# The Courts v Twitter: The Future of Live Court Reporting in NSW

## Chris Paver examines the use of Twitter in courtrooms and the challenges posed by social media to the administration of justice.*

NSW Attorney General Greg Smith's attempt to tighten a loophole in court security laws has drawn attention to an emerging battleground for today's Internet-savvy court reporters. In a Bill[1] introduced in late 2012, he proposes to ban the use of devices like smartphones or laptops to transmit sounds, images or information "that forms part of the proceedings of a court" from inside courtrooms or places where courts are sitting. All of a sudden, it appeared that journalists caught Tweeting, blogging, texting and even emailing from court could face fines of up to $22,000 and a year in jail – a hefty penalty for simply reporting on the activities of the court.[2] Following concerns discussed in the press, Smith has now clarified that journalists and lawyers will be exempt from the restrictions under a new regulation[3] – essentially leaving the question of live tweeting to the courts.

**How, for example, can the courts ensure the due administration of justice when any member of the public, armed only with a mobile phone, could easily transmit live what one witness says in court to another witness waiting outside to give evidence?**

Explaining the amendments in Parliament, Smith said they were intended to address "recent security incidents" that highlighted the law's failure to keep pace with modern technology.[4] How, for example, can the courts ensure the due administration of justice when any member of the public, armed only with a mobile phone, could easily transmit live what one witness says in court to another witness waiting outside to give evidence? While the planned media exemption may soften the blow for journalists, however, it also illustrates the need for legislators and the courts to redefine the fundamental principle of open justice in the digital age.

### A step in the wrong direction

In late 2011, the Lord Chief Justice of England and Wales, Lord Judge, delivered new guidance allowing journalists to Tweet from inside courtrooms, without seeking permission. He was aware of the risks, especially in the context of criminal trials, but concluded:

> "A fundamental aspect of the proper administration of justice is open justice. Fair, accurate and, where possible, immediate reporting of court proceedings forms part of that principle."[5]

Under the guidance, judges retained the right to prohibit live, text-based reporting in the interests of justice. Less than two months later, the judge in a high profile case did just that after a Twittering journalist was believed to have used the service both to name a juror and report on matters discussed in the absence of the jury, according to media reports.[6] The case, and several others internationally, highlight the well-documented risks that instant publication can pose in the context of the courts.

Such examples raise concerns, but as social media continues to play a greater role in our daily lives, how far should NSW courts go to restrict its use? More importantly, could an overly aggressive approach restrict scrutiny and cement impressions that the courts are out of touch? It has been noted on numerous occasions that greater transparency and public access can boost public understanding of and confidence in the judicial process.[7] In the High Court of Australia, it has been observed that 'the public administration of justice tends to maintain confidence in the integrity and independence of the courts.'[8]

Introducing the Bill last year, Smith emphasised that the motivation behind the proposed ban was not to target journalists. He said:

> "…it is important to preserve the principle of open justice. Although not common, there may be circumstances in which journalists wish to use electronic devices to report on proceedings contemporaneously through new media, such as Twitter or by blogging."[9]

He went further in February, stating that:

> "Under the exemption, journalists will have the same freedom to report on court proceedings as they do under the current

1 Courts and Other Legislation Further Amendment Bill 2012 (NSW), Schedule 1 Item 1.8.

2 Ibid.

3 James Hutchinson and Alex Boxsell, NSW waters down court social media laws (19 February 2013), The Australian Financial Review, < http://www.afr.com/p/technology/nsw_waters_down_court_social_media_X6dcNSKJThJ5nMX0w7C7gM>

4 New South Wales, Parliamentary Debates, Legislative Assembly, 21 December 2012 (Greg Smith, Attorney General).

5 Judiciary of England and Wales, Guidance on Live, Text-Based Communications from Court (14 December 2011) <http://www.judiciary.gov.uk/publications-and-reports/guidance/2011/courtreporting>.

6 Andrew Pugh, Twitter ban at Redknapp trial after reporter names juror (25 January 2012) Press Gazette <http://www.pressgazette.co.uk/node/48623>.

