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AUSTRALIAN COURTS AND SOCIAL MEDIA

ALYSIA BLACKHAM and GEORGE WILLIAMS

Social media, like Facebook and Twitter, are now pervasive in many sectors of Australian society. However, Australia’s courts are generally taking a cautious approach to using this technology to enhance and complement their processes. Where courts have used social media, it has generally been in the context of regulating its use by others (for example, by limiting journalists’ live tweeting of court cases or juries’ use of extraneous social media ‘research’) rather than considering how they might make active use of social media themselves. In this article, we examine the extent to which Australian courts are using social media. We consider the opportunities and challenges posed by such media for courts and assess the extent to which they could make greater use of the technology.

The rise of social media

Social media generally refers to the ‘set of online tools that are designed for and centered around social interaction’, including such platforms as Facebook, Twitter, YouTube and blogs. Unlike more traditional mediums such as print journalism, radio and television, social media depend on user-generated content and allow people to communicate and share content in a social setting. As a result, social media platforms are designed to facilitate a dialogue between users, rather than acting merely as a broadcast mechanism. This emphasis on dialogue and interaction is also what distinguishes social media from more traditional, static websites that are generally directed towards the passive viewing of content.

The key characteristics of major social media platforms are as follows:

<table>
<thead>
<tr>
<th>Platform</th>
<th>Description</th>
<th>Global Users</th>
<th>Australian Users (March 2013)³</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facebook</td>
<td>Online social networking service that allows users to create a personal profile, add other users as ‘friends’, exchange messages, join common interest groups, upload photographs and post comments or ‘status updates’. Users can select who is able to view the content they post.</td>
<td>Over a billion monthly active users and 618 million daily active users (as at December 2012).</td>
<td>11.5 million</td>
</tr>
<tr>
<td>Twitter</td>
<td>Online social networking and ‘microblogging’ site that allows users to send and read messages of up to 140 characters (‘tweets’). While tweets are publicly accessible, users may also send private messages to other users.</td>
<td>554 million registered users (as at April 2013).</td>
<td>2.1 million</td>
</tr>
<tr>
<td>YouTube</td>
<td>Video-sharing website that allows users to upload, view and comment on videos. Videos uploaded to the site are publicly accessible.</td>
<td>Over 1 billion unique users each month.</td>
<td>11 million</td>
</tr>
<tr>
<td>Blogs</td>
<td>Discussion or information sharing sites consisting of multiple ‘posts’. Blogs can be authored by an individual or group. Most blogs allow visitors to leave comments or, in some cases, to message other readers directly.</td>
<td>Varies according to hosting platform (eg Tumblr: 105.2 million blogs; Wordpress: 64.9 million blogs; LiveJournal: 63.3 million blogs).</td>
<td>6 million (Blogspot and WordPress.com)</td>
</tr>
</tbody>
</table>
Social media is now nearly ubiquitous in Australia, especially among younger users. The figures above demonstrate that nearly half of Australia’s population has signed up to Facebook and uses YouTube. The statistics are remarkable given that Facebook was only launched in 2004 and YouTube in 2005.

The courts and social media

Most Australian courts have not been early adopters of social media. However, there has been significant discussion around these issues, including at conferences and seminars of the Australasian Institute of Judicial Administration. Further, social media platforms are recognised as having the potential to enhance other government services. For example, the Australian Tax Office uses Facebook, Twitter and YouTube to publicise information about recent tax changes, initiatives and services; remind users of tax deadlines; foster interaction with individuals and provide information about tax topics. Similarly, the Department of Immigration and Citizenship uses these platforms and others to distribute information and encourage interaction on migration issues, including answering individual questions and queries. Given this, it is worth considering whether courts also might benefit from a stronger engagement with social media.

Potential benefits of courts using social media

In the broader governmental context, Bertot and his co-authors argue that social media offer four key opportunities for governments:

- Promoting ‘democratic participation and engagement’ by engaging the public in government processes;
- Enabling governments and the public to jointly ‘co-produce’ services by including the public in their development, design and delivery;
- Helping governments with ‘crowdsourcing solutions and innovations’ (that is, soliciting answers to problems from a large group of people online); and
- Facilitating transparency and accountability to build public trust and foster governmental accountability.

