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Challenges of Social Media for Courts & Tribunals

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Dedication

This issues paper is dedicated to Mr Kennedy Krawitz.

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1. Introduction

This issues paper will start with two brief scenarios for you to consider. The first scenario is: you are presiding over a criminal trial. The accused tells you that she requests a new trial because your adult children, who no longer live with you, have several social media connections with the victim's family. The second scenario is: you are informed that an accused wrote about you on social media. He then appeared before you and was found guilty of an offence related to firearm use. The accused wrote that he would 'get you' on social media and he posted a photograph of bullets beside those words. Both of these scenarios are loosely based on situations that judicial officers faced in reality. This issues paper will discuss these situations later on. Do you know what you would do if either of these scenarios happened to you?

This issues paper, prepared for 'A Symposium: Challenges of Social Media for Courts & Tribunals' in May 2016, organised by The Australasian Institute of Judicial Administration Inc. and the Judicial Conference of Australia ("Symposium"), intends to help you decide what you would do in both of these situations, in addition to help you decide what you would do in other challenging situations that involve social media.

Social media is a relatively new type of technology that is having a significant impact upon the lives of individuals and upon the world at large. "Social media" is the contemporary phrase used to describe modern digital methods of communication having extensive reach and popularity; the forms of social media and the features thereof are continuously evolving.¹ Over sixty percent of Australians use social media.² Social media has also had a significant impact on Australian courts and tribunals in a relatively short period. The author of this issues paper commenced her research about how social media impacts upon the courts in 2011. At that time, there was little Australian research in this area and little evidence that Australian courts were taking significant advantage of the benefits that social media use offers or had taken significant steps to prevent the dangers that social media use may cause.

Currently, a body of Australian research exists about how social media impacts upon courts and tribunals. Many Australian courts and tribunals use social media to inform the public about court activities in real time. Australian courts and tribunals are also taking protective measures to try to prevent the dangers that social media may bring. Some of these dangers include: judicial officers using social media inappropriately in their personal capacity and jurors using social media inappropriately. An example of one of the protective measures that Australian courts are taking is that they direct jurors not to use social media to discuss the trial that they are allocated to.

The specific topics that this issues paper will discuss and the order in which it will discuss them is as follows: (a.) what is social media and how it works; (b.) when judicial officers and tribunal members (and their families) personally use social media – the

¹ *Comite Interprofessionnel Du Vin De Champagne v Powell* [2015] FCA 1110 (20 October 2015) [131] (Beach J).

² Patrick Keyzer et al, 'The Courts and Social Media: what do Judges and Court Workers Think?' (2013) 25(6) *Judicial Officers Bulletin* 47, 51.

potential benefits and risks; (c.) when courts and tribunals use social media – the potential benefits and risks; (d.) when social media is used to analyse and comment upon the work of the courts and tribunals; and (e.) when social media is used maliciously or contemptuously to denigrate or threaten judicial officers or tribunal members; the issues involved, can judicial officers be protected, and the potential for Government response. These are the same topics that were discussed at the Symposium.

Ultimately, the purpose of this issues paper and of the Symposium was to provide Australian judicial officers with a basic understanding of social media and some of the issues that concern its use that are highly pertinent to courts and tribunals, to help ensure that the public's confidence in the judiciary is not lowered because of social media, and possibly even increased in some ways.³ Australian judicial officers currently vary regarding their knowledge about social media and the ethical issues associated with it. It is envisioned that this issues paper and the Symposium help to level the playing field.

When this issues paper refers to 'courts', it includes both courts and tribunals, and when it refers to 'judicial officers', it includes both judicial officers and tribunal members.

2. What is Social Media and how it Works

“[S]ocial media” encompasses social interaction via technological means. These technological means allow users to interact with vast amounts of information in unprecedented ways, and allows for personalization as a result of the ability to control the flow of information.⁴ Examples of popular social media include: Facebook, Twitter, YouTube, Instagram, LinkedIn and blogs. A person can use social media to share information,⁵ including comments, photographs and videos easily and it is normally free to do so.⁶ A person merely needs internet access on a computer or a digital media device to use social media. A large number of people can see what a social media user shares,⁷ and the information shared 'may remain on the internet in perpetuity'.⁸ A social media

³ This issues paper is distinctive in that a draft of it was provided to everyone who attended the Symposium before the Symposium occurred. Speakers at the Symposium spoke about the topics contained in it. The author of this issues paper modified this issues paper after the Symposium to ensure that it contained some of the relevant material that was shared at the Symposium. This document represents the final version of the issues paper.

⁴ Nicola A. Boothe-Perry, 'Friends of Justice: Does Social Media Impact the Public Perception of the Justice System?' (2014) 35 *Pace Law Review* 72, 81.

⁵ Norman H Meyer, Jr., 'Social Media and the Courts: Innovative Tools or Dangerous Fad? A Practical Guide for Court Administrators' (2014) 6(1) *International Journal for Court Administration* 1, 3.

⁶ Tom Johansmeyer, *Social Media is Free: Social Media Marketing is Not* (11 January 2011) <<http://www.adweek.com/socialtimes/social-media-is-free-social-media-marketing-is-not/35000>>.

⁷ Pamela D Schulz, 'Trial by Tweet? Social Media Innovation or Degradation?' (2012) 22 *Journal of Judicial Administration* 29, 33.

⁸ Lorana Bartels and Jessica Lee, 'Jurors Using Social Media in our Courts: Challenges and Responses' (2013) 23 *Journal of Judicial Administration* 35, 37.

user can also add comments, photographs, etc. to an existing social media post.⁹ Social media users can modify the privacy settings that apply to their social media to control who can see their social media accounts and posts.¹⁰

Social media has some similarities with the average website, but an important difference is that social media permit the public to post information immediately, and the average website generally does not. Social media are also highly interactive, whereas the average website usually is not.¹¹ It is also ordinarily easier for the average person to create and update a social media account than it is to create a website because social media is very user friendly. A person who wants to create a website will normally have to purchase the domain name (the online address) for the website, but a social media user does not need to do the same.¹²

The rest of this section will explain some of the most popular social media briefly.

Facebook

Facebook is a social media that enables ‘users to identify, contact, and befriend other members’.¹³ Each Facebook user can post photographs, comments and videos on their profile page, called a ‘wall’.¹⁴ Other people who use Facebook can press a button underneath any post on a Facebook ‘wall’ to indicate that they ‘like’ a post or that the post makes them feel ‘sad’, ‘angry’, etc.¹⁵ A Facebook user can send a ‘friend’ request to another Facebook user.¹⁶ Assuming that the other user accepts the ‘friend’ request, the two Facebook users can see each other’s Facebook ‘wall’ (depending on their privacy settings).¹⁷ The Facebook users can also send each other private messages.¹⁸ Over one billion people used Facebook daily as of December 2015.¹⁹

⁹ Jonathan Barrett, ‘Open Justice or Open Season? Developments in Judicial Engagement with Social Media’ [2011] *Queensland University of Technology Law and Justice Journal* 1, 15.

¹⁰ Bartels and Lee, above n 8, 37.

¹¹ Judge Judith Gibson, ‘Judges, Cyberspace and Social Media’ (2015) 12(2) *Judicial Review: Selected Conference Papers: Journal of the Judicial Commission of New South Wales* 237, 240.

¹² For an example of a website that sells domain names, see: GoDaddy, <<https://au.godaddy.com/>>.

¹³ Samuel Vincent Jones, ‘Judges, Friends and Facebook: the Ethics of Prohibition’ (2011) 24 *The Georgetown Journal of Legal Ethics* 281, 283.

¹⁴ Techopedia, *Facebook Wall* <<https://www.techopedia.com/definition/5170/facebook-wall>>.

¹⁵ Liz Stinson, *Facebook Reactions, the Totally Redesigned Like Button, Is Here* (24 February 2016) *Wired* <<http://www.wired.com/2016/02/facebook-reactions-totally-redesigned-like-button/>>.

¹⁶ Jones, above n 13, 284.

¹⁷ Samuel Vincent Jones, ‘Judges, Friends and Facebook: the Ethics of Prohibition’ (2011) 24 *The Georgetown Journal of Legal Ethics* 281, 284; Johnathan Micah, *How to Change the Settings for your Wall on Facebook* <<http://www.howcast.com/videos/488674-how-to-use-facebook-wall-posts-status-updates-and-messages/>>.

¹⁸ Jones, above n 13, 284.

¹⁹ Facebook, *Our Mission* <<http://newsroom.fb.com/company-info/>>.

Twitter

Twitter is a social media platform that people can use to post short comments, links, photographs and videos on their profile pages. The name of each profile page commences with the '@' symbol.²⁰ A person who uses 'Twitter' is called a 'Twitterer'.²¹ A Twitterer's Twitter post is called a 'tweet'.²² Each Twitter profile has a list of everyone who follows the Twitterer.²³ Twitterers can press a button to 'like' other Twitterer's tweets.²⁴ A Twitterer can post another person's tweet on their homepage, which is called 'retweeting'.²⁵ A Twitterer can press the 'follow' button on other Twitterers' profiles and then the other Twitterers' tweets appear on the Twitterer's homepage. Twitterers can discuss specific events, issues, etc. by adding the '#' symbol before a word. Twitterers can then search for the specific word or words that comprise the event, issue, etc. to read what other Twitterers tweeted about it.²⁶ Twitter restricts the length of tweets to 140 characters,²⁷ but certain programs can help a Twitterer to avoid this restriction.²⁸ Twitterers can also tweet a link to avoid this restriction: Twitter converts links to 20 characters, even if they are longer.²⁹ Three hundred and twenty million people used Twitter monthly, as of October 2015.³⁰

YouTube

YouTube is a social media platform that allows people to share videos.³¹ People who use YouTube have their own YouTube page called a 'channel' where they post videos and information about themselves.³² YouTube users can comment on videos posted on YouTube and they can also click 'like' and 'dislike' buttons.³³ YouTube users can adjust their privacy settings so that only certain people can see their videos.³⁴ Over eight hundred million different people use YouTube per month.³⁵

Instagram

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- ²⁰ *Comite Interprofessionnel Du Vin De Champagne v Powell* [2015] FCA 1110 (20 October 2015) [132] (Beach J).
- ²¹ Jane Douglas, 'All of a Twitter?' (2012) 26 *Online Currents* 305, 307.
- ²² *Ibid.*
- ²³ *Comite Interprofessionnel Du Vin De Champagne v Powell* [2015] FCA 1110 (20 October 2015) [133] (Beach J).
- ²⁴ *Ibid.*
- ²⁵ *Ibid.*
- ²⁶ Douglas, above n 21, 306.
- ²⁷ *Ibid.*
- ²⁸ See, for example, Long Tweets, in Jane Douglas, 'All of a Twitter?' (2012) 26 *Online Currents* 305, 306.
- ²⁹ Douglas, above n 21, 306.
- ³⁰ Craig Smith, *How Many People Use 1000+ of the Top Social Media, Apps and Digital Services* (19 February 2016) <<http://expandedramblings.com/index.php/resource-how-many-people-use-the-top-social-media/4/#.UxZPfYV9U40>>.
- ³¹ Judge Gibson, above n 11, 240.
- ³² *Comite Interprofessionnel Du Vin De Champagne v Powell* [2015] FCA 1110 (20 October 2015) [137] (Beach J).
- ³³ *Ibid.*
- ³⁴ *Ibid.*
- ³⁵ John G Browning, 'Social Media and the Law: Keynote Address' (2014) 68 *University of Miami Law Review* 353, 353.