7 Adriana C. Cervantes, 'Will Twitter Be Following You in the Courtroom?: Why Reporters Should Be Allowed to Broadcast During Courtroom Proceedings' (2011) 33:1 Hastings Communications and Entertainment Law Journal 150. See also Chief Justice of Canada Beverley McLachlin, 'The Relationship between the Courts and the News Media' in Patrick Keyzer, Jane Johnston and Mark Pearson, The Courts and the Media (Halstead Press, 2012) 24, 26.

8 Russell v Russell [1976] HCA 23, 8 (Gibbs J).

9 Hansard, above n 4.

court policies. They will continue to be able to use their phone or other electronic device to transmit information to colleagues outside the court, unless ordered otherwise by the judge."[10]

The statutory changes themselves do not provide an exemption for journalists. However, they emulate other provisions allowing judges to grant exemptions,[11] which means journalists could continue to tweet as long as the judge approved. The NSW Government has also consulted with media organisations to draft the regulations that will create an exemption for journalists. More complex questions about the status of citizen journalists and bloggers, however, remain unanswered. The question also arises, why not simply include the exemptions in the amendments? Media lawyer Kevin Lynch argues that without clear statutory exemptions, regulations could be changed without being reviewed by the Parliament. "If you're going to put a restriction which has the potential of restricting freedom of speech it's best that you're quite clear about the limits of those restrictions when you actually write the law," he said.[12]

The NSW Government's amendments come at a time when many courts themselves are becoming more proactive about improving public access. The Supreme Court of Victoria, for example, already has its own Twitter account with more than 1,300 followers, webcasts some of its key decisions online, and is reviewing its policy in relation to court reporting via Twitter.[13] On the other hand, Victoria has also been singled out for criticism in recent years over the excessive use of suppression orders.[14] In Queensland courts, reporters can already use laptops to live-Tweet proceedings, while in South Australia, a working party is now considering the use in court of live text-based forms of communication, including Twitter, with a view to producing a Practice Direction for the Supreme and District Courts.[15] In each of these examples the courts have recognised that digital and social media have forever changed the way in which people access information and communicate with each other. As Keyzer notes, the notion that we are still willing to wait until the evening news for information about what is happening in the courts seems "not just antiquated but bizarre".[16]

In this context, Smith's earlier assertion that circumstances where journalists wish to report live via Twitter are "not common" is also unlikely to stand the test of time. There is little wonder that many journalists and media organisations more broadly have already embraced Twitter and other powerful new tools like Facebook to instantly report to thousands of people, satisfying our itch for immediate access to information. Indeed, some media reports suggest journalists are already routinely tweeting and texting from court, perhaps even without the knowledge of judges and magistrates.[17]

## Twitter and the Courts

Journalists using Twitter to report on court proceedings is by no means a new phenomenon. In Australia, the R*oadshow Films Pty Ltd v iiNet Limited* copyright case in the Federal Court is widely acknowledged as the first case to be live-tweeted. In that case, Justice Cowdroy opted not to stop two journalists from using Twitter, noting in his judgment that he granted approval "in view of the public interest in the proceeding, and it seems rather fitting for a copyright trial involving the Internet".[18] Interestingly, in the end The Australian's publisher News Limited pulled the plug on journalist Andrew Colley's tweets, a spokeswoman highlighting that content should be published on "company properties" and that the company faced a risk when it could not "legal" journalists' content.[19]

**The wariness some judges and legislators have shown about the capacity for social media to be used either deliberately or inadvertently to derail judicial process is understandable**

Other courts have taken a different approach. In 2011, a Victorian magistrate chose to put a stop to tweeting during committal proceedings against a former police officer accused of leaking information to The Australian about a planned anti-terror raid.[20] Magistrate Peter Mealy warned journalists that tweeting the case would amount to contempt of court, explaining that it was inappropriate because statements made could later be suppressed or be the subject of objection.