Many of these benefits are not applicable to courts: no court for example will wish to crowdsource solutions to legal problems. However, other benefits could apply to courts including improved ways of cultivating democratic participation and public engagement with legal processes. Improving the accessibility and equity of court processes is a key focus of contemporary justice initiatives. In a democratic society, it is widely recognised that a court system should operate fairly, be open to all, and function efficiently and effectively. Recognising this, courts and tribunals seek to improve the ways in which they interact with the broader community. In this area, social media could be a useful means of both making courts more accessible and ensuring that they are responsive to the needs of users. For example, individuals may use social media to ask questions of court officers and raise concerns regarding legal processes.

Further, by facilitating individuals’ engagement with the courts, social media may perform an educative function and promote the general public’s understanding of court processes. This is particularly pertinent given the limited knowledge that many people have of the legal system: as de Jersey argues, ‘the work of the court is, I suggest, the least understood operation of government’. Engaging with the public through social media can provide courts with a direct channel of communication to the general public, allowing them to present their own information on issues without filtering by the media. By using social media, courts are provided with the opportunity to correct inaccuracies in media reporting and publicise information that may not be regarded as ‘newsworthy’. Further, social media can help to reaffirm public confidence in the legal system by assisting courts to build more personal relationships with individuals thereby showing a more ‘human’ side to the judicial system.

Potential pitfalls of courts using social media

While the use of social media offers potential benefits to courts, it is accompanied by a number of challenges and hazards. First, it is possible that engaging with social media will affect the integrity of the courts and reduce public confidence in judicial processes. de Jersey argues that courts need to operate with a degree of detachment to preserve their authority. Engaging with the public through social media might reduce this level of detachment, thereby undermining the integrity of the courts.

In particular, concerns have been raised that engaging with vexatious or discontented litigants via social media may drain court resources and damage the courts’ reputation and authority. Similarly, it is possible that the collaborative and participatory nature of social media is antithetical to traditional judicial processes, which are far more geared to the transmission of information for the public’s passive reception. If courts use social media only for information transmission purposes, this will promote a very limited form of ‘transparency’ and fail to engage with the full potential of social media. In turn, this limited engagement might in some cases heighten public scepticism of the courts. As a result, courts will need to consider carefully whether limited engagement with social media will prove more damaging than no engagement at all.

Second, engagement with social media may expose the courts to criticism or jeopardise the due administration of justice. Mediums such as Twitter allow impulsive comments to be instantaneously visible, globally. There is a risk that court officers may make a comment that is liable to be criticised or release information prematurely into the public sphere. This risk would need to be carefully managed through staff training in the use of social media and supervision of the sort of information and comments that are made on such platforms.
Internal barriers in the courts themselves may also limit their ability to utilise social media effectively. Like other government issues of privacy, security and archiving, through appropriate court officer training and adopting risk mitigation strategies. Policies of the respective social media platforms. It is unclear whether these policies are consistent with government requirements, particularly given social media site policies are constantly evolving and changing.

Third, the use of social media by government bodies raises issues of access, equity and technical literacy among the general population. In particular, if courts are going to use social media as a means of disseminating information, it is necessary to consider who will have access to that information and who will be excluded. Social media and Internet usage are far less common among older Australians than younger Australians. In mid-2008 only 4 per cent of Australians aged over 65 reported using a social networking site in the previous 12 months. This may be attributable to a lack (or perceived lack) of technical skills among older Australians: when asked in 2008 to self-assess their competency using the Internet, 52 per cent of respondents aged 65 to 69 and 49 per cent of respondents aged 70 and over felt their competency levels were below average.

The availability of Internet access more generally in Australia also varies with socio-economic status. In 2010–11, 79 per cent of Australian households had access to the Internet at home. However, only 55 per cent of households in the lowest income quintile had such access. Further, even with the rollout of the National Broadband Network, individuals living in rural Australia may still have more limited Internet access. As a result, younger, urban and more affluent individuals and households are more likely to have access to material released on social media. If courts wish to utilise social media as a means of connecting with and informing the general public, it will be necessary to ensure there are other ways for people to receive the same information. Hence, while social media may be a useful tool for courts, it should not displace other avenues of communication.

