a juror used social media inappropriately.

Jurors may be affected by videos that they watch or photos that they see in addition to information that they read on social media. For example, a juror's daughter in Shannon Gatliff's assault trial in the United States found a video on YouTube of the alleged assault. The juror may have seen the video.⁵¹ The accused applied for a new trial as a result of the video, but was unsuccessful.⁵² In *Wilgus and Ors v F/V Sirius Inc.*,⁵³ a juror found pictures on the plaintiffs' Facebook pages that made him think that the plaintiffs supported using mushrooms, smoking and binge drinking.⁵⁴ The majority of cases to date in which a juror used social media inappropriately involve comments that a juror posted on social media, as opposed to videos or photos that he or she saw. This could be because it is easier and quicker to post comments on social media than it is to post videos or photos.

Even jurors who do not use social media inappropriately can face challenges if their fellow jurors do so. For example, a juror may use social media to chat with a witness in a trial. The juror may then discuss the social media conversation with other jurors. The other jurors may then become biased towards the accused, even though they never used social media inappropriately themselves, nor did they have any intention to. A judge could decide to dismiss the jurors who discussed the social media chat (in addition to the juror who participated in the chat) even though they were arguably blameless.

⁵¹ *Ohio v Gatliff*, (12th App D Ohio, No CA2012-06-045, 7 January 2013) 20.

⁵² *Ohio v Gatliff*, (12th App D Ohio, No CA2012-06-045, 7 January 2013) 21. Note that social media is often used as evidence in trials, see, eg, *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157 (13 December 2013) (Dowsett, Flick and Griffiths JJ). A discussion about using social media as evidence in trials is outside the boundary of this thesis.

⁵³ 665 F Supp 2d 23, 10 (Me D, 2009).

⁵⁴ *Wilgus and Ors v F/V Sirius Inc.*, 665 F Supp 2d 23, 10 (Me D, 2009).

6.2.3 Prevalence of Jurors Using Social Media Inappropriately

Studies such as that of the Federal Judicial Center confirm that jurors' inappropriate social media use is problematic. Staff of the Federal Judicial Center in the United States sent an electronic survey to 952 District Court Judges about jurors' social media use in their courtrooms; of these, 508 completed the survey.⁵⁵ The survey asked judges whether they had experienced jurors using social media to communicate during a trial or deliberations and if so, how many trials they had experienced it in.⁵⁶

Six per cent, or 30 judges who completed the survey had experienced instances of jurors using social media at some point during a trial or deliberations. Of these 30, 28 judges reported that this had occurred only once or twice. Jurors' social media use occurred more often during trials than during deliberations: 23 judges reported that the jurors' social media use occurred during trials and 12 judges reported that the occurrences happened during deliberations.⁵⁷ Three of the judges stated that jurors used social media to contact 'participants in the case'.⁵⁸ Three of the judges wrote that jurors used or tried to use social media to 'friend' 'participants' in the trial.⁵⁹ Three of the judges wrote that jurors had used social media to provide information about the trial, though no judge wrote that a juror had used social media to provide information about the trial that was confidential.⁶⁰ Two judges wrote that jurors contacted people and provided 'case-specific information'.⁶¹ One judge wrote about a juror who had contacted a former staff member of the plaintiff and stated the probable verdict.⁶² Another judge wrote about an alternate juror who had contacted a lawyer in the case while the jury deliberated and stated the probable verdict.⁶³ It appears from this survey that the number of jurors who use social media inappropriately is small. It is possible

⁵⁵ Meghan Dunn, *A Report to the Judicial Conference Committee on Court Administration and Case Management Jurors' Use of Social Media During Trials and Deliberations* (22 November 2011) Federal Judicial Center, 1 <[http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/\\$file/dunnjuror.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf)>.

⁵⁶ *Ibid.* 15.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* 3.

⁵⁹ *Ibid.* 4.

⁶⁰ *Ibid.* 3.

⁶¹ *Ibid.* 4.

⁶² *Ibid.*

⁶³ *Ibid.*

that the number of jurors who use social media inappropriately will increase as more people use social media.

The judges' reactions to the jurors' social media use varied. Nine judges dismissed the relevant juror, eight judges reprimanded the relevant juror but permitted him or her to stay on the jury, and four judges declared the cases as mistrials.⁶⁴ Three judges stated that they questioned the juror about his or her social media use.⁶⁵ Decisions to dismiss jurors and declare mistrials clearly show that jurors using social media inappropriately cause problems.

A high proportion of lawyers also believe that jurors using social media inappropriately can be a problem. Lawyers can probably understand better than a layperson the ramifications for trials if jurors use social media inappropriately. Staff of the International Bar Association, based in London, United Kingdom, implemented a survey about social media and the law. The survey was sent to bar associations globally⁶⁶ and was answered by staff from 60 bar associations in 47 different countries,⁶⁷ including Australia, the United Kingdom and the United States.⁶⁸

Some of the goals of the survey were to learn the views of staff of bar associations on 'the posting of comments or opinions on online social networks by lawyers, judges, jurors and journalists about one another or the cases in which they are involved'⁶⁹ and 'the adequateness of routine jury instructions versus the need for specific instructions limiting their online communications and use of online social networking'.⁷⁰ Association staff found that the members of approximately 80 per cent of the bar associations who answered the survey (and who used juries) felt that it was unacceptable for jurors, parties or witnesses in a trial to contact each other by social media or any other method.⁷¹ The survey also asked whether it was acceptable for jurors to write comments about judges, lawyers, parties or the trial itself

⁶⁴ Ibid 5.

⁶⁵ Ibid.

⁶⁶ International Bar Association, *The Impact of Online Social Networking on the Legal Profession and Practice* (February 2012) 7

<http://www.ibanet.org/Committees/Divisions/Legal_Practice/Impact_of_OSN_on_LegalPractice/Impact_of_OSN_Home.aspx>.

⁶⁷ Ibid 10.

⁶⁸ Ibid 38.

⁶⁹ Ibid 7.

⁷⁰ Ibid 10.

⁷¹ Ibid.

on social media. Members from approximately half of the bar associations who completed the survey wrote that the question did not apply to them because they did not use juries, and the other half wrote that they disagreed.⁷² As a result of the survey, members of the International Bar Association intend to establish an advisory group on the issue of social media and the law.⁷³ This survey appears to show that the lawyers in the bar associations surveyed are aware of the problems that can result when jurors use social media inappropriately.

This section demonstrates that when jurors use social media inappropriately, an accused's right to a fair trial may be affected in several ways. It is important for courts to understand why jurors use social media in order to decide how to deal with jurors who use social media inappropriately.

6.3 Reasons Why Jurors Use Social Media Inappropriately

There are several reasons why jurors may use social media inappropriately during a trial.⁷⁴ In 2009, a juror tweeted 'Wow. Jury duty. First time ever. Can I be excused because I can't be offline for that long?'⁷⁵ While the juror's tweet appears humorous, it captures one of several reasons why jurors use social media: some people are addicted to it.⁷⁶ Even if judicial officers instruct them not to use it, some jurors cannot comply. Jurors may also feel empowered about making the final decision in a trial, and therefore feel the urge to use social media to tell others about their importance.⁷⁷

Jurors may not believe that there is anything wrong with discussing a trial on social media. They may use social media because it is part of their daily lives.⁷⁸ Additionally, jurors may not understand the consequences of using social media to write about a trial or they may not take the responsibilities of being a juror sufficiently seriously.⁷⁹ Some jurors may comment about a trial on social media because they feel that they must explain why they have not posted comments on social media during the days or weeks that they have served as jurors.

⁷² Ibid 18.

⁷³ Ibid 11.

⁷⁴ Zora, above n 27, 589.

⁷⁵ Lee, above n 14, 189.

⁷⁶ Jaclyn Cabral, 'Is Generation Y Addicted to Social Media?' (2011) 2(1) *The Elon Journal of Undergraduate Research In Communications* 5, 12.

⁷⁷ Zora, above n 27, 589.

⁷⁸ Ibid 590.

⁷⁹ Ellie, above n 24, 4.

Some jurors may post information about a trial on social media because they think that other people will find the information interesting. This may be more likely to happen when a juror is involved in a high-profile case.

Many jurors comment about trials on Twitter because it feels ‘more like a private conversation’.⁸⁰ Some jurors may find that using social media is ‘an extension of thinking’.⁸¹ Social media can also encourage impulsive behaviour. A juror may take action on social media in an impulsive moment;⁸² for example, in *New York v Rios*,⁸³ a juror attempted to befriend a witness in a trial during the jury’s deliberations.⁸⁴ The juror later stated at court that she had acted impulsively.⁸⁵ Jurors may use social media to obtain an explanation if they do not know a specific law or they are confused about it; even if the information that they read on social media is inaccurate,⁸⁶ jurors may not be aware of its inaccuracy. They may not even think of analysing the probability that the information that they read on social media is accurate. Jurors may also use social media to communicate information because they require an ‘emotional outlet’ for their experience.⁸⁷

Thaddeus Hoffmeister adds that jurors seek information from outside the courts because they receive restricted information from the courts. Judges permit jurors to hear only certain evidence. Jurors may have no intention of disobeying a judge’s instruction not to use social media. Currently, potential jurors who already possess information about the parties, witnesses or facts in a case do not normally proceed to actual jury duty. Consequently, jurors become curious during a case.⁸⁸ Potential and actual jurors may resent judicial officers telling them that they cannot obtain information online, and so they do the opposite of what they are told.⁸⁹ It may be particularly difficult to stop these types of jurors from using social media inappropriately, because judges’ explanations about why they cannot use social media and the negative consequences of using them may not have an impact. Professor Mo Bahk from

⁸⁰ Lee, above n 14, 195.

⁸¹ Bartels and Lee, above n 5, 42.

⁸² Lowe, above n 44, 186.

⁸³ 87 AD 3f 916, 917 (NY1d, 2011).

⁸⁴ *New York v Rios*, 87 AD 3f 916, 917 (NY1d, 2011).

⁸⁵ Ibid.

⁸⁶ Miland F Simpler III, ‘Student Article: The Unjust “Web” We Weave: The Evolution of Social Media and its Psychological Impact on Juror Impartiality and Fair Trials’ [2012] 36 *Law & Psychology Review* 275, 283.

⁸⁷ Ibid 286.

⁸⁸ Hoffmeister, above n 30, 419.

⁸⁹ Mark D White, ‘Does Facebook Threaten Trial By Jury’, *Psychology Today* (online), 29 May 2010, [6] <<http://www.psychologytoday.com/blog/maybe-its-just-me/201005/does-facebook-threaten-trial-jury>>.

California State University explains that people communicate their opinions online because ‘[t]he Internet provides us with opportunities to “participate” rather than passively receive information.’⁹⁰ This may apply to jurors because jurors often need to spend many days in a courtroom passively receiving information.

The reasons that jurors use social media demonstrate that jurors generally do not use social media inappropriately to anger judicial officers or deliberately to sabotage an accused’s right to receive a fair trial. Rather, jurors are accustomed to using social media regularly or they want more information about a trial to assist with their decision making. Knowing these reasons can assist judicial officers to decide how they will try to prevent jurors from using social media inappropriately and how they may deal with jurors who do use social media inappropriately.

6.4 How to Prevent Jurors from Using Social Media Inappropriately

Methods of preventing jurors from using social media inappropriately during the trial process may fall into one of two categories: high interference and low interference. High interference methods have significant effect on jurors’ daily lives (e.g., sequestering them). Low interference methods barely interfere with jurors’ daily lives (e.g., instructing jurors not to use social media to discuss the trial). The preventative measures discussed below attempt to spare judicial officers the wasted resources that result from jurors using social media inappropriately. The aim of this section is to identify preventative measures that would be the most appropriate for Australian courts to implement.

6.4.1 Ban Mobile Devices such as Phones and iPods

If judicial officers ban jurors from using their mobile devices during trial, jurors cannot access social media.⁹¹ In Australia, judicial officers’ approaches to regulating jurors’ mobile phone use are different across jurisdictions, though in the majority of jurisdictions courts take jurors’ mobile phones from them at some point. In Western Australia a jury officer takes

⁹⁰ Simpler III, above n 86, 286.

⁹¹ Artigliere, Barton and Hahn, above n 12, 12.

jurors' mobile phones from them while they consider their verdict.⁹² In New South Wales, court officers or sheriff officers take jurors' mobile phones from them while they are at court.⁹³ In Victoria, mobile phones are not confiscated, but jurors are told that they must not be used in the courtroom or while the jury deliberates.⁹⁴ Jurors may use their mobile phones in the jury pool room.⁹⁵ In the Supreme Court in Tasmania, jurors need to leave their mobile phones and any other technological items with the court's receptionist each day that they attend court.⁹⁶ In the Australian Capital Territory, jurors must give their mobile phones and laptop computers to the sheriff's officer if they bring them to court.⁹⁷

In Canada, most judges do not allow jurors to take their mobile phones into the jury room.⁹⁸ In the United States, different court systems have different rules about jurors using their mobile phones; for example, judicial officers at the United States District Court for the Eastern District of Virginia ban jurors from entering the courthouse with mobile phones.⁹⁹ American jurors at the District Court of the Southern District of Florida may bring their mobile phones to Court. However, they may not use their mobile phones in any courtroom or while they deliberate.¹⁰⁰

In the Federal Judicial Center study previously mentioned, 147 judges (28.9 per cent) surveyed confiscated mobile devices while jurors deliberate.¹⁰¹ Another 113 judges (22.2 per

⁹² Government of Western Australia, Department of the Attorney General, *Jurors Frequently Asked Questions* (18 November 2011) [10]

<http://www.courts.dotag.wa.gov.au/J/jurors_frequently_asked_questions.aspx?uid=2110-6806-2288-7004#What%20about%20my%20mobile%20phone%20and%20the%20internet?>.

⁹³ Attorney General's Department of NSW, *A Guide for Jurors, Welcome to Jury Service* (February 2007) NSW Sheriff, 13

<http://www.courts.lawlink.nsw.gov.au/agdbasev7wr/_assets/cats/m402652l2/agdjurorsguide.pdf>.

⁹⁴ Juries Commissioner's Office Victoria, *Juror's Handbook* (2012) Supreme Court Victoria, 9

<<https://www.courts.vic.gov.au/sites/courts.vic.gov.au/files/PUB11-05%20Juror%27s%20Handbook%20FINAL%20web.pdf>>.

⁹⁵ *Ibid.*

⁹⁶ Supreme Court of Tasmania, *The First Day* [4]

<http://www.supremecourt.tas.gov.au/jurors/during_the_trial>.

⁹⁷ ACT Supreme Court, *Jury Service in the Australian Capital Territory* (September 2012) [40]

<<http://www.courts.act.gov.au/supreme/section/view/260>>.

⁹⁸ Canadian Judicial Council, *Model Jury Instructions* (June 2012) [16]

<http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_NCJI-Jury-Instruction-Preliminary-2011-03_en.asp>.

⁹⁹ United States District Court Eastern District of Virginia, *Jury Service FAQ's* (2014) [41]

<<http://www.vaed.uscourts.gov/jury/jury-service.htm>>.

¹⁰⁰ United States District Court of the Southern District of Florida, *Frequently Asked Questions (FAQs) — Jury Duty* [3] <http://www.flsd.uscourts.gov/?page_id=1847>.

¹⁰¹ Dunn, above n 55, 8.

cent) confiscated mobile devices at the beginning of each day of the trial.¹⁰² It appears that banning mobile devices is occurring in at least a quarter of American trials.

To help jurors feel more comfortable about attending court without their mobile phones, courts can provide jurors with a court telephone number to give to their family and friends. This enables jurors' family and friends to call them in the event of an emergency.¹⁰³ Admittedly, some of the jurors' family and friends may have different opinions about what constitutes an emergency. Even so, it is still a good idea to have an emergency telephone number ready in case a true emergency occurs. This way the juror and his or her family and friends may not find it as challenging for the juror to participate in jury duty. Some Australian courts provide jurors with emergency telephone numbers that jurors' friends and family may call.¹⁰⁴

Forbidding jurors from using their mobile phones during a trial makes jury duty more inconvenient for some,¹⁰⁵ and can be described as a medium interference solution. It is also inconvenient for the jurors who would not use social media inappropriately on their mobile phones.¹⁰⁶ One possibility to make this restriction less onerous is to forbid jurors from using mobile phones while in the jury box and while in the deliberation room, but allow them to use their mobile phones during their breaks and during the evening.¹⁰⁷ It would be extremely difficult for courts to forbid jurors to use social media during the evening, because jurors can use social media on any computer with an internet connection that they can access. It is debatable whether it is a good idea to permit jurors to use their mobile phones during their breaks. Jurors may find it convenient to use their mobile phones during their breaks, but jurors may be thinking about the trial at those times, so they may be more likely to use social media inappropriately then in contrast to their using social media in the evening after court finishes for the day.

¹⁰² Ibid.

¹⁰³ Artigliere, Barton and Hahn, above n 12, 12.

¹⁰⁴ See, eg, NSW Sheriff, *A Guide for Jurors Welcome to Jury Service* (2007) NSW Government Courts & Tribunal Services, 13

<http://www.courts.lawlink.nsw.gov.au/agdbasev7wr/_assets/cats/m402652l2/agdjurorsguide.pdf>;

Courts and Tribunals Victoria, *Attending for Jury Service* [4]

<<https://www.courts.vic.gov.au/jury-service/attending-jury-service>>.

¹⁰⁵ National Public Radio, 'Social Media Crashes the Courtroom', *Talk of the Nation*, 17 September 2009, [15] (Gary Randall J) <www.npr.org/templates/story/story.php?storyId=112926570>.

¹⁰⁶ Bartels and Lee, above n 5, 50.

¹⁰⁷ Sharon Nelson, John Simek and Jason Foltin, 'The Legal Implications of Social Networking' (2009) 22(1) *Regent University Law Review* 1, 4.

In *Maryland v Dixon*, court staff confiscated jurors' electronic devices while they deliberated.¹⁰⁸ After deliberating, the jury convicted Baltimore Mayor Sheila Dixon on one count of receiving a gift card donated to the poor of the City of Baltimore, valued in excess of \$500.00, and using it herself.¹⁰⁹ The jurors became friends with each other on Facebook about a week before they delivered their verdict.¹¹⁰ They also wrote about the case in posts online during their deliberations.¹¹¹ This case shows that confiscating jurors' electronic devices during deliberation may not be sufficient to prevent them from using social media inappropriately during a trial. It is worth considering whether the jurors in this case would still have contacted each other if courts had confiscated the jurors' technological devices for the entirety of the trial. This case is one of the few that the author found in which the judgment stated that the court had confiscated the jurors' electronic devices at some point during a trial. It is possible that this case is an anomaly and that confiscating jurors' electronic devices lessens the probability that jurors will use social media inappropriately.

When Australian courts take jurors' mobile phones from them while they are at court, it makes it somewhat harder for jurors to use social media to comment about the trial. They cannot do it immediately and impulsively, but rather must wait until they go home at night. Making it even slightly harder for jurors to comment about a trial on social media could have significant positive repercussions. When court staff take jurors' mobile phones, they may want to consider explaining why they are doing so; otherwise, jurors may feel resentful when it occurs. The explanation will also serve to emphasise for jurors that their part in the trial affects their lives and their use of technology. It may result in jurors thinking twice before using social media to discuss a trial. When court staff take jurors' mobile phones from them, it results in more administrative work for them. Courts also need to ensure that the mobile phones are placed in a very secure area where no one can steal them. This work is so important, however, that it is worth the extra time spent on taking the mobile phones and returning them.

It would be futile for courts to try to cut jurors off from all social media for the duration of a trial (e.g., by not returning the devices to the jurors at the end of each day.) That would not

¹⁰⁸ *Maryland v Dixon* (Circuit Court, Baltimore City, Md, No 109210015, 21 December 2009) 19.

¹⁰⁹ *Ibid* 1.

¹¹⁰ *Ibid*.

¹¹¹ *Ibid*.

prevent jurors from using other people's devices (which can be easily available) to access their social media accounts. Courts can also try to pay attention to advances in technology. They can try to be aware of all technology that jurors might use to access social media and take this from them while they attend court during a trial.¹¹²

6.4.2 Sequestering Jurors

Another possible preventative solution is to sequester jurors.¹¹³ This means isolating jurors from the public. Its purpose is to 'shield jurors from biasing outside influences that might vitiate the integrity of the trial and deprive defendants of their right to verdicts based on law and evidence'.¹¹⁴ It could be the most successful method of ensuring that juries follow rules forbidding inappropriate social media use during a trial.¹¹⁵

Sequestration is no longer widely used. When used, it is mostly for high-profile trials.¹¹⁶ Sequestration is still used, for example, in Florida, United States where it is required in death penalty cases, but it is rare in civil cases.¹¹⁷ In Australia, sequestering jurors used to be common, but is not anymore.¹¹⁸ Chief Justice James Spigelman of the Supreme Court of New South Wales suggested sequestration as a method of preventing jurors from searching the internet during trials.¹¹⁹ Judicial officers in some Australian States, such as New South Wales, South Australia and Victoria permit juror sequestrations,¹²⁰ though they are rare. Juries are sometimes sequestered in cases that receive a lot of media attention; for example, the jury in the Queensland case of Jayant Patel was sequestered.¹²¹

¹¹² For examples of new technology that courts may want to be aware of see, eg, Google Glass, *Welcome to a World through Glass* (undated) <<http://www.google.com/glass/start/what-it-does/>>; Hugh Langley, 'Google Watch: Release Date, News and Rumors', *techRadar* (online), 31 October 2013 <<http://www.techradar.com/au/news/portable-devices/google-watch-release-date-news-and-rumours-1151012>>.

¹¹³ 'Juror Internet Research and Social Networking' (2011) 15(2) *International Journal of Evidence & Proof* 170, 170.

¹¹⁴ James P Levine, 'The Impact of Sequestration on Juries' (1996) 79(5) *Judicature* 255, 266.

¹¹⁵ Hoffmeister, above n 30, 441.

¹¹⁶ *Ibid.*

¹¹⁷ Artigliere, Barton and Hahn, above n 12, 8.

¹¹⁸ Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21st Century — Has Trial by Jury Been Caught in the World Wide Web?' (2012) 36(2) *Criminal Law Journal* 103, 118.

¹¹⁹ *John Fairfax Publications and Or v District Court of NSW and Ors* (2004) 61 NSWLR 344, 361.

¹²⁰ Jane Goodman-Delahunty et al, *Practices, Policies and Procedures That Influence Juror Satisfaction in Australia* (July 2007) Australian Institute of Criminology, 42 <<http://www.aic.gov.au/documents/E/7/9/%7BE7906C72-D740-45A4-A296-9568C97240E8%7Drpp87.pdf>>.

¹²¹ Jodie O'Leary, 'Who's Who in the Legal Zoo: The Jury' (2011) 17(2) *The National Legal Eagle* 1, 2

Sequestration can be very expensive for courts and can be difficult for jurors.¹²² For example, the cost of sequestering jurors in the OJ Simpson criminal trial in the United States was approximately \$1 million.¹²³ If the trial were held today, it might be even more expensive to sequester the jurors due to inflation. Sequestration may increase the number of potential jurors who decline their summons to participate in jury duty¹²⁴ because many jurors cannot be isolated from their family and job.¹²⁵ Increased frequency of sequestration can bring about negative public relations repercussions for the courts.¹²⁶ Sequestration can also demotivate jurors and encourage them to deliver verdicts more quickly than they might otherwise.¹²⁷ Jurors may resent being sequestered and take their resentment out on the prosecution or the accused, depending on whom they believe caused them to be sequestered.¹²⁸

If courts were to commence sequestering all juries to avoid having jurors using their social media, it would be a significant change to the work involved with juries. It would be a highly time-consuming and impractical high-interference solution. There is considerable discussion in the media about Australian courts' lack of resources.¹²⁹ Chapter Four of this thesis also discussed surveys completed by courts that stated this lack of resources. It would be unlikely that the court could afford to sequester every jury. It is also possible that sequestered jurors may be able to access social media despite courts' best intentions to prevent that from happening. For example, a juror sequestered at a hotel may ask another visitor at the hotel to borrow the visitor's mobile phone. The juror may then use the visitor's mobile phone to access social media. Nevertheless, sequestering jurors is likely the solution that would most effectively prevent jurors from using social media inappropriately during a trial. However, it is also the solution that is probably of the greatest interference to their lives.