People can use the social media platform Instagram to upload photographs and videos which they can share with others on Instagram or on other social media platforms, such as Facebook and Twitter. People who use Instagram can create a profile page that contains information about them, in addition to the photographs and videos. Instagram users can modify their privacy settings so that only selected people can see their content. They can also press a button to 'like' Instagram content.³⁶

LinkedIn

People who use the social media platform LinkedIn can create a profile that contains detailed information about their current and past employment.³⁷ They can also connect to people in many different industries.³⁸ Employers and employees can find information about each other on LinkedIn.³⁹ LinkedIn users can also search for other people's CVs.⁴⁰ Over 300 million people use LinkedIn.⁴¹

Blogs

Blogs are [d]iscussion 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.⁴² At least six million Australians have blogs.⁴³

One of the most important issues to consider regarding the courts and social media is the potential benefits and risks that result from judicial officers and their families using social media personally. Considering this issue can help judicial officers decide whether they want to use social media in a personal capacity (or if they currently use social media in a personal capacity, whether they want to continue doing so) and whether they should talk to their family members about their family members' social media use.

³⁶ *Comite Interprofessionnel Du Vin De Champagne v Powell* [2015] FCA 1110 (20 October 2015) [139] (Beach J).

³⁷ Marilyn Krawitz, *An Examination of Social Media's Impact upon the Courts in Australia* (PhD (Law) Thesis, Murdoch University, 2014) 14.

³⁸ Chad Brooks, *What Is LinkedIn?* (9 May 2012) <<http://www.businessnewsdaily.com/2489-linkedin.html>>.

³⁹ University of Toronto Mississauga Career Centre, *What Is LinkedIn?* <[https://www.utm.utoronto.ca/careers/sites/files/careers/public/shared/pdf/tipsheets/LinkedIn%20Tipsheet%20-%20\(May%202015-RW\).pdf](https://www.utm.utoronto.ca/careers/sites/files/careers/public/shared/pdf/tipsheets/LinkedIn%20Tipsheet%20-%20(May%202015-RW).pdf)>.

⁴⁰ Digital Unite, *What is LinkedIn* <<http://digitalunite.com/guides/social-networking-blogs/linkedin/what-linkedin>>.

⁴¹ LinkedIn, *The World's Largest Professional Network: 300 Million* <https://www.linkedin.com/static?key=what_is_linkedin>.

⁴² Alysia Blackham and George Williams, 'Australian Courts and Social Media' (2013) 38(3) *Alternative Law Journal* 170, 170.

⁴³ *Ibid.*

3. When Judicial Officers and Tribunal Members (and their Families) Personally Use Social Media - the Potential Benefits and Risks

a. The Benefits

‘Judges today are more in touch with the community than they were during the 19th century (when, significantly, many judges were not even legally qualified).’⁴⁴ It is important for judicial officers to stay in touch with their community⁴⁵ and using social media in a personal capacity can help them to do so. There are other benefits to judicial officers when they use social media personally.

If judicial officers use social media, it can improve their image. The public may find that judicial officers are more approachable and relatable. Judicial officers can use social media to see what their family and friends are doing⁴⁶ and to see the latest photographs and/or videos of their friends and family. Judicial officers can use social media to quickly learn about judgments worldwide⁴⁷ with little effort. Judicial officers can use social media to keep up to date with current events in Australia and internationally. They can also use social media to learn the public’s views on important issues (for example, whether Australia should become a republic) and to listen to new music that they like (which would be particularly easy to do on YouTube).

The knowledge that judicial officers acquire from using social media personally can potentially help them with their job. They may better understand how to warn jurors against using social media to discuss a trial. They may also be better able to decide whether stalking on social media took place,⁴⁸ whether a defendant defamed the plaintiff in a trial involving an allegation of defamation on social media⁴⁹ and whether they will permit witnesses to testify by Skype.⁵⁰

⁴⁴ Judge Gibson, *Should Judges Use Social Media?* (31 May 2013) New South Wales District Court
<<http://www.districtcourt.justice.nsw.gov.au/Documents/Should%20Judges%20use%20social%20media.pdf>> 2.

⁴⁵ Judge Gibson, above n 11, 253.

⁴⁶ Justice Virginia Bell AC, ‘The Role of a Judicial Officer - Sentencing, Victims and the Media’ (Speech delivered at the Magistrates’ Court of Victoria Professional Development Conference, 22 July 2015) 17.

⁴⁷ ABC Radio National, ‘Justice Tweeted is Justice Done’, *The Law Report*, 9 July 2013 (Judge Judith Gibson)
<<http://www.abc.net.au/radionational/programs/lawreport/social-media-courts/4805884#transcript>>.

⁴⁸ Marla N Greenstein, ‘Judges Must Keep up with Technology: it’s not just for Lawyers’ (2014) 53 *Judges’ Journal* 40, 40.

⁴⁹ Felicity Nelson, ‘Lawyers Shouldn’t ‘Assume’ Judges Know how Social Media Works’, *Lawyers Weekly* (online), 2 September 2015
<<http://www.lawyersweekly.com.au/news/17076-don-t-assume-judges-know-how-social-media-works>>.

⁵⁰ See: Marilyn Krawitz and Justine Howard, ‘Should Australian Courts Give More Witnesses the Right to Skype?’ (2015) 25 *Journal of Judicial Administration* 44.

b. The Risks

There are potential risks if judicial officers use social media personally. If a judicial officer writes an inappropriate post on social media, the post can become public⁵¹ and many people can see it without the judicial officer knowing who wrote the post. People can easily and quickly inform others about the post. The post may be permanently available to the public, even if the judicial officer deletes it.⁵² This is because sharing is at the heart of social media. When a person posts on social media, they may erroneously assume that they control that information and who sees it. They may have set privacy settings so that only a chosen group of people can see their posts. The reality is that other people may be able to share what the original person posted and their post can potentially be seen around the world. Further, if a judicial officer posts on social media anonymously, the public can become aware of the judicial officer's identity.⁵³ Therefore, judicial officers should be careful about what they share on social media if they choose to use it.

American judicial officers have used social media inappropriately several times. For example, New York State Supreme Court Judge Matthew A. Sciarrino was transferred because he posted comments and photographs on social media while he was in the courtroom. He also became the contact of many lawyers on Facebook.⁵⁴ A judge in Georgia contacted a party who appeared before him on Facebook. The judge and the party met in person and the party borrowed money from the judge. The judge advised the party about her case. When the public learned about the relationship, the judge resigned from his position.⁵⁵ If a judicial officer becomes a contact of a lawyer or another participant in a trial on social media, someone may accuse the judicial officer of bias.⁵⁶ This issues paper will discuss this subject in detail later on.

Another example of an American judicial officer who used social media inappropriately is Judge Olu Stephens of the 30th Judicial Circuit in Kentucky, who commented on social media that a prosecutor was racist. As a result, His Honour was not permitted to preside over a trial.⁵⁷

⁵¹ Federal Court of Australia, *Draft Guidelines for Judges about Using Electronic Social Media* (2013);

American Bar Association, *Formal Opinion 462, Judge's Use of Electronic Social Networking Media* (21 February 2013) 1 - 2.

⁵² American Bar Association, *Formal Opinion 462, Judge's Use of Electronic Social Networking Media* (21 February 2013) 1 - 2.

⁵³ See, for example, Jane Buchanan, *Identifying an Anonymous Facebook User* <<http://smallbusiness.chron.com/identifying-anonymous-facebook-user-41415.html?>>. Section 7 of this issues paper provides more detail about discovering the identity of someone who makes social media posts while using an anonymous identity.

⁵⁴ Jones, above n 13, 294.

⁵⁵ Sharon D. Nelson and John W. Simek, 'Feature: Attention: the Perils of Social Media for Judges' (2014) 57 *Res Gestae* 27 - 28.

⁵⁶ See: Marilyn Krawitz, *An Examination of Social Media's Impact upon the Courts in Australia* (PhD (Law) Thesis, Murdoch University, 2014) 43 - 54.

⁵⁷ Matthew Glowicki, 'Judge Olu Stevens Again Removed from Case', *Courier-Journal* (online), 12 January 2016 <<http://www.courier-journal.com/story/news/crime/2016/01/11/judge-again-removed-case-chief-justice/78645530/>>. For an example of an Australian barrister who

According to a 2013 Australian article, there have been no Australian cases regarding judges using social media inappropriately.⁵⁸ This could be because few Australian judicial officers use social media, so they do not use it inappropriately. It could also be that the inappropriate use is simply not known about. It is hoped that Australian judicial officers have simply not used social media inappropriately to date. Australian judicial officers are known to be very ethical. If the judicial officers who may need it take advantage of the training about social media that is provided to them, then Australian judicial officers may never use social media inappropriately.

Training for Australian judicial officers regarding social media that took place to date includes the National Judicial College of Australia holding a session entitled 'Media/Social Media and its Influence on the Judiciary' in its 'Dialogues on being a Judge'.⁵⁹ The Australasian Institute of Judicial Administration Incorporated held an 'AIJA Courts and Tribunals Technology Conference' in May 2015 that had sessions that included discussions about social media.⁶⁰ The Australasian Institute of Judicial Administration Inc. and the Judicial Conference of Australia also provided valuable training for judicial officers regarding social media at the Symposium.

Information technology specialists can work with judicial officers on computers and demonstrate how social media works. Judicial officers can then practise creating social media accounts themselves (without using their given name on the accounts) and posting information on those accounts, if they choose to. They can delete those accounts after they create them and learned how to use social media. This is in addition to training judicial officers about social media in an abstract sense and telling them about the ethical challenges that may arise if they use social media. It could also be beneficial to train other court employees besides judicial officers (such as judges' associates) about

used social media inappropriately, see the comments that were allegedly made by barrister Charles Waterstreet: Louise Hall, 'Barrister Charles Waterstreet Probed for Contempt of Court over Social Media Posts in Murder Trial', *The Sydney Morning Herald* (online), 14 August 2015 <<http://www.smh.com.au/nsw/barrister-charles-waterstreet-probed-for-contempt-of-court-over-social-media-posts-in-murder-trial-20150814-giz0k1.html>>. For examples of Canadian judges who used social media inappropriately, see: Canadian Centre for Court Technology, *The Use of Social Media by Canadian Judicial Officers* (2015) <<http://wiki.modern-courts.ca/pub/Social-Media-Report.pdf>> 25 - 27.

For another example of an American Judge who used social media inappropriately, see: Public Reprimand of B. Carlton Terry Jr., N.C. Judicial Standards Comm'n Inquiry No 08-234 (2009).