It may also be necessary for courts to consider whether certain types of information should not be released on social media to prevent non-users from being disadvantaged. For example, where material is time-sensitive or individuals are expected to meet tight deadlines, users of social media may obtain an unfair advantage if they are notified of material earlier than non-users. As a result, equity considerations may limit the usefulness of social media in the court context. However, this is unlikely to constrain the majority of uses of social media.

Fourth, even if individuals have access to social media, it is unclear whether users want to engage with public bodies in this way. A 2011 survey of social media users found that only 7 per cent of respondents used social media to engage with government representatives or departments. As a result, even with a concerted effort to communicate with the general public, courts’ use of social media may not impact on most social media users. However, social media may still be effective as a communication tool with segments of the public such as the legal community and the media.

As a fifth point, concerns have been raised that social media has significant limitations in conveying complex information, like that distributed by courts. Keyzer notes that it is already difficult to convey complex material in traditional media outlets. These challenges can be compounded in social media forums, where messages are often limited in length (for example, Twitter messages are limited to 140 characters). It is likely to prove challenging for courts to provide sufficiently nuanced and accurate depictions of issues within the constraints of social media. As a result, courts will need to consider carefully how they will use social media and which purposes it is suited to. While social media may be sufficient for alerting people to new judicial developments, such as decisions being handed down, it is unlikely to facilitate public dialogue of any depth.

Finally, social media also raises significant issues in relation to data security, individual privacy and archiving of information. At present, government agencies that use social media might be seen as implicitly endorsing the privacy, security and archiving policies of the respective social media platforms. It is unclear whether these policies are consistent with government requirements, particularly given social media site policies are constantly evolving and changing.

In relation to data security, recurrent ‘hacking’ scandals, particularly on Twitter, have raised concerns as to the adequacy of social media platforms’ security policies. By establishing a presence on social media, courts run the risk of unauthorised individuals accessing their information and their account being hijacked (i.e. someone else posting in their name). Both scenarios could seriously affect the courts’ reputation and public standing.

Further, individuals who engage with courts on social media may inadvertently disclose personal information to the public at large, raising privacy issues. While social media platforms generally have privacy policies in place, it is unclear whether these are consistent with broader governmental data requirements. Recognising these challenges, the Family Court of Australia publicises information on its website about personal privacy and the use of Twitter, encouraging individuals to:

Remember, any posts you make on any social networking websites like YouTube, Facebook and Twitter are publicly viewable and searchable. Please be aware that what you post may remain online indefinitely and can be found through search engines and online archives. We ask that you protect your personal privacy and the privacy of others by not posting personal information on the Court’s social networking account.

These issues are particularly pertinent in the context of the Family Court, where cases are subject to a number of privacy rules, especially those that involve children. By engaging with social media, courts may inadvertently encourage individuals to breach privacy rules or suppression orders.

The use of social media also raises issues of data archiving and the retention of information. Without a concerted strategy to secure and retain information, data posted on social media sites can be easily lost. To address this, NSW State Records, the Public Record Office Victoria and the National Archives of Australia have developed advice and guidelines on managing social media information, including recordkeeping strategies for capturing and keeping data. Before using social media, courts must consider and address issues of privacy, security and archiving, through appropriate court officer training and adopting risk mitigation strategies.

Internal barriers in the courts themselves may also limit their ability to utilise social media effectively. Like other government departments and institutions, courts may have limited time and resources to constantly update and monitor social media sites. Further, without training, court officers may lack the skills and understanding to make best use of social media.
Use of social media by Australian courts

Australian courts are increasingly focusing on how they engage with the public. For example, all superior courts have appointed public information officers or court information officers to manage public communication strategies. However, with the notable exception of those in Victoria, it appears that most court information officers are not engaging with social media platforms. In a survey of such officers previously conducted by Johnston, no respondents used Twitter, blogs or Facebook in their role. However, the use of social media was being considered in one jurisdiction and one court had previously posted to YouTube. While courts are becoming more proactive in their public communications, for most, this does not appear to extend to engaging with social media. Further, there was recognition that courts may lack the staffing levels to manage the use of social media effectively.

Johnston’s findings are supported by an empirical survey we conducted in April 2013 of Australian federal, state and territory courts’ presence on social media platforms, canvassing Twitter, Facebook, YouTube and blogs. In relation to Twitter, the only courts with official Twitter accounts are the Family Court of Australia (@FamilyCourtAU), Federal Court of Australia (@fedcourtAus), Federal Circuit Court of Australia (@CircuitCourtAU), Victorian Supreme Court (@SCVSupremeCourt), Victorian County Court (@CCVMedia) and the Victorian Magistrates’ Court (@MagCourtVic). While each Court has established an account, they are used in substantially different ways.