<<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1172&context=nle>>.

¹²² Artigliere, Barton and Hahn, above n 12, 8.

¹²³ Levine, above n 114, 272.

¹²⁴ Myers Morrison, above n 13, 1610.

¹²⁵ Hoffmeister, above n 30, 441.

¹²⁶ Frank J Mastro, 'Preventing the "Google Mistrial": The Challenge Posed by Jurors Who Use the Internet and Social Media' (2011) 37(2) *Litigation American Bar Association* 23, 26.

¹²⁷ Simpler III, above n 86, 288.

¹²⁸ Levine, above n 114, 269.

¹²⁹ See, eg, Nicolas Perpetch, 'Crime Move to Ease WA Supreme Court Workload', *The Australian* (online), 12 September 2013

<<http://www.theaustralian.com.au/national-affairs/state-politics/crime-move-to-ease-wa-supreme-court-workload/story-e6frgczx-1226717220935#>>.

6.4.3 Jury Instructions

Another possible preventative solution is to expressly instruct jurors not to use social media during a trial and subsequent deliberations.¹³⁰ Traditional instructions to jurors state that they should not talk with anyone about their case¹³¹ nor read or listen to any information about the case outside the courtroom.¹³² Courts have consistently used instructions to jurors as a method to prevent jurors from acting inappropriately.¹³³

A study by the staff of the New Media Committee of the Conference of Court Public Information Officers (“Committee”) shows that instructing juries not to use social media is becoming common in the United States. In 2011, staff from the Committee sent an electronic survey about social media to approximately 15 000 people working in American State Courts. They did not include Federal Courts. A total of 713 people answered the survey, of whom 33 per cent were judicial officers. The Committee had implemented a similar survey in 2010.¹³⁴ The goal of the surveys was to provide the ‘first year-to-year comparison data further unravelling how social media, cultural changes evoked by new media technologies, and the broader changes in the media industry are impacting judges and the courts’.¹³⁵ Some of the relevant survey findings were: 60 per cent of judicial officers reported that they included some information about social media use in their instructions to juries. This had increased from 55.5 per cent of judicial officers surveyed in 2010.¹³⁶

In the United States, instructions to jurors differ from courtroom to courtroom.¹³⁷ American Judges have discretion over their instructions to the jury and the language of the instructions.¹³⁸

¹³⁰ Dunn, above n 55, 6.

¹³¹ *In Re Standard Jury Instructions in Civil Cases* 943 So 2d 137, 141 - 142 (Fla, 2006).

¹³² *Ibid* 142.

¹³³ Justice Amy St Eve and Michael A Zuckerman, ‘Ensuring an Impartial Jury in the Age of Social Media’ (2012) 11(1) *Duke Law & Technology Review* 1, 25.

¹³⁴ ‘2011 CCPIO New Media Survey’ (Paper presented at the Conference of Court Public Information Officers 21st Annual Meeting, St. Petersburg, Florida, 20 August 2012) 4.

¹³⁵ *Ibid* 2.

¹³⁶ *Ibid* 23.

¹³⁷ Lee, above n 14, 203.

¹³⁸ *United States v Fumo*, (United States Court of Appeals for the Third Circuit, No 09-3388, 09-3389, 09-3390, 23 August 2011) 10.

6.4.3.1 Model Jury Instructions

In the United States, staff of the Judicial Conference Committee on Court Administration and Case Management (“Judicial Committee”) prepared model jury instructions (“Model Instructions”) against the use of social media.¹³⁹ The Model Instructions are:

Before trial:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any sources outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through email, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

At the Close of the Case:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog or website

¹³⁹ Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions The Use of Electronic Technology to Conduct Research On or Communicate About a Case* (December 2009) United States Courts
<<http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf>>.

such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.¹⁴⁰

In 2012, staff of the Federal Judicial Conference of the United States Committee on Court Administration and Case Management released an amended version of the Model Instructions.¹⁴¹ The only significant change appears to be the addition of Google+ to the list of technology that jurors may not use to communicate about the case in the second last paragraph. This change shows that the Committee's staff pay attention to the creation of new social media. The Judicial Committee's staff have missed some other new social media, such as Flickr. Increasingly, it will be difficult to include mentions of all social media.

The staff of the Judicial Committee made significant changes to their Model Instructions for use at the close of the case. After the words 'I accept your verdict' they added the following:

In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violations of these instructions.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.¹⁴²

¹⁴⁰ Ibid.

¹⁴¹ Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions The Use of Electronic Technology to Conduct Research On or Communicate About a Case* (June 2012) United States Courts <<http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf>>.

¹⁴² Ibid.

6.4.3.2 Characteristics of Good Jury Instructions

Instructions for jurors should use language that jurors can understand and should contain examples of inappropriate behaviour.¹⁴³ The Model Instructions appear to satisfy both of these requirements, though it is acknowledged that the author is a practicing lawyer and does not examine the Model Instructions through a layperson's eyes.

The instructions should list as many different types of social media as possible.¹⁴⁴ This could help to avoid a situation like the one that occurred in Seattle, where a judicial officer dismissed a juror for blogging about a robbery trial. The juror said that although the judge had specifically stated that jurors could not tweet, the judge had not expressly mentioned that blogging was forbidden.¹⁴⁵ Admittedly, if some types of social media are listed, one can assume that a juror can extrapolate that he or she must not use any other types of social media. It may be difficult for a judicial officer to list every single popular type of social media if many more new social media are created in the future.

Instructions for jurors should also state that jurors should inform courts if they learn that other jurors have not followed the judicial officer's instructions about social media use.¹⁴⁶ This is important because it is hard for courts to become aware of inappropriate juror behaviour unless other jurors or the jurors who behaved inappropriately themselves inform them.¹⁴⁷ The amended Model Instructions to be given at the close of the trial fulfil this requirement. The amended Model Instructions to be given before trial do not, nor do the original Model Instructions. The amended Model Instructions to be given before trial should be modified to fulfil this requirement.

Instructions should provide reasons as to why they are necessary.¹⁴⁸ This gives the instructions more meaning and makes jurors more likely to follow them.¹⁴⁹ Providing

¹⁴³ Hoffmeister, above n 30, 452; Law Commission (UK), *Contempt of Court (1): Juror Misconduct and Internet Publications*, Report No HC 860 (2013) 109.

¹⁴⁴ Zimmerman, above n 32, 651.

¹⁴⁵ Bartels and Lee, above n 5, 40.

¹⁴⁶ Law Commission (UK), *Contempt of Court (1): Juror Misconduct and Internet Publications*, Report No HC 860 (2013) 110.

¹⁴⁷ Hoffmeister, above n 30, 456.

¹⁴⁸ Laura Whitney Lee, 'Comment: Silencing the "Twittering Juror": The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age' (2010) 60(1) *DePaul Law Review* 181, 202;

instructions to jurors without giving reasons for them can make jurors become hostile.¹⁵⁰ The amended Model Instructions for the close of the trial fulfil this requirement, but the amended Model Instructions for before trial do not and could be more useful if they were amended.

The Model Instructions were provided to all judges in the United States Federal District Courts. The Model Instructions may assist in maintaining uniformity in Federal Courts, even though judges can apply their discretion about using them.¹⁵¹ Currently, no uniform instructions for American State Courts exist.¹⁵²

Giving instructions to jurors about social media ‘treats jurors with respect’ and is ‘consistent with the long-standing presumption that jurors will follow a judge’s instructions’.¹⁵³ While providing jurors with instructions will not altogether prevent jurors from using social media inappropriately, it may help to lessen the number of occurrences.¹⁵⁴ Judges can also instruct jurors about social media use during their opening and closing comments to the jury, and occasionally during the trial.¹⁵⁵ Hoffmeister states that the sooner that judicial officers give instructions about social media use, such as when they first arrive at court, the more likely it is that jurors will follow them¹⁵⁶. He recommends that judicial officers repeat instructions often, otherwise jurors may forget them. He suggests that reminders to jurors should be given during their breaks and that instructions should be given again before jurors commence their deliberating. The more frequently instructions are provided to jurors, the more likely it is that jurors will follow them. However, courts should be aware that if they instruct jurors about inappropriate social media use too often, this might annoy jurors, who might then feel tempted to use social media inappropriately.

Zimmerman, above n 46, 650; Law Commission (UK), *Contempt of Court (1): Juror Misconduct and Internet Publications*, Report No HC 860 (2013) 109.

¹⁴⁹ Lee, above n 14, 212.

¹⁵⁰ Ibid.

¹⁵¹ Ebony Nicolas, ‘Note and Recent Development: A Practical Framework for Preventing “Mistrial by Twitter”’ (2010) 28(2) *Cardozo Arts & Entertainment Law Journal* 385, 405.

¹⁵² *West Virginia v Dellinger*, 225 W Va 736, 743 (2010).

¹⁵³ St Eve J and Zuckerman, above n 133, 25.

¹⁵⁴ St Eve and Zuckerman, above n 133, 26. Note Eric P Robinson’s comment that there are several cases in which jurors received instructions about not using social media but they still used social media inappropriately, Eric P Robinson, ‘Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media’ (2011) 1(3) *Reynolds Court and Media Law Journal* 307, 311.

¹⁵⁵ St Eve J and Zuckerman, above n 133, 26.

¹⁵⁶ Hoffmeister, above n 30, 456.

When judicial officers provide instructions, they might warn jurors that using social media inappropriately can lead to a mistrial.¹⁵⁷ The Model Instructions do not do this, nor do the amended Model Instructions. Officers can further inform jurors that new trials waste a lot of the court's resources, which come from the jurors' taxes,¹⁵⁸ and a new trial could indicate that the original jurors' time was wasted. Judges can also remind jurors that the public has a 'great faith and trust' in jurors generally.¹⁵⁹

Staff of the Arizona Criminal Jury Instruction Committee proposed instructions to jurors that provide explanations for why they cannot use social media during the trial. The proposed instructions state that

one reason for these prohibitions is because the trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. As I previously told you, the only evidence you are to consider in this matter is that which is introduced in the courtroom. The law that you are to apply is the law that I give you in the final instructions. This prohibits you from consulting any outside sources.¹⁶⁰

These instructions use language that is easy to understand. Unfortunately, the instructions do not specify which outside sources jurors should not use. Jurors may be left wondering about this. The instructions also do not mention the importance of providing an accused with a fair trial, which is highly relevant.

6.4.3.3 Other American Jury Instructions on Social Media

Judicial officers in some American states, including Indiana,¹⁶¹ New York¹⁶² and Utah,¹⁶³ instruct jurors not to use social media. Judicial officers in other states, including Colorado,

¹⁵⁷ Daniel William Bell, 'Note: Juror Misconduct and the Internet' (2010) 38(1) *American Journal of Criminal Law* 81, 96.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ariz. Crim. Jury Instruction, *Preliminary Criminal Instructions 13 - Admonition* (2009) <http://www.azbar.org/media/58829/preliminary_criminal_instr.pdf>.

¹⁶¹ Randall T Shepard, *Order Amending Indiana Jury Rules* (1 March 2010) Indiana Supreme Court <<http://www.in.gov/judiciary/files/rule-amends-2010-0301-jury.pdf>>.

¹⁶² New York Courts, *Jury Admonitions In Preliminary Instructions* (5 May 2009) <http://www.nycourts.gov/judges/cji/1-General/CJI2d.Jury_Admonitions.pdf>.

¹⁶³ Utah Courts, *Model Utah Jury Instructions, Second Edition* (8 January 2014) <<http://www.utcourts.gov/resources/muji/index.asp?page=crim>>.

Florida and Georgia, are currently deciding whether they should amend their jury instructions to include information about social media.¹⁶⁴ In the states where judicial officers do not have existing instructions for jurors about social media, it is possible that the rates of jurors using social media inappropriately are higher than in the states where judicial officers use instructions; however, the author could not find research to confirm this.

6.4.3.4 Jury Instructions in England and Wales Regarding Social Media

In England and Wales, the Judicial College recommends that judges instruct jurors against using social media inappropriately prior to the opening of the prosecution case. The instruction is as follows:

Jurors should not discuss the case with anyone, not least family and friends whose views they trust, when they are away from court, either face to face, or over the telephone, or over the internet via chat lines or, for example, Facebook or MySpace. If they were to do so they would risk disclosing information which is confidential to the jury.¹⁶⁵

Judges are not bound to use this instruction.¹⁶⁶ There are several problems with the instruction that are similar to those with the amended Model Instructions, such as that they list few examples of popular social media.

6.4.3.5 Jury Instructions in Canada on Social Media

The Canadian Judicial Council's model instructions for jurors state that jurors should not use social media to discuss the trial that they are deciding,¹⁶⁷ and include examples of social media.¹⁶⁸ Canadian judges are not required to use the model instructions.¹⁶⁹ The model instructions do not explain why jurors should not use social media to discuss the trial, so they might not be as effective as they would be if they provided reasons.

¹⁶⁴ Mastro, above n 126, 26.

¹⁶⁵ Judicial Studies Board, *Crown Court Bench Book Directing the Jury* (Judicial Studies Board, 2010) 9.

¹⁶⁶ *Ibid* v.

¹⁶⁷ Canadian Judicial Council, above n 98, [3.8].

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid*.

6.4.3.6 Jury Instructions in Australia on Social Media

In Australia, judicial officers take different approaches towards instructing jurors about the inappropriate use of social media, depending on which State they are in. In New South Wales, a recommendation exists for judges to use during jury empanelling to warn jurors against social media use. Specifically, judicial officers are to instruct jurors not to obtain information about the trial on their own for the entirety of the trial. The instruction states that:

[i]t is a serious criminal offence for a member of the jury to make any inquiry for the purpose of obtaining information about the accused, or any other matter relevant to the trial. It is so serious that it can be punished by imprisonment. This prohibition continues from the time the juror is empanelled until the juror is discharged. It includes asking a question of any person other than a fellow juror or me. It includes conducting any research using the internet.¹⁷⁰

The instructions continue that if the judge ‘considers it appropriate’, he or she should add the following:

[y]ou should keep away from the internet and the other communication sources which may pass comment upon the issues in this trial. You may not communicate with anyone about the case on your mobile phone, smart phone, through email, text messaging, or on Twitter, through any blog or website, any internet chatroom, or by way of any other social networking websites including Facebook, MySpace, LinkedIn and YouTube. You should avoid any communication which may expose you to other people’s opinions or views.¹⁷¹

The second paragraph of the New South Wales instructions lists the most popular forms of social media. It also uses clear language that jurors are likely to understand. It is noteworthy that judges should only use it if they ‘consider it appropriate’, as opposed to using it in every trial. Judicial officers in Australia could consider using the second paragraph to instruct the jury for every trial because a juror in any trial has the potential to use social media inappropriately.

In Victoria, there is a direction to jurors that specifically mentions social media. It states that:

¹⁷⁰ Ibid.

¹⁷¹ Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2012) 1-490.

[y]ou must also avoid talking to anyone other than your fellow jurors about the case. This includes your family and friends. You must not discuss the case on social media sites, such as Facebook, Myspace, Twitter, blogs or anything else like that. Of course, you can tell your family and friends that you are on a jury, and about general matters such as when the trial is expected to finish. But do not discuss the case itself. It is your judgment, not theirs, that is sought. You should not risk that judgment being influenced by their views – which will necessarily be uninformed, because they will not have seen the witnesses or heard the evidence.¹⁷²

In Queensland, judges do not instruct jurors specifically not to use social media. Instead, judges tell jurors at the beginning of the trial that they cannot discuss the case with anyone orally or ‘by electronic means’, with the exception of other jurors.¹⁷³ Western Australian judicial officers direct jurors not to use social media (see for example *Haruna v The Queen*¹⁷⁴).

Research undertaken could not find any judges’ instructions to the jury that discussed using social media inappropriately for South Australia, Tasmania, the Australian Capital Territory or the Northern Territory. The information that staff from the above states provide for jurors online does not address social media use as at the completion of this thesis.

Judicial officers in Australia could consider using a modified version of the New South Wales instructions. Some potential modifications could be that (1) they provide reasons, (2) they recommend that jurors inform court staff if they learn that other jurors have used social media inappropriately, and (3) they state the punishment that jurors may face if they use social media inappropriately.

6.4.3.7 When Judicial Officers Should Consider Using Instructions about Social Media Use

Judicial officers could consider using the instructions at other times besides jury empanelling. The instructions could be stated prior to each occasion that jurors have the opportunity to use social media again during the trial. At a minimum, the instructions could be stated each day.

¹⁷² Judicial College of Victoria, *Victorian Criminal Charge Book* (2010) [1.5.2].

¹⁷³ Queensland Courts, *Supreme and District Courts Benchbook* (Queensland Courts, 2012) 5B.7.

¹⁷⁴ *Haruna v The Queen* [2013] WASCA 170 (1 August 2013) [18].

If courts return the jurors' technological devices to them at the end of each day of trial, then the instructions could be given at the end of each day of trial. The instructions may be a helpful reminder to the jurors not to use social media to discuss the trial. Another possibility could be for judicial officers of all Australian States to implement the amended Model Instructions. If this happens, the amended Model Instructions could be tailored to Australians. For example, the list of social media that jurors cannot use to communicate about the trial could be modified to include the social media that Australians use most.

6.4.3.8 Using Instructions About Inappropriate Social Media Use Can Make It Easier to Decide How to Punish the Juror

Another positive aspect of using specific instructions to the jury to avoid using social media inappropriately during a trial is that if a juror violates the instructions, courts can more easily decide how to deal with the juror. It is a simple matter for them to state that the juror violated the judicial officer's instructions, and therefore punish the juror accordingly. This occurred in *Dimas-Martinez v Arkansas*.¹⁷⁵

Dimas-Martinez v Arkansas involved a jury convicting the appellant of capital murder and aggravated robbery.¹⁷⁶ The appellant was sentenced to life imprisonment and death. The appellant applied for a new trial on two bases: one was that a juror tweeted during the trial, in breach of Judge David Clinger's instructions not to. Before opening statements, Judge Clinger specifically instructed jurors not to tweet.¹⁷⁷ At every recess during the trial, the Judge instructed the jurors not to discuss the trial with anyone.¹⁷⁸ The appellant argued that the juror did not follow the Judge's instructions.¹⁷⁹ The appellant's second basis for an appeal was that a juror fell asleep during his trial, which was also inappropriate juror behaviour.¹⁸⁰ A Circuit Court Judge rejected the appellant's application for a new trial.¹⁸¹ Subsequently, the appellant appealed and a fresh trial was ordered.¹⁸²

¹⁷⁵ *Dimas-Martinez v Arkansas*, 2011 Ark 515, 1 (2011).

¹⁷⁶ 2011 Ark 515, 5 (2011).

¹⁷⁷ *Ibid* 21.

¹⁷⁸ *Ibid* 22.

¹⁷⁹ *Ibid* 5.

¹⁸⁰ *Ibid* 7.

¹⁸¹ *Ibid*.

¹⁸² *Ibid* 5.

A party alleging juror misconduct has the burden to prove the misconduct and ‘that a reasonable possibility of prejudice resulted from it’.¹⁸³ He or she must also prove that the ‘alleged misconduct prejudiced his chances for a fair trial’.¹⁸⁴ The juror who tweeted during the trial did so on the day that evidence was tendered for the sentencing of the appellant.¹⁸⁵ The juror’s tweet read as follows: ‘[c]hoices to be made. Hearts to be broken. We each define the great line.’¹⁸⁶ The appellant argued that the juror’s tweets constituted misconduct for the following reasons:

1. They were about the trial, because they were posted during the trial;
2. They breached the judicial officer’s instructions, which demonstrated that the juror ‘could not follow the court’s instructions’; and
3. A journalist followed the juror’s tweets.¹⁸⁷

After the juror tweeted, but before the jurors delivered a verdict, the judicial officer and counsel for both sides asked the juror questions about the tweet. The juror replied

what it means was, um, not only like to pertain to this case but also to future stuff. Um, obviously, whatever we as a jury decide — you know, I’m not necessarily saying I know what’s going to be decided, but we have to decide — make a huge decision. Either way, you know, if we do decide something like it’s just gonna — a lot of people are either going to be mad about it watching the news because, you know, people have expressed to me you’re on that court case, right? I can’t talk about it. So I leave. So there’s a ton of people watching this. And either way we decide, people are either going to be angry or people are going to be hurt either way. So what I was meaning by that was, you know, we have to define the great line of, you know, where we stand on a subject and, you know, what we have to choose — decide in the future. And also “Define the Great Line” was an Underoath album, and I thought I’d throw that in there along with my tweet.¹⁸⁸

The juror’s comments appear to indicate that he was not biased towards the appellant. The comments appear general in nature, and could apply to any trial that he sat on. This raises the

¹⁸³ Ibid 13.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid 16.

¹⁸⁶ Ibid 17.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid 18.

issue: are trivial or general comments that a juror makes about a trial inappropriate? This is a challenging issue, in particular because it is a subjective matter whether comments are trivial or general. Perhaps a reasonable person test could be created and applied to this situation. The test could be: would a reasonable person think that the comments that the juror made on social media were about the trial? It does not seem fair to punish jurors for making comments that are general in nature about a trial. However, if jurors are allowed to make general comments about a trial, it may also encourage them to make specific comments about a trial later on.

The judicial officer also asked the juror whether he had already decided the verdict when he tweeted. The juror responded that he had not, and that the other jurors would assist him to.¹⁸⁹ The appellant's solicitors requested that the juror be disqualified, because he did not follow the judicial officer's instructions.¹⁹⁰ The judicial officer rejected this request, because the juror had not committed 'a material breach of my instruction or of his oath'.¹⁹¹

After being questioned about his tweeting and specifically instructed not to talk about the trial, the juror tweeted again twice, while the jurors deliberated the appellant's sentence. The juror made the following two tweets:

1. 'if its wisdom we seek...we should run to the strong tower'; and
2. 'its over.'¹⁹²

The Appeal Court Judges decided that the juror had prejudiced the appellant's case — not from his tweet, but by failing to follow the trial judge's instructions.¹⁹³ They stated that the 'appellant was denied a fair trial in this case where Juror 2 disregarded the Circuit Court's instructions and tweeted about the case and Juror 1 slept through part of the trial'.¹⁹⁴ They added, 'This court has recognized the importance that jurors not be allowed to post musings, thoughts, or any other information about trials on any online forums. The possibility for

¹⁸⁹ Ibid 19.

¹⁹⁰ Ibid 14.

¹⁹¹ Ibid 20.

¹⁹² Ibid 21.

¹⁹³ Ibid 24.

¹⁹⁴ *Dimas-Martinez v Arkansas*, 2011 Ark 515, 24 (2011). For an Australian example of a judicial officer sleeping during a trial, see *Cesan v R* (2008) 236 CLR 358.

prejudice is simply too high'.¹⁹⁵ As a result of the juror's actions and for other reasons, the Appeal Court Judges reversed the appellant's conviction and sentence. They decided that a new trial was required.¹⁹⁶

In July 2012, the appellant entered a plea of guilty to murder and aggravated robbery. He was sentenced to life imprisonment without parole.¹⁹⁷ The appellant avoided the death penalty because he pleaded guilty rather than being found guilty by a jury.¹⁹⁸ The appellant was able to be housed with the general prison population because he avoided the death penalty. If he had been sentenced to the death penalty, the appellant would be in solitary confinement for 23 hours daily before his execution.¹⁹⁹ This shows how jurors using social media inappropriately can indirectly impact on an offender's sentence.