⁵⁸ Graham Maher and Sarah McCarthy, 'Social Media Friends without Privileges', *The Australian* (online), 27 September 2013 <<http://www.theaustralian.com.au/business/legal-affairs/social-media-friends-without-privileges/story-e6frg97x-1226727843287>>. However, note the case in Tasmania in which the judicial officer did not use social media inappropriately, but happened to be a Facebook friend of the defendant's wife in a death by negligent driving case: AAP, 'Facebook Friend Could Rule Second Senior Magistrate out of Tim Ellis Case', *The Australian* (online), 13 December 2013 <<http://www.theaustralian.com.au/news/nation/facebook-friend-could-rule-second-senior-magistrate-out-of-tim-ellis-case/story-e6frg6nf-1226782442090>>.

⁵⁹ Bartels and Lee, above n 8, 49.

⁶⁰ The Australasian Institute of Judicial Administration Inc., *AIJA Courts and Tribunals Technology Conference* (May 2015) <<http://www.amp.com.au/aija15/>>.

social media, including how to use social media and their corresponding ethical obligations. If court employees use social media inappropriately, this could also negatively impact upon the public's confidence in the judiciary.

c. Should Judicial Officers Use Social Media in a Personal Capacity?

It is well known that when lawyers join the judiciary, there are some constraints on their behaviour.⁶¹ One might argue that one of these constraints should include that judicial officers cannot use social media personally, to prevent any of the risks occurring that the last section described. If one of those risks occurs, then the public may lose confidence in the judiciary. Even an isolated incident by one individual judicial officer can reflect poorly on the judiciary as a whole.

There is diverse support for judicial officers to use social media personally. Australian judicial officers support other judicial officers to use social media personally.⁶² Guidelines for judicial officers regarding social media use in Australia and overseas do not forbid them from using social media in a personal capacity. The Federal Court of Australia released *Draft Guidelines for Judges about Using Social Media*.⁶³ In the Draft Guidelines Chief Justice James Allsop states

[a] judge may use electronic social media, but in doing so he or she should have regard to the guiding principles of impartiality, judicial independence, and integrity and personal behaviour set out in the Council of Chief Justices' Guide to Judicial Conduct. Any conduct by a judge that would undermine these principles or create a perception of impropriety or bias should be avoided.⁶⁴

⁶¹ Justice Virginia Bell AC, 'The Role of a Judicial Officer - Sentencing, Victims and the Media' (Speech delivered at the Magistrates' Court of Victoria Professional Development Conference, 22 July 2015) 16.

⁶² For example, Justice Virginia Bell AC of the High Court of Australia stated that '[j]udicial officers are free to engage in social media communications', see: Justice Virginia Bell AC, 'The Role of a Judicial Officer - Sentencing, Victims and the Media' (Speech delivered at the Magistrates' Court of Victoria Professional Development Conference, 22 July 2015) 16; Chief Justice Wayne Martin AC of the Supreme Court of Western Australia stated that '[i]n the Supreme Court of Western Australia, we decided there was nothing wrong with judges having a personal Facebook account although they should, of course, be very cautious about the material put on their pages', see: Chief Justice Wayne Martin AC, 'Freedom of the Press and the Courts' (Speech delivered at the Judicial Conference of Australia Colloquium 2015, Adelaide, 9 October 2015) 23. Judge Judith Gibson of the New South Wales District Court stated that '[w]hether judges (as opposed to doctors, religious leaders or police officers) should refrain from use of social media is an issue best left to the guidance of the courts'. See: Judge Judith Gibson, 'Judges, Cyberspace and Social Media' (2015) 12(2) *Judicial Review: Selected Conference Papers: Journal of the Judicial Commission of New South Wales* 237, 264 - 265.

⁶³ Federal Court of Australia, *Draft Guidelines for Judges about Using Electronic Social Media* (2013).

⁶⁴ Federal Court of Australia, *Draft Guidelines for Judges about Using Electronic Social Media* (2013). Some of the relevant sections of the Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (at March 2007) include: 2.1 (bias), 5.6.1 (participation in public debate) and 5.6.2 (public debate about judicial decisions).

The *United Kingdom Guide to Judicial Conduct* 2013 (“UK Guide”) states that it is a matter of personal choice⁶⁵ for each judicial officer whether they use social media. The UK Guide states that judicial officers may blog, but they should not state their position in their blog. It also states that judicial officers should not state opinions that could damage public confidence in the judiciary should the public read them (irrespective of whether or not the blog is anonymous).⁶⁶

Several American judicial ethical opinions discuss judicial officers’ social media use. None of the opinions found state that a judge should not be able to use social media in a personal capacity.⁶⁷ International surveys have found that judicial officers support other judicial officers using social media in a personal capacity.⁶⁸

Judge Judith Gibson of the District Court of New South Wales has a Twitter account that tweets defamation and media law links.⁶⁹ Justice Lex Lasry of the Supreme Court of Victoria has a public Twitter account. It states that he is a Supreme Court Judge, but that he posts in a personal capacity.⁷⁰ This supports other Australian judicial officers using social media in a personal capacity also.

The author of this issues paper searched Facebook, Twitter and Instagram to find additional social media accounts that belong to Australian judicial officers, but she could not find any. This does not mean that additional judicial officers do not have social media accounts. Judicial officers may have social media accounts in a personal capacity and they adjusted their privacy settings to make it more difficult for the public to find them. Judicial officers’ accounts may not be under their given names, and may contain profile photographs that are not photographs of their faces. This would also make it harder to find the judicial officers’ social media accounts. For example, Judge Tyrion Lannister may have a social media account with the name ‘Throne Gamer’ and a photograph of his dog on his profile page. If someone searches for ‘Tyrion Lannister’ or ‘Judge Tyrion Lannister’ on social media, then they will not be able to find him. Judge

⁶⁵ Judiciary of England and Wales, *UK Guide to Judicial Conduct 2013* (2013) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/judicial_conduct_2013.pdf>.

⁶⁶ Ibid.

⁶⁷ See for example, 01 Informal Op. Utah Ethics Advisory Committee (2012); 01 Op. Tennessee Judicial Ethics Committee (2012); 06 Op. Florida Supreme Court Judicial Ethics Advisory Committee (2009); 08-176 Op. New York Advisory Committee on Judicial Ethics (2009).

⁶⁸ See, for example, Conference of Court Public Information Officers, *2012 CCPIO New Media Survey* (31 July 2012) <<http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctmedia/id/34>> 16; Canadian Centre for Court Technology, *The Use of Social Media by Canadian Judicial Officers* (2015) <<http://wiki.modern-courts.ca/pub/Social-Media-Report.pdf>> 6, 8.

⁶⁹ ABC Radio National, ‘Justice Tweeted is Justice Done’, *The Law Report*, 9 July 2013 (Judith Gibson J) <<http://www.abc.net.au/radionational/programs/lawreport/social-media-courts/4805884#transcript>>. Also see: Judge Judith Gibson’s Twitter Account <<https://twitter.com/Alesia148>>.

⁷⁰ Felicity Nelson, ‘Lawyers Shouldn’t ‘Assume’ Judges Know how Social Media Works’, *Lawyers Weekly* (online), 2 September 2015 <<http://www.lawyersweekly.com.au/news/17076-don-t-assume-judges-know-how-social-media-works>>. Also see: Justice Lex Lasry’s Twitter Account <<https://twitter.com/Lasry08>>.

Lannister may need to add people on social media as contacts himself if he wants to add contacts on social media or tell other people that they should search for ‘Throne Gamer’ to find his social media account.

While the author of this issues paper was unable to find data regarding how many Australian judicial officers use social media after a thorough search, this kind of information is available regarding Kiwi judicial officers. Justice Rebecca Ellis of the High Court of New Zealand and Judge Colin Doherty of the District Court of New Zealand undertook a survey regarding judicial officers’ social media use. They provided the 53 question survey online to 237 Kiwi judicial officers. One hundred and ninety five judicial officers (82%) completed the survey. The survey found that 45 judicial officers (23%) of those who completed the survey used social media. Forty-nine judicial officers of those who completed the survey stated that they used social media at least weekly.⁷¹ It appears that a high percentage of Kiwi judicial officers use social media. If a similar percentage of Australian judicial officers use social media, it supports one of the main recommendations of this issues paper: that training Australian judicial officers regarding social media is very important.

A related issue involves the social media posts of people newly admitted to the judiciary.⁷² The author of this issues paper could not find any Australian research regarding what should be done about these posts. Before someone becomes a judicial officer, should a search of all of the person’s social media posts occur to see if they posted anything that should prevent them from becoming a judicial officer? Do the staff of Attorneys-General undertake such a search? If they do, then there remains the question of what they should they look for. What social media posts may be considered sufficiently inappropriate that they would prevent someone who has otherwise had a highly distinguished legal career from joining the judiciary? The final question is particularly difficult to answer. Carefully drafted guidelines may provide some assistance about what should occur.

d. Judges Becoming Social Media Contacts with Participants in a Trial

Another issue regarding judicial officers’ social media use is whether judicial officers should recuse themselves from a court matter if they have an existing connection on social media with someone who is part of a court matter before them (e.g. a lawyer who appears before them or a witness in a trial before them). Associated with this topic is whether a judicial officer should be permitted to add a person who may be part of a future court matter before them as a contact on social media. This issue is contentious and the literature on this issue offers different points of view.

⁷¹ The Hon Justice Rebecca Ellis, ‘When Judicial Officers and Tribunal Members (and their Families) Personally Use Social Media – the Potential Benefits and Risks’ (Speech delivered at A Symposium: Challenges of Social Media for Courts & Tribunals, Radisson on Flagstaff Gardens, Melbourne, 26 May 2016).

⁷² Professor George Williams AO, ‘When Courts and Tribunals Use Social Media – the Potential Benefits and Risks’ (Speech delivered at A Symposium: Challenges of Social Media for Courts & Tribunals, Radisson on Flagstaff Gardens, Melbourne, 26 May 2016).

Judge Gibson states that being someone's contact on social media is 'a completely novel form of communication that can't be judged in the same way as going up to someone and shaking their hand and becoming their friend.'⁷³ It's possible that a judicial officer has never met a social media contact in person and they never will. The judicial officer may never exchange a single communication with the social media contact or look at any of the information that the social media contact posted. The judicial officer may know nothing about the social media contact besides the name that is stated on their social media profile (which may not even be the social media contact's real name) and anything that their social media profile states.

The Federal Court of Australia Draft Guidelines state that if a judicial officer has a connection with a lawyer on social media (especially if the lawyer works at a firm that is known to appear frequently in that judicial officer's court), then someone may raise an allegation of apprehended bias.⁷⁴

If a judicial officer has a contact on social media who is a participant in a trial, they may want to inform the court about this connection or consider recusing himself or herself.⁷⁵ The test to decide whether a judicial officer should recuse himself or herself due to apprehended bias is 'whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide'.⁷⁶ This test is determined objectively and 'is founded in the need for public confidence in the judiciary'.⁷⁷ The judicial officer can inform the parties of the relevant facts that are part of a potential apprehended bias application. The judicial officer will decide himself or herself about whether or not they will recuse himself or herself.⁷⁸

When applying the apprehended bias test in this type of situation, the judicial officer may want to also consider the type of social media connection in question. For example, when a judicial officer adds a contact on Facebook, it usually requires the judicial officer's permission (unless the Facebook user changed their privacy settings). Typically, the judicial officer and the contact will be able to access each other's personal information, photographs, etc. if they choose to. This is different from other social media platforms that focus on following, like Twitter and Instagram. A person can follow a

⁷³ ABC Radio National, above n 47.