The Family Court of Australia uses its Twitter account to publish court news (eg articles featuring judges); judgments delivered by the Court; administrative matters (eg registry opening hours, changes to fees, court disruptions); broader news (eg reports by the Attorney General, relevant talks at conferences) and educational items (eg informing people of the ability to file court documents online). While the Federal Court of Australia and Federal Circuit Court have created Twitter accounts, neither has been used. As at 24 April 2013, no tweets had been recorded. In contrast, the Victorian Supreme Court actively uses its account to tweet short summaries of judgments (eg ‘Justice Betty King jails a man to 14 yrs who has attacked three partners over his lifetime, killing one in Perth’, 23 April 2013); links to oral judgments; notices of judicial appointments; links to the live streaming of trials; retweets of relevant newspaper articles; and publicity for events. The Victorian County Court uses its account to publicise events, educational items (eg directions group guidelines) and provide administrative information (eg about scheduled hearings). Finally, the Victorian Magistrates’ Court tweets information about judicial appointments, events, practical information and occasionally provides links to judgments.

Of the Australian courts, the Victorian Supreme Court is engaging with Twitter and other social media tools in the most active way, including by making trials and oral judgments available online via the Court’s website. Further, Twitter has been used in the past to respond to criticism of the Court and publicly present the Court’s perspective. This has the potential to significantly improve the accessibility of the Court and the transparency of its processes. Recognising this, the Chief Justice of the Supreme Court of Victoria, Marilyn Warren, has committed to ‘accelerating the use of social media’ for ‘communicating the work of the court’, via Twitter, blogging, the Court’s website and, potentially, Facebook. However, this use also raises some of the challenges discussed above: is it possible to encapsulate the rationale of a judge’s decision in 140 characters? Does this risk oversimplifying complex legal issues? At the time of writing the Court has 1641 followers on Twitter, most of who appear to be lawyers, journalists and university students, perhaps reflecting the demographics of those who use Twitter in Australia. As a result, the use of social media appears to have improved the Court’s accessibility to a specialist audience, though not to the public at large. This supports the conclusion that social media offers advantages in communicating with a specialist audience, but more traditional forms of communication should still take precedence for connecting with the broader community.

While some courts have official Twitter accounts, no Australian judge appears to be using Twitter in their individual official capacity. However, Chief Justice Warren occasionally blogs in an individual professional capacity for the Melbourne Herald Sun, addressing topics such as the power of sport to prevent antisocial behaviour and reform to criminal trials. Further, judges occasionally appear on other people’s blogs, such as by giving interviews. Given the nature of the judicial role and the challenges experienced in other jurisdictions reported above, it is understandable that judges have only limited engagement with social media in their official role. However, this does not preclude the possibility that judges are using social media as private individuals. For example, Judge Judith Gibson of the NSW District Court is a very active user of Twitter. While Judge Gibson’s Twitter profile does not mention that she is a judge, there is a link to her account from an external professional profile. If this personal social media use impacted on a judge’s professional responsibilities, this could be a cause for concern.

No court has established an official Facebook page. However, Facebook has automatically created unofficial pages for many Australian courts. While it is understandable that Australian courts have not prioritised engaging with Facebook, a number of pages that are critical of Australian courts have emerged on Facebook (‘Family Court of Australia (Discrimination)’ and ‘Family Court of Australia: Family Court — the business setup to make money from others [sic] misfortunes’). It is also common to find prejudicial comments on Facebook about crimes and contentious trials. Without an official presence to balance these derogatory sites, there is a risk that public confidence in the court system may be eroded.