A reason why this case is particularly interesting is that a judicial officer warned the relevant juror individually not to use social media inappropriately after learning that he did so, yet the juror did not listen to the judicial officer's instructions and used social media again. One might assume that after judicial officers have scolded a juror for using social media inappropriately and individually instructed a juror not to use it, the juror would obey the instructions. This case also shows that judicial officers should consider dismissing jurors after they use social media inappropriately during a trial, because the jurors may use social media inappropriately again if they are not dismissed.

If judicial officers instruct jurors specifically not to use social media and a juror uses social media inappropriately, then judicial officers can punish the juror for contempt of court for not obeying the instruction. In contrast, if judicial officers do not instruct the juror specifically not to use social media, judicial officers face a lengthier process to decide what they should do. This lengthy process typically involves the following: if a verdict has not yet been delivered, the judge in the relevant trial instructs a court officer to speak to the relevant juror about the incident and examine the juror's social media profiles.²⁰⁰ Depending on what the court officer learns, the judicial officer then calls the juror allegedly involved in the

¹⁹⁵ *Dimas-Martinez v Arkansas*, 2011 Ark 515, 24 (2011).

¹⁹⁶ *Ibid* 1.

¹⁹⁷ Larry Henry, 'Dimas-Martinez Avoids Death, Gets Life Without Parole', *Channel 5 News* (online), 13 July 2012, [1] <<http://5news.com/2012/07/13/erickson-dimas-martinez-gets-life-without-parole/>>.

¹⁹⁸ *Ibid* [3].

¹⁹⁹ *Ibid* [18].

²⁰⁰ *R v Wills & Ors* [2012] NSWDC 285 (17 July 2012) [1], [2].

misconduct to court. The judicial officer then asks the juror a series of questions about his or her post, tweet or message on social media.²⁰¹ The judicial officer tries to determine whether the relevant juror has formed a view about the accused and whether he or she shared that view with other jurors.²⁰² The judicial officer then decides whether to cease the trial or whether to dismiss the jurors.²⁰³ The judicial officer can also decide whether the juror's actions were inappropriate and if so, whether or not to dismiss the juror. The judge may also decide whether to punish the juror, as in *Attorney General v Frail*.²⁰⁴

If courts learn that a juror used social media inappropriately after a verdict has been delivered, then the side against whom the juror was allegedly biased may request an appeal of the verdict on the grounds of juror misconduct. The appeal judge then summons the relevant juror and the judge and the parties' counsel ask them similar questions. The appeal judge then considers whether the juror's behaviour was inappropriate. If it was, the appeal judge then considers whether the juror should be punished for his or her misconduct and whether a new trial should be ordered. The appeal judge may consider whether there was a miscarriage of justice.²⁰⁵ The general descriptions above of the judicial officer's actions can vary depending on the country and the state where the trial occurred.

In *R v K*,²⁰⁶ the court learned that jurors allegedly searched the internet during a trial. The Court's Sheriff spoke to the jurors about their actions.²⁰⁷ The jurors then signed affidavits that described their misconduct.²⁰⁸ The affidavits were provided to the judicial officers and the parties.²⁰⁹ Prosecutors subsequently investigated the substance of the affidavits and reported their findings to the judicial officers.²¹⁰

Providing instructions to jurors is a low-interference solution: it does not interfere with jurors' daily lives. If jurors follow the instructions, they can still use social media, but they cannot use them to discuss the trial. Jurors are not legally trained, so they may not know that

²⁰¹ See, eg, *Haruna v The Queen* [2013] WASCA 170 (1 August 2013) [25] - [26].

²⁰² See, eg, *Haruna v The Queen* [2013] WASCA 170 (1 August 2013) [62].

²⁰³ *Haruna v The Queen* [2013] WASCA 170 (1 August 2013) [30] - [31].

²⁰⁴ [2011] EWHC 1629 (Admin) [57] (Ouseley J).

²⁰⁵ See, eg, *Haruna v The Queen* [2013] WASCA 170 (1 August 2013) [86].

²⁰⁶ (2003) 59 NSWLR 431.

²⁰⁷ *R v K* (2003) 59 NSWLR 431, 443.

²⁰⁸ *Ibid* 436.

²⁰⁹ *Ibid* 434, 437.

²¹⁰ *Ibid* 437.

it is wrong to discuss a trial on social media unless a judge instructs them about it or they receive other training or see posters about it. Training jurors and using posters will be discussed later in this Chapter. Admittedly, the instructions do require jurors to alter their conduct slightly: while they could previously write about anything that they wanted to on social media (as long as they did not breach any laws, e.g., defamation), during trial and deliberation they cannot write about the trial. Nevertheless, this alteration to the jury's lives is very slight, especially in comparison to other potential preventative solutions, such as sequestration.

In a study by Judge Amy St Eve and Michael Zuckerman, jury instructions appeared to be a reason why jurors did not use social media inappropriately during trials.²¹¹ In their study, St Eve J of the United States District Court for the Northern District of Illinois and her law clerk, Zuckerman, provided surveys to approximately 140 jurors in both criminal and civil trials in the Northern District of Illinois after the jurors had completed their jury duty.²¹² In each case, the judge had instructed jurors against using social media inappropriately during the trial. In some of the lengthier trials, the judge instructed the jury on a daily basis to avoid using social media to discuss the trial. The jurors answered the surveys on a voluntary basis and anonymously.²¹³

Two of the questions in their survey were: '[w]ere you tempted to communicate about the case through any social networks, such as Facebook, My Space, LinkedIn, YouTube or Twitter? If so, what prevented you from doing so?'²¹⁴ Only six of the 140 jurors who answered the surveys 'reported any temptation to communicate about the case through social media'. None of the six jurors wrote that he or she actually followed through on his or her temptation. The same six jurors stated that the reason why they did not follow through with their temptation to discuss the case through social media was 'the judge's instructions or the obligations of a juror'.²¹⁵ 'Most' of the 134 jurors who did not report a temptation to discuss the case on social media stated that they lacked the temptation due to the judge's

²¹¹ St Eve J and Zuckerman, above n 133.

²¹² Ibid 20.

²¹³ Ibid 21.

²¹⁴ Ibid 10.

²¹⁵ Ibid 21.

instructions.²¹⁶ Other jurors who did not report such a temptation stated that ‘fairness’ was the reason why they lacked the temptation.²¹⁷ Some of the jurors who indicated that they did not feel tempted to use social media during the trial wrote that they simply did not use this technology.²¹⁸ As a result of their survey, St Eve J and Zuckerman believe that a judge’s instructions to a jury can prevent jurors from using social media inappropriately.²¹⁹ They also feel that it was important that the jurors recalled the judges’ instructions after the trial concluded.²²⁰ Judge St Eve and Zuckerman’s research is particularly interesting because it involves surveying jurors. In Australia, the law typically tries to keep jurors and their respective views a secret,²²¹ so little research is conducted with jurors.²²²

Judge St Eve and Zuckerman stated that they used a ‘model social media instruction during opening and closing instructions’²²³; but they did not state which model instructions they used. Judge St Eve and Zuckerman used a small sample size. The jurors may not have been as honest as they would normally be because a judge was one of the people responsible for the survey, as opposed to an academic being responsible. The jurors surveyed may have been ashamed to admit that they used social media inappropriately to a judge, even in anonymous surveys. It was useful for Judge St Eve and Zuckerman to specifically ask jurors what prevented them from using social media, so as to obtain information about which methods that attempt to prevent jurors from using social media are the most helpful. The study also shows that model instructions are useful and that model instructions should discuss fairness to the accused.

²¹⁶ St Eve J and Zuckerman, ‘Ensuring an Impartial Jury in the Age of Social Media’ (2012) 11(1) *Duke Law & Technology Review* 1, 22. It is unfortunate that the article did not state how many jurors did not report ‘a temptation’ to discuss the case on social media due to the judge’s instructions. This information would be useful to consider how important judges’ instructions are to prevent jurors from using social media inappropriately.

²¹⁷ Ibid 23.

²¹⁸ Ibid.

²¹⁹ Ibid 24.

²²⁰ Ibid 25.

²²¹ Australian Law Reform Commission, above n 3, 18.9.

²²² Judith Fordham, ‘Illuminating or Blurring the Truth: Jurors, Juries and Expert Evidence’ in Belinda Brooks-Gordon and Michael Freeman (eds), *Law and Psychology* (Oxford University Press, 2006) 338, 338. However, see research about jurors in Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (February 2001) Law and Justice Foundation of New South Wales <[http://www.lawfoundation.net.au/ljf/site/articleIDs/F6283F64E9523039CA257060007D13C2/\\$file/mpp_rep.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/F6283F64E9523039CA257060007D13C2/$file/mpp_rep.pdf)>; see also the substantial research of Kate Warner et al with juries in Tasmania: Kate Warner et al, *Jury Sentencing Survey* (April 2010) Criminology Research Council <<http://www.criminologyresearchcouncil.gov.au/reports/0607-4.pdf>> and New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper no 4 (December 2008).

²²³ St Eve J and Zuckerman, above n 133, 21.

Judicial officers already instruct juries about many issues, such as identification evidence and bad character evidence, so they could also consider instructing jurors about using social media inappropriately. Australian judicial officers already have a presumption that ‘until the contrary is demonstrated, jurors understand and conform to the direction of the trial judge’.²²⁴ Using instructions is not expensive, nor would it require any drastic changes to how trials are run.

6.4.3.9 The Argument Against Providing Instructions to Jurors

In contrast, some judges believe that they should not instruct jurors about social media use, preferring to use the general jury instructions that they already use. They believe that providing instructions about social media ‘is bound to be under-inclusive in light of rapid technological developments’.²²⁵ If judges do not instruct jurors not to use social media inappropriately, then it may not occur to jurors that there may be a problem with their social media use. It is also possible for judges to use other preventative methods to lessen the chance that jurors will use social media, in addition to instructing the jury.²²⁶

Some people believe that instructing jurors not to use social media could encourage them to use it.²²⁷ For example, in *R v K*,²²⁸ instructions were not given to the jury about searching the internet ‘because it was feared that any mention, of that kind, might only place the idea in the minds of an inquisitive juror’.²²⁹ While the instructions that the judicial officer considered using involved telling jurors not to search the internet, as opposed to not using social media inappropriately, searching the internet and using social media are similar in that they both involve using technology and communication. They are both part of many people’s daily lives. While instructing jurors not to use social media inappropriately may only encourage some jurors to do so, Judge St Eve and Zuckerman’s survey indicates that more jurors would probably abide by the instructions.

²²⁴ *Hansen v Western Australia* [2010] WASCA 180 (10 September 2010) [19]; *Demirok v R* (1977) 137 CLR 20, 22 (Barwick CJ); *Yuill v R* (1993) 69 A Crim R 450, 453 - 454 (Kirby ACJ); *R v Bell* (Unreported, NSWCCA, Spigelman CJ, 8 October 1998) [9].

²²⁵ Lee, above n 14, 204.

²²⁶ Robinson, above n 154, 311.

²²⁷ Artigliere, Barton and Hahn, above n 12, 10.

²²⁸ (2003) 59 NSWLR 406.

²²⁹ *R v K* (2003) 59 NSWLR 406, 433.

Caren Myers Morrison argues that instructions to jurors do not work. She suggests that jurors often misinterpret them.²³⁰ Jurors often believe instructions are limits to their decision making, so they dislike them.²³¹ Even if jurors dislike instructions, instructions can be an effective tool for informing jurors about how they should behave during a trial. It is inevitable that there will be limits to jurors' decision making during a trial. Marcy Zora states that having a judge providing jurors with instructions to avoid using social media is insufficient to prevent jurors from doing so.²³² She further states that

social media has become such an integrated part of many people's lives that it is unlikely a simple jury instruction will be enough to prevent them from broadcasting their role as a juror on the Internet. Even frequently given instructions have been ignored by jurors.²³³

Zora does not appear to differentiate between a juror making general comments about a trial and a juror making specific comments about a trial. If a juror makes a general comment about a trial (e.g., he or she writes that he or she is serving as a juror), then this would arguably not be a major problem as opposed to a juror who states something specific about a trial or shows a bias of some kind (e.g., a juror who writes 'I think the accused should be found guilty').

There can be some problems with giving standard instructions to a jury.²³⁴ The positive aspect of standard instructions is that a judicial officer does not need to spend time considering how to draft the instructions him or herself. The judicial officer can benefit from the careful thought that others have spent to draft the standard instructions.

It may be objected that jurors may not understand the standard instructions.²³⁵ If instructions are carefully drafted in plain English, then this does not need to happen. Since jurors may have different levels of English comprehension, it is possible that jurors may not understand instructions no matter how well drafted the instructions are. It may be possible that standard

²³⁰ Myers Morrison, above n 13, 1608.

²³¹ Ibid.

²³² Zora, above n 27, 594.

²³³ Ibid.

²³⁴ Ralph Artigliere, 'Symposium Article: Sequestration for the Twenty-First Century Disconnecting Jurors from the Internet During Trial' (2011) 59(3) *Drake Law Review* 621, 629.

²³⁵ Elizabeth Greene and Jodie O'Leary, 'Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 101, 111.

instructions can be drafted so that the majority of jurors understand. Courts can ask linguistic experts' opinions about the instructions to ensure that this occurs.

In 2008, research by staff of the New South Wales Law Reform Commission and the New South Wales Bureau of Crime Statistics and Research conducted with 1225 jurors showed that 95 per cent of jurors thought that they 'understood all or most of the judge's instructions on the law' and 47 per cent of jurors thought that they 'understood completely'.²³⁶ This reinforces the idea that jurors can understand a judicial officer's instructions, though admittedly, it is possible that jurors believed that they understood the instructions, when they did not in reality. In the United Kingdom, case simulations with jurors took place to see the extent to which jurors understood the directions of a judge. Almost 70 per cent of jurors at two courts believed that they understood the directions of the judge, while approximately 50 per cent of jurors at another court believed that the same directions were too hard for them to understand.²³⁷

Instructions may be boring for jurors to listen to because they 'do not tell a story and are intentionally devoid of climax, emphasis, and drama'.²³⁸ However, it is irrelevant whether instructions to the jury are boring: there are many parts of a trial that a layperson may consider boring, such as opening submissions. It is not the goal of a trial (in real life, as opposed to on television) to entertain.

6.4.4 Providing a Message

An additional preventative method is that, while allowing jurors to receive social media messages during a trial and deliberations, the court can provide jurors with a specific message that they can send to friends and family when they receive a social media message during a trial. This way jurors do not need to ignore the social media messages that they receive completely. One possible reply for jurors to send to messages that they receive is:

²³⁶ Bartels and Lee, above n 5, 54.

²³⁷ Cheryl Thomas, *Are Juries Fair?* (February 2010) United Kingdom Ministry of Justice <<http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>>.

²³⁸ Artigliere, above n 234, 630.

I am sending this note to you as instructed by Judge _____. I am now a sworn juror in a trial. I am sequestered. This means I am not allowed to read or comment upon anything having to do with the subject of the trial, the parties involved, the attorneys, or anything else related to my service as a juror. Please do not send me any materials; don't email, text, or tweet me any questions or comments about this case or my service as a juror. Please do not text or email me during the course of this trial except in an emergency. I will send you a note when I am released from my duty as a juror.²³⁹

The appeal of this solution is that jurors do not have to modify their everyday life as much as they would if social media use were completely banned. On the other hand, this thesis has stated that when jurors send the message from the judge, the message's recipients may try to entice the juror to talk about the trial. The recipients of a message that uses legal language or that states that it was sent because of a judge's instructions may become alarmed or frightened upon receiving the message.²⁴⁰

Lorana Bartels and Jessica Lee state that 'Krawitz's concerns about the official nature of the message may also be unjustified — instead, a message conveyed with the imprimatur of the court may serve to highlight to jurors, their friends and family the importance of refraining from communication.'²⁴¹ It is possible that Bartels and Lee are correct and recipients of the message may simply obey it without giving it another thought. It is possible that the juror's family and friends may be more likely to obey the message because it uses legal language. This option makes it relatively easy for jurors to deal with a situation in which someone contacts them on social media to discuss the trial. The jurors do not need to think about what they can or cannot include in a response to friends or family.

6.4.5 Written Warning or Written Oath

Another possible method to prevent jurors from using social media inappropriately is to ensure that the warning given to jurors about inappropriate social media use is given in writing (in addition to being provided orally).²⁴² The written warning should be specific.²⁴³

²³⁹ Artigliere, Barton and Hahn, above n 12, 16.

²⁴⁰ Marilyn Krawitz, *Guilty as Tweeted: Jurors Using Social Media Inappropriately During the Trial Process* (November 16, 2012). UWA Faculty of Law Research Paper No. 2012-02. Available at SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176634> 28.

²⁴¹ Bartels and Lee, above n 5, 56.

²⁴² Editorial, above n 39, 591.

At the end of each day of trial in *Maryland v Dixon*²⁴⁴ the court gave each juror a letter. The first paragraph of the letter stated, ‘you should not discuss anything about this case with anyone else.’ The fourth paragraph stated ‘you should not make any posting on any internet site about this case or you being on this jury. This means no texting, instant messaging or leaving messages of any type on internet sites about this case or your involvement in this case.’²⁴⁵ Nevertheless, the jurors became friends with each other on Facebook about a week before they delivered their verdict. They also wrote about the case in posts online during their deliberations.²⁴⁶ This case demonstrates that providing jurors with a written warning may not be sufficient to prevent them from using social media inappropriately during a trial.

Judicial officers can also request that jurors can take an oath or sign an affidavit to acknowledge the instructions that the court provided them.²⁴⁷ This could increase jurors’ knowledge about the instructions’ existence.²⁴⁸ It would probably increase how seriously the court perceives a juror’s actions if he or she subsequently uses social media inappropriately during the trial. Jurors could sign an oath or affidavit before the trial and another one at the end of the trial confirming that they did not use social media at any point during the trial.²⁴⁹ If jurors are required to sign an oath or affidavit, it gives them another opportunity to ask the court questions about their obligation not to use social media inappropriately during the trial.²⁵⁰ If the oath or affidavit is only about certain court instructions and not others, jurors could possibly believe that the instructions that were the basis of the affidavit or oath are more important than other instructions.²⁵¹ Even so, jurors may be more likely not to use social media inappropriately if they must sign a written oath or affidavit. Research for this chapter could not find any cases to date in which jurors took an oath or signed an affidavit about social media use prior to a trial. Some people may argue that this could intimidate jurors.

²⁴³ Ibid; Kimberley Chow, ‘Chapter 181: The End to Juror Electronic Communications’ (2012) 43(3) *McGeorge Law Review* 581, 586.

²⁴⁴ *Maryland v Dixon* (Circuit Court, Baltimore City, Md, No 109210015, 21 December 2009).

²⁴⁵ Ibid 17.

²⁴⁶ Brendan Kearney, ‘Despite Judge’s Warning, Dixon Jurors Went on Facebook’, *The Daily Record* (online), 2 December 2009

<<http://thedailyrecord.com/2009/12/02/despite-judge%E2%80%99s-warning-dixon-jurors-went-on-facebook>>.

²⁴⁷ Editorial, above n 39, 591.

²⁴⁸ Hoffmeister, above n 30, 457.

²⁴⁹ Lee, above n 14, 219.

²⁵⁰ The Law Commission (UK), *Contempt of Court (1): Juror Misconduct and Internet Publications*, Report No HC 860 (2013) 114.

²⁵¹ Hoffmeister, above n 30, 457.

If a juror has literacy challenges, and cannot understand the written oath or affidavit, the court staff member who manages juries can take the time to explain the written oath or affidavit to the juror. If the juror does not understand the court staff member's explanation, then the court staff member can inform the judicial officer.²⁵²

Requiring Australian jurors to sign an oath or affirmation that states that they understand that they are forbidden from discussing the trial on social media is an easy, low-interference method to compel jurors to sincerely consider the judicial officer's instructions. Jurors may take the instructions more seriously and they may be more likely to remember them if they see them in writing and promise to uphold them. A potential written oath for jurors to sign could be as follows:

I sincerely declare that I will not mention this trial or anything related to the trial on any social media (including but not limited to Twitter, Facebook, MySpace, LinkedIn, Google+, Flickr and YouTube) during the trial or during or after jury deliberations. The reason for this requirement is that it is critical to give the accused a fair trial. It is also to prevent my decision about the accused's guilt being affected by others who are not part of the jury. If I violate this oath then a judicial officer may find me in contempt of court. The punishment for contempt of court is imprisonment or a fine or both. If I accidentally violate my oath then I will inform a court staff member immediately.²⁵³

Bartels and Lee recommend that research be done with mock jurors signing the above oath to learn how successful it is.²⁵⁴ An advantage of using mock jurors is that it allows researchers to 'isolate' one or more variables.²⁵⁵ Also, it should be relatively easy to conduct research with mock jurors in Australia, as opposed to with real jurors.

6.4.6 Training Judges

²⁵² The Law Commission (UK), above n 250, 115.

²⁵³ Krawitz, above n 240, 34.

²⁵⁴ Bartels and Lee, above n 5, 51.

²⁵⁵ Paula Hannaford-Agor, David B Rottman and Nicole L Waters, *Juror and Jury Use of Social Media: A Baseline Exploration* (2012) State Justice Institute, 9
<http://www.sji.gov/PDF/NCSC_Harvard_005_Juror_and_Jury_Use_of_New_Media_Final.pdf>.

Another possible low-interference preventative solution is to train judges about the potential negative repercussions of jurors using social media inappropriately. This ‘would ensure that judges are aware of new potential threats to the administration of justice, while still respecting the discretion afforded to trial judges’.²⁵⁶ If judges are educated about jurors’ possible inappropriate social media use during a trial, then judges will be better able to anticipate when jurors might be likely to use social media inappropriately and better able to use their discretion to handle the situation when it occurs.²⁵⁷

In Australia, staff of the Australasian Institute of Judicial Administration and the National Judicial College of Australia hold seminars for judges about social media. For example, in August 2013, the Australasian Institute of Judicial Administration held a seminar entitled ‘Media/Social Media and its Influence on the Judiciary’.²⁵⁸ Australian judges could benefit from attending short courses on social media (if they have not done so already) to ensure that they understand how social media works and how a juror could use it to communicate inappropriately about a trial. Judges’ new knowledge about social media could be useful in other aspects of their jobs. For example, judges might use their new knowledge about social media to decide whether serving court documents by social media is acceptable in cases of substituted service if a party requests it in a civil matter. The training can also help judges if they face ethical situations involving their own social media use, such as those discussed in Chapter Two.

6.4.7 Training Jurors

Another possible preventative, low-interference solution is to train jurors before a trial not to use social media.²⁵⁹ Courts could develop an online course for jurors that takes an hour.²⁶⁰ The course could explain the jurors’ job and their legal obligations. It could also state that jurors should not use media or social media during a trial and after the trial to discuss the trial. It could state the punishment that jurors receive if they use social media or media to

²⁵⁶ Nicolas, above n 151, 407.

²⁵⁷ Ibid 406.

²⁵⁸ Bartels and Lee, above n 5, 49.

²⁵⁹ Johnston et al, above n 11, 24; Chow, above n 243, 586.

²⁶⁰ Johnston et al, above n 11, 24.

discuss a trial. There could also be a test at the end of the course for jurors to complete. The correct answers could be provided to jurors for every incorrect answer that they enter.²⁶¹

When jurors receive their summons to attend jury duty, they could receive a notice that they must complete their online jury training before they attend court for empanelling. The notice could state that if jurors do not have access to a computer, they can complete their training on a computer in a special room at court. The notice can also state that if jurors do not complete the online training before empanelling, then they must pay a fine. Providing computers at court and threatening jurors with a potential fine if they do not complete the online training could help to put sufficient pressure on the jurors to complete the online training.