⁷⁴ Federal Court of Australia, *Draft Guidelines for Judges about Using Electronic Social Media* (2013). Also see: Judge Judith Gibson, 'Judges, Cyberspace and Social Media' (2015) 12(2) *Judicial Review: Selected Conference Papers: Journal of the Judicial Commission of New South Wales* 237, 257 and Sharon D. Nelson and John W. Simek, 'Feature: Attention: the Perils of Social Media for Judges' (2014) 57 *Res Gestae* 26, 26.

⁷⁵ Federal Court of Australia, *Draft Guidelines for Judges about Using Electronic Social Media* (2013).

⁷⁶ *Johnson v Johnson* (2000) 201 CLR 488, 492 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). Also see: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 492 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁷⁷ *Johnson v Johnson* (2000) 201 CLR 488, 493 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁷⁸ The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct (Second Edition)* (2007)
<[http://www.supremecourt.wa.gov.au/_files/GuidetoJudicialConduct\(2ndEd\).pdf](http://www.supremecourt.wa.gov.au/_files/GuidetoJudicialConduct(2ndEd).pdf)>.

judicial officer with a Twitter or Instagram account without the other judicial officer following the person.

A social media user can also follow a judicial officer without requiring the judicial officer's permission on Twitter and Instagram (unless the judicial officer changes their social media settings. On Twitter, this would mean changing the Twitter account so that it is 'protected').⁷⁹ For example, many people follow politicians on Twitter and Instagram, but that does not mean that the politicians gave express permission for a single follower to do so.

The judicial officer may also want to consider the connection as it exists in reality, when the connection was made and the communication on social media since the connection was made. For example, if the connection was made five years ago, the judicial officer and the other person did not exchange a single message on social media since, and the judicial officer and the other person never met in public, then this would support the judicial officer not recusing himself or herself. The judicial officer can also take into consideration the type of hearing before them: if the judicial officer is presiding over a hearing where they do not exercise any discretion (such as a hearing to simply allocate a trial date) then the judicial officer may want to preside over the hearing notwithstanding any social media connection with any of the participants. This is as opposed to the judicial officer presiding over a trial in which they need to exercise their discretion and there may be a stronger argument that the judicial officer should recuse himself or herself.

The American Bar Association states that a judicial officer who has a social media connection with a party or lawyer before them 'must evaluate' their connection to decide whether they should inform the court.⁸⁰ It recommends that the same test should be applied that would be applied when a judicial officer has a friendship or knows the person in reality. A judicial officer does not need to look through their social media platforms to see if there is a social media connection if they are not aware of one.⁸¹ A judicial officer would find it highly onerous to search through all of their social media contacts for every new case to check if they are contacts on social media with someone who participates in it.⁸²

e. Important Tips for When Judges Use Social Media in a Personal Capacity

There are several important tips to provide to judicial officers when they use social media in a personal capacity. Judicial officers should be aware of important security issues when they use social media. They should not post their home address, when they go on

⁷⁹ For information about how to change a Twitter account so that it is 'protected', see: Twitter, *Protecting and Unprotecting your Tweets* <<https://support.twitter.com/articles/20169886#>>. For information about how to modify an Instagram account so that approval is required for someone to follow an Instagram user, see: Instagram, *How do I Set my Photos and Videos to Private so that only Approved Followers can See them* (2016) <<https://help.instagram.com/448523408565555>>.

⁸⁰ American Bar Association, above n 52, 2.

⁸¹ Ibid 3.

⁸² Nelson and Simek, above n 55, 26.

holidays or information about their ‘personal life’.⁸³ They should also check their privacy settings to be careful about who sees what they post,⁸⁴ although they should not rely on social media’s privacy settings, because they may change.⁸⁵

Judicial officers should also be mindful of their social media contacts generally. If the contacts are not someone a judicial officer would want to have a connection with in real life, they should carefully consider whether they should maintain their social media contact. In particular, they should be careful about having social media connections with people or organisations that have controversial views.

Judicial officers should ensure that they do not comment about the cases that they preside over⁸⁶ on social media. They should also assume that anything that they post on social media could become public.⁸⁷ If a judicial officer posts on social media anonymously, they should assume that the public can learn their identity.⁸⁸

f. How can Judicial Officers Prevent a Situation where their Family Members use Social Media to Discuss a Trial

An important issue that is similar to judicial officers using social media in a personal capacity is when a member of a judicial officer’s family uses social media to discuss a case before the judicial officer or when there’s an existing connection between a judicial officer’s family and a case that comes before the judicial officer. If the family member of a presiding judicial officer posts their opinion on social media about a case before the judicial officer, it can have detrimental consequences to the trial. While the family member may assume that their comments were clearly their own opinion and have nothing to do with the judicial officer who they are related to, the public may query whether the family member’s social media post is a reflection of the judicial officer’s opinion or possible bias. This could negatively impact upon the public’s confidence in the judiciary.

There is currently little literature about judicial officers’ families using social media inappropriately. This could be because the media typically ignores this issue when it occurs, out of respect to the judicial officer’s family. The media may not learn that the judicial officer’s family discussed a case on social media, because the judicial officer’s family posted on social media anonymously (and no efforts were made to discover the identity of the person who made the anonymous posts), or the media did not learn that

⁸³ Judiciary of England and Wales, *UK Guide to Judicial Conduct* (2013) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/judicial_conduct_2013.pdf>.

⁸⁴ Ibid.

⁸⁵ Benjamin P Cooper, ‘Judges and Social Media: Disclosure as Disinfectant’ (2014) 17 *SMU Science and Technology Law Review* 521, 537.

⁸⁶ County Court of Victoria, *Guidelines for the Media* (21 November 2013).

⁸⁷ Graham Maher and Sarah McCarthy, ‘Social Media Friends without Privileges’, *The Australian* (online), 27 September 2013 <<http://www.theaustralian.com.au/business/legal-affairs/social-media-friends-without-privileges/story-e6frg97x-1226727843287>>.

⁸⁸ See, for example, Jane Buchanan, *Identifying an Anonymous Facebook User* <<http://smallbusiness.chron.com/identifying-anonymous-facebook-user-41415.html?>>.

the posts existed. Ideally, judicial officers' families rarely use social media inappropriately, so the media cannot report that this occurred.

An example of a social media connection that a judicial officer's family member had with participants in a trial occurred in Will County, Illinois, in the United States. A defendant was charged with battering a child. The defendant applied for a new trial because the presiding Judge, Daniel Rozak, had many children who were Facebook connections with the victim's family.⁸⁹ The defendant's lawyer argued that the relationship between Rozak J's children and the victim's family was 'deeper than a simple social-media connection' and the relevant social media connection was 'only the tip of the iceberg'.⁹⁰ Judge Rozak did not recuse himself from the matter because his children were adults who did not live with him, he did not use their social media sites himself, nor did he 'vet their 'friends''.⁹¹ Many Australian judicial officers may have adult children who do not live with them who use social media. These adult children may have an existing connection to a participant in a case before the judicial officer. The judicial officer may want to apply the test for apprehended bias, and as discussed earlier, consider the connection between their family member and the trial participant as it exists in reality, when the connection was made, the exchanges since the connection was made and the nature of the court proceeding that they are presiding over.

Another relevant example that involves a family member of a judicial officer acting inappropriately occurred in the United Kingdom. The long-term romantic partner of Judge Jason Dunn-Shaw of the Crown Courts in Canterbury and Maidstone logged into the Judge's Facebook account. The Judge's partner then posted expletives and made inappropriate remarks. For example, he wrote 'collars which are excellent if you don't sweat like a fat lass in Greggs' about barristers' collars.⁹² This case shows that judicial officers should be careful about who they give the passwords to their social media accounts to. If they give their social media account passwords to another person, they may want to provide detailed instructions about what communication they permit the other person to make if they log into the judicial officer's social media accounts. Judicial officers may also want to be careful that they do not store the passwords to their social media accounts in locations that others can access. If another person logs into a judicial officer's social media accounts and posts inappropriate comments, this could receive a significant amount of publicity. In turn, this could negatively impact upon the public's confidence in the judiciary.

⁸⁹ John G Browning, 'Why Can't We Be Friends? Judges' Use of Social Media' (2014) 68 *University of Miami Law Review* 487, 508 - 509.

⁹⁰ Ibid 509.

⁹¹ Ibid 509.

⁹² Chris Greenwood, 'Judge in Row over Online Antics of his Gay Lover who Left Crude Comments on his Facebook Page including Lewd Quip about Chuka Umunna', *The Daily Mail* (online), 1 March 2016
<<http://www.dailymail.co.uk/news/article-3468670/Judge-row-gay-lover-s-online-antics-left-crude-comments-Facebook-page-including-lewd-quip-Chuka-Umunna.html>>. For an example of a video of a judicial officer beating his daughter with a belt (which is unrelated to a trial or case), see Judge William Adams, mentioned in Maxine D Goodman, 'Shame, Angry Judges, and the Social Media Effect' (2014) 63 *Catholic University Law Review* 589, 609 - 610.

To prevent judicial officers' families from discussing a trial on social media, the courts can provide training and/or guidelines to judicial officers' families, in addition to training to judicial officers, regarding 'ethical issues and potential security concerns' associated with social media.⁹³ Judicial officers should know that their family members can discuss a trial on social media, so they can warn them not to.⁹⁴ Judicial officers can inform their family members about the serious negative consequences that can arise if they discuss a case on social media. Judicial officers can choose not to discuss a case with their family members, so it may be less likely that their family members will discuss it on social media, although the judicial officer's family members may still be able to read about the case from news online, etc. Judicial officers may also want to warn their family members against commenting on the courts and the judiciary generally on social media (for example, posting a comment on Facebook that Australian judicial officers give light sentences) to prevent their family members from making any posts that could negatively impact upon the judicial officer and the public's confidence in the judiciary.

If a judicial officer learns that their family member used social media to discuss a trial or are somehow connected on social media to someone relevant to a trial, they may want to consider applying the apprehended bias test previously described and some of the considerations that were mentioned regarding Rozak J. For example, the judicial officer can consider how close they are to the family member (e.g. whether or not the family member lives with the judicial officer).⁹⁵ They may also want to consider how often they talk to the family member. Judicial officers can also consider applying the usual test for apprehended bias and the aspects of it that can specifically apply to social media previously discussed.

This section of the issues paper considered judicial officers and their family members using social media. It is also possible that the courts will use social media - in fact, many Australian courts currently do. Therefore, the next section of this issues paper will discuss Australian courts using social media to engage the public.

⁹³ Utah State Courts, *Social Media Subcommittee of the Judicial Outreach Committee, Report and Recommendations for Judges Using Social Media* (18 October 2011) <http://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/Social_Media_Subcommittee_FINAL_REPORT.ashx> 7.