The debate now taking place in NSW again highlights the challenges that social media poses to the courts as they search for the right balance between open justice in the digital age on the one hand, and the due administration of justice on the other. As Keyzer observes, "digital and social media have tipped the balance decisively in favour of freedom of communication".[21]

The wariness some judges and legislators have shown about the capacity for social media to be used either deliberately or inadvertently to derail judicial process is understandable. The "central thesis" of the administration of criminal justice, after all, is the entitlement of the accused to a fair trial under the law.[22] A simple Google search instantly reveals dozens of examples of where the Internet,

10 New South Wales, Parliamentary Debates, Legislative Assembly, 19 February 2013 (Greg Smith, Attorney General).

11 *Court Security Act 2005* (NSW) s 9(2)(a).

12 Stephanie Quine, Technology ban may not be smart move (17 January 2013), Lawyers Weekly, < http://www.lawyersweekly.com.au/news/technology-ban-may-not-be-smart-move >.

13 Email correspondence from Michelle Dall to Christopher Paver, 21 January 2013.

14 John Hartigan, 'The Courts and the Media in the Digital Era: A Media Perspective' in Patrick Keyzer, Jane Johnston, Mark Pearson The Courts and the Media (Halstead Press, 2012) 16, 18 and 22.

15 Email correspondence from Sylvia Kriven to Christopher Paver, 18 January 2013.

16 Patrick Keyzer, 'Who Should Speak for the Courts and How? The Courts and the Media Today' in Patrick Keyzer, Jane Johnston, Mark Pearson The Courts and the Media (Halstead Press, 2012) 5-6.

17 Nic Christensen, Reporters' live tweeting from court risks mistrials (5 December 2011) The Australian <http://www.theaustralian.com.au/media/digital/reporters-live-tweeting-from- court-risks-mistrials/story-fna03wxu-1226213631453>.

18 *Roadshow Films Pty Ltd v iiNet Limited (No. 3)* [2010] FCA 24.

19 Sally Jackson, Judges have final decision after Twitter enters court (19 October 2009) <http://www.theaustralian.com.au/media/judges-have-final-decision-after-twitter-enters-court/story-e6frg996-1225788100101>.

20 Chip Le Grand and Pia Akerman, With court a'Twitter, magistrate bans tweets (4 November 2011) The Australian <http://www.theaustralian.com.au/media/with-court-atwitter-magistrate-bans-tweets/story-e6frg996-1226185137003>

21 Keyzer, above n 16.

22 *McKinney v The Queen* (1991) 171 CLR 468, 478.

and social media in particular, have clashed with courtroom rules and traditions and, in some instances, prejudiced a case. In the United States, a Kansas judge declared a mistrial in a murder case after a reporter tweeted a grainy photograph from inside the courtroom featuring the profile of a juror.[23] Jurors themselves have even ventured online, one famously taking to Facebook to declare it was "gonna be fun to tell the defendant they're GUILTY". The person in question was dismissed from the jury and slapped with a fine and a five--page essay on the right to a fair trial.[24]

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Associate Professor of Journalism and Public Relations at Bond University, Jane Johnston, identifies four primary issues upon which concerns about tweeting from court are based:

- interruptions to proceedings;
- the fact that tweets are limited to 140 characters and cannot reflect context;
- the temptation to use smartphone cameras; and
- the capacity for people without knowledge of the laws of contempt or defamation to tweet from court.[25]

She notes that the first three arguments also applied to the well--documented issue of whether television cameras should be allowed in court, which, despite recent progress,[26] remains a sore point for the mainstream media.[27]

In relation to the idea that tweeting journalists might disrupt proceedings, the nature of the process itself suggests the contrary. In fact, it seems more likely that a journalist typing quietly on a laptop would cause no more distractions to the court than one scribbling on a notepad, and far fewer than one constantly leaving so they can tweet outside.[28]

It is obvious that a 140 character Tweet will never achieve the level of detail of a full court report or broadcast. For those who believe the media already focuses too much on sensational details and fails to report comprehensively, the shorter word count is hardly likely to inspire confidence. Of course in the case of Twitter, journalists are able to create hashtags in order to make their tweets easily searchable, arguably creating a more complete report.[29] However, there is no guarantee that individual tweets would not be read in isolation or be re-tweeted by to a wider audience. South Australia's Victims of Crime Commissioner Michael O'Connell has also warned that Tweeting carries with it the risk of "making a case sound more sinister", emphasising the need for stronger laws to protect the privacy and rights of victims.[30]