This solution may be expensive to create, but its possible benefits could be worth it. The online course could be useful to teach jurors about other ethical issues that they should be aware of, besides the requirement not to use social media inappropriately. Since the course would be online, it would be easy for jurors to take the course anywhere that they choose. Jurors who receive orientation programs are more satisfied with their experience on the jury.²⁶² They are also more competent at decision making.²⁶³ Australian courts could use this measure to train jurors about a number of important issues.

The Law Commission of the United Kingdom recommends that training in schools is given to every member of society about their duties as a juror. When they become jurors, then they will be more likely to abide by the training that they received.²⁶⁴ This is an excellent idea, but it may be expensive to provide training about jury duty to every person who attends school. It may also be difficult to organise.

6.4.8 Posters and Other Visual Aids

²⁶¹ Ibid 24–5.

²⁶² Julianna C Chomos et al, 'Increasing Juror Satisfaction: A Call to Action for Judges and Researchers' (2011) 59(3) *Drake Law Review* 707, 713.

²⁶³ Ibid. For a discussion about why jurors should also learn the rules of logic and inference, see Jonathan Koehler, 'Train Our Jurors' (2006). *Faculty Working Papers*, paper 141

<<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/141>>.

²⁶⁴ The Law Commission (UK), above n 250, 109.

It is possible that posters and other visual aids that state that jurors should not use social media inappropriately could be placed in the jurors' deliberation rooms²⁶⁵ to serve as a useful reminder to the jurors. It may be of particular use to jurors who learn visually or who did not pay attention to a judge's oral instructions. This would be a low-cost method of informing jurors not to use social media inappropriately. Bartels and Lee state that this suggestion is 'sensible' and has 'minimal adverse impact on jurors'.²⁶⁶

In *Attorney General v Davey & Beard*, there were six posters in the jury lounge and foyer that warned jurors that they could be imprisoned if they used social media.²⁶⁷ A juror still used Facebook to discuss the case.²⁶⁸ Even though the posters were not successful in convincing the juror not to use social media to discuss the trial, it is possible that the posters successfully deterred other jurors from doing so (though the judgment did not state whether this was the case). Using posters as a preventative solution is cheap and easy to implement and has the potential to be effective.

6.4.9 Publicise Jurors Punished for Misconduct

Another possible preventative solution is that when a judge sentences a juror for contempt of court as a result of using social media during a trial, courts can publicise the judge's decision as much as possible.²⁶⁹ This could be a useful deterrent to other jurors who contemplate doing the same thing.²⁷⁰ There are two main reasons for this: if a juror is self-interested, he or she will want to avoid the punishment, and the possibility of punishment may bring home to a juror how important it is to follow the rule.²⁷¹ One method of publicising a sentence is to mention the sentence on posters placed in the jury room, as previously mentioned. Courts could also draft a media release about this issue and circulate it to journalists in the hope that the journalists will write about it in newspapers and other media.

The deterrent effect may be even greater in the rare situations where the juror who inappropriately used social media is a celebrity. Al Roker is an example. Roker worked as a

²⁶⁵ Krawitz, above n 240, 35.

²⁶⁶ Bartels and Lee, above n 5, 49.

²⁶⁷ *Attorney General v Davey & Beard* [2013] EWHC 2317 (Admin) (29 July 2013) [13].

²⁶⁸ *Ibid* [1].

²⁶⁹ Editorial, above n 39, 591.

²⁷⁰ Myers Morrison, above n 13, 1610.

²⁷¹ Simpler III, above n 86, 294.

weatherman for the Today Show in the United States. In 2009, he was summonsed as a juror to the Manhattan Supreme Court.²⁷² At court, a sign stated that taking photos was banned. Nevertheless, Roker took photos of jurors in the courthouse, but not in the courtroom, and tweeted them. Roker later informed the court of his tweets.²⁷³ The court subsequently dismissed Roker from jury duty, though he claimed that he was dismissed for reasons related to his background, as opposed to his tweets.²⁷⁴

David Bookstaver, the chief court spokesperson, said that Roker's tweets were 'ill-advised', though not illegal.²⁷⁵ He added that 'it is really nice that a guy who is really well known came down to do his jury service like everybody else.'²⁷⁶ Roker later tweeted that he 'learned a lesson'²⁷⁷ and 'going back into the courtroom, (with) iPhone buried deep in my bag'.²⁷⁸ Roker said that while he did not think that the incident was 'a big deal', he did not intend to repeat his behaviour in the future.²⁷⁹ Roker was not yet part of a jury when he tweeted from the courthouse, nor did he tweet about a specific case.²⁸⁰ Bookstaver's comments were too positive about Roker, given Roker's inappropriate social media use. Bookstaver could have potentially undone any deterrent effect from publicising Roker's inappropriate social media use. When politicians increase sentences for crimes generally, this often does not result in a deterrent effect that reduces crime.²⁸¹

6.4.10 Preventative Measures that Would not be Suitable in Australia

Some American academics or researchers in the area of jurors using social media inappropriately suggest preventative measures that are novel and would be unlikely to be implemented in Australia. These measures are: virtual sequestration and a more active jury.

²⁷² Corky Siemaszko, 'Al Roker Gets Ripped For Snapping Court Pix and Tweeting During Jury Duty', *NY Daily News* (online), 29 May 2009, [2]

<http://articles.nydailynews.com/2009-05-29/gossip/17923878_1_jury-duty-chief-jury-clerk-civic-duty>.

²⁷³ Nicole D Galli, Christopher D Olszyk Jr and Jeffrey G Wilhelm, 'Social Media Symposium: Litigation Considerations Involving Social Media' (2010) 81(2) *Pennsylvania Bar Association Quarterly* 59, 66.

²⁷⁴ Dareh Gregorian, 'Oh, What a Twit! Tweeting Roker Sorry for Taking Juror Pix', *New York Post* (online), 29 May 2009, [12] <http://www.nypost.com/p/news/regional/item_orPeW3RKHabFGbsbXOYCXI>.

²⁷⁵ *Ibid* [7].

²⁷⁶ Siemaszko, above n 272, [15].

²⁷⁷ Gregorian, above n 274, [13].

²⁷⁸ *Ibid* [10].

²⁷⁹ *Ibid* [13].

²⁸⁰ Nicolas, above n 151, 391.

²⁸¹ Cassia Spohn, 'The Deterrent Effect of Imprisonment and Offenders' Stakes in Conformity' (2007) 18(1) *Criminal Justice Policy Review* 31, 32.

The author included these measures in this section for the sake of completeness. Additionally, American courts that read this thesis may decide to implement these preventative measures.

6.4.10.1 Virtual Sequestration

Hoffmeister²⁸² suggests ‘virtual sequestration’ as another method to prevent jurors from using social media inappropriately. This involves allowing jurors to return home in the evenings, but allowing courts to block their internet access or observe it. This is less costly than physical sequestration to the courts and is easier for jurors to deal with. Jurors may object to this intrusion into their privacy.²⁸³ Research for this thesis did not find any courts that have implemented ‘virtual sequestration’ to date.

This preventative method is of high interference and it would violate jurors’ privacy significantly. It would probably cost courts considerable money because they would need to hire many information technology professionals to implement it. If courts were allowed access to jurors’ social media posts, they would gain access to jurors’ extremely sensitive and personal information. Jurors could easily avoid ‘virtual sequestration’ by starting new social media accounts that courts would not know about. ‘Virtual sequestration’ might also affect people who share the same computer as the juror (e.g., a family sharing a home computer). It would be unfair to the people who share a computer with the juror if the court blocks their internet access. Some technologically savvy jurors (or non-jurors who share their computers) may be able to avoid the ‘virtual sequestration’ regardless. This method would not be fair to the jurors who would access social media during a trial, but would not post anything inappropriate.

6.4.10.2 A More Active Jury

Another possible preventative, low-interference solution is to have ‘a more active jury’.²⁸⁴ This means that jurors can take notes while in the courtroom, ask questions if they do not understand something, talk about a trial before they deliberate²⁸⁵ and ask witnesses

²⁸² Hoffmeister, above n 30, 442.

²⁸³ Ibid.

²⁸⁴ Zora, above n 27, 598.

²⁸⁵ Ibid; Nancy S Marder, ‘Answering Jurors’ Questions: Next Steps in Illinois’ (2010) 41(4) *Loyola University Chicago Law Journal* 727.

questions.²⁸⁶ Jurors can also use an online forum anonymously to write their ideas and thoughts about the trial. The reasoning behind this solution is that it might prevent jurors from wanting to discuss the trial on social media.²⁸⁷ Permitting jurors to talk about the trial with other jurors, who are effectively strangers, may not prevent jurors from still wanting to share their ideas about the trial with their family and friends on social media.²⁸⁸ Unfortunately, if an anonymous online forum is established and people outside the jury can read the jurors' online forum, then they may try to influence the jurors.²⁸⁹ An anonymous forum may not be sufficient for jurors, because it would not primarily be used to contact friends and family, unlike social media.²⁹⁰

Modifications to juries to make them more active would be a radical change. The best solutions to this problem are likely ones that do not require radical changes. Radical changes would possibly take more time to be approved. The changes discussed above to jurors would provide jurors with powers similar to lawyers (e.g., the ability to ask witnesses questions). Jurors do not have legal training (aside from potentially taking a short course), so if they ask witnesses questions and complete other tasks in a more active jury, it could cause problems (e.g., wasting the court's time).

6.5 How to Assist Courts to Discover that Jurors Used Social Media Inappropriately

If a juror uses social media inappropriately it is possible that the person with whom the juror communicated will inform the relevant judge's associate, as occurred in *Haruna v The Queen*.²⁹¹ It is also possible that the relevant juror will tell one of the lawyers involved in the case, as occurred in *Wilgus v Sirius Inc.*²⁹²

People who are not directly involved in the trial or with one of the parties may inform a lawyer in the trial that a juror has used social media inappropriately. The son of the defence lawyer in the trial involving juror Hadley Jons found Jons' Facebook post about the trial because he conducted online searches of the jurors in the case. He informed his parent about

²⁸⁶ Chomos et al, above n 262, 723.

²⁸⁷ Zora, above n 27, 598.

²⁸⁸ Ibid 599.

²⁸⁹ Ibid 600.

²⁹⁰ Ibid.

²⁹¹ *Haruna v The Queen* [2013] WASCA 170 (1 August 2013).

²⁹² *Wilgus and Ors v F/V Sirius Inc.*, 665 F Supp 2d 23, 2 (Me D, 2009).

what he found and the defence lawyer informed the court about Jons' post.²⁹³ Some Australian jurors may currently use social media inappropriately without the courts' knowledge. This section will discuss methods to increase the probability that Australian courts will discover when a juror has used social media inappropriately.

6.5.1 Speak with Courts, Establish a Whistleblower Hotline, Email or Internet Page

Courts could inform jurors that if they learn that another juror has used social media inappropriately, then they should inform the court staff member who looks after the jury. The juror could try to have a quiet word with the court staff member, who could then tell the presiding judicial officer as soon as possible.

Additionally, courts could establish an anonymous hotline for jurors to call to report other jurors whom they know used social media inappropriately during a trial or during deliberations, similar to Crime Stoppers. Courts could investigate complaints to the hotline. Courts could assure the reporting jurors that their names would not be mentioned in court as having provided the information or disclosed it to the other jurors. Establishing the hotline could assist the court to learn when juror misconduct by using social media occurs. The anonymous aspect of the hotline could be of great comfort to jurors who want to inform the court that a juror has used social media inappropriately but are worried that other people may find out that they provided the information. Disadvantages might be that if jurors do not understand precisely when they should call the hotline, this could result in unnecessary calls to the hotline and unnecessary investigations. A hotline could also possibly make some jurors unnecessarily anxious about being reported, despite doing nothing wrong. Since a juror is at court during the day, the juror may not be able to call the hotline until after the trial. It is better if the juror informs the court about the other juror's inappropriate social media use as soon as possible so that the presiding judicial officer can investigate.

Another similar method courts could use to learn if jurors have used social media inappropriately is to create an email address specifically for jurors to email if they want to report other jurors who used social media inappropriately.²⁹⁴ The email address could be made easy for jurors to remember. Courts could promise jurors that any emails sent to this

²⁹³ Hoffmeister, above n 30, 429.

²⁹⁴ Krawitz, above n 240, 38.

email address would be confidential and courts will not disclose the person or email address. Receiving an email is not expensive or time consuming, although a court official would need to take time to monitor the emails that are received. Informing jurors about this email address could also help to prevent jurors from potentially using social media to discuss the trial in the first place. It could be problematic if the email arrives months or years after a trial. This is because of the importance of ‘the finality of jury verdicts’.²⁹⁵

If courts decide to give jurors a written oath that states that they will not use social media, as previously discussed, they could include information about the aforementioned suggested email address at the same time. One of the benefits of jurors emailing the court about this issue is that jurors could easily and quickly send emails from their homes in the evening after court. However, a whistleblower hotline or email could cause jurors to be overly careful about the information that they share with each other and it could cost some money.²⁹⁶

Courts could also create new pages on the court’s website that provide information to juries about what they should do in the event that they learn that a juror used social media inappropriately.²⁹⁷ If courts tell jurors orally about what they should do if they learn that jurors used social media inappropriately and jurors forget, it is possible that the jurors may visit the court’s website to seek information about what they should do. It would probably not cost the court much money to create the webpage. After courts put in the time to create the website, it should not take much time to maintain it.

6.5.2 Review the Jurors’ Social Media Pages During the Trial

Another possible method of discovering when jurors have used social media inappropriately is for a lawyer in the trial to review the publicly available elements of the social media pages of each juror without informing them during the trial.²⁹⁸ Some lawyers already review jurors’ social media pages; this has become increasingly common among American lawyers. Some

²⁹⁵ *R v K* (2003) 59 NSWLR 406, 436. For a contrasting view also see Bartels and Lee, above n 5, 48.

²⁹⁶ Johnston et al, above n 11, 21.

²⁹⁷ The Law Commission (UK), above n 250, 122.

²⁹⁸ Hope A Comisky and William M Taylor, ‘Don’t Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas — Discovery, Communications with Judges and Jurors, and Marketing’ (2011) 20(2) *Temple Political & Civil Rights Law Review* 297, 311.

American judicial officers and staff of bar associations are in favour of this method.²⁹⁹ However, reviewing some jurors' social media pages may be challenging or even impossible if a juror has strict privacy settings.³⁰⁰ It may be hard to find a juror's social media posts if he or she uses a nickname, particularly one that is completely different from their real name.³⁰¹

Lawyers may miss some or all of jurors' inappropriate social media use during a trial, no matter how hard they try to find it. Jurors may be displeased with this intrusion into their privacy and it may cause some jurors to try to avoid jury duty. It is possible that some lawyers will not inform courts if they discover that a juror has used social media inappropriately if they think that a juror is prejudiced in their client's favour. Most American courts do not require lawyers to provide them and opposing counsel with the information that they find while researching jurors' social media pages. Some American judicial officers require prosecution lawyers to provide this information, but normally only after the defence requests it. There does not appear to be a requirement that the defence provides this information.³⁰²

This preventative solution would be impossible in Australia because it would probably breach the Solicitor's Rule not to act in a manner that would lower the public's confidence in the administration of justice.

6.6 Consequences for the Juror or Jurors who Used Social Media Inappropriately

When Australian judicial officers discover that a juror used social media inappropriately, they need to decide the consequences for the juror. There are a range of possible options that judicial officers may wish to implement.

6.6.1 Dismiss the Juror

Nicole D Galli, Christopher D Olszyk and Jeffrey G Willhelm suggest that courts dismiss a juror who has used social media inappropriately.³⁰³ This has occurred in at least five cases in

²⁹⁹ Hoffmeister, above n 30, 443.

³⁰⁰ Zora, above n 27, 579.

³⁰¹ Ibid 598.

³⁰² Hoffmeister, above n 30, 444–5.

³⁰³ Galli, Olszyk Jr and Wilhelm, above n 273, 66.

the relevant jurisdictions. For example, this occurred in Australia in *Haruna v the Queen*.³⁰⁴ In that case, the jury foreperson communicated with a member of the State Director of Public Prosecutions by text and Facebook about the trial and was dismissed.³⁰⁵ The jury foreperson was a law student.³⁰⁶ One might expect that a law student would know better than to use social media inappropriately because the law student should understand the concept of providing a fair trial to an accused.

In July 2011, Jonathan Hudson was a juror in a civil car crash trial in Texas. He sent the defendant a friend request on Facebook. The defendant reported Hudson's request to the court. Consequently, the judicial officer dismissed Hudson from the jury.³⁰⁷ A similar decision would likely be made if this incident occurred in Australia. This is because the test applied to discharge a juror in Australia would probably be

[w]hether the incident is such that, notwithstanding the proposed or actual warning of the trial judge, it gives rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the juror or jury has not discharged or will not discharge its task impartially.³⁰⁸

This case also illustrates that it is not necessary for a juror to make comments directly about a trial to be dismissed. Just before Hudson's conduct, Texas regulators amended instructions to the jury so that they specifically stated that jurors were not allowed to use social media during the trial.³⁰⁹

As stated previously, Al Roker was dismissed from jury duty³¹⁰ for taking photos of jurors in the courthouse, but not in the courtroom, and tweeting them.³¹¹ A juror was also dismissed for inappropriately using social media in the United Kingdom. The juror had to decide on the guilt of the accused in a sexual assault and child abduction case. The juror added a poll to her

³⁰⁴ [2013] WASCA 170 (1 August 2013) [31].

³⁰⁵ *Haruna v The Queen* [2013] WASCA 170 (1 August 2013) [32].

³⁰⁶ *Ibid* [9].

³⁰⁷ Scott A Durfee, 'Feature: Will You Be My Friend?: Ethical Issues in Social Networking' (2011) 49(3) *The Houston Lawyer* 26, 27.

³⁰⁸ *Haruna v the Queen* [2013] WASCA 170 (1 August 2013) [66] (Mazza JA).

³⁰⁹ Patrick M Delaney, 'Sorry Linus, I Need your Security Blanket: How the Smartphone, Constant Connectivity with the Internet and Social Networks Acts as Catalysts for Juror Misconduct' (2012) 24(3) *St Thomas Law Review* 473, 482.

³¹⁰ Siemaszko, above n 272, [19].

³¹¹ Galli, Olszyk Jr and Wilhelm, above n 273, 66.

Facebook page which asked how she should vote.³¹² A judicial officer dismissed the juror and the trial continued with the remaining jurors.³¹³ This case also demonstrates that jurors are not allowed to use social media applications to discuss a trial, in addition to simply commenting on social media.

In the cases to date, judicial officers have dismissed jurors for using social media inappropriately, but on rare occasions have dismissed entire juries where one juror has used social media inappropriately and then discussed his or her social media use with the other jurors. Dismissing an entire jury would be a far greater interruption to the trial than if a judicial officer dismisses a single juror. It would also be a greater waste of resources.

Another issue involving dismissing a juror who has used social media inappropriately is the relevance of the timing of the inappropriate social media use, for example, where it occurs not during the trial, but prior to the trial. As stated previously, Al Roker was dismissed from jury duty for his inappropriate social media use before he was actually assigned to a trial.³¹⁴ As soon as a juror is allocated to a trial, it is unacceptable for him or her to write anything specific about the trial. Prior to a juror being allocated to a trial in Australia, a juror likely knows nothing about the trial so he or she could probably not reveal anything confidential on social media. Nevertheless, he or she could potentially be influenced by a third party, if for example, he or she posted on Facebook 'I'm going to court tomorrow to potentially become a juror in a trial, let's see what happens,' and a third party comments, 'find them guilty whatever you do — they deserve it!'

Dismissing a juror for using social media inappropriately can demonstrate the importance of alternate jurors. For example, in the Josh Carrier trial in the United States, Carrier faced charges involving sexually abusing a child. During the trial, one of the jurors sent a Facebook message to a friend of hers that stated that she had jury duty. Judge David Gilbert learned about the Facebook message from the defendant's lawyer. His Honour dismissed the juror

³¹² 'Juror Dismissed After Asking Facebook Friends How She Should Vote on Trial', *Daily Mail Reporter* (online), 25 November 2008
<http://www.dailymail.co.uk/United_Kingdom/sciencetech/article-1089228/Juror-dismissed-asking-Facebook-friends-vote-trial.html>.

³¹³ Brian Fitzgerald, Cheryl Foong and Megan Tucker, 'Web 2.0, Social Networking and the Courts' (2011) 35(3) *Australian Bar Review* 281, 286.

³¹⁴ Nicolas, above n 151, 394.

from the case and replaced her with an alternate juror.³¹⁵ This is as opposed to a juror who was dismissed for inappropriately using social media in the United Kingdom. As previously stated, a juror added a poll to her Facebook page that asked her friends how she should vote in the trial.³¹⁶ A judicial officer dismissed the juror and the trial continued with the remaining jurors.³¹⁷ If there are no alternate jurors, then a trial may need to proceed without a full complement of jurors.

6.6.2 Compel the Juror to Write an Essay

Punishing jurors who use social media inappropriately by compelling them to write an essay about a fair trial for the accused may make jurors more likely to understand why courts have punished them than other types of punishment (e.g., imprisonment). In 2010, 20-year-old Michigan juror Hadley Jons wrote on her Facebook wall, ‘gonna be fun to tell the defendant they’re GUILTY’.³¹⁸ Jons wrote this post after the first day of a trial.³¹⁹ The son of the defence lawyer in the trial found Jons’ post because he was conducting online searches of the jurors in the case.³²⁰ The defence lawyer informed the court about Jons’ post and the judge dismissed Jons from the jury before the second day of the trial commenced.³²¹ The judge later charged Jons with contempt of court and required her to return to court.³²² The judicial officer also sentenced Jons to pay a \$250 fine and write a five-page essay about an accused’s ‘right to a fair and impartial jury’.³²³

Compelling a juror to write an essay may be highly useful in cases where the juror does not think that their use of social media was wrong. It may also be an effective deterrent to future

³¹⁵ Lindsay Watts, ‘Juror Dismissed from Josh Carrier Trial’, *Krdo News* (online), 28 March 2012, [2] <<http://www.krdo.com/news/Juror-Dismissed-From-Josh-Carrier-Trial/-417220/14814204/-iorrk/-/index.html>>.

³¹⁶ ‘Juror Dismissed After Asking Facebook Friends How She Should Vote on Trial’, above n 312.

³¹⁷ Fitzgerald, Foong and Tucker, above n 313, 286.

³¹⁸ Dana McCauley, ‘Jurors Using Social Media Are Endangering Criminal Trials’, *The Herald Sun* (online), 16 September 2011, [16] <<http://www.heraldsun.com.au/news/more-news/facebook-jurors-put-criminal-trials-at-risk/story-fn7x8me2-1226138760202>>.

³¹⁹ Hoffmeister, above n 30, 429.

³²⁰ *Ibid* 429.

³²¹ *Ibid*.

³²² Martha Neil, ‘Oops. Juror Calls Defendant Guilty on Facebook, Before Verdict’ (2010) *ABA Law Journal*, [4] <http://www.abajournal.com/news/article/oops._juror_calls_defendant_guilty_on_facebook_though_verdict_isnt_in>.

³²³ *Ibid*.

jurors. Australian States' sentencing acts do not contain any provisions that appear to permit judges to sentence offenders to write an essay, nor do they appear to contain any provisions that are analogous to compelling an offender to write an essay.³²⁴ In restorative justice, offenders often must write a letter in which they apologise for their actions.³²⁵ This is somewhat similar to requiring an offender to write an essay. Both require the offender to think critically about their actions.