⁹⁴ Utah State Courts, *Social Media Subcommittee of the Judicial Outreach Committee, Report and Recommendations for Judges Using Social Media* (Draft) (18 October 2011) 5.

⁹⁵ Browning, 'Why Can't We Be Friends? Judges' Use of Social Media', above n 89, 509.

5. When Courts and Tribunals Use Social Media - the Potential Benefits and the Risks

a. The Benefits

Courts can experience many potential benefits if they use social media to engage the public. The Chief Justice of the Supreme Court of Victoria, Marilyn Warren AC, states that '[t]he public now relies almost exclusively on the media, and increasingly on social media, for information about the work of the courts'.⁹⁶ Courts can use social media to provide information to people who primarily use social media to obtain information, such as younger people.⁹⁷ The courts can also use social media to be more accountable and transparent⁹⁸ because they directly inform the public about their activities. Courts can use social media to give the public the exact message that they choose, instead of giving information to journalists who may change the courts' message.⁹⁹ Consequently, the public's confidence in the courts may increase.¹⁰⁰ Courts can also use social media to correct mistakes that journalists make about the courts.¹⁰¹

Courts can use social media to follow journalists and see whether journalists correctly report on court proceedings. Courts can also use social media to communicate with

⁹⁶ Chief Justice Marilyn Warren AC, 'Embracing Technology: the Way Forward for the Courts' (2015) 24 *Journal of Judicial Administration* 227, 233.

⁹⁷ Blackham and Williams, above n 42, 171.

⁹⁸ Norman H Meyer Jr, 'Social Media and the Courts: Innovative Tools or Dangerous Fad? A Practical Guide for Court Administrators' (2014) 6(1) *International Journal for Court Administration* 1, 3;
Alysia Blackham and George Williams, 'Australian Courts and Social Media' (2013) 38(3) *Alternative Law Journal* 170, 171.

⁹⁹ Chief Justice Marilyn Warren AC, 'Embracing Technology: The Way Forward for the Courts' (2015) 24 *Journal of Judicial Administration* 227, 234; Alysia Blackham and George Williams, 'Australian Courts and Social Media' (2013) 38(3) *Alternative Law Journal* 170, 171; Marilyn Krawitz, *An Examination of Social Media's Impact on the Courts in Australia* (PhD Thesis, Murdoch University, 2014) 106.

¹⁰⁰ Alysia Blackham and George Williams, 'Australian Courts and Social Media' (2013) 38(3) *Alternative Law Journal* 170, 171; Marilyn Krawitz, *An Examination of Social Media's Impact on the Courts in Australia* (PhD Thesis, Murdoch University, 2014) 105.

¹⁰¹ In fact, this is one of the reasons why the Family Court of Australia commenced using social media: Ms Denise Healy, 'When Courts and Tribunals Use Social Media – the Potential Benefits and Risks' (Speech delivered at A Symposium: Challenges of Social Media for Courts & Tribunals, Radisson on Flagstaff Gardens, Melbourne, 26 May 2016). Ms Healy also provided an example of when journalists misrepresented an issue. Journalists stated that a disgruntled litigant, Michael Fox, was protesting against the Family Court of Australia. Mr Fox had never appeared in the Family Court of Australia, though he had appeared in another court. For more information about Mr Fox's protest, see: Peter Bodkin, 'Man who Scaled the Harbour Bridge in Protest against the Family Court Defends Action', *The Daily Telegraph* (online), 2 February 2012 <<http://www.dailytelegraph.com.au/news/nsw/man-who-scaled-the-harbour-bridge-in-protest-against-the-family-court-defends-action/story-e6freuzi-1226260755358>>.

other courts and learn new ideas from them.¹⁰² The public can repost or retweet a court's social media posts,¹⁰³ which can help to spread them to a huge number of people without the court making any extra effort.

The public may create unofficial social media accounts that purport to be the courts' social media accounts, but people who have nothing to do with the courts create and maintain them. These unofficial social media accounts may contain incorrect information that can damage the public's confidence in the judiciary. If the courts have social media accounts, then the public can find information about the courts that is correct and accurate.¹⁰⁴ Even if the courts create official social media accounts, the public may still find existing fake social media accounts and rely on that information, instead of finding the courts' official social media accounts. As a result, it's important that courts clearly state on their social media accounts that they are official social media accounts and promote the weblinks to their social media accounts as much as possible. Courts can also obtain 'verified' Twitter accounts.¹⁰⁵ Twitter verifies these accounts to ensure that they are authentic. If they are, Twitter allows the accounts to post a special blue checkmark on them.¹⁰⁶ Facebook offers a similar option.¹⁰⁷ If courts have official or 'verified' social media accounts, it may be easier to distinguish between official or 'verified' social media accounts and unofficial social media accounts. Creating official or 'verified' social media accounts for the courts can potentially discourage members of the public from creating unofficial social media accounts.

b. The Risks

The courts may experience some risks or challenges if they use social media to engage the public. There are potential access to information issues. Certain people may not have access to social media, such as older people and people from a low socioeconomic background. Courts should ensure that they also provide the information on their social media pages through other means,¹⁰⁸ such as having it available if people call the court. One can argue that the courts may find it difficult to communicate complex legal arguments to the public through Twitter due to Twitter's restriction on the number of characters in a tweet.¹⁰⁹ However, the courts can post links on their Twitter pages to documents that contain complex legal arguments. The public may be encouraged to write negative comments about the courts if they use social media, since they may do so easily.¹¹⁰

¹⁰² Krawitz, above n 37, 109.

¹⁰³ Ibid 122.

¹⁰⁴ Ibid 111.

¹⁰⁵ Twitter, *Facts about Verified Accounts* <<https://support.twitter.com/articles/119135#>>. Note: this idea was mentioned by Josh Bornstein, 'When Judicial Officers and Tribunal Members (and their Families) Personally Use Social Media - the Potential Benefits and Risks' (Speech delivered at A Symposium: Challenges of Social Media for Courts & Tribunals, Radisson on Flagstaff Gardens, Melbourne, 26 May 2016).

¹⁰⁶ Twitter, *Facts about Verified Accounts* <<https://support.twitter.com/articles/119135#>>.

¹⁰⁷ Facebook, *Verified Page or Profile* <<https://www.facebook.com/help/196050490547892>>.

¹⁰⁸ Blackham and Williams, above n 42, 172.

¹⁰⁹ Schulz, above n 7, 34.

¹¹⁰ Blackham and Williams, above n 42, 172.

A court may have a policy that states the rules that the public must follow in order to post on its social media platforms. Having such a policy may help to lessen the chance that a member of the public makes offensive comments on the court's social media (Annexure A of this issues paper provides examples of some Australian Courts' social media policies).

Courts should also be vigilant about the privacy implications associated with having a social media account. If someone breaks into a court's social media account, the results can be damaging. The person who breaks in can make many extremely offensive posts. To prevent this from happening, the courts can have strong passwords for their social media accounts (that include numbers and both capital and lower case letters). Courts can also limit the number of staff who can access their social media accounts by giving the passwords to as few people as possible. The courts can also use the latest anti-virus technology on their computers. While this may help, it is still not a guarantee that people cannot break into the courts' social media accounts.

c. Which Courts in Australia are using Social Media to Engage the Public

The author of this issues paper undertook a survey in late 2015 in which she asked courts a threshold question about whether they had social media accounts and other questions that flowed from whether or not the courts had social media accounts. The survey was based on a similar survey that she distributed in 2013 as part of her PhD thesis. She found that the following Australian Courts currently have social media accounts:

Commonwealth

Family Court of Australia

New South Wales

District Court of New South Wales, Supreme Court of New South Wales

South Australia

South Australian Courts (this includes all South Australian Courts)

Victoria

County Court of Victoria, Supreme Court of Victoria

Annexure B of this issues paper contains a table of the types of social media that Australian courts currently use. Annexure C of this issues paper contains a table of the web addresses for the social media that Australian courts currently use. Both Annexures include the social media and web addresses for the social media that belong to Australian courts that participated in or did not participate in the survey. The number of Australian courts that use social media to engage the public nearly doubled between collecting data for the first survey in 2013 and collecting data for the second survey in 2015. Reasons for this may be that social media has become even more prevalent

recently and that the courts that used social media to engage the public in 2013 had a positive experience, which encouraged other courts to do the same. Please contact the author of this issues paper if you would like to read a copy of the survey questions or obtain more information about them.

d. Selected Issues that the Survey Found Involving Social Media

i. Input-Output Approach or Output Only

When courts use social media, they may use an Input-Output approach or an Output Only 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... write on courts' Facebook walls or become friends with courts on Facebook.¹¹¹

The Family Court of Australia's Twitter page allows the public to follow it and retweet its tweets. It is important in the Family Court that parties and witnesses are not identified.¹¹² Similar to the Family Court, the South Australian Courts¹¹³ Twitter page allows the public to follow it, but the public cannot retweet its tweets. The County Court of Victoria¹¹⁴ uses an Output Only approach.

The Supreme Court of New South Wales¹¹⁵ and the District Court of New South Wales¹¹⁶ use an Input-Output approach. Whether a court uses an Input-Output Approach or an Output Only approach affects the amount of resources that it needs for its social media

¹¹¹ Marilyn Krawitz, *An Examination of Social Media's Impact on the Courts in Australia* (PhD Thesis, Murdoch University, 2014) 106. To read a survey regarding an American Court using social media to engage the public, see: 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>>.

¹¹² Survey of the National Media and Public Affairs Manager, Family Court of Australia (by email, 23 October 2015); Family Court of Australia's Twitter Account: <<https://mobile.twitter.com/FamilyCourtAU>>; see: *Family Law Act 1975* (Cth) s 121.

¹¹³ Survey of the Media and Communications Manager, South Australian Courts Administration Authority (by email, 9 November 2015); South Australian Courts' Twitter Account: <<https://mobile.twitter.com/CourtsinSA>>.

¹¹⁴ Survey of the Strategic Communications Manager, County Court of Victoria (by email, 22 December 2015).

¹¹⁵ Survey of the Chief Justice's Research Director and the Court's Media Managers, Supreme Court of New South Wales (by email, 16 October 2015).

¹¹⁶ Survey of the Media Officer, District Court of New South Wales (by email, 1 December 2015).

account. A court would need staff to monitor its social media accounts regularly to see if the public posted any offensive comments if it uses the Input-Output approach. It may also want its staff to monitor its social media accounts to ensure that they respond to the public's queries within a reasonable time frame.

ii. Benefits Received by the Courts

The Courts that use social media stated in their survey responses that they benefit from their social media use. The Supreme Court of New South Wales 'received feedback that suggests its social media presence is useful, appreciated and improves awareness about its work'.¹¹⁷ There has also been 'greater interaction, awareness and accessibility by the public with the Court's work'.¹¹⁸ The media uses the Supreme Court of New South Wales' judgment summaries posted on its social media. Consequently, the Court believes that the media reports more accurately about its work.¹¹⁹ The media informed the District Court of New South Wales that it appreciates the Court posting judgments on social media.¹²⁰

The District Court of New South Wales 'would endorse the use of social media and that it is a useful tool for communicating the messages of the court without relying on a third party such as the media or other communication channels'.¹²¹ The Supreme Court of Victoria found that it can 'directly' inform the public about important events and cases.¹²² Journalists retweet the South Australian Courts' tweets to their followers.¹²³

iii. Problems Experienced by the Courts when Using Social Media

The Family Court of Australia has had 'largely...a very positive' experience with its social media use.¹²⁴ Similarly, the District Court of New South Wales¹²⁵ and the South Australian Courts have not experienced any major problems with their social media use.¹²⁶

¹¹⁷ Survey of the Chief Justice's Research Director and the Court's Media Managers, Supreme Court of New South Wales (by email, 16 October 2015).