On the other hand, the Supreme Court of Victoria's decision to take to Twitter to report its own decisions clearly reflects its belief that 140 characters is enough to accurately reflect the outcome of a case. In the United Kingdom, Lord Judge's practice guidance on live, text base reporting presumes that journalists tweeting during court cases are using their devices for the purpose of producing fair and accurate reports.[31] Trained journalists also typically have a strong understanding of legal restrictions that already exist on court reporting, whether in print, broadcast or online. Of course, not all court reporters – or, indeed, citizen journalists or members of the public - may choose to use Twitter inside courtrooms. However, the fact that that they could simply leave the room and tweet from outside without breaching the law also brings into question the utility of the proposed restrictions.

The Supreme Court of Victoria's decision to use Twitter highlights another important aspect of the social media debate: that the courts are now, more than ever before, able to use technology to communicate directly with the public rather than relying exclusively on the mainstream media. The media remains vital. However, Victorian Chief Justice Marilyn Warren has noted:

> "The courts are getting to a stage where they have had enough of the inappropriate criticism, the skewing of information in the media, and we really need to try and seize the day ourselves and give some information to the community."[32]

Clearly, it is possible that social media could be used more widely to enhance the amount of information available to both journalists and members of the public.

A similar argument could be made in relation to the regulation of court reporting and attempts by the courts to suppress information that could taint witnesses or jurors or impinge on the rights of people involved in a matter. As Stepniak observes:

> "The internet is clearly not restricted by geographical boundaries of jurisdictions and by expectations that memory will fade with the passing of time – core factors on which contempt laws are premised. In the light of such implications of new technology courts may well need to protect the administration of justice through dissemination of accurate information rather than through increasingly ill-suited attempts at suppression."[33]

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23 Beth Stebner, Reporter causes mistrial in murder case by tweeting photos of juror – after judge warned against it (12 April 2012), Mail Online < http://www.dailymail.co.uk/news/article-2128556/Reporter-causes-MISTRIAL-murder-case-tweeting-photo-including-grainy-profile-juror--judge-warned-it.html>; AP, Reporter's photo causes mistrial in Austin Tabor drug murder case (11 April 2012) Huffington Post < http://www.huffingtonpost.com/2012/04/11/reporter-photo-austin-tabor-case-mistrial-declared-ann-marie-bush_n_1418723.html>

24 Ed White, *Judge punishes Michigan juror for Facebook post* (2 September 2010) The Seattle Times, <http://seattletimes.com/html/nationworld/2012785464_apusfacebookjuror.html>.

25 Jane Johnston, 'Courts' New Visibility 2.0' in Patrick Keyzer, Jane Johnston, Mark Pearson, The Courts and the Media (Halstead Press, 2012) 41, 45.

26 See Daniel Stepniak, 'Cameras in Court: Reluctant Admission to Proactive Collaboration' in Patrick Keyzer, Jane Johnston, Mark Pearson The Courts and the Media (Halstead Press, 2012) 66.

27 Hartigan, above n 14, in Keyzer et al, 21.

28 Mark L. Tamburri, Thomas M. Pohl, and M. Patrick Yingling, 'Twitter in the Courtroom' (2010) 15 Electronic Commerce & Law Report 1415; Adriana C. Cervantes, 'Will Twitter Be Following You in the Courtroom?: Why Reporters Should Be Allowed to Broadcast During Courtroom Proceedings' (2011) 33:1 Hastings Communications and Entertainment Law Journal 152.

29 Jacqui Ewart, 'Terrorism, the Media and Twitter' in Patrick Keyzer, Jane Johnston, Mark Pearson *The Courts and the Media* (Halstead Press, 2012) 55, 65.

30 Sean Fewster, South Australian lawyers say live tweeting from the court room is OK (17 July 2012) Adelaide Now <http://www.adelaidenow.com.au/news/south-australia/south-australian-lawyers-say-live-tweeting-from-the-court-room-is-ok/story-e6frea83-12264285261877>.