6.6.3 Amend the Jury Act

A simple solution for Australian courts could be for legislators from each State to amend their respective jury acts to state that if a juror comments on social media inappropriately about a trial prior to delivering the verdict then he or she is in contempt of court. To date, no Australian legislators have done so. The jury acts in some Australian States prohibit researching a case on the internet.³²⁶ Changing the jury acts to prohibit social media use and making it punishable as contempt of court is not a far stretch. Courts could then treat each juror who used social media as being in contempt, and punishing the juror could become a straightforward process.

It is noted that contempt of court is also an offence pursuant to the common law.³²⁷ 'The fundamental basis of any charge of contempt of court consists of the capacity of the impugned conduct to interfere with the due administration of justice.'³²⁸ The remedy for committing contempt of court at common law is a fine or imprisonment.³²⁹ It may be possible that a judicial officer could decide to punish a juror who used social media inappropriately for contempt of court at common law.

6.6.4 Imprison the Juror

³²⁴ See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA); *Sentencing Act 1997* (Tas) and *Penalties and Sentencing Act 1992* (Qld).

³²⁵ Kathleen Daly, 'Girls, Peer Violence, and Restorative Justice' (2008) 41(1) *Australian and New Zealand Journal of Criminology* 109, 118.

³²⁶ See, eg, *Jury Act 1977* (NSW) s 68C(5)(B); *Jury Act 1995* (Qld) s 69A(3)(a).

³²⁷ *Her Majesty's Attorney-General in and for the State of New South Wales v Whiley* (1993) 31 NSWLR 314, 320 (Clarke JA, Meagher JA and Handley JA).

³²⁸ *R v Hinch* [2013] VSC 520 (2 October 2013) [17] (Kaye J).

³²⁹ *City Hall Albury Wodonga Pty Ltd v Chicago Investments Pty Ltd* [2006] QSC 031 (2 March 2006) [2] (Atkinson J).

Research into jurors using social media inappropriately in the relevant jurisdictions found that three jurors have been imprisoned for inappropriately using social media. In 2010, Judge Nancy Donnellan of the Twelfth Judicial Circuit Court of Florida dismissed 29-year-old Jacob Jock from jury duty in a negligence case.³³⁰ Her Honour dismissed Jock because he had attempted to add the defendant as a friend on Facebook after the trial began.³³¹

After Her Honour dismissed Jock from jury duty, Jock wrote on Facebook ‘score...I got dismissed!! Apparently they frown upon sending a friend request to the defendant...haha.’³³² Her Honour then summonsed Jock to return to court and found him guilty of contempt of court. She sentenced him to three days in gaol.³³³ Her Honour stated, ‘I cannot think of a more insidious threat to the erosion of democracy than citizens who do not care.’³³⁴ In this case, the Judge appeared to consider Jock’s rude behaviour when she sentenced him. Her Honour was correct to consider Jock’s offensive attitude to the court when she sentenced him. It is important for the public to respect the courts in order for the public to have confidence in them. It is interesting that Jock was not punished for originally attempting to contact the defendant, but instead was punished for his subsequent conduct. This subsequent conduct gave some colour to the original conduct to make it seem like it was deliberate. It shows that Jock had a lack of understanding of the need for jurors to behave properly.

The second case in which a juror was imprisoned for using social media inappropriately was *Attorney General v Fraill*.³³⁵ This case involved contempt of court charges against Joanne Fraill, who had been previously a juror at the criminal case of Jamie Sewart and her co-accused at the Crown Court in Manchester before Judge Peter Lakin in 2010.³³⁶ Jamie Sewart was tried with eight other accused. One of the nine co-accused, Philip Berry, was charged with conspiracy to commit misconduct in a public office. Berry pleaded guilty.³³⁷ The other eight co-accused were jointly charged with conspiracy to supply heroin and conspiracy to supply amphetamines. The co-accused were charged with additional offences that primarily

³³⁰ Robert Eckhart, ‘Juror Jailed Over Facebook Friend Request’, *The Herald Tribune* (online), 16 February 2012, [2] <<http://www.heraldtribune.com/article/20120216/ARTICLE/120219626>>.

³³¹ *Ibid* [8].

³³² *Ibid* [3].

³³³ *Ibid* [1].

³³⁴ *Ibid* [5].

³³⁵ [2011] EWHC 1629 (Admin) (16 June 2011).

³³⁶ *Ibid* [12].

³³⁷ *Ibid* [3].

related to drugs and attempting to involve a police officer to further their drug offences.³³⁸ The Judge specifically gave the jury a direction about internet use, but not social media use. The Judge repeated this direction consistently during the trial.³³⁹

After the jury had deliberated and provided some of its verdicts in early August 2010, Jamie Sewart was found not guilty on all of the charges against her. Some of her co-accused were convicted.³⁴⁰ After the majority of the verdicts were delivered, Lakin J learned that one of the jurors had contacted Sewart on Facebook. Judge Lakin asked each juror whether he or she had communicated with the accused through Facebook.³⁴¹ Fraill then informed Lakin J that she contacted Sewart by Facebook.³⁴² Judge Lakin learned that after the jury acquitted Sewart of all of the charges against her (but before the jury decided all of the verdicts for some of Sewart's co-accused), Fraill had sent Sewart a message to her Facebook account that stated 'you should know me, I cried with you enough'. Sewart saw that this friend request, by a person named Jo Smilie, displayed a photograph of Fraill, whom she recognised as one of the jurors who acquitted her. Sewart then commenced a conversation with Fraill via the Facebook instant messaging service. They discussed the trial.³⁴³

The day after Sewart and Fraill's conversation on Facebook messenger, Sewart contacted her lawyer to inform her lawyer about the conversation. Sewart's lawyer informed her counsel. Counsel arranged to provide the information about Sewart and Fraill's conversation on Facebook instant messenger to Lakin J.³⁴⁴ Justice Ouseley held that both Fraill and Sewart were in contempt of court as a result of their actions.³⁴⁵

The relevant law that Ouseley J applied was the *Contempt of Court Act*³⁴⁶ which states 'it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings'. Justice Ouseley explained his decision to find Fraill guilty of contempt of court as follows:

³³⁸ Ibid.

³³⁹ Ibid [6].

³⁴⁰ Ibid [8]–[11].

³⁴¹ Ibid [12].

³⁴² Ibid [13].

³⁴³ Ibid [15].

³⁴⁴ Ibid [17].

³⁴⁵ Ibid [24].

³⁴⁶ *Contempt of Court Act 1981* (UK) c 49, s 8(1).

Frail is, as she has admitted, guilty of contempt of court because as a juror she communicated with Sewart via the internet and conducted an online discussion about the case with her when the jury deliberations had not been completed and verdicts had not been returned. During the course of the discussion she provided Sewart with information about the state of the jury's deliberations. This conduct contravened the provisions of section 8 of the 1981 Act and disobeyed the clear and unequivocal series of directions given by the trial judge regarding such conduct.³⁴⁷

Additionally, Ouseley J explained his decision that Sewart was guilty of contempt of court as follows:

Sewart denied that she was in contempt. She was called to give evidence before us. In the course of her evidence she admitted that she knew perfectly well that during the communications between her and Frail, that Frail was a member of the jury which had acquitted her, and which was still considering the last remaining verdicts. The substance of the discussions have been set out in paragraphs 16 above. We shall not repeat them. It is clear, however, from the texts that she knew that what she was doing was wrong, and one of the earlier questions, 'whats happenin with the other charge??' asked by her is not open to any other interpretation than intentional solicitation of particulars of the jury deliberations. The remaining part simply underlined that the subject of the conversation was the deliberations of the jury. We had no hesitation in finding that Sewart's conduct constituted clear contravention of section 8(1) of the 1981 Act.³⁴⁸

Justice Ouseley sentenced Frail to immediate imprisonment for a term of eight months.³⁴⁹ His reasoning for the immediate imprisonment consisted of hoping to 'ensure the continuing integrity of trial by jury'.³⁵⁰ He added that

her conduct in visiting the internet repeatedly was directly contrary to her oath as a juror and her contact with the acquitted defendant as well as her repeated searches on the internet constituted flagrant breaches of the orders made by the judge for the proper conduct of the trial.³⁵¹

³⁴⁷ *Attorney General v Frail* [2011] EWHC 1629 (Admin) (16 June 2011) [35] (Ouseley J).

³⁴⁸ *Ibid* [36].

³⁴⁹ *Ibid* [57].

³⁵⁰ *Ibid* [53].

³⁵¹ *Ibid* [54].

Justice Ouseley sentenced Sewart to two months imprisonment, suspended for two years.³⁵² A T H Smith and Kate O’Hanlon state that this case will ‘advance the state of the law by the crystallisation of underlying principles into a new rule. Jurors who flout a clear judicial instruction not to conduct their own research on the net are liable to sanctions that might include a period of imprisonment.’³⁵³

Cheryl Thomas states that because of the online nature of the Facebook communication between Fraill and the co-accused, it could be used as evidence of the misconduct. In contrast, if they had had the same conversation in person, judicial officers may not have known what they said to each other at all, or that their conversation even occurred.³⁵⁴

Fraill appears to have set a precedent in the United Kingdom that jurors who use social media inappropriately could face imprisonment, although the *Fraill* case was not mentioned in the third case in which a juror was imprisoned: *Attorney General v Davey & Beard*³⁵⁵ (“*Davey*”). Both the *Fraill* and *Davey* cases were heard in the United Kingdom High Court of Justice. The *Davey* judgment was handed down two years after *Fraill*.

Attorney General v Davey & Beard involved contempt of court charges against Davey and Beard. Davey was originally a juror in a paedophilia case.³⁵⁶ During the trial he posted the following message on Facebook: ‘Wooooow I wasn’t expecting to be in a jury Deciding a paedophile’s fate, I’ve always wanted to Fuck up a paedophile & now I’m within the law!’ Davey had 400 friends on Facebook and two of his friends posted smiley faces in response to the post.³⁵⁷ One of Davey’s Facebook friends informed the trial judge. The trial judge discharged Davey from the jury.³⁵⁸ The President of the Queen’s Bench division later decided that Davey ‘did an act calculated to interfere with the proper administration of justice and which he intended would interfere with the proper administration of justice’.³⁵⁹ This decision

³⁵² Ibid [60].

³⁵³ A T H Smith and Kate O’Hanlon, ‘Contempt of Court; HM Attorney General v Fraill and Sewart; R v Knox — Juror’ (2012) 4 *Criminal Law Review* 286, 290.

³⁵⁴ Cheryl Thomas, ‘Avoiding the Perfect Storm of Juror Contempt’ [2013] (6) *Criminal Law Review* 483, 494-495.

³⁵⁵ [2013] EWHC 2317 (Admin) (29 July 2013).

³⁵⁶ *Attorney General v Davey & Beard* [2013] EWHC 2317 (Admin) (29 July 2013) [5].

³⁵⁷ Ibid [6].

³⁵⁸ Ibid [8].

³⁵⁹ Ibid [26].

was made because Davey knew that he had to be fair to the accused and that he should not talk about the trial with anyone other than the jurors. He also knew that he should not discuss the case on the Internet.³⁶⁰ Davey was sentenced to two months in gaol.³⁶¹

The punishments that the jurors who used social media inappropriately in *Frail*³⁶² and in *Davey*³⁶³ received are much more severe than the other punishments given in this area in the other jurisdictions. Researchers will likely be interested to follow judicial officers in the United Kingdom to see if they continue their strong stance against jurors using social media inappropriately or whether they will take a less strict approach in future cases. *Frail* and *Davey* were sentenced in the British High Court; judgments in this Court can be overruled in the Court of Appeal and the Supreme Court.³⁶⁴

Judge Dennis Sweeney, who presided over *Dixon* (a case in which jurors friended each other on Facebook and they also wrote about the case in posts online³⁶⁵), states that the majority of judges dislike punishing jurors, even when jurors commit misconduct.³⁶⁶ He believes that it may be acceptable to punish a juror ‘in particularly egregious cases where the directives to the juror were clear and there is no reasonable excuse for a violation.’ He adds that this is particularly the case where the juror’s misconduct resulted in a mistrial or an application for a new trial.³⁶⁷ It is submitted that the outcome of a juror’s misconduct (a mistrial or an application for a new trial) should not be relevant to whether a juror is punished. A mistrial or an application for a new trial may not occur for reasons that are not related to a juror’s misconduct, yet a juror may still have purposely violated a judicial officer’s instructions. Similarly, Hoffmeister argues that punishing jurors who use social media inappropriately should be avoided, if possible, because it could encourage potential jurors to avoid jury duty.³⁶⁸ Even if jurors are deterred from attending jury duty because a juror was punished, in

³⁶⁰ Ibid [28].

³⁶¹ John Aston, ‘Two Jurors Jailed Over Contempt of Court Over Use of Internet During Trials’, *The Independent* (online), 30 July 2013, [1]

<<http://www.independent.co.uk/news/uk/crime/two-jurors-jailed-for-contempt-of-court-over-use-of-internet-during-trials-8737004.html>>.

³⁶² *Attorney General v Frail* [2011] EWHC 1629 (Admin) (16 June 2011) [57] (Ouseley J).

³⁶³ Aston, above n 361, [1].

³⁶⁴ *Organisation of Justice — United Kingdom* (2012) European Commission

<http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/org_justice_eng_en.pdf>.

³⁶⁵ *Maryland v Dixon* (Circuit Court, Baltimore City, Md, No 109210015, 21 December 2009).

³⁶⁶ Justice Dennis Sweeney, ‘Social Media and Jurors’ (2010) XL111(6) *Maryland Bar Journal* 44, 48.

³⁶⁷ Ibid 49.

³⁶⁸ Hoffmeister, above n 30, 437.

some cases it still may be important to punish jurors for their misconduct. Zora believes that punishing jurors who use social media inappropriately during a trial is critical to deter other jurors from possibly doing the same. She adds that punishment should only be given in cases where judges gave express instructions not to use social media and then a juror breached these instructions and the juror's actions 'brings the juror's impartiality into question'.³⁶⁹ Zora's suggestion about when judicial officers should punish jurors may be too narrow. Jurors may act inappropriately in ways that have nothing to do with breaching a judicial officer's express instructions, yet the jurors should still be punished. For example, if a judicial officer instructs jurors not to use any outside sources to research a case and a juror uses social media to obtain information about the case. The judicial officer did not expressly tell the juror not to use social media, but a judicial officer might still punish the juror.

6.7 The Consequences for a Trial After a Judicial Officer Discovers that a Juror Used Social Media Inappropriately

There are a range of consequences that can follow when a judge discovers that a juror used social media inappropriately. Judges have decided upon different consequences for a trial after they discovered that a juror used social media inappropriately. In *Haruna v the Queen*³⁷⁰ the trial judge dismissed the relevant juror and continued the trial. In *Cecil*, their Honours reversed the accused's conviction because a juror used social media inappropriately.³⁷¹

Judges appear to make decisions on this issue by examining the circumstances of each individual case.³⁷² If a judge learns that a juror has used social media inappropriately and the trial has not yet concluded, he or she can declare a mistrial or continue the trial. If the trial has already concluded when a judge learns that a juror has used social media inappropriately, the prosecutor or the accused may apply for an appeal on the grounds of the juror's misconduct. An appeal judge can change the original verdict or let the verdict stand.

³⁶⁹ Zora, above n 27, 603.

³⁷⁰ *Haruna v The Queen* [2013] WASCA 170 (1 August 2013) [9].

³⁷¹ *State v Cecil*, 221 W Va 495, 505 (207).

³⁷² Emily M Janoski-Haehlen, 'The Courts Are All A "Twitter": The Implications of Social Media Use in the Courts' (2011) 46(1) *Valparaiso University Law Review* 43, 49.

6.7.1 Mistrial or Continue the Trial

If a judge believes that a juror used social media inappropriately, he or she can decide that a mistrial occurred.³⁷³ A mistrial occurs when a judge stops a trial before it is finished and restarts the trial at a later time.³⁷⁴ In Moncton, Canada, Judge George Rideout of the Court of Queen's Bench of New Brunswick declared a mistrial after he learned that a juror in Fred Prosser's murder trial was a member of a Facebook group that was anti-Prosser. The juror also made comments in the group. Judge Rideout was concerned that the juror's bias against Prosser might have influenced other jurors.³⁷⁵ Judge Rideout learned about the juror's Facebook bias just before the prosecution was going to open its case.³⁷⁶ A mistrial should only be declared as a last resort due to the resources that are wasted. In this case, it was clear that the juror was biased against the accused. In fact, this case could be one of the clearest examples of an appearance of bias in a juror's social media post. The juror's comments on Facebook should not be interpreted to mean that the rest of the jury was biased against the accused or that the juror even spoke to her fellow jurors about her bias.

6.7.2 Permit an Appeal or Let the Verdict Stand

If a judge learns only after the trial has concluded that a juror has used social media inappropriately, it is possible that an appeal judge may grant an appeal³⁷⁷ or else let the verdict stand. In the cases where a judge decides to grant an appeal because a juror used social media inappropriately, the juror's inappropriate social media use is usually not the sole cause of the decision to grant a new trial. For example, in *Dimas-Martinez v Arkansas*,³⁷⁸ Associate Justice Donald Corbin granted the appellant a new trial because one juror slept during the trial, and another juror used social media inappropriately.³⁷⁹

³⁷³ Bell, above n 157, 86.

³⁷⁴ Dunn, above n 55, 35.

³⁷⁵ 'Murder Case Mistrial Over Juror's Facebook Comments', *CBC* (online), 18 July 2012, [11] <<http://www.cbc.ca/news/canada/new-brunswick/murder-case-mistrial-over-juror-s-facebook-comments-1.1213673>>.

³⁷⁶ Jonathan MacInnis, 'Judge Declares Mistrial in Fred Prosser Murder Case', *CTV* (online), 18 July 2012, [2] <<http://atlantic.ctvnews.ca/judge-declares-mistrial-in-fred-prosser-murder-case-1.883513>>.

³⁷⁷ Michael R Kon, 'Ijury: The Emerging Role of Electronic Communication Devices in the Courtroom' (2011) 57(1) *Wayne Law Review* 291, 203.

³⁷⁸ 2011 Ark 515 (2011).

³⁷⁹ *Dimas-Martinez v Arkansas*, 2011 Ark 515, 24 (2011).

As previously stated, a new trial was also requested, but denied, in *Maryland v Dixon*. After the accused was convicted Dixon's lawyers argued that there should be a new trial in the matter because (a) jurors used social media inappropriately, and (b) there were problems with the trial judge's instructions to the jury.³⁸⁰

6.7.3 The Trial Judge's Decision on how to Deal with the Juror's Inappropriate Behaviour Is the Reason for the Appeal

A judicial officer's decision in first instance about how to deal with a juror's inappropriate behaviour on social media can be the sole reason that a judge grants an appeal. In *Tennessee v Smith*, the appellant had been convicted of murder and sentenced to life in prison.³⁸¹ During the trial at first instance, a juror used Facebook to contact a witness who testified at the trial and posted that the witness 'did a great job' at court. The accused's lawyer requested that he have permission to question the relevant juror, but the trial judge denied the request. The appellant's lawyer also requested a new trial and alleged that the appellant did not receive a fair trial, but his request was denied.³⁸² On appeal, their Honours decided that the trial judge had made a mistake because he did not order a hearing in open court with the relevant juror to learn more about the juror's social media posts.³⁸³ As a result, on appeal the original judgment was vacated and a new trial was ordered.³⁸⁴

6.7.4 An Accused May Need to Show More than Mere Social Media Use

When a party seeks an appeal because a juror has used social media inappropriately, they may need to show that the juror was biased in addition to simply showing that the juror used social media inappropriately. In *McGaha v Kentucky*,³⁸⁵ the appellant appealed the conviction of murder against him. One of the grounds of appeal was that one of the jurors did not inform the court that she was a Facebook friend of the wife of the victim.³⁸⁶ Justice Daniel Venters delivered an opinion on behalf of the Supreme Court of Kentucky. He stated that when a juror is Facebook friends with someone involved in a trial, it cannot be automatically

³⁸⁰ *Maryland v Dixon* (Circuit Court, Baltimore City, Md, No 109210015, 21 December 2009) 16.

³⁸¹ *Tennessee v Smith* (Tenn, No M2010-01384-SC-R11-CD, 10 September 2013) 5.

³⁸² *Ibid* 4 - 5.

³⁸³ *Ibid* 10.

³⁸⁴ *Ibid* 13 - 14.

³⁸⁵ (Ky, No 2012-SC-000155-MR, 20 June 2013) 1.

³⁸⁶ *McGaha v Kentucky*, (Ky, No 2012-SC-000155-MR, 20 June 2013) 1.

presumed that a juror is biased.³⁸⁷ The appellant was required to provide evidence to substantiate that the juror was biased.³⁸⁸ The appellant failed on this ground to convince the Supreme Court Justices that he should be granted an appeal.³⁸⁹

6.7.5 The Media Informs the Public of the Juror's Inappropriate Use of Social Media

It is possible that if a juror uses social media inappropriately, the media will inform the public. The judge will then have to consider how the relevant juror acted after the news of the inappropriate use of social media became public knowledge. In *United States v Fumo*, Pennsylvania Senator Vincent J Fumo was convicted of 137 out of 139 charges of making misleading statements about job classification reports and contracts. A co-accused was also convicted.³⁹⁰ Fumo's solicitors appealed against his convictions on various grounds. One of these grounds was that the trial judge had erred in failing to remove Eric Wuest from the jury.³⁹¹ During jury deliberations, Wuest wrote about the trial on Facebook, Twitter, his website and his blogs.³⁹² Wuest then watched a news report on television which stated that a juror in *Fumo* had posted material about the case online.³⁹³ Wuest then deleted his online posts.³⁹⁴ The accused requested that the judicial officer remove Wuest from the jury.³⁹⁵ The Court then questioned Wuest about his social media use during the trial,³⁹⁶ and the judicial officer allowed him to continue as a juror in the case.³⁹⁷

The appeal judge believed that Wuest watching the single television report was an accident which lacked a 'prejudicial effect on the trial,' because it was about Wuest's social media posts and not the particulars of the case itself.³⁹⁸ Wuest also said that he became very alarmed when he heard that the media knew about his posts.³⁹⁹ Consequently, he deleted his posts

³⁸⁷ Ibid 7.

³⁸⁸ Ibid 8.

³⁸⁹ Ibid 9.

³⁹⁰ (United States Court of Appeals for the Third Circuit, No 09-3388, 09-3389, 09-3390, 23 August 2011) 10.

³⁹¹ Ibid 17.

³⁹² Ibid 12.

³⁹³ Ibid.

³⁹⁴ Ibid.

³⁹⁵ Ibid 14.

³⁹⁶ Ibid.

³⁹⁷ Ibid.

³⁹⁸ Ibid 30.

³⁹⁹ Ibid 12.

soon after.⁴⁰⁰ The Judge found that Wuest deleting his posts was ‘harmless’ behaviour.⁴⁰¹ The appeal judge rejected the accused’s demand for a new trial,⁴⁰² and stated that ‘Wuest was a trustworthy juror who was very conscientious of his duties.’⁴⁰³

The author is hesitant to agree with the trial judge that Wuest was ‘very conscientious of his duties’ given that he made general comments about the trial on social media. She is also hesitant to agree that Wuest deleting his posts right after he saw himself on the news was ‘harmless’ behaviour.

6.7.6 Evidence Against the Accused Is Very Strong

It is possible that judges will consider the evidence against an accused to be so strong that a juror’s inappropriate use of social media in the trial is irrelevant. *Commonwealth v Werner* is a third case in which a new trial was requested, but was denied.⁴⁰⁴ In that case, a jury convicted the accused of 12 counts of larceny in excess of \$250. At first instance, the trial judge instructed jurors not to chat about the case; however, she did not specifically instruct them not to use social media.⁴⁰⁵ After the accused’s conviction, her lawyers reviewed the Facebook posts of various jurors in the trial. The lawyers found that two jurors had posted comments on Facebook about the trial, before and after it.⁴⁰⁶

As a result of the posts, the accused’s lawyers filed a motion requesting a new trial. They also attempted to subpoena the jurors’ Facebook posts and messages pertaining to their jury service. The trial judge denied the accused a new trial.⁴⁰⁷ On appeal, the appeal judges examined the evidence against the appellant. The evidence against the appellant was extremely strong, so even if an ‘extraneous influence’ had existed, the prosecution could still likely have proved that there had been no prejudice to the accused. The decision of the Judge at first instance was not overturned.⁴⁰⁸ If evidence against an accused is ‘extremely strong’, to

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid 14.