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Survey of the Media Officer, District Court of New South Wales (by email, 1 December 2015).

¹²¹ Ibid.

¹²² Survey of the Senior Communications Advisor, Supreme Court of Victoria (by email, 23 October 2015).

¹²³ Survey of the Media and Communications Manager, South Australia Courts Administration Authority (by email, 9 November 2015).

¹²⁴ Survey of the National Media and Public Affairs Manager, Family Court of Australia (by email, 23 October 2015).

¹²⁵ Survey of the Media Officer, District Court of New South Wales (by email, 1 December 2015).

¹²⁶ Survey of the Media and Communications Manager, South Australia Courts Administration Authority (by email, 9 November 2015).

The Supreme Court of New South Wales found that using social media can take a lot of time,¹²⁷ though the Court did not indicate how long.

The County Court of Victoria found it challenging sometimes to obtain permission from some judicial officers to tweet a link to their sentencing decisions, even though the judicial officers agreed that a link to the sentencing decisions can be posted on the Court's homepage in the 'recent decisions' section. Some judicial officers are pleased that the Court uses Twitter in this manner.¹²⁸

iv. Reasons why Courts do not Use Social Media

There are several reasons why some of the courts that participated in the survey do not use social media. Some courts lack the resources to use social media.¹²⁹ This is understandable: courts would need staff who are well trained in social media to operate the courts' social media accounts. Courts are known to be under resourced, so they may not have the appropriate staff with sufficient capacity to create and maintain social media platforms. It has been suggested that individual courts should have social media coordinators.¹³⁰ The coordinators can manage courts' social media accounts (this is as opposed to the courts' current media staff or staff who are responsible for work in other areas). A social media coordinator can also train members of the judiciary who use social media about the benefits and risks that social media pose. However, some courts already lack the resources to allocate to existing staff the task of being responsible for social media. It could be impossible for those courts to hire staff members whose sole responsibilities would be in the purview of social media.

The ACT Courts do not use social media because of 'the risks of a social media site being used by others to post malicious or other unhelpful material'.¹³¹ This issues paper will discuss this issue later on. The High Court of Australia¹³² and the Northern Territory Courts¹³³ do not use social media because they believe that their website already provides sufficient information to the public. If a court uses social media to engage the public, it may already provide sufficient information through different means (e.g. a

¹²⁷ Survey of the Chief Justice's Research Director and the Court's Media Managers, Supreme Court of New South Wales (by email, 16 October 2015).

¹²⁸ Survey of the Strategic Communications Manager, County Court of Victoria (by email, 22 December 2015).

¹²⁹ These Courts are: the Australian Capital Territory Magistrates Court and Supreme Court, the Children's Court of Victoria, the Coroners Court of Victoria, all Western Australian Courts and the Queensland Supreme, District and Land Courts. (The author of this issues paper obtained this information from the surveys that she distributed to these Courts, which the Courts completed).

¹³⁰ The Hon Justice Greg Garde AO, 'When Social Media is Used to Analyse and Comment upon the Work of the Courts and Tribunals' (Speech delivered at A Symposium: Challenges of Social Media for Courts & Tribunals, Radisson on Flagstaff Gardens, Melbourne, 27 May 2016).

¹³¹ Survey of the Principal Registrar of the ACT Law Courts and Tribunal (by email, 13 October 2015).

¹³² Survey of the Senior Executive Deputy Registrar, High Court of Australia (by email, 14 October 2015).

¹³³ Survey of the Courts Liaison and Education Officer, Northern Territory Supreme Court (by email, 11 November 2015).

website). However, courts can use social media to provide information to the public in a unique form - a form that is easy to use and that many people use as an alternative to visiting websites. Courts can usually post information onto social media much quicker than they can by updating a website. In fact, by the time court staff post information onto a court's website, the information may already be out of date.

The Children's Court of Victoria does not believe that it needs a social media account.¹³⁴ The New South Wales Drug Court does not have a social media account due to the '[s]ecurity and privacy of the staff and participants of the Drug Court'.¹³⁵ It is understandable why some courts might have security and privacy concerns regarding social media. However, the courts can use information technology professionals to assist with this issue and implement some of the tips regarding security and privacy that this issues paper previously discussed. Admittedly, even if the courts take all the precautions possible to prevent security and privacy concerns from their social media use being realised, those concerns may still become a reality.

Some of the courts that participated in the survey are considering using social media to engage the public in the future.¹³⁶ There was a significant increase in the number of Australian courts that use social media to engage the public between 2013 and 2015, which indicates that this trend may continue.

Courts can also use webcasting as an alternative to creating social media accounts. Webcasting involves 'broadcasting live audio and video in real-time' on a website¹³⁷ and can include the audio and video staying on the website after it is broadcast for people to listen to or view.¹³⁸ Some Australian Courts webcast selected trials, sentences and other court events.¹³⁹ When the courts use webcasting, this can help to implement open justice because the public can see what occurs in the courtroom. The next section of this issues paper will discuss how journalists using social media in the courtroom helps to implement open justice and other issues associated with journalists using social media in the courtroom. It will also consider social media in the context of another important court stakeholder: the jury.

¹³⁴ Survey of the Media and Communications Manager, Children's Court of Victoria (by email, 16 October 2015).

¹³⁵ Survey of the Judges' Associate, Drug Court of New South Wales (by email, 16 October 2015).

¹³⁶ These Courts are: the Australian Capital Territory Magistrates and Supreme Courts, the Victoria Coroners Court, the Federal Court of Australia and all the Northern Territory Courts. (The author of this issues paper obtained this information from the surveys that she distributed to these Courts, which the Courts completed).

¹³⁷ The University of Texas at Austin, *What is Webcasting* <<http://www.utexas.edu/ce/tcc/plan/webcast-media/>>.

¹³⁸ Technopedia, *Webcasting* <<https://www.techopedia.com/definition/22901/webcasting>>.

¹³⁹ For example, see: The Supreme Court of Victoria, *Sentences and Judgment Portal* <<http://scv2.webcentral.com.au/sentences/>>.

6. When Social Media Is Used to Analyse and Comment upon the Work of the Courts and Tribunals

a. Journalists - whether Journalists can Use Social Media in the Courtroom, and Policies regarding Journalists Using Social Media in the Courtroom

Open justice originated in England and currently applies in Australia.¹⁴⁰ Open Justice means that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’.¹⁴¹ It involves giving the public the ability to attend court proceedings¹⁴² and it holds the courts accountable to the public.¹⁴³ Open justice is crucial to the Australian justice system.¹⁴⁴

An extension of open justice involves permitting journalists to use social media from the courtroom to report on what occurs. When journalists use social media in the courtroom, they can provide information to the public very quickly. They can quote judges, lawyers or others. For example, in 2015, a court reporter informed the public on social media that a judge and a barrister removed their wigs to make a child witness feel more comfortable. Journalists can report on matters that online or print media may not include because there’s a lack of room or they believe that the public is uninterested. If trained professionals use social media from the courtroom, the public can become more engaged with the courts.¹⁴⁵ Twelve percent of Australians use social media to obtain news,¹⁴⁶ so it makes sense for journalists to tweet from the courtroom.

Kate McClymont is a reporter with *The Sydney Morning Herald*. She currently has several thousand followers on Twitter.¹⁴⁷ Ms McClymont tweets from the courtroom. She tweeted daily from the Independent Commission against Corruption (ICAC) inquiry in Sydney and ‘[i]t is probably the most widely read piece of journalism in Australia for

¹⁴⁰ Chief Justice Wayne Martin AC, ‘Freedom of the Press and the Courts’ (Speech delivered at the Judicial Conference of Australia Colloquium 2015, Adelaide, 9 October 2015) 2.

¹⁴¹ *R v Sussex Justices; Ex Parte McCarthy* [1924] KB 256, 259 (Lord Hewart CJ). See also *Scott v Scott* [1913] AC 417.

¹⁴² Chief Justice Wayne Martin AC, above n 140, 2.

¹⁴³ Chief Justice Wayne Martin AC, ‘Freedom of the Press and the Courts’ (Speech delivered at the Judicial Conference of Australia Colloquium 2015, Adelaide, 9 October 2015) 3; Leah Findlay, ‘Courting Social Media in Australia’s Criminal Courtrooms: the Continuing Tension between Promoting Open Justice and Protecting Procedural Integrity’ (2015) 27(2) *Current Issues in Criminal Justice* 237, 239.

¹⁴⁴ *John Fairfax v District Court of New South Wales* (2004) 61 NSWLR 344, [18], found in Judge Judith Gibson, ‘Judges, Cyberspace and Social Media’ (2015) 12(2) *Judicial Review: Selected Conference Papers: Journal of the Judicial Commission of New South Wales* 237, 246.

¹⁴⁵ Leah Findlay, ‘Courting Social Media in Australia’s Criminal Courtrooms: the Continuing Tension between Promoting Open Justice and Protecting Procedural Integrity’ (2015) 27(2) *Current Issues in Criminal Justice* 237, 239 - 240.

¹⁴⁶ Chief Justice Wayne Martin AC, above n 140, 19.

¹⁴⁷ Kate McClymont’s Twitter Account on 12 December 2015 <https://twitter.com/Kate_McClymont>; Catherine Gleeson, ‘Social Media and the Courts’ [2013 - 2014] *Bar News: the Journal of the NSW Bar Association* 54, 54 and 59.

some time.¹⁴⁸ This shows that Australians are very interested in reading journalists' posts on social media about court matters. It also supports Australian courts permitting journalists to use social media in the courtroom.

Most Australian courts have either legislation, practice directions or policies addressing journalists using social media in the courtroom. The Supreme Court of Western Australia Practice Directions,¹⁴⁹ the Supreme Court of Queensland Practice Directions,¹⁵⁰ and Victorian¹⁵¹ and New South Wales¹⁵² legislation forbid anyone from using social media in the courtroom, but journalists are an exception. The *Federal Court Rules* similarly forbid anyone from using social media in the courtroom. It states that the Court can 'dispense' with this rule.¹⁵³ Journalists may also use social media to report on proceedings in the State Administrative Tribunal¹⁵⁴ and the Victorian Civil and Administrative Tribunal.¹⁵⁵

The Supreme Court of Western Australia Practice Directions¹⁵⁶ and the Supreme Court of Queensland Practice Directions¹⁵⁷ both state that journalists should follow suppression orders.