31 Judiciary of England and Wales, above n 5.

32 AAP, Victorian courts look at tweeting rulings (1 September 2011) CIO <http://www.cio.com.au/article/399317/victorian_courts_look_tweeting_rulings/>.

33 Stepniak, above n 33, 77.

In NSW, the proposed restrictions focus on instantaneous communication – attempting to stop people with "malicious intentions" from disrupting the work of the courts.[34] However, the challenges social medial poses to the criminal justice system are broader. Johnston refers to several examples of high profile criminal cases where discussions on Facebook and blogs have "raised significant problems for the administration of justice",[35] such as the seven and a half year search for Sunshine Coast teenager Daniel Morcombe which resulted in a 42-year-old man being charged. More recently, social media users have been urged to exercise restraint and caution in their comments online about the death of Jill Meagher, in case they prejudice the trial of the man charged with her murder.[36] One Facebook hate page had reportedly attracted about 44,000 'Likes'.[37] The Herald Sun reported that Victoria would push for national laws to reduce the risk that comments on social media sites like Facebook could influence juries and thus compromise criminal trials.[38]

As Burd and Horan note, such prejudicial publicity is only a click away for the "Googling juror".[39] While the courts have numerous mechanisms to help prevent prejudicial publicity affecting jury trials – such as suppression orders and contempt laws, and jury directions to prevent juror misconduct like conducting Internet searches – several commentators believe these remedies have become less effective in the digital age. Some even propose trials by judge alone in certain cases.[40] In relation to the live communication covered by the planned amendments in NSW, the Chief Justice of Canada, the Right Honourable Beverley McLachlin's observation is pertinent: "If witness or juror contamination is a concern with television, is it not even more so with ubiquitous social media accessed or received automatically via a hand-held device?"[41] This issue is yet to be satisfactorily addressed.

## Conclusion

In the digital age, the principle of open justice – and its corollary that is the right of the media to report on court proceedings[42] – must go further than simply granting access to the courtroom. It is arguable that instant reporting, including journalists' use of Twitter to report on the activities of the court, is important to "increase transparency and public understanding of the judicial process".[43] Serious consideration should therefore be given to the merits of allowing live court reporting where appropriate. In NSW, the state government's proposal to modernise outdated court security laws seeks to address another important issue: ensuring that modern technology is not used to compromise the administration of justice. Without carefully crafted exemptions for journalists as a minimum, however, the threat to open justice is clear. As such, until the effect of the exemption for the media is known, exactly where that balance will lie in NSW remains uncertain.

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*This article is based on Chris' winning entry into the 2012-2013 CAMLA Essay Competition.

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34 Smith, above n 10.

35 Johnston, above n 32, 46.

36 Adrian Lowe, 'Trial by social media' worry in Meagher case (28 September 2012) The Age <http://www.theage.com.au/technology/technology-news/trial-by-social-media-worry-in-meagher-case-20120928-26pe4.html>.

37 Marianna Papadakis, Social media threatens justice in Jill Meagher murder case (1 October 2012)

<http://www.afr.com/p/national/social_media_threatens_justice_in_GXfIGAuxkDLEB2LzThiHTN>.

38 Grant McArthur, Victoria to push for new national laws to cut the risk that social media will jeopardise trials (2 October 2012), <http://www.heraldsun.com.au/news/victoria/victoria-to-push-for-new-national-laws--to-cut-the-risk-that-social-media-will-jeopardise-trials/story-e6frf7kx-1226486126154>.

39 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 Criminal Law Journal 103, 106.

40 Elizabeth Greene and Jodie O'Leary, 'Ensuring a Fair Trail for an Accused in a Digital Era: Lessons for Australia' in Patrick Keyzer, Jane Johnston, Mark Pearson The Courts and the Media (Halstead Press, 2012) 101, 119.

41 Chief Justice of Canada Beverley McLachlin, 'The Relationship between the Courts and the News Media' in Patrick Keyzer, Jane Johnston, Mark Pearson The Courts and the Media (Halstead Press, 2012) 24, 33.

42 *John Fairfax Publications Pty Ltd v District Court of NSW & Ors* [2004] NSWCA 324, 20 per Spigelman CJ.

43 Cervantes, above n 7, 158