⁴⁰² Ibid 30.

⁴⁰³ Ibid.

⁴⁰⁴ 81 Mass. App. Ct. 690 (2012).

⁴⁰⁵ Ibid 700.

⁴⁰⁶ Ibid 690.

⁴⁰⁷ Ibid 691 - 692.

⁴⁰⁸ Ibid 698.

the extent that jurors' actions are irrelevant, then one could argue that juries are irrelevant in the first place.

6.7.7 Biased Comments on Social Media Use by Third Parties May not Be Sufficient for the Offender to Receive a New Trial

Even if jurors write about a matter on social media and their friends write biased comments underneath, it is still possible that the accused will not receive a new trial. The lawyers for Michael Roseboro in Pennsylvania requested a new trial, but were denied.⁴⁰⁹ Roseboro's trial was for the first degree murder of his wife. The Judge in the action instructed the jurors several times daily not to read about the case or research it, and not to talk about it with others.⁴¹⁰

Two jurors in the case, Nick Keene and Michael Hecker, wrote various posts on Facebook while they served as jurors. Keene wrote 'yea it blows three (expletive) weeks and when I'm done I have two weeks until school starts.' Hecker wrote 'hoping this will be the last week of court,' on his Facebook page prior to the final week of the trial commencing. Three people commented on Hecker's post. Their comments were:

1. 'ha';
2. 'fry him'; and
3. 'why were you in court?'⁴¹¹

Hecker responded on his Facebook page to the comments by writing 'Im a juror on a 1st degree murder trial...have been for the last 3 weeks unfortunately. I cant wait till I can share my thoughts on it'. One of Hecker's friends on Facebook later wrote 'You'll have to stop in at CNH and share....' After the prosecution concluded its case, Hecker posted on his Facebook wall 'Your honor, the Commonwealth rests. THANK GOD'.

⁴⁰⁹ Tom Murse, 'Roseboro Juror's Facebook Postings Pose Problems', *Intelligencer Journal Lancaster New Era* (online), 4 August 2009 <<http://articles.lancasteronline.com/local/4/240616#>>.

⁴¹⁰ Tom Murse, 'Roseboro Juror's Facebook Postings Pose Problems', *Intelligencer Journal Lancaster New Era* (online), 4 August 2009 <<http://articles.lancasteronline.com/local/4/240616#>>. The author notes that Murse did not state whether the Judge instructed the jurors against using social media inappropriately.

⁴¹¹ *Ibid.*

Journalists who searched for the jurors' contact information found the jurors' Facebook posts. They provided copies of the posts to the relevant judges in the trial. The jurors then delivered a verdict of guilty of murder in the first degree.⁴¹² The Judge did not take any action when he learned about the jurors' Facebook use from journalists.⁴¹³

The accused's solicitors then requested a new trial as a result of the jurors' Facebook posts; however, the Judge denied this request. One of the judges stated that the Facebook posts were 'regrettable and contrary to the Court's instructions' but 'woefully insufficient to taint the unanimous verdict of the jury'. The accused's solicitors appealed his conviction. They also appealed on a second ground of the amount of weight that the jury gave to the evidence that a forensic pathologist provided during the trial.⁴¹⁴

The other remarks on Hecker's Facebook page and the remark on Keene's Facebook page appear fairly general and unrelated to the verdict in the case. The Roseboro case is another case which demonstrates that the unanimity of a jury verdict appears relevant to whether a judge will take action when a juror uses social media inappropriately during a trial.

6.7.8 Juror Uses Social Media Inappropriately After the Verdict Is Delivered

If jurors use social media inappropriately after a verdict is delivered, then it should not be a successful ground for appeal. In *Wilgus v Sirius Inc.*,⁴¹⁵ a new trial was requested but was denied. In this case, the plaintiffs sued the defendant for personal injury and wrongful death. The jury found for the defence. Four days after the jury delivered its verdict, one of the jurors emailed the plaintiff's solicitors a message stating that they had seen photographs on the plaintiff's social media pages a few days after the trial that 'advocated the use of mushrooms and weed smoking'. The plaintiff's lawyers informed the court.⁴¹⁶

The Judge agreed that the relevant juror did not see the plaintiff's Facebook pages during the trial or the jury's deliberations. The Judge decided that the juror did not commit juror

⁴¹² Ibid.

⁴¹³ Janet Kelly, 'Roseboro Appeal Questions 2 "Errors"', *Intelligencer Journal Lancaster New Era* (online), 6 March 2011 <http://lancasteronline.com/article/local/249519_Roseboro-appeal-questions-2--errors-.html>.

⁴¹⁴ Ibid.

⁴¹⁵ *Wilgus and Ors v F/V Sirius Inc.*, 665 F Supp 2d 23, 2 (Me D, 2009).

⁴¹⁶ Ibid.

misconduct and rejected the plaintiff's application for a new trial.⁴¹⁷ It makes sense that the Judge denied the plaintiff's application for a new trial because the juror did not see any potentially prejudicial material before the jury delivered a verdict.

6.7.9 A Juror's Attempt to Use Social Media Inappropriately Is a Problem, even if a Juror Does Not Actually Do Anything Inappropriate

Judicial officers may still be concerned if jurors attempt to use social media inappropriately during a trial, even if they do not actually make any inappropriate comments or see any inappropriate material. *West Virginia v Cecil*⁴¹⁸ involved a juror who used social media inappropriately, which contributed to the Judge's decision to hold a new trial. In this case, the appellant was tried and convicted of one count of sexual abuse in the first degree and two counts of sexual abuse by a custodian. The appellant appealed his convictions on various grounds. One of these grounds was 'misconduct and bias on the part of certain jury members'.⁴¹⁹

The appellant's counsel submitted that the misconduct occurred when two of the jurors tried to view the MySpace account of one of the victims in the trial. The public's ability to access the victim's MySpace website was removed prior to the trial; consequently, the jurors were not able to view it. One of the jurors talked about the case with her daughter who attended school with one of the victims. One of the jurors also advised other jurors that the law required them to give more weight to the children's testimony than the adults' testimony.⁴²⁰

The Judge stated that the jurors' attempts to view the MySpace profile 'constitutes misconduct extrinsic to the jury's deliberative process'. However, the Judge stated that if this were the only misconduct that had occurred, it would not be sufficiently prejudicial to modify the verdict.⁴²¹ The Judge later stated that even though the jurors did not actually see the victim's MySpace website,

⁴¹⁷ Ibid 13.

⁴¹⁸ 221 W Va 495 (2007).

⁴¹⁹ Ibid 499.

⁴²⁰ Ibid 504.

⁴²¹ Ibid.

the mere fact that members of a jury in a serious felony case conducted any extrajudicial investigation on their own is gross juror misconduct which simply cannot be permitted. Without meaningful censure, failure to properly punish such behaviour would encourage or allow its repetition.⁴²²

The Judge added that the greater concern was the juror who incorrectly advised other jurors about the legal standard to apply to the victim's testimony.⁴²³ The Judge decided that the totality of the juror misconduct had resulted in a trial that was unfair to the accused. The accused's convictions were vacated and a new trial was held.⁴²⁴ This case shows that concern about jurors using social media can arise because of a mere attempt to use social media, regardless of whether that attempt was successful.

6.8 Key Recommendations of this Chapter

The most important measures that the author recommends to prevent jurors from using social media inappropriately are: providing jury instructions, requiring jurors to sign written oaths, training jurors and displaying relevant posters and other visual materials in the jury room. All four of these preventative measures are practical and require few resources. They are all low-interference solutions, so jurors may be less likely to resent them. Courts should consider implementing these preventative methods as soon as possible, rather than wait until jurors' use of social media becomes a frequent problem. It is better for courts to use a combination of methods, as opposed to just one, because different preventative methods may be more effective for different jurors.

In order to assist courts in discovering when jurors have used social media inappropriately, it is recommended that the courts (1) create new pages on their websites that provide information to jurors about what they should do in the event that they learn that a juror has used social media inappropriately, and (2) create an email address that jurors may use if they want to report other jurors who have used social media inappropriately. Neither of these measures should cost the courts considerable resources, and they may be of significant help to courts in revealing inappropriate social media use.

⁴²² Ibid.

⁴²³ Ibid 504.

⁴²⁴ Ibid 505.

6.9 Conclusion

Sharon Nelson, John Simek and Jason Foltin state that ‘this is the world in which we live, and we take our jurors as we find them’.⁴²⁵ Should we have to? The introduction to this chapter discussed *Fraill*;⁴²⁶ should the judge in that case been required to take Fraill as she was found?

This chapter has dealt with the studies and cases in Australia, Canada, the United Kingdom and the United States to date on this issue. These studies and cases demonstrate that some jurors are using social media inappropriately and causing problems for courts in the jurisdictions examined; for example, courts may be required to expend resources investigating jurors’ actions.

Throughout the history of the jury, there have been significant changes, and people have predicted before that these changes would end the use of juries. Those predictions were wrong. The jury system has changed and endured the relevant changes, so it appears probable that the jury system will also be able to survive and adapt to the existence of social media.⁴²⁷ It is crucial that Australian courts actively address the issues mentioned in this chapter, because of the importance of what is at stake: an accused’s right to a fair trial.

⁴²⁵ Nelson, Simek and Foltin, above n 107, 3.

⁴²⁶ *Attorney General v Fraill* [2011] EWHC 1629 (Admin) (16 June 2011) [57] (Ouseley J).

⁴²⁷ Sweeney, above n 366, 49.

Chapter 7: Conclusions and Key Overall Recommendations

In this thesis, the author has tried to avoid simply criticising procedures and court rules, instead attempting to inform readers about the actions that courts and legal regulators in four relevant jurisdictions have taken to adapt to social media. The relevant jurisdictions are: (1) Australia; (2) Canada; (3) the United Kingdom; and (4) the United States. The author has also made recommendations for Australian courts, journalists, lawyers and legal regulators to consider.

This chapter will summarise the main points of each previous chapter, then go on to discuss general similarities among the issues affecting the stakeholders that this thesis has discussed. These stakeholders are the courts, lawyers, journalists and the public. It will then discuss the key findings and main recommendations of this thesis, concluding by making recommendations for future research in the area of social media and the courts, along with some final points.

7.1 Summary of Each Chapter of this Thesis

Chapter One of this thesis provided background information about social media and explained important terms: (1) confidence in the courts and the judiciary, (2) confidence in the legal profession, (3) providing a fair trial to an accused, and (4) open justice.

Chapter Two examined the issue of judges using social media privately and its potential impact upon the public's confidence in the courts and the judiciary. It considered three specific issues: (1) whether judges should be discouraged from using social media privately, (2) whether they should be prevented from being 'friends' on social media with lawyers who may appear before them, and (3) judges participating in ex parte communication about cases before them.

Chapter Three discussed the benefits and challenges that lawyers who use social media can experience. If lawyers face ethical challenges when they use social media, it can lower the public's confidence in the courts and the legal profession. This chapter discussed three ethical issues that lawyers can face if they use social media: (1) unintended or faulty retainers, (2) challenges involving their duty to the court, and (3) their duty of confidentiality. The author

drafted a set of proposed ethical guidelines for lawyers regarding their social media use. The proposed ethical guidelines are in Appendix A.

In Chapter Four the author discussed the results of her survey on courts' social media use. Of 23 contacted, 15 courts completed the survey. When courts engage with the public by using social media, it can increase the public's confidence in the courts. Chapter Four examined the benefits that courts can receive when they use social media. It also discussed: (1) the reasons why some courts do not use social media, (2) the information that courts can post on social media, (3) which types of social media courts should use, (4) which courts should be responsible for the courts' social media accounts, and (5) how courts can start using social media.

Chapter Five considered whether journalists should be able to use social media in the courtroom. The chapter discussed the relationship between courts and the media and how social media has changed the media industry. It also mentioned how judicial officers have dealt with the presence of video cameras in the courtroom. It examined which courts currently permit journalists to use social media in the courtroom and which do not. It discussed safeguards that judicial officers can employ if they permit journalists to use social media in the courtroom and alternatives to permitting journalists to use social media in the courtroom. It was argued that journalists should be able to use social media in the courtroom as an extension of the open justice principle. Appendix E of this thesis contains a policy on this issue for courts to consider using.

Chapter Six examined cases where jurors use social media inappropriately and how this can result in an unfair trial for an accused. It considered the reasons why jurors who use social media inappropriately can be a problem, reasons why jurors use social media, and potential methods to prevent jurors from using social media inappropriately. It posed the question of how to assist courts to discover inappropriate social media use by jurors and also discussed the consequences for jurors who have behaved inappropriately.

7.2 Issues Common to the Majority of Stakeholders

7.2.1 Lack of Knowledge About Social Media and Its Ethical Implications

There appears to be a lack of knowledge about how to use social media and about its accompanying dangers among many of the stakeholders discussed in this thesis. Additionally, courts and legal regulators across Australia do not use standardised guidelines or procedures to address the ethical implications of social media. Courts and legal regulators could benefit from standardisation (e.g., using the same ethical guidelines about social media use for all Australian lawyers). If standardisation occurs, the relevant stakeholders in this area (judicial officers, lawyers, journalists, courts and jurors) can benefit from other people's knowledge. The relevant stakeholders nationwide will also have access to ethical guidelines that concern their social media use. It is admitted that it may be time consuming for legal regulators nationwide to agree on single sets of ethical guidelines.

7.2.2 Regulators in the United States Are Taking the Lead

Inappropriate use of social media by the relevant stakeholders (e.g., judges and lawyers) has occurred more frequently in the United States than in the other countries discussed in this thesis. It comes as no surprise, then, that legal regulators in the United States are taking a lead on creating ethical guidelines for social media use. For example, several ethical bodies in the United States have released ethical guidelines about the judiciary using social media, yet no ethical bodies in Australia have released guidelines about the judiciary using social media. Since American legal regulators have taken a lead on this issue, Australian legal regulators can consider the American ethical guidelines. They can also examine whether Americans have experienced problems following the guidelines.

7.2.3 Few Incidents in Australia of Inappropriate Social Media Use by the Relevant Stakeholders Have Occurred

To date, there have been few publicly reported incidents of inappropriate social media use by the Australian stakeholders discussed in this thesis. The recommendations made in this thesis can help to lessen the chances that such inappropriate social media use will occur in the future. It is submitted that it is better to implement preventative measures now than to wait for inappropriate uses of social media to occur. Increasing use of social media by Australians could increase the chances that the relevant Australian stakeholders will use social media inappropriately and increase the need for ethical guidelines.

7.2.4 The Instantaneous Nature of Social Media Can Cause Problems

The ability to post information on social media instantly can have a negative impact on all stakeholders discussed. All of these stakeholders can benefit from taking a cautious approach to social media.

7.2.5 Grounds for Appeal

It is possible that inappropriate use of social media by the stakeholders mentioned could form the grounds for an appeal by a party. While this has only happened in Australia once to date,¹ it has happened in other jurisdictions several times and consumes a considerable amount of courts' resources. It could also lower the public's confidence in the courts.

7.3 Key Findings

7.3.1 There Is a Lack of Ethical Guidelines on Social Media for Australian Judges and Lawyers

The Guide to Judicial Conduct is the primary document in Australia containing information about the community's expectations of judges.² It does not currently discuss social media. Judicial officers may face many different types of ethical challenges when they use social media, such as whether they should 'friend' lawyers who appear before them.

In Australia, legal regulatory bodies in Victoria,³ New South Wales⁴ and Queensland⁵ have created guidelines for lawyers about social media use. The law societies of the other

¹ See *Haruna v The Queen* [2013] WASCA 170 (1 August 2013).

² Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at March 2007).

³ Law Institute of Victoria, 'Guidelines on the Ethical Use of Social Media' (29 November 2012) <<http://www.liv.asn.au/PDF/For-Lawyers/Ethics/2012Guidelines-on-the-Ethical-Use-of-Social-Media.aspx>>.

⁴ Office of the Legal Services Commissioner (NSW), 'A Guide on Practice Issues: Social Media' (Practice Guidelines, May 2013) <http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/social_media_practice_guideline_may2013.pdf>; Legal Technology Committee, 'Guidelines on Social Media Polices' (Guidelines, Law Society of New South Wales, March 2012)

<<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/587803.pdf>>.

⁵ Stafford Shepherd, *Seven Ethical Sins in Social Media*, Queensland Law Society Ethics Centre (11 March 2013) <<http://ethics.qls.com.au/sites/all/files/HUB%20update%20-%20Seven%20ethical%20sins%20in%20social%20media%2011%20Mar%2013.pdf>>.

Australian States and Territories have not released guidelines on this topic to date. As a result, some Australian lawyers may find it difficult to find answers to ethical challenges that they face involving social media.

7.3.2 Few Australian Courts Use Social Media

In Australia, staff of the Family Court, the Supreme Court, the County Court and Magistrates' Court in Victoria, and the Supreme Court of New South Wales use social media to engage the public. Four Australian courts out of nine surveyed by the author use social media.⁶ The survey found that the main reasons why courts do not use social media are a lack of resources or a lack of conviction that they will experience benefits from doing so.

7.3.3 There Are No Uniform Guidelines for Australian Journalists on Social Media Use in the Courtroom

There is currently legislation in New South Wales⁷ and South Australia⁸ that permits journalists to use social media in the courtroom. The Supreme Court of Victoria⁹ also has a formal policy that permits journalists to use social media in the courtroom. The courts in the other states and territories do not have any such legislation or formal policy. The public in those States and Territories cannot receive the benefits that flow from journalists using social media in the courtroom.

7.3.4 Inappropriate Social Media Use by Jurors Can Have Many Different Repercussions

If jurors use social media inappropriately, it can affect the accused: the accused may not receive a fair trial because the juror was exposed to information about the trial to which the

⁶ It is noted that the NSW Supreme Court stated in the author's survey that it did not use social media, but has commenced using social media since the finalising of this thesis. See New South Wales Supreme Court, *Twitter Account* <<https://twitter.com/NSWSupCt>>.

⁷ *Court Security Regulations 2011* (NSW) r 6B(a).

⁸ *Supreme Court Civil Rules 2006* (SA) r 9B(3); *District Court Criminal Rules 2013* (SA) r 38(3); *District Court Civil Rules 2006* (SA) r 9B(3).

⁹ Supreme Court of Victoria, *Media Policies and Practices* (26 August 2010) 6

<https://assets.justice.vic.gov.au/scv/resources/52d4064b-f5c1-408b-ad06-5f62d2bda4fc/media_procedure_policy.pdf>.

rules of evidence were not applied.¹⁰ If jurors use social media inappropriately during a trial, a judicial officer may have to investigate the matter. He or she will have to decide how to deal with the relevant juror and whether to let the trial continue or declare a mistrial. If he or she declares a mistrial, this can affect many people involved in the trial, such as the victim, the other jurors and the lawyers. If the judicial officer learns about the juror's inappropriate use of social media after a trial finishes, then an appeal judge may need to decide whether or not to grant an appeal. This can have an additional impact on the accused, the victim and the lawyers in the trial. The accused's future may be uncertain and the accused may have to endure another trial. The victim may need to participate in this additional trial, which may be stressful to him or her, while the lawyers may need to spend time preparing for and appearing at another trial.

7.4 Key Recommendations

7.4.1 Modify the Guide to Address Social Media Use

The Guide to Judicial Conduct should be modified to discuss social media use. This can help to maintain the public's confidence in the judiciary; Judge Judith Gibson of the New South Wales District Court agrees with this view.¹¹ The Australian judiciary may currently be uncertain about their ethical obligations when they use social media. If the Guide is modified to address questions relating to social media, it may be of particular assistance to judges working in isolated parts of Australia who may not be able to consult other judges. Some judges may not have the skills to know about the potential problems that they can create if they use social media. If the Guide is amended to discuss social media, it could increase the courts' transparency and accountability; it may also increase the public's confidence in the judiciary.

7.4.2 Create Standardised National Guidelines on Lawyers' Social Media Use

This thesis has argued that standardised national guidelines on lawyers' social media use are necessary to try to prevent lawyers from using social media inappropriately. Legal regulators

¹⁰ David E Aaronson and Sydney M Patterson, 'Modernizing Jury Instructions in the Age of Social Media' (2013) 27(4) *ABA Criminal Justice* 4, 4.

¹¹ ABC Radio National, 'Justice Tweeted Is Justice Done', *The Law Report*, 9 July 2013 (Judith Gibson J).

could benefit from using the draft guidelines found in Appendix A of this thesis or parts thereof. The staff of the bar associations who participated in the International Bar Association's survey¹² and Mark, Gordon and Shackel of the New South Wales Office of the Legal Commissioner¹³ support the view that ethical guidelines on social media use are necessary for lawyers. A standardised set of guidelines makes sense because of the profession's current stance towards uniformity, and could signify to lawyers the importance of this issue. More lawyers nationally may read uniform national guidelines than if only a few states have their own set of guidelines. National guidelines on lawyers' social media use could also increase the public's confidence in the legal profession.

7.4.3 More Australian Courts Should Use Twitter

Australian courts that do not use social media should think about creating a Twitter account to increase public contact with and confidence in the judiciary and the courts.¹⁴ Some of the Australian courts that use social media have experienced benefits from doing so.¹⁵ A presence on Twitter would likely take the smallest amount of resources to maintain out of the many different kinds of social media. If Australian courts use Twitter, they can directly communicate with people who they may not have had opportunities to reach otherwise.¹⁶ They can also provide information to the public immediately, or when they choose to.¹⁷ They may be able to assist self-represented litigants in new ways.¹⁸

¹² International Bar Association, *The Impact of Online Social Networking on the Legal Profession and Practice* (February 2012) 30
<http://www.ibanet.org/Committees/Divisions/Legal_Practice/Impact_of_OSN_on_LegalPractice/Impact_of_OSN_Home.aspx>.

¹³ Steve Mark, Tahlia Gordon and Rita Shackel, 'Regulation of Legal Services in the E-World: A Need to Short Circuit Hot Spots in Ethics and Novel Practices?' (Working Paper Part 1, Office of the Legal Services Commissioner, October 2011)
<http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/regulation_of_legal-services_working_paper_oct2011_part1.pdf>.

¹⁴ Alysia Blackham and George Williams, 'Australian Courts and Social Media' (2013) 38(3) *Alternative Law Journal* 170, 171.

¹⁵ For example, the Family Court of Australia, the Victoria Magistrates' Court and the Victoria Supreme Court.

¹⁶ Laura Click, *From Sketch Pads to Smart Phones: How Social Media Has Changed Coverage of the Judiciary* (2011) National Center for State Courts, 48
<<http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctmedia/id/30>>.

¹⁷ Patricia Seguin, *The Use of Social Media in Superior Court of Arizona in Maricopa County* (2011) Superior Court of Arizona in Maricopa County
<<http://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2011/Social%20Media.ashx>>.

¹⁸ Katherine Bladow and Joyce Raby, *Using Social Media to Support Self-Represented Litigants and Increase Access to Justice* (2011) National Center for State Courts, 36
<<http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctmedia/id/29>>.