Potential problems can occur when journalists use social media in the courtroom. Journalists may post incorrect or prejudicial information or information that can seriously harm a trial.¹⁵⁸ For example, a journalist in the United States tweeted a photograph of a juror from the courtroom and the judicial officer declared a mistrial as a result.¹⁵⁹

Further, 'citizen journalists' can inform the public about what occurs in the courtroom.¹⁶⁰ Citizen journalists are people who are not trained as journalists who report the news (often online).¹⁶¹ Citizen journalists may share information with the public that is incorrect, but the public may assume that the information is correct.

¹⁴⁸ Judge Judith Gibson, above n 11, 245.

¹⁴⁹ Supreme Court of Western Australia, Practice Direction No 3.1 – *Use of Electronic Devices in Court* (4 February 2014).

¹⁵⁰ Supreme Court of Queensland, Practice Direction No 8 of 2014 – *Electronic Devices in Courtrooms* (17 February 2014).

¹⁵¹ *Court Security Act 1980* (Vic) s 4A.

¹⁵² *Court Security Act 2005* (NSW) s 9A.

¹⁵³ *Federal Court Rules 2011* (Cth) r 6.11.

¹⁵⁴ Val Buchanan, 'Live Tweeting from WA Courts Allowed' (Media Release, 31 January 2014) <http://www.supremecourt.wa.gov.au/_files/Live_Tweeting_in_WA_Courts.pdf>.

¹⁵⁵ Victorian Civil and Administrative Tribunal, *Media Policy* (19 February 2013) <https://www.vcat.vic.gov.au/sites/default/files/media_policy_vcat.pdf>.

¹⁵⁶ Supreme Court of Western Australia, *Practice Direction No 3.1 – Use of Electronic Devices in Court* (4 February 2014).

¹⁵⁷ Supreme Court of Queensland, *Practice Direction No 8 of 2014 – Electronic Devices in Courtrooms* (17 February 2014).

¹⁵⁸ Findlay, above n 145, 238.

¹⁵⁹ Rachel Bunn, *Reporter's Tweeted Photo of Juror Leads Judge to Declare Mistrial in Murder Prosecution* (16 April 2012) <<http://www.rcfp.org/browse-media-law-resources/news/reporters-tweeted-photo-juror-leads-judge-declare-mistrial-murder-pr>>.

¹⁶⁰ Findlay, above n 145, 238.

¹⁶¹ Tony Rogers, *What is Citizen Journalism*

Courts have the power to make suppression orders.¹⁶² Suppression orders are an exception to open justice.¹⁶³ ‘Suppression orders are made in the interests of justice to prevent prejudice to the proper administration of justice or to prevent undue hardship to a limited group of persons being victims of crime, children, or witnesses in legal proceedings’.¹⁶⁴ Breaching a suppression order can result in a contempt of court charge.¹⁶⁵ If journalists use social media in the courtroom, they may breach suppression orders.

Social media has made it more likely that journalists or others will breach suppression orders.¹⁶⁶ Reporting used to involve a time delay between what occurred in court and publication, so the court could have some control over what was published. However, social media does not have a similar time delay, or arguably any time delay at all.¹⁶⁷ To try to prevent journalists from breaching suppression orders, a court can require journalists to wait for a certain period of time after evidence is tendered or stated in court before writing about it on social media.¹⁶⁸ Courts can have appropriate signs that inform reporters and others about suppression orders.¹⁶⁹ Courts can also create a register that lists all suppression orders.¹⁷⁰ Journalists can quickly check the register to see if a suppression order applies to a matter. It is also possible that a journalist will state court information upon which a judicial officer will later order that a suppression order applies. Judicial officers may want to warn the court that a suppression order may later be requested or ordered about certain court information and caution journalists against informing the public about it.

When journalists report on social media, they do not experience the usual review and editing process of traditional reporting. It is essential that journalists are well trained about relevant court procedure and legislation as a result. The courts may also want to consider offering training to citizen journalists, particularly those who have a wide following. As a result of the training, it would be hoped that journalists and citizen journalists may make less errors when they report about the courts on social media.

<<http://journalism.about.com/od/citizenjournalism/a/whatiscitizen.htm>>.

¹⁶² See, for example, *Evidence Act 1929* (SA) s 69A.

¹⁶³ Barrett, above n 9, 1.

¹⁶⁴ *Peek v Channel Seven Adelaide Pty Ltd* [2006] SASC 63 (7 March 2006) [13] (DeBelle J).

¹⁶⁵ 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, 109. See, for example, *R v Hinch* [2013] VSC 520 (2 October 2013) (Kaye J).

¹⁶⁶ Barrett, above n 9, 2.

¹⁶⁷ Leah Findlay, ‘Courting Social Media in Australia’s Criminal Courtrooms: the Continuing Tension between Promoting Open Justice and Protecting Procedural Integrity’ (2015) 27(2) *Current Issues in Criminal Justice* 237, 240 - 241. Two cases that concern journalists breaching suppression orders in part due to their social media use are: *Registrar of the Supreme Court of South Australia v Advertiser Newspapers Pty Ltd* [2015] SASC 157; *Queen v Hinch* [2013] VSC 520.

¹⁶⁸ Findlay, above n 145, 241.

¹⁶⁹ *Ibid* 242.

¹⁷⁰ Barrett, above n 9, 28.

b. Some of the Dangers that can Occur when Jurors Use Social Media

Jurors have acted inappropriately since juries were created.¹⁷¹ In Australia, the principle of providing an accused with a fair trial is ‘protected by numerous specific practices and rules that have developed over the course of centuries of practical experience involving adaptation to changing circumstances, in accordance with the classic common law process’.¹⁷²

American surveys found that jurors rarely use social media inappropriately,¹⁷³ although jurors have used social media inappropriately in the United States over 10 times.¹⁷⁴ Jurors have also used social media inappropriately in the United Kingdom on a few occasions.¹⁷⁵ Jurors used social media inappropriately a handful of times in Australia. For example, in Victoria, in 2010, a juror stated on Facebook ‘everyone’s guilty’.¹⁷⁶ The juror did not attend court for jury duty and the jury was discharged.¹⁷⁷ It’s possible that more jurors use social media inappropriately; however, the courts do not know that it’s occurring.¹⁷⁸ Despite there being few reported cases of jurors using social media inappropriately, there is a significant body of literature about this topic, particularly in the United States. This may be because even though the reported cases are few, the result of a juror using social media inappropriately is extremely serious. It can result in a trial that is not fair to the accused and it can lower the public’s confidence in the judiciary.

¹⁷¹ Peter Lowe, ‘Problems Faced by Modern Juries’ (2012) *Bar News: The Journal of the NSW Bar Association* 46, 46.

¹⁷² Spigelman CJ, ‘The Internet and the Right to a Fair Trial’ (2006) 7 *The Judicial Review* 403, 410, found in Lorana Bartels and Jessica Lee, ‘Jurors Using Social Media in our Courts: Challenges and Responses’ (2013) 23 *Journal of Judicial Administration* 35, 37.

¹⁷³ See, for example: Meghan Dunn, *Jurors’ and Attorneys’ Use of Social Media During Voir Dire, Trials, and Deliberations A Report to the Judicial Conference Committee on Court Administration and Case Management* (1 May 2014) Federal Judicial Centre, 3 <[http://www.fjc.gov/public/pdf.nsf/lookup/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf/\\$file/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf/$file/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf)>; Hon Amy J St Eve, Hon Charles P Burns and Michael A Zuckerman, ‘More from the #Jury Box: the Latest on Juries and Social Media’ (2014) 12 *Duke Law and Technology Review* 64.

¹⁷⁴ For example, seven incidents are listed in: Jeannine Turgeon, ‘Legal Tech 2014: Avoiding Tweeting Troubles, Facebook Fiascos and Internet Imbroglios: Adapting Jury Instructions for the Age of Social Media’ (2014) 36 *Pennsylvania Lawyer* 38, 39. Also see: *State v Smith*, No M2010-01384, 2013 WL 4804845 (Tenn. Sept 10, 2013); *Sluss v Commonwealth*, 381 S W 3 d 215 (Ky, 2012); *Commonwealth v Werner*, 81 Mass App Ct 689 (2012).

¹⁷⁵ See, for example, *Attorney General v Davey & Beard* [2013] EWHC 2317 (Admin) (29 July 2013); *Attorney General v Frail* [2011] EWCH 1629 (Admin) (16 June 2011).

¹⁷⁶ Lorana Bartels and Jessica Lee, ‘Jurors Using Social Media in our Courts: Challenges and Responses’ (2013) 23 *Journal of Judicial Administration* 35, 40. For two other Australian cases concerning social media and jurors see: *R v Wills & Ors* [2012] NSWDC 285 (17 July 2012) (Haesler SC J); *Haruna v R* [2013] WASCA 170 (1 August 2013) (McLure P, Buss and Mazza JJA).

¹⁷⁷ Bartels and Lee, above n 8, 40.

¹⁷⁸ Brooke Lovett Shilo, ‘Juror Internet Misconduct: a Survey of New Hampshire Superior Court Judges’ (2014) 12 *University of New Hampshire Law Review* 245, 248.

It's crucial that jurors make their decisions based only on evidence that is presented in the courtroom and that is tested according to the appropriate common law rules.¹⁷⁹ Jurors may not research or read about the case outside of the courtroom.¹⁸⁰ A juror may become biased toward one of the parties after using social media during a trial.¹⁸¹

There are many reasons why jurors may use social media inappropriately. Jurors may use social media inappropriately because they are bored with jury duty. They may be addicted to social media and are unable to stop using it during a trial. Jurors may not understand a judicial officer's instructions not to use social media during a trial. They may also resent being told by the courts that they should not use social media and use it as a response to being told not to.¹⁸² Jurors may find the way that evidence is presented in court, which is primarily orally, to be 'archaic'.¹⁸³ Jurors watch trials inactively. In contrast, social media is interactive.¹⁸⁴ Jurors may use social media during a trial because they do not receive information in a highly organised way that is easy to understand. One suggestion to combat this is that the courts permit jurors to use notebooks that contain a dictionary, exhibits and agreed facts. Jurors can write in the notebooks as the trial progresses. Jurors may become more 'engaged' and less likely to use the internet to research a trial.¹⁸⁵ American courts have tried this.¹⁸⁶

When jurors use social media, they can instantly inform a significant number of people about a case.¹⁸⁷ Jurors may be able to use social media to easily find parties in a trial.¹⁸⁸ Jurors only need the relevant person's name and they may be able to contact them on social media. If a juror uses social media inappropriately, the traditional media can learn about it and report it.¹⁸⁹

*R v Wills & Ors*¹⁹⁰ is an example of how a court dealt with a juror who may have acted inappropriately. In this case, a DPP solicitor informed the court that a juror discussed the fraud trial that they were a part of on Facebook.¹⁹¹ A court officer examined the juror's Facebook page and asked the juror questions. The court officer learned that the

¹⁷⁹ The Honourable James Spigelman, 'The Internet and the Right to a Fair Trial' (2006) 7 *The Judicial Review* 403, 405, found in Lorana Bartels and Jessica Lee, 'Jurors Using Social Media in our Courts: Challenges and Responses' (2013) 23 *Journal of Judicial Administration* 35, 39.