The only Australian courts with an official YouTube ‘channel’ are those within the purview of the Courts Administration Authority in South Australia. That Authority has posted a series of ‘how to’ videos on YouTube, showing viewers how to navigate court processes like lodging an appeal and making intervention order applications. Courts often provide a link on their webpage to the videos. Further, the NSW Department of Attorney General and Justice has a YouTube channel that includes informational videos on jury service and court processes for victims of crime and people with cognitive disabilities. These videos have been watched hundreds of times. Finally, even though the majority of courts have not been uploading material to YouTube, as on Facebook, there is an ‘auto generated’ YouTube channel for some courts, including the High Court of Australia. Auto generated channels are created by algorithms to collect trending and popular videos on a specific topic. As a result, auto generated channels assemble a range of videos about the courts, some of which may be highly critical. By not posting their own material on YouTube, courts are limiting their opportunity to contribute to ongoing public debates about their operations and to counter damaging information.

Reflecting the growing importance of social media, a number of federal courts, including the Family Court of Australia and Federal Court, have revised or adopted social media policies in accordance with the Australian Public Service Commission’s (‘APSC’) guidance on the use of social media. The APSC’s guidance makes it clear that the Australian Public Service (‘APS’) Values and Code of Conduct apply to all online comment. Further, when making a comment in an unofficial capacity, APS employees are
required to:

- Notify their manager of any comment to be made in an ‘expert’ capacity that might reasonably reflect on their APS employment;
- Make it clear that they are not representing their agency or government;
- Not compromise their capacity to fulfill their duties in an unbiased manner or compromise public confidence in their agency or the APS, including through harsh or extreme criticism of the government, its policies, their agency’s administration or stakeholders; and
- Not disclose certain information without authority and follow agency policies relating to clearance of material for public release.

Conclusion

Social media offers important benefits to Australian courts. In particular, it enables courts to communicate directly to members of the public as well as a specialised audience involved in the regular use of court services. However, despite ongoing discussion of the issue, most Australian courts are making little use of social media, as demonstrated by their limited engagement with platforms like Twitter, Facebook, YouTube and blogs. Still there are some notable exceptions, including the Victorian Supreme Court and Family Court of Australia, which are engaging with Twitter, and the Courts Administration Authority in South Australia, which is using YouTube to good effect.

In the absence of official court involvement with social media, numerous pages and comments are appearing that contain information that is prejudicial to the interests and reputation of the courts. An official, authoritative source of information on Facebook and other social media platforms could be a useful means of countering this and bolstering the administration of justice.

Court reluctance to engage with social media is understandable. The new technologies pose challenges in relation to access, data security and confidentiality and, if used improperly, may compromise the integrity of the courts and the administration of justice. However, these challenges can be managed by introducing clear guidelines for the use of social media and educating court staff about how to minimise the risks associated with social media usage. In any event the pervasive influence of social media in Australian society, and the dangers of not engaging with this form of communication, mean that courts have more to gain than lose through making appropriate use of this new technology.

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4. See, eg, AUJA Public Information Officers’ Conferences, ‘Courts Interacting with the Public’ (30 March 2012, Brisbane) and (30 April 2010, Melbourne).
8. Ibid.
13. However, note that other bodies could also fulfill this educative role, such as (in Victoria) the Judicial College of Victoria, the Sentencing Council of Victoria and the Law Foundation of Victoria.
15. de Jersey, above n 9, 35.
18. For the factors that influence Internet use in Australia see Suzanne Willis and Bruce K Tranter, ‘Beyond the “Digital Divide”: Internet Diffusion and Inequality in Australia’ (2006) 42(1) Journal of Sociology 43.
21. Ibid.
25. Jacqui Ewart, ‘Terrorism, the Media and Twitter’ in Keyzer et al, above n 9, 55, 64.
32. According to the Federal Circuit Court, it has opened a Twitter account to ensure the Court has its preferred Twitter name (or ‘handle’) if it later decides to start tweeting: email from Denise Healy to the author, 2 May 2013.
33. Note that the Supreme Court of Western Australia has also attempted to introduce web streaming of court cases, but has been prevented from doing so by the WA Attorney-General and budgetary considerations: ‘Top Judge and Attorney-General in War Over “Court TV”’, PerthNow (online) 9 May 2013 <http://www.perthnow.com.au/news/western-australia/wa-attorney-general-blocks-court-tv/story-fnhocxo3-1226638437606>.
34. O’Shea, above n 1, 2.
35. Ibid.
41. See Courts Administration Authority, YouTube <http://www.youtube.com/user/CourtsAdminAuthority>.
42. Justice NSW, YouTube <http://www.youtube.com/user/JusticeNSW>.
44. Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Response to Attorney-General’s Department Portfolio Question No 141.