7.4.4 Australian Courts Should Consider Releasing a Policy that Permits Journalists to Use Social Media in the Majority of Courtrooms

This thesis has recommended that Australian courts consider releasing a formal policy that permits journalists to use social media in the courtroom, or use part of the policy found in Appendix E of this thesis. A model policy can provide Australian courts with clarity on whether social media may be used in the courtroom and whether there are any limitations on use. Such a policy can also help courts to preserve the open justice principle, and allow journalists and the public to experience the many benefits of using social media discussed in this thesis. Some examples of these benefits are that it can make it easier for the public to scrutinise the courts and the judiciary,¹⁹ decreasing the likelihood that people in the courtroom will commit perjury.²⁰ It can also provide information to members of the public who want to attend court in person, but are unable to do so.²¹

7.4.5 Australian Courts Use Four Key Preventative Measures for Jurors' Social Media Use

This thesis has recommended that the four best preventative measures for courts to implement in order to decrease the chances that jurors will use social media are: (1) judges giving directions to jurors, (2) courts training jurors not to use social media, (3) jurors signing an oath not to use social media, and (4) courts displaying posters that tell jurors not to use social media. These recommendations are all practical, low-interference solutions that should not cost too much time or money.

One of the most important preventative measures is that judicial officers give directions to all jurors, witnesses and parties in a trial not to use social media in the courtroom. The instructions should be drafted (1) using language that laypeople can understand, (2) to include examples of social media, and (3) to contain examples of inappropriate social media use.

¹⁹ David Banks, 'Tweeting in Court: Why Reporters Must Be Given Guidelines', *The Guardian* (online), 15 December 2010 <<http://www.guardian.co.uk/law/2010/dec/15/tweeting-court-reporters-julian-assange>>.

²⁰ Jacob E Dean, 'To Tweet or Not to Tweet: Twitter, "Broadcasting," and Federal Rule of Criminal Procedure 53' (2010) 79(2) *University of Cincinnati Law Review* 769, 787.

²¹ Mark D White, 'Does Facebook Threaten Trial By Jury', *Psychology Today* (online), 29 May 2010 <<http://www.psychologytoday.com/blog/maybe-its-just-me/201005/does-facebook-threaten-trial-jury>>.

Providing instructions to jurors makes sense because judges have consistently used instructions to jurors as a method of preventing jurors from acting inappropriately in the past.²² This strategy also applies the presumption that jurors will follow judges' instructions.²³ Research has found that instructions are a major reason why jurors do not use social media inappropriately during trials.²⁴ Training jurors about social media use is also important. Johnston et al agree that training jurors about social media use is an important preventative measure.²⁵

Jurors should also sign an oath that states that they will not use social media inappropriately during a trial. Signing an oath could increase the jurors' awareness of the requirement not to use social media during a trial.²⁶ They may also take the instructions more seriously and be more likely to uphold them.

Finally, posters and other visual materials should be placed in the jury room to advise jurors against using social media inappropriately during a trial. Bartels and Lee support this idea.²⁷ Posters may be a useful reminder to the jurors, and may be of particular use to jurors who learn visually or who did not pay attention to a judge's oral instructions. This would be a low-cost method of informing jurors not to use social media inappropriately. Since so many Australian trials involve juries²⁸ and so much money is spent on juries in Australia,²⁹ it is in courts' interest to implement the preventative measures discussed.

7.5 Recommendations for Future Research

7.5.1 Surveys

²² Amy St Eve J and Michael Zuckerman, 'Ensuring an Impartial Jury in the Age of Social Media' (2012) 11(1) *Duke Law & Technology Review* 1, 25.

²³ Ibid.

²⁴ Ibid 21.

²⁵ Jane Johnston et al, *Juries and Social Media* (2013) Victorian Department of Justice <<http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/juries%20and%20social%20media%20-%20final.pdf>>.

²⁶ Thaddeus Hoffmeister, 'Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age' (2012) 83(2) *University of Colorado Law Review* 409, 457.

²⁷ Lorana Bartels and Jessica Lee, 'Jurors Using Social Media in our Courts: Challenges and Responses' (2013) 23(1) *Journal of Judicial Administration* 35, 49.

²⁸ Ibid 46.

²⁹ Ibid.

There is room for future research in this area using surveys. For example, researchers could survey Australian judges and lawyers about their social media use, asking whether the Australian judges and lawyers have experienced challenging ethical issues in connection with their social media use. Researchers could also survey citizen journalists who write about the courts, asking them about their knowledge of suppression orders and general court etiquette. Researchers could also give surveys to staff of the law societies who have not yet released guidelines for lawyers' social media use. Australian researchers could also undertake similar research in the United States, where courts are very knowledgeable about social media.

Researchers could draft and post a survey on the Supreme Court of Victoria's Twitter page, which has the most followers of all Australian courts' Twitter pages at the time of writing this thesis. The survey could ask people whether they feel that they better understand the Court because they used the Court's Twitter page. It could also ask whether people have more confidence in the Court or know more about the Court as a result of using the Court's Twitter page. The survey could also ask whether the people surveyed use the Court's Twitter page to keep informed of breaking news.

7.5.2 General Research

Useful research could be conducted to examine the actions that courts are taking to adapt to social media in common law jurisdictions other than the four considered in this thesis. It could also examine other social media (e.g. Flixster, Google+ and Foursquare) than the core social networks that this thesis has discussed.

Research could also be helpful in areas including judges' clerks and associates' social media use,³⁰ how social media affects law students³¹ and how social media can specifically affect lawyers who have different specialties.³² Research would be useful about what should occur

³⁰ See, eg, Kate Crowley, 'Why Can't We Be Friends? A Judicial Clerk's Guide to Social Networking' [2010–2011] 14 *Richmond Journal of Law and the Public Interest* 641.

³¹ See, eg, Tal Harari, 'Facebook Frenzy Around the World: the Different Implications Facebook Has on Law Students, Lawyers and Judges' (2012) 19(1) *ILSA Journal of International & Comparative Law* 1, 5.

³² For example, see a discussion about how social media impacts bankruptcy lawyers in Mark Duedall et al, 'The Ethics Panel: Ethics 2.0 - The Ethical Challenges and Pitfalls Web 2.0 Presents to Bankruptcy Attorneys' (2010) 26(2) *The Emory Bankruptcy Developments Journal* 245.

if a lawyer who has posted information on social media on behalf of a firm leaves the firm: would the lawyer then be able to repost the same information on behalf of the new firm?³³

7.5.3 Specific Research

There are several potential areas for specific future research on this issue; some examples are given below. One such area could be the use of social media by judges as an educational tool. Researchers might also look at issues pertaining to using social media as identification evidence in criminal trials.³⁴ It could be investigated whether limitations ought to be placed on the judiciary having LinkedIn profiles or whether judges should be prevented from liking things such as movies or books on Facebook.

Research into the effects of publicising that jurors are punished for using social media inappropriately could be helpful. Given that the *Frail* case involved sentencing a juror to the harshest punishment to date for using social media inappropriately — eight months imprisonment³⁵ — the research could potentially focus on the effect that publicising this case had on the British people. It may be that the deterrent effect is overstated. Research could be conducted on whether judge-only trials should be used in more cases to avoid the risk that jurors will use social media inappropriately.³⁶

Research could also be conducted into consequences if a client posts a link to their social medium account on a lawyer's social media account. Can the lawyer be held responsible for the client's posts?³⁷

Research could also examine whether it is possible to design a social media application to help courts to censor negative comments that the public make on social media. The

³³ Michael H Rubin, 'The Social Media Thicket for Mississippi Lawyers: Surviving and Thriving in an Ethical Tangled Web' (2012) 31(2) *Mississippi College Law Review* 281, 296.

³⁴ See, eg, *Strauss v Police* [2013] SASC 3 (18 January 2013).

³⁵ *Attorney General v Frail* [2011] EWHC 1629 (Admin) (16 June 2011) [57] (Ouseley J).

³⁶ Elizabeth Greene and Jodie O'Leary, 'Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 101, 118.

³⁷ See, eg, Thomas Spahn, 'The Rise of Facebook Creates Ethics Issues for Lawyers and Judges' (2011) 21(3) *Experience* 35, 35.

repercussions of the High Court posting audio and visual recordings of their court proceedings online could also be researched.³⁸

7.5.4 Conference

Another possibility for future work in this area is to hold a conference on the topic of social media and the courts. The conference could include members of the courts, lawyers and academics from Australia, Canada, the United States and the United Kingdom.³⁹ At the conference, attendees could discuss best practices in the area of social media and ethics for the relevant stakeholders.

7.6 Final Words

The Chief Justice of the New South Wales Supreme Court, Tom Bathurst, states:

One thing is for sure. We are only just beginning to come to terms with and identify the scope of social media's potential influence, and whether it is capable of fundamentally altering the basic structures of our society.⁴⁰

Social media can influence courts and legal regulators to alter court procedures and court rules, which are arguably important 'basic structures of our society'.

This thesis began with a comparison of Ned Kelly's trial to Lloyd Rayney's. The nature of trials and the ways in which people communicate about trials have changed dramatically in the period between the two, and trials and communication about them will continue to change in the future. It is to be hoped that courts, legal regulators and academics will work together as time passes to try to ensure that they embrace fundamental legal principles while this change occurs.

³⁸ AAP, 'High Court Footage to Go Online', *The Sydney Morning Herald* (online), 13 September 2013 <<http://news.smh.com.au/breaking-news-national/high-court-footage-to-go-online-20130913-2tout.html>>.

³⁹ The Australasian Institute of Judicial Administration held a conference on 14–15 June 2013 that brought together Australian academics, public court information officers and some members of the judiciary about social media and the courts. The author presented parts of this thesis at the conference.

⁴⁰ Chief Justice Tom Bathurst, 'Social Media: the End of Civilization?' (Speech delivered at the University of New South Wales, 21 November 2012) 1.

Appendices

Appendix A¹

Model Ethical Guidelines for Australian Lawyers on Social Media Use

Australian lawyers increasingly use social media² for many different purposes. Some use it to advertise their business and to network;³ others use it to recruit new staff;⁴ others use it to educate the public and other lawyers.⁵ It is important that lawyers be aware of the ethical issues that they may face when they use social media. Several lawyers in the United States have faced ethical challenges as a result of using social media. For example, a prosecutor in Florida posted updates about an assault trial on Facebook, based on the *Gilligan's Island* theme song. The prosecutor was disciplined for his actions.⁶

These ethical guidelines should be read together with legislation, court rules, the common law and professional conduct rules. The contents of these guidelines are not binding upon lawyers.⁷ It is important to note that if lawyers act unethically while using social media, this can decrease the public's confidence in the legal profession and the courts. Lawyers may also breach professional conduct rules. These guidelines are not an exhaustive list of all of the ethical challenges that Australian lawyers may face when they use social media, and they should be updated regularly to ensure that they remain as relevant as possible.

¹ The author notes that this appendix is almost identical to Chapter Three of this thesis. The author intends for Appendix A to be used by legal regulators and lawyers easily — they can simply read Appendix A as opposed to reading the entirety of Chapter Three of this thesis.

² Mark, Steve Mark, 'New Technologies — Social Networking Sites' (February 2011) *Without Prejudice: The Office of the Legal Services Commissioner*
<http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/wp_issue53_feb11.pdf>

³ The Law Society, 'Social Media' (Practice Note, The Law Society, 20 December 2011), [1.2]
<<http://www.lawsociety.org.uk/advice/practice-notes/social-media/>>.

⁴ Office of the Legal Services Commissioner (NSW), 'A Guide on Practice Issues: Social Media' (Practice Guidelines, May 2013)
<http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/social_media_practice_guideline_may2013.pdf>.

⁵ Dustin B Benham, 'Symposium, The Internet and the Law: The State Bar of Texas Provides New Guidelines to Attorneys Regarding the Proper Use of Social Media and Blogs for Advertising Purposes' (2010) 52 *Advocate* 13, 16.

⁶ Kathryn K Van Namen, 'Facebook Facts and Twitter Tips — Prosecutors and Social Media: an Analysis of the Implications Associated with the Use of Social Media in the Prosecution Function' (2012) 81(3) *Mississippi Law Journal* 549, 568.

⁷ Office of the Legal Services Commissioner (NSW), above n 4.

Unintended Retainers

The word ‘retainer’ describes a contract between a lawyer and a client for the lawyer to provide legal services. If a retainer exists, then the lawyer owes fiduciary duties to the client. This includes the duty of confidentiality. A lawyer’s professional indemnity insurance normally applies to work that is completed pursuant to a retainer.⁸ A lawyer cannot accept a retainer if it conflicts with his or her duties to other current or former clients or his or her own interests.⁹ If a lawyer acts in litigation without a proper retainer, then the lawyer may have to pay the client’s costs.¹⁰

On social media, people may ask a lawyer legal questions. If the lawyer answers the questions, this can create an unintended retainer.¹¹ Even if the lawyer answers someone’s legal question on social media in general terms, a client may still assume that a retainer was created by the lawyer’s mere answering of the question.

If a lawyer provides general legal advice to a client on social media, it is important that in addition to answering the question, the lawyer clearly states that he or she does not intend to create a retainer.¹² Even better, if the lawyer does not intend to create a retainer when a client requests legal advice on social media, the lawyer should not post any legal response. This is particularly important because the lawyer’s insurance may not cover the lawyer if the lawyer gives advice without a retainer in place.

A potential client may also post a question on a lawyer’s social media page that the lawyer should not answer because he or she is not licensed to practise in the potential client’s jurisdiction.¹³ The lawyer may answer the question because he or she does not believe that a retainer was created or the lawyer may not have considered the repercussions of giving legal advice to a client in a jurisdiction where he or she is not licensed to practise.

⁸ Gino Dal Pont, ‘Social Networking Sites Can Prove Ethically Dangerous’ (2011) 49(5) *Law Society Journal* 46, 46.

⁹ Law Council of Australia, *Australian Solicitors’ Conduct Rules* (at June 2011) rr 10.1, 11.1.

¹⁰ *AW & LM Forrest Pty Ltd v Beamish* (Unreported, Supreme Court of New South Wales Equity Division, Young J, 27 August 1998) 14.

¹¹ Coralie Kenny and Tahlia Gordon, ‘Social Media Issues for Legal Practice’ (2012) 50(4) *Law Society Journal* 66, 68.

¹² *Ibid.*

¹³ ISBA Legal Ethics Committee, ‘Need to Know: Legal Ethics Involved in Online Social Media and Networking: An Overview’ (2011) 54 *Res Gestae* 64, 64.

A retainer may exist on social media between a lawyer and a client, but the lawyer and client may have different ideas about the scope of the retainer because of the brevity of their social media exchanges.

If a lawyer answers another person's question on social media and the lawyer does not take full instructions, the lawyer may not have the knowledge to properly advise the client. As a consequence, the lawyer may unintentionally provide inaccurate legal advice. A lawyer who makes an error while providing advice on social media could face a negligence claim.¹⁴

A lawyer may properly advise a client pursuant to a proper retainer on social media, but because the advice is given publicly, other people who are not the lawyer's clients may read the advice and decide that it applies to them when it does not.¹⁵ These other people may then face a problem if they implement legal advice that does not apply to them.

A lawyer may be in a position of conflict because he or she is unintentionally in a retainer with someone who is in conflict with one of his or her current or past clients.¹⁶

A disclaimer may assist lawyers in the above situations involving unintended retainers. This may help lawyers to avoid being held accountable and prevent people from taking advice that was not meant for them. The disclaimer should clearly communicate to social media users that the lawyer does not intend to provide legal advice on social media.¹⁷ It should also state that the information posted should not be used as legal advice.¹⁸ Thus if a lawyer provides legal advice on social media, their disclaimer can state that the advice is not intended to be legal advice or that the advice is for a certain jurisdiction only.¹⁹ Such a disclaimer could also

¹⁴ David Day et al, 'Your Presence in the E-World Guidelines for Ethical Marketing Practices Using New Information Technologies' (Guidelines, Canadian Bar Association, August 2009) <<http://www.cba.org/CBA/activities/pdf/ethicsguidelines-eng.pdf>>.

¹⁵ Law Institute of Victoria, 'Guidelines on the Ethical Use of Social Media' (29 November 2012) <<http://www.liv.asn.au/PDF/For-Lawyers/Ethics/2012Guidelines-on-the-Ethical-Use-of-Social-Media.aspx>>.

¹⁶ Day et al, above n 14.

¹⁷ Law Society of Upper Canada, 'Professional Responsibilities When Using Technology' (Practice Management Topics, 2013) [6] <<http://www.lsuc.on.ca/ProfessionalResponsibilitiesWhenUsingTechnology/>>; Office of the Legal Services Commissioner (NSW), above n 4, [2].

¹⁸ Ibid.

¹⁹ Michael E Lackey Jr and Joseph P Minta, 'Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging' (2012) 28(1) *Touro Law Review* 149, 165.

increase the chances that professional indemnity insurance would cover the lawyer in the event that the client sues the lawyer.

Lawyers' Duty to the Court

A lawyer has a duty to the court that is 'paramount',²⁰ even if a client gives contrary instructions.²¹ 'The essence of these duties is the requirement for lawyers (within the context of the adversarial system) to act professionally, with scrupulous fairness and integrity and to aid the court in promoting the cause of justice'.²² Part of this duty is that lawyers must not publish any comments about current legal proceedings that could prejudice a fair trial or the administration of justice.²³

It is possible for lawyers to breach their duty to the court while using social media inappropriately. Lawyers may write negative comments about judicial officers or other lawyers on social media.²⁴ For example, a prosecutor in San Francisco blogged that opposing counsel was 'chicken' because she requested a continuance.²⁵ The presiding judge called the prosecutor's comments 'juvenile, obnoxious and unprofessional'.²⁶ They may also comment on the merits of their cases on social media. The likelihood of lawyers doing so is increased because of social media's informality.²⁷

While in the past lawyers who commented about the merits of a case in public could reach many people, it is unlikely that they could have easily reached as many people as they now can using social media.

Lawyers should not post anything on social media that they would not be comfortable saying in front of a judge, because it is possible that a lawyer's post on social media could be

²⁰ *Giannerelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ); Law Council of Australia, *Australian Solicitors' Conduct Rules* (at June 2011) r 3.1.

²¹ *Rondel v Worsley* [1969] 1 AC 191, 227.

²² D A Ipp, 'Lawyers' Duties to the Court' (2012) 114 *Law Quarterly Review* 63, 65.

²³ Law Council of Australia, *Australian Solicitors' Conduct Rules* (at June 2011) r 28.

²⁴ Law Institute of Victoria, above n 15, [1].

²⁵ Gina Slaughter and John G Browning, 'Feature: The Attorney and Social Media Social Networking Dos and Don'ts for Lawyers and Judges' (2010) 73(2) *Texas Bar Journal* 192, 193.

²⁶ Margaret M DiBianca, 'Ethical Risks Arising from Lawyers' Use of (and Refusal to Use) Social Media' (2011) 12 *Delaware Law Review* 179, 197.

²⁷ Law Institute of Victoria, above n 15, [1].

brought to a judge's attention, whether a lawyer intends this or not (e.g., a lawyer writes something that opposing counsel emails to a judge's associate).

Lawyers should act courteously and with integrity when using social media.²⁸ Lawyers should also be careful because their occupation may add authority to comments that they make on social media.²⁹

Lawyers should be careful about the photos that they post on social media or that others tag them in. Some photos or videos could bring the legal profession into disrepute. An example of this would be a photo of a lawyer standing in front of a dartboard with a judge's photo on it on a lawyer's Facebook page.

The Duty of Confidentiality

Lawyers have a duty to keep information that their clients tell them confidential.³⁰ This is 'fundamental to the relationship between solicitor and client'.³¹

A lawyer may not provide anyone outside their firm with any confidential information obtained from a client unless the client gives permission or the lawyer is required to provide the information by law.³² Commentary of the Australian Solicitors' Conduct Rules state that the following classes of information may be confidential:³³

- (a) information of a former client that is directly related to a matter for an existing client, for example information belonging to an insurer concerning a potential claim, in circumstances where the solicitor is asked to accept instructions to act for the claimant;
- (b) information of relevance to a competitor, such as product pricing or business models; and

²⁸ Office of the Legal Services Commissioner (NSW), above n 4.

²⁹ Ethics and Professional Issues Committee, 'Guidelines for Practising Ethically with New Information Technologies' (Information to supplement the Professional Code of Conduct, Canadian Bar Association, September 2008) <www.cba.org/cba/activities/pdf/guidelines-eng.pdf>.

³⁰ *Legal Practitioners Complaints Committee v Camp* [2010] WASC 188 (28 July 2010) [33] (Heenan, Blaxell and Beech JJ).

³¹ *Legal Services Commissioner v Tampoe* [2009] LPT 14 (Atkinson J), quoted in Kenneth Martin J, 'Between the Devil and the Deep Blue Sea: Conflict Between Duty to the Client and Duty to the Court' (Speech delivered at the Bar Association of Queensland Annual Conference, 4 March 2012) 21.

³² Law Council of Australia, *Australian Solicitors' Conduct Rules* (at June 2011) r 9.

³³ Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Consultation Draft Commentary* (at 19 October 2012) r 9.

- (c) in some circumstances, particularly intimate knowledge of a client, its business, personality and strategies, for example in [the] *Yunghanns* case.

Lawyers should approach confidentiality on social media differently than they would other electronic communication because of how quickly and effortlessly confidential information can be sent to millions of people.

Social media provides several new ways for lawyers to breach the duty of confidentiality, often accidentally.³⁴ If a lawyer writes on social media that he or she just met with a client, but does not name the client, people who are aware of whom the lawyer met with can learn about the existence of the lawyer-client relationship between the two.³⁵ Lawyers can make other remarks about a client that may not mention the client's name, but could allow others to deduce who the client is.

Lawyers can breach the duty of confidentiality on social media by writing something confidential on other lawyers' social media pages. In particular, lawyers may not think of the ethical problems that can result when they write on the social media page of another lawyer at their firm. The other lawyer's privacy settings may permit people from outside their firm to see their social media posts.

A lawyer may 'vent' about his or her job, clients or judges he or she appears before on social media, which can breach their duty of confidentiality.³⁶ For example, *In the Matter of Margrett A. Skinner* in the United States, one of Skinner's clients wrote negative comments about Skinner's conduct as a lawyer on a few websites.³⁷ Skinner retaliated by writing confidential information about the client on blogs.³⁸ Staff of the State Bar of Georgia disciplined her as a result.³⁹

³⁴ Steven C Bennett, 'Ethics of Lawyer Social Networking' (2009) 73(1) *Albany Law Review* 113, 118.

³⁵ D Bruce, 'The Attorney and Social Media Ethically Navigating the Social Media Landscape' (2010) 73 *Texas Bar Journal* 196, 200.

³⁶ Carrie Pixler and Lori A Higuera, 'Special Feature: Lawyers and the Cloud: Social Media: Ethical Challenges Create Need for Law Firm Policies' (2011) 47 *Arizona Attorney* 32, 36.

³⁷ *In re Margrett A. Skinner*, No S13Y01015, 2 (Ga, March 18, 2013)
<<http://www.gasupreme.us/sc-op/pdf/s13y0105.pdf>>.

³⁸ *Ibid.*

³⁹ *Ibid* 1.

While there have been lawyers who have vented inappropriately about their jobs and clients for as long as the profession has existed, the ability of social media to reach so many people risks making the situation arguably worse than in previous contexts. While lawyers' duty of confidentiality is well known, lawyers may not think about this duty when using social media.

Some social media sites allow the user to import information, such as contacts, from his or her existing email accounts. While doing so, a lawyer may accidentally make information public about his or her clients or witnesses. A lawyer who posts photographs on social media may thereby reveal confidential information from one of their matters.⁴⁰ For example, in Florida, the family of an accused brought leopard-print underwear to court for the accused to wear.⁴¹ The accused's lawyer photographed the underwear and posted the photograph on her Facebook page with a caption.⁴² Someone who saw the photograph on Facebook informed the judge, who declared a mistrial.⁴³ The accused's lawyer was also fired from her public defender role.⁴⁴

It is important that all lawyers have a strategy to ensure that information on their computers is secure. If a lawyer's social media site is hacked, confidential information may be taken.