¹⁸⁰ Laura W McDonald et al, 'Digital Evidence in the Jury Room: the Impact of Mobile Technology on the Jury' (2015) 27(2) *Current Issues in Criminal Justice* 179, 181.

¹⁸¹ Lorana Bartels and Jessica Lee, 'Jurors Using Social Media in our Courts: Challenges and Responses' (2013) 23 *Journal of Judicial Administration* 35, 43;

Nancy S Marder, 'The 2014 SMU Criminal Justice Colloquium: Foreword: Jurors and Social Media: Is a Fair Trial Still Possible?' (2014) 67 *SMU Law Review* 617, 628.

¹⁸² Bartels and Lee, above n 8, 42 - 43.

¹⁸³ Judge David Harvey, 'The Googling Juror: the Fate of the Jury Trial in the Digital Paradigm' [2014] *New Zealand Law Review* 203, 214.

¹⁸⁴ Ibid 215.

¹⁸⁵ Ibid 225 - 226.

¹⁸⁶ Ibid 226.

¹⁸⁷ Bartels and Lee, above n 8, 43.

¹⁸⁸ Ibid 44.

¹⁸⁹ Nancy S Marder, 'The 2014 SMU Criminal Justice Colloquium: Foreword: Jurors and Social Media: Is a Fair Trial Still Possible?' (2014) 67 *SMU Law Review* 617, 630.

¹⁹⁰ [2012] NSWDC 285 (17 July 2012) (Haesler SC J).

¹⁹¹ Ibid.

juror was a Facebook contact of other jurors and the juror did not comment about the evidence in the trial. The juror made general comments¹⁹² and the juror did not try to hide the Facebook account. Judge Andrew Haesler SC decided that the juror wrote ordinary information that they could be expected to share when part of a trial, such as the length of the trial.¹⁹³ Judge Haesler SC added

there is nothing on a prima facie level to indicate that the juror has been influenced by any extraneous material or, even on a prima facie level, potentially breached any of the provisions of s 68C Jury Act 1977. In those circumstances I do not believe it is necessary at this stage to either examine the juror on oath or examine other jurors nominated as Facebook friends or to request of jurors that they open their Facebook pages for inspection.¹⁹⁴

His Honour did not examine other jurors about their social media use in this particular case, but it is possible in other cases that the judicial officer will question many jurors and even discharge an entire jury because of the inappropriate social media use of a juror or many jurors. Therefore, it's crucial that courts take action to try to prevent jurors from using social media inappropriately.

c. What Courts are Doing to Try to Prevent Jurors from using Social Media Inappropriately

Courts use different methods to try to prevent jurors from using social media inappropriately. Providing directions to jurors that instruct them not to use social media inappropriately is one of these methods. Some States' benchbooks specify directions that tell jurors not to use social media inappropriately. There is an optional direction in New South Wales to give to the jury after empanelment which tells jurors not to discuss the case on social media or read other people's comments on social media. It provides the following examples of social media: Facebook, MySpace, LinkedIn and YouTube.¹⁹⁵ There is a direction in Victoria that tells jurors not to comment on the case on social media, and it lists Facebook, Myspace, Twitter, blogs and 'or anything else like that'.¹⁹⁶ The direction to the jury in Queensland states '[y]ou may discuss the case amongst yourselves. But you must not discuss it with anyone else and this includes using electronic means.'¹⁹⁷ Directions are also given to jurors not to use social media in Western Australia.¹⁹⁸

Directions to jurors can remind them not to use social media at as many stages that a court interacts with jurors as possible.¹⁹⁹ Directions to jurors regarding social media

¹⁹² Ibid [2].

¹⁹³ Ibid [5].

¹⁹⁴ *R v Wills & Ors* [2012] NSWDC 285 (17 July 2012) [6] (Haesler SC J).

For another Australian example of a juror using social media during a trial, see: *Haruna v R* [2013] WASCA 170 (1 August 2013) (McLure P, Buss and Mazza JJA).

¹⁹⁵ Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2012) 1-490.

¹⁹⁶ Judicial College of Victoria, *Victorian Criminal Charge Book* (2010) [1.5.2].

¹⁹⁷ Queensland Courts, *Supreme and District Courts Benchbooks* (2016) [4.6].

¹⁹⁸ See, for example, *Haruna v R* [2013] WASCA 170 (1 August 2013) [18] (McLure P, Buss and Mazza JJA).

¹⁹⁹ Marder, above n 189, 618.

use can include a lot of important information. This section will list some of this information, but a complete list is outside the bounds of this issues paper. It may be a challenge for judicial officers to decide how much information to include in a direction, yet still try to keep the direction concise and not overly lengthy.

When the reason for the prohibition against jurors using social media is explained to them, jurors are more likely not to use social media inappropriately during a trial. Also, specific examples of the behaviour that jurors should not engage in may be provided.²⁰⁰ One example could be instructing jurors not to try to find the accused, any of the witnesses, or any of the jurors on social media. Another example could be telling jurors that if anyone involved with the trial contacts them on social media, they should not respond and they should inform the court immediately. The instructions should use plain language and a blank line can be included at the end of the list of different types of social media so that new social media can be added in the future.²⁰¹ Instructions can also state the consequences resulting from jurors using social media inappropriately, like the juror may be charged with contempt of court.²⁰² This may help jurors to understand the seriousness of using social media inappropriately. The court can also provide jurors with a copy of the instructions in writing.²⁰³ There is disagreement regarding whether jurors follow judges' directions.²⁰⁴ Some jurors may not follow a judge's directions, even though they will be punished for this.²⁰⁵

Jurors can take an oath which states that they will not use social media inappropriately during a trial.²⁰⁶ Jurors may be less likely to use social media inappropriately during a trial if they publicly state that they will not do so.²⁰⁷

The courts in many Australian States take jurors' mobile telephones from them while they serve as jurors. This may make it harder for jurors to use social media at court, but they can still use social media when they are outside of court. Doing so may be unfair to jurors who would not use social media inappropriately while they serve as jurors.²⁰⁸ It is also possible to place posters in the room that jurors use that inform

²⁰⁰ Jeannine Turgeon, 'Legal Tech 2014: Avoiding Tweeting Troubles, Facebook Fiascos and Internet Imbroglios: Adapting Jury Instructions for the Age of Social Media' (2014) 36 *Pennsylvania Lawyer* 38, 41.

²⁰¹ Ibid 42 - 43.

²⁰² Ibid 43.

²⁰³ Ibid.

²⁰⁴ Lorana Bartels and Jessica Lee, 'Jurors Using Social Media in our Courts: Challenges and Responses' (2013) 23 *Journal of Judicial Administration* 35, 40; Hon 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.

²⁰⁵ Isaac Frawley Buckley, 'In Defence of "Take-Down" Orders: Analysing the Alleged Futility of the Court-Ordered Removal of Archived Online Prejudicial Publicity' (2014) 223 *Journal of Judicial Administration* 203, 217.

²⁰⁶ Lorana Bartels and Jessica Lee, 'Jurors Using Social Media in our Courts: Challenges and Responses' (2013) 23 *Journal of Judicial Administration* 35, 51; Thaddeus Hoffmeister, 'Preventing Juror Misconduct in a Digital World' (2015) 90 *Chicago-Kent Law Review* 981, 999.

²⁰⁷ Isaac Frawley Buckley, 'Pre-Trial Publicity, Social Media and the "Fair Trial"' (2013) 33 *Queensland Lawyer* 38, 49.

²⁰⁸ Bartels and Lee, above n 8, 50.

jurors not to use social media inappropriately.²⁰⁹ A court can explain to jurors why juries are significant²¹⁰ and how being biased can negatively impact upon a trial.²¹¹

Another method to try to prevent jurors from using social media inappropriately is to teach judicial officers and jurors about the issue.²¹² Training judicial officers about social media is a consistent recommendation that appears throughout this issues paper. This will help judicial officers to benefit from the opportunities that social media creates and manage the challenges that it brings.

Training jurors about social media can be included in the training of jurors that courts already provide. Information about social media can also be included in the materials that are provided to jurors. Just as jurors using social media inappropriately can impact upon the public's confidence in the judiciary, so too can members of the public who post malicious or contemptuous comments about judicial officers.

²⁰⁹ Lorana Bartels and Jessica Lee, 'Jurors Using Social Media in our Courts: Challenges and Responses' (2013) 23 *Journal of Judicial Administration* 35, 48 - 49. Also see: *Attorney General v Davey & Beard* [2013] EWHC 2317 (Admin) (29 July 2013) [13].

²¹⁰ Harvey, above n 183, 223.

²¹¹ Ibid 224.

²¹² Lorana Bartels and Jessica Lee, 'Jurors Using Social Media in our Courts: Challenges and Responses' (2013) 23 *Journal of Judicial Administration* 35, 48; Judge David Harvey, 'The Googling Juror: the Fate of the Jury Trial in the Digital Paradigm' (2014) *New Zealand Law Review* 203, 223.

7. When Social Media is Used Maliciously or Contemptuously to Denigrate or Threaten Judicial Officers or Tribunal Members; the Issues Involved, Can Judicial Officers be Protected, and the Potential for Government Response

a. What Options are Available for Judicial Officers and Court Staff to Deal with this

The reasons of the judicial officer as well as the reasons of any court of appeal may be vigorously scrutinised and be legitimately criticised, even robustly criticised, provided that the critic does not breach the law of contempt or the law of defamation. Such criticism not infrequently is published in the media.²¹³

Fair criticism of judicial officers is integral to democracy. The judiciary may also benefit from helpful criticism.²¹⁴ To some extent, the public expect that judicial officers will receive some negative feedback because of the nature of their position, particularly because they sentence offenders. However, there is a clear difference between a member of the public venting frustration with a decision that they disagree with and a member of the public making malicious or contemptuous comments.

There are many options for judicial officers to deal with malicious or contemptuous comments about them on social media. A thorough search of the relevant legal resources could not find any literature about judicial officers dealing with malicious or contemptuous comments on social media that addresses the topic in depth, though some literature mentions it briefly in a paragraph or two.²¹⁵

Judicial officers may want to have a strategy ready to deal with malicious or contemptuous comments about them on social media.²¹⁶ If judicial officers have such a strategy ready, then they may experience less stress when they learn about the existence of such comments. They may also be able to respond to such comments quicker. Judicial officers can work with the relevant media officers and information technology professionals at their court to develop this type of strategy and possibly develop a uniform strategy for all judicial officers in their jurisdiction. It may be helpful to research and consider the strategy that other professionals use to respond to malicious or contemptuous comments about them on social media. For example, the author of this issues paper researched how government officials and businesses generally respond to malicious or defamatory comments on social media because there is a lack of research available regarding how judicial officers should respond to such posts about them on social media.

²¹³ *Peek v Channel Seven Adelaide Pty Ltd* [2006] SASC 63 (7 March 2006) [13] (Debelle J).

²¹⁴ Ronald Sackville J, 'How Fragile are the Courts? Freedom of Speech and Criticism of the Judiciary' (2005) *Monash University Law Review* 191, 194.

²¹⁵ See, for example, Alysia Blackham and George Williams, 'Australian Courts and Social Media' (2013) 38(3) *Alternative Law