Lawyers should think critically about the risks of a specific type of technology prior to sharing confidential information on it.⁴⁵ A cookie cutter approach to client confidentiality on social media may not be appropriate because new types of technology emerge all the time. Existing social media also significantly change often.

Lawyers who are debating whether or not to post material on social media because it may be confidential should think about whether it falls into the categories of confidential information listed above.

⁴⁰ Lackey Jr and Minta, above n 19, 155.

⁴¹ David Ovalle, 'Lawyer's Facebook Photo Causes Mistrial in Miami-Dade Murder Case', *The Miami Herald* (online), 9 September 2012
<<http://www.miamiherald.com/2012/09/12/2999630/lawyers-facebook-photo-causes.html>>.

⁴² Ibid [3] and [4].

⁴³ Ibid [5].

⁴⁴ Ibid [6].

⁴⁵ Ethics and Professional Issues Committee, above n 29.

Additional Information

Social media has had a major impact on how lawyers work,⁴⁶ and it is important that lawyers understand how to use it.⁴⁷ Lawyers should not forget to apply common sense when they use social media.⁴⁸ Lawyers should not use social media to contact another lawyer's client. If another lawyer's client tries to become a lawyer's friend on social media, the lawyer should reject his or her request.⁴⁹ Lawyers should ensure that any client communications that they have on social media are secure.⁵⁰

Lawyers should ensure that staff in their offices, besides lawyers, also read through these ethical guidelines. Non-lawyer staff may breach these guidelines in the same way as a lawyer. If a lawyer is in doubt about an ethical issue involving social media, he or she should speak to another lawyer at his or her law firm or call his or her State's legal regulatory body.

⁴⁶ Steve Mark, Tahlia Gordon and Rita Shackel, 'Regulation of Legal Services in the E-World: A Need to Short Circuit Hot Spots in Ethics and Novel Practices?' (Working Paper Part 1, Office of the Legal Services Commissioner, October 2011) 4

<http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/regulation_of_legal-services_working_paper_oct2011_part1.pdf>.

⁴⁷ Federation of Law Societies of Canada, 'Guideline on Ethics and the New Technology' (Guidelines, Law Society of British Columbia, April 2002)

<<http://www.lawsociety.bc.ca/page.cfm?cid=1505&t=Guidelines-on-Ethics-and-the-New-Technology>>.

⁴⁸ Stafford Shepherd, *Seven Ethical Sins in Social Media*, Queensland Law Society Ethics Centre (11 March 2013)

<<http://ethics.qls.com.au/sites/all/files/HUB%20update%20-%20Seven%20ethical%20sins%20in%20social%20media%2011%20Mar%2013.pdf>>.

⁴⁹ Law Institute of Victoria, above n 15, [1]–[2].

⁵⁰ Ethics and Professional Issues Committee, above n 29.

Appendix B

List of Court Social Media Accounts that Responded to the Survey

Australia

Family Court of Australia:

<https://twitter.com/FamilyCourtAU>

Supreme Court of Victoria:

<https://twitter.com/SCVSupremeCourt>

<http://www.youtube.com/user/SupremeCourtVictoria?feature=guide>

Magistrates' Court of Victoria:

<https://twitter.com/magcourtvic>

Canada

The Courts of Nova Scotia:

https://twitter.com/CourtsNS_News

https://twitter.com/CourtsNS_Notice

https://twitter.com/CourtsNS_NSCA

https://twitter.com/CourtsNS_NSSC

https://twitter.com/CourtsNS_NSPC

https://twitter.com/CourtsNS_NSSM

Saskatchewan Law Courts:

<https://twitter.com/SKCourts>

<http://www.youtube.com/channel/UC192QXfF7WP3ktJvIIB3O4g?feature=watch>

Appendix C

Participant Consent Information and Survey Questions

Participant Consent

By submitting the questionnaire I agree to the following. I have read the information letter enclosed about the nature and scope of this questionnaire. Any questions I have about the research process have been answered to my satisfaction. I give my consent for the results to be used in the research. I am aware that this survey is anonymous and that no personal details are being collected or used, though the researcher will state the name of the relevant court and the position of the person who provided information to her in her thesis or other scholarly work. I know that I may change my mind, withdraw my consent, stop participating, and withdraw my data within two weeks of submitting the questionnaire. My responses are representative of the court wherein I am employed.

I understand that the findings of this study may be published and that no information which specifically identifies me will be published.

Survey Questions

- Does your court use social media webpages to inform the public about the court's activities (i.e. Facebook, Twitter)? (yes/no)
- If yes, please provide a link to all of the social media webpages.
- If yes, please describe the activities of your court on social media webpages (i.e. has a Facebook page, has a Twitter account).
- If yes, what is the title of the person responsible in your court for maintaining the social media webpages (i.e. a public information officer)?
- If yes, please describe approximately how often new information is added onto your court's social media webpages.
- If yes, why has your court decided to use social media?
- If yes, has your court received any benefits from using social media? (yes/no)
- If yes, what are the benefits that your court has received?

- If no, please provide a reason if you can.
- If no, please state whether your court is considering implementing social media activities in the future.

Appendix D

Information Letter

Dear

I invite you to participate in a research study looking at whether courts in Australia, Canada, the United Kingdom and the United States use social media to engage the public. Social media are online communities wherein people can communicate by providing text, photos and video. Social media makes information instantly available to a wide audience. Some courts use social media to encourage the public to become more interested in legal issues.

This study is part of one chapter of my PhD Degree in law, supervised by Professor Neil McLeod in the School of Law at Murdoch University.

Nature and Purpose of the Study

The aim of this study is to investigate whether courts use social media and if not, whether they intend to in the future. The study will also produce recommendations regarding social media use by courts.

If you consent to take part in this research study, it is important that you understand the purpose of the study and the task you will be asked to complete. Please make sure that you ask any questions you may have, and that all your questions have been answered to your satisfaction before you agree to participate.

You should be aware that this survey is anonymous and no personal details are being collected or used, though I will state the name of the relevant court and the position of the person who provided information to me in my thesis or other scholarly work.

What the Study Will Involve

If you decide to participate in this study, you will be asked to complete the following task:

- Complete one questionnaire that asks about your court's social media use.
- The questionnaire is attached to this email.
- It is estimated that the questionnaire will take approximately 10 minutes to complete.

Please note that a document describing your consent to this study is enclosed with this email.

If you do not respond by informing me whether or not you will participate in the survey, I may telephone you to confirm that you received this email and the questionnaire.

Voluntary Participation and Withdrawal from the Study

Your participation in this study is entirely voluntary. You may withdraw within two weeks of submitting the questionnaire without discrimination or prejudice.

If you withdraw within two weeks of submitting the questionnaire, all information you have provided will be destroyed.

Benefits of the Study

After I complete this section of my PhD, I will share with you the information that I learn about what the target countries are doing regarding this issue. This may help inform your court's response in the future.

Possible Risks

There are no specific risks anticipated with participation in this study.

If you have any questions about this project please feel free to contact either myself, Marilyn Krawitz, marilyn.krawitz@nd.edu.au (+61 0403864029), or my supervisor Professor

McLeod, N.McLeod@murdoch.edu.au on ph. +61 8 9360 2981. Professor McLeod and I are happy to discuss with you any concerns you may have about this study.

Once I have analysed the information from this study I will email you a summary of my findings. You can expect to receive this feedback in three to six months.

If you are willing to consent to participation in this study, please complete the attached questionnaire and return it via email.

Thank you for your assistance with this research project.

Sincerely

Marilyn Krawitz

This study has been approved by the Murdoch University Human Research Ethics Committee (Approval 2013/014). If you have any reservation or complaint about the ethical conduct of this research, and wish to talk with an independent person, you may contact Murdoch University's Research Ethics Office (Tel. +61 8 9360 6677) or e-mail ethics@murdoch.edu.au). Any issues you raise will be treated in confidence and investigated fully, and you will be informed of the outcome.

Appendix E

All Responses to the Survey

Note: The author modified some of the answers to delete irrelevant information.

Australian Courts

Q. Does your court use social media webpages to inform the public about the court's activities (i.e. Facebook, Twitter)?

(yes/no)

Family Court: Yes, but only a Twitter account.

Federal Court: The Federal Court does not use social media such as Twitter and Facebook at this stage. However, we do take an active interest in its development and are part of a working group in Victoria — consisting of other courts, tribunal and government agencies — looking at this issue.

NSW Supreme Court: It does not currently engage in social media activities.

NT Supreme Court: No.

SA Courts: No.

VIC Children's Court: No.

VIC Magistrates' Court: Yes.

VIC Supreme Court: Yes.

WA Supreme Court: No.

Q. If yes, please provide a link to all of the social media webpages.

Family Court: The Twitter handle is: @FamilyCourtAU

VIC Magistrates' Court: <https://twitter.com/magcourtvic>

VIC Supreme Court: <https://twitter.com/SCVSupremeCourt>

<http://www.youtube.com/user/SupremeCourtVictoria?feature=guide>

Q. If yes, please describe the activities of your court on social media webpages (i.e. has a Facebook page, has a Twitter account).

Family Court: Only Twitter and there are no plans to become involved on Facebook.

VIC Magistrates' Court: The Court has a Twitter account, which is used to connect with court users and the wider community. We regularly provide information about new magistrates, changes to legislation, changes to court process and new practice directions, as well as details of upcoming and past community engagement activities.

At this stage, the only social media platform used by the Court is Twitter.

VIC Supreme Court: Twitter is used predominantly as a signpost to take followers to judgments and sentences on the court's website or Austlii. Twitter is also used regularly to publicise court decisions, announcements and events. Twitter is followed to monitor news reports and court reporting.

The court has established a YouTube channel, currently containing two in-house videos of significant reform announcements.

Q. If yes, what is the title of the person responsible in your court for maintaining the social media webpages (i.e., a public information officer)?

Family Court: There are three staff members responsible for sending and authorising the tweets which is beneficial for a number of reasons: 1) to ensure that it is a 'business-wide' approach and doesn't focus on one aspect of court business (e.g., it is not just for media interest): 2) to spread the responsibility and to encourage broader ownership of the account and 3) to maintain consistency in the number and frequency of tweets, should the staff members be on leave.

The three staff members are from different areas of the court: Media Manager — tweets information on media reports or interviews, media releases, information from the Chief Justice and ceremonial sittings.

Manager National Enquiry Centre — tweets practical information such as registry closures, updates on the Court's portal and new judgments

Communications Manager — tweets information that has been updated on the website such as new publications, practice directions, fee updates.

VIC Magistrates' Court: There are two staff members responsible for the Court's Twitter account, the Manager, Magistrates' Support Services and the Court Advice Officer (Operations)

VIC Supreme Court: Strategic Communication Manager

Q. If yes, please describe approximately how often new information is added onto your court's social media webpages.

Family Court: We are averaging 3–4 tweets per week. From commencement on 15 October 2012 to 8 August 2013, the court had sent 139 tweets and it has 579 followers.

VIC Magistrates' Court: The Court aims to regularly post new information, with this occurring daily or weekly depending on the number of reportable items.

VIC Supreme Court: Twitter is very much driven by court business and activity. Tweets are posted regularly, but not necessarily daily. Tweets are limited to factual information, without comment or personal views.

Q. If yes, why has your court decided to use social media?

Family Court: To provide information direct to our various audiences by pushing it through new channels to allow urgent information such as an outage at a registry to be immediately pushed out to followers who could then further expand the audience by re-tweeting.

To have an avenue to release critical information or message directly to the public without having to rely on traditional forms of media which can at times, skew the message that the Court is attempting to convey.

VIC Magistrates' Court: With the support of the former Chief Magistrate, the Court decided to use social media as an additional way to inform court users and the community of the Court's activities as well as keeping them up to date with legislative reforms and any changes to court processes and fees. It is a great tool for keeping in touch with our users, and they can contact us using this forum.

VIC Supreme Court: A Twitter account was established initially to monitor court reporting, but also in recognition of the fast emerging trend of 'instant' media being used and adopted by community members who did not necessarily follow traditional media. During times of budget restraints, Twitter provides a free and easy-to-use social media platform. A YouTube channel was established as a platform to host our own video productions, as an educational tool on some aspects of Court business.

Q. If yes, has your court received any benefits from using social media? (yes/no)

Family Court: Yes.

VIC Magistrates' Court: Yes.

VIC Supreme Court: Yes.

Q. If yes, what are the benefits that your court has received?

Family Court: Many benefits were achieved with the introduction of a Twitter account and the objectives for commencing the account as listed above, have been achieved. The Court initially commenced the account as a pilot to determine whether it was a viable and worthwhile form of communication, and without significant risk. Following the six-month pilot, the Court undertook a review and it was determined that there were many benefits and that the account should continue. The review included stakeholder feedback which was quite positive. There had been concerns, given the sensitive nature of the Court's jurisdiction, that the account would be at risk of being used inappropriately by disgruntled members of the public. This has not been the case and as most of the followers are lawyers or related to the law, a professional tone has been set.

The other benefit is that there is minimal/no cost associated apart from the time of personnel.

VIC Magistrates' Court: The Court has received great benefit from establishing the use of social media. It has given us the opportunity to effectively connect with members of the public, who we may not have previously engaged with, and the public are easily made aware of the Court's community engagement activities and recruitment opportunities. The use of social media has also provided the Court with another way of collaborating with other Victorian Courts by participating in the Courts' Social Media Group.

VIC Supreme Court: Increased awareness, via Twitter. Disseminating a message in a timely fashion, having it retweeted to increased followers. Court tweets provide credibility, before or after media tweets on Court activity, being the authoritative primary source. Followers receive information that a sentence or judgment has been handed down in a more timely manner and can go to the full text sooner instead of relying upon traditional media to tell them about a case.

Recognition among court peers as a progressive jurisdiction setting the benchmarks. The Supreme Court of Victoria was the first court in Australia to establish an active Twitter account two years ago.

Q. If no, please provide a reason if you can.

NSW Supreme Court: Until now, there has been no official consideration given to the need for the Court to use social media and no submissions made to the Court on the issue. However, there has been some informal discussion within the Court about social media engagement and contact made with other jurisdictions both here and overseas to ascertain what is done in other places.

SA Courts: There are insufficient resources to examine social media and potential benefits from adopting it. Nevertheless, there is a working party consisting of the Former Chief Justice, the Honourable John Doyle AC QC, and other judges to examine the in-court use of live text-based forms of communication.

There is currently a Facebook page for the Hon John Doyle AC QC, which he did not set up himself.

The Court does not have the resources to dedicate to a Facebook page.

There may be some benefit for the Courts Education Manager to engage with school students for civics education and legal studies through Facebook.

VIC Children's Court: Court officials publish very few written decisions and are concerned that there would not be enough information to tweet about. They do not publish daily lists online due to the legislative restriction on publication of identifying details relating to people involved in cases before the court. Resources may also be an issue.

WA Supreme Court: We are not using social media webpages. We did look at it carefully, but decided not to use it, mainly due to resourcing and the practical issues of constant maintenance of the sites.

Q. If no, please state whether your court is considering implementing social media activities in the future.

NSW Supreme Court: The Court is currently considering the use of social media, particularly Facebook and Twitter, to communicate directly with the community, beyond its static website.

NT Supreme Court: The Judges of the Northern Territory of the Supreme Court are currently assessing the value of social media and if proceeded with will need to consider any pitfalls, develop supporting policies and any resourcing implications.

VIC Children's Court: Court officials are open to using social media — they just need to be convinced that there's a good reason to start using social media.

Canada, USA and UK Courts

Q. Does your court use social media webpages to inform the public about the court's activities (i.e. Facebook, Twitter)? (yes/no)

Alberta Court of Queen's Bench: No.

British Columbia Court of Appeal: No.

Nova Scotia Courts: Yes.

Saskatchewan Courts: Yes.

Massachusetts Court System: The Massachusetts Court System does not currently use social media as a public communications tool, but a social media plan will be developed in the near future.

United Kingdom¹: No. The courts in the UK do not have the time or resources to communicate in such a fashion.

Q. If yes, please provide a link to all of the social media webpages.

Nova Scotia Courts: https://twitter.com/CourtsNS_News;

https://twitter.com/CourtsNS_Notice; https://twitter.com/CourtsNS_NSCA;

https://twitter.com/CourtsNS_NSSC; https://twitter.com/CourtsNS_NSPC;

https://twitter.com/CourtsNS_NSSM.

Saskatchewan Courts: Twitter: <https://twitter.com/SKCourts>;

YouTube: <http://www.youtube.com/channel/UC192QXff7WP3ktJvIIB304g?feature=watch>.

Q. If yes, please describe the activities of your court on social media webpages (i.e., has a Facebook page, has a Twitter account).

Nova Scotia Courts: The Courts of Nova Scotia use their Twitter accounts to Tweet news items about the Court, notices for the legal profession, and links to decisions of the Courts as they are released (daily). The Twitter accounts are set up as a one-way (outward) communications tool. The Courts do not get tweets in return.

Saskatchewan Courts: The Courts have a Twitter page and a YouTube page.

Q. If yes, what is the title of the person responsible in your court for maintaining the social media webpages (i.e. a public information officer)?

Nova Scotia Courts: There are two; The Manager of Publications (Decisions); and The Director of Communications.

Saskatchewan Courts: Courts Communication Officer.

¹ A member of Her Majesty's Tribunals Service Performance Analysis, Reporting Team completed the survey.

Q. If yes, please describe approximately how often new information is added onto your court's social media webpages.

Nova Scotia Courts: The Manager of Publications (Decisions) sends out tweets with links to released decisions every day. The Communications Director sends out tweets about News and Notices twice a month for each, on average.

Saskatchewan Courts: Twitter: 3–4 times a week; YouTube: rarely.

Q. If yes, why has your court decided to use social media?

Nova Scotia Courts: We used to have an RSS Feed service on the Courts' website. It did not get many subscribers. We have hundreds of subscribers for our Twitter accounts.

Saskatchewan Courts: To make information more accessible to users by placing it where they can access it easily.

Q. If yes, has your court received any benefits from using social media? (yes/no)

Nova Scotia Courts: Yes.

Saskatchewan Courts: Too soon to determine. The Twitter and YouTube accounts were launched in March 2013.

Q. If yes, what are the benefits that your court received?

Nova Scotia Courts: We have many more subscribers to the Twitter service than we had for the RSS service. The Twitter service also appears to be drawing more people to the website where, we assume, they discover the other content available to them on the website.

Q. If no, please provide a reason if you can.

Alberta Court of Queen's Bench: The reason we do not is because we do not have the staff needed to administer social media interaction.

British Columbia Court of Appeal: The cost of providing a social media portal is beyond the Court's budget. The Court, as an institution, 'pushes' information out into the public and does not engage in a dialogue. In fact, it often cannot engage in a dialogue about its decisions.

Q. If no, please state whether your court is considering implementing social media activities in the future.

Alberta Court of Queen's Bench: Although the above assessment effectively closes the door, if we did have the resources, we would need to engage in an analysis to assess the

benefits and risks of engaging the public in social media. Judicial expression is subject to many limitations based on principles such as impartiality, independence and fairness. These constraints may not conform to the nature and purpose of social media.

British Columbia Court of Appeal: The Court will continue to look at the advantages and disadvantages of using social media in the future.

United Kingdom: No. Lack of resources. In the current UK economic climate of austerity there is no scope for this.

Appendix F

Possible Model Policy for Australian Courts on Journalists Using Electronic Devices in the Courtroom

Introduction

This policy sets out Australian accredited journalists' permitted and prohibited uses of electronic devices in all Australian courtrooms,¹ except Family Courts.² It is based on the following principles:

- a. Judicial officers must ensure that court proceedings are interrupted as little as possible;³
- b. Open justice must be maintained;⁴ and
- c. Permitting accredited media to use electronic devices in the courtroom assists the media to inform the public about court proceedings.⁵

Definitions for the Policy

- a. 'Accredited journalists' means journalists who are accredited pursuant to the Courts' *Media Accreditation Policy*;⁶
- b. 'Courtroom' means a room in which a hearing occurs;⁷
- c. 'Electronic device' means 'any device capable of transmitting and/or recording data or audio, including smartphones, cellular phones, computers, laptops, tablets, notebooks, personal digital assistants, or other similar devices';⁸ and

¹ Provincial Court of British Columbia, *Policy on Use of Electronic Devices in Courtrooms* (17 September 2012) 1 <http://www.courts.gov.bc.ca/supreme_court/media/PDF/Policy%20on%20Use%20of%20Electronic%20Devices%20in%20Courtrooms%20-%20FINAL.pdf>.

² *Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings*, Rule 3(c) (2003).

³ Courts of Saskatchewan, *Twitter and Other Text-Based Forms of Media Communication from Saskatchewan Courtrooms* (2010) 1 <http://www.sasklawcourts.ca/docs/Twitter_Protocol_2012.pdf>.

⁴ *Ibid.*

⁵ Judiciary of England and Wales, *Practice Guidance: The Use of Live Text-Based Forms of Communication (including Twitter) from Court for the Purpose of Fair and Accurate Reporting* (14 December 2011) 2 <<http://www.judiciary.gov.uk/publications-and-reports/guidance/2011/courtreporting>>.

⁶ Provincial Court of British Columbia, above n 1, 1.

⁷ *Ibid.*

⁸ *Ibid.*

- d. 'Judicial officer' means any Justice of the Peace, Magistrate, Registrar, Master or Judge in Australia.⁹

Use of Electronic Devices in the Courtroom

1. Accredited journalists may use electronic devices in courtrooms to send and receive messages and use social media, without seeking permission,¹⁰ except as follows:
 - a. where the accredited journalist causes any interference with court technology;¹¹
 - b. where the accredited journalist takes photographs, videos or audio recordings in a courtroom;¹² or
 - c. where a court order or legislation forbids the public from attending the court proceeding.¹³

Judicial Officer's Discretion

2. Notwithstanding this policy, the presiding judicial officer(s) may use his/her/their discretion to decide whether accredited journalists may use electronic devices in his/her/their courtroom.¹⁴ If the presiding judicial officer(s) decide(s) to use his/her/their discretion not to permit social media in the courtroom, he/she/they must provide express reasons.
3. It is possible to appeal a judicial officer's decision. [Courts should explain how to appeal a judicial officer's decision here.]

⁹ Ibid.

¹⁰ Ibid 2.

¹¹ Court of Queens Bench of Alberta, *Electronic and Wireless Devices Policy* (January 2012) 2 <www.albertacourts.ab.ca/qb/Electronic_Policy_FINAL.pdf>.

¹² Ibid.

¹³ Canadian Centre for Court Technology, *Guidelines Regarding the Use of Electronic Communication Devices in Court Proceedings* (November 2012) 2 <<https://modern-courts.ca/documentation/Use%20of%20Electronic%20Communication%20Devices%20in%20Court%20Proceedings.pdf>>.

¹⁴ Provincial Court of British Columbia, above n 1, 2.

Publication Bans

4. Accredited journalists must abide by any publication bans that the judicial officer(s) release(s).¹⁵

Penalties

5. An accredited journalist who does not follow this policy may be subject to one or more of the following penalties:¹⁶
 - a. He or she may be instructed to turn off his or her electronic device or provide it to court staff while he or she is in the courtroom;¹⁷
 - b. He or she may be instructed to leave the courtroom;¹⁸
 - c. He or she may forfeit his or her media accreditation;¹⁹
 - d. He or she may be prosecuted for contempt of court;²⁰
 - e. He or she may be prosecuted for breaching a suppression order;²¹ or
 - f. Any other order that the relevant judicial officer thinks fit.²²

¹⁵ Canadian Centre for Court Technology, above n 13, 2.

¹⁶ Provincial Court of British Columbia, above n 1, 3.

¹⁷ Court of Queens Bench of Alberta, above n 11, 2.

¹⁸ Ibid.

¹⁹ Provincial Court of British Columbia, above n 1, 3.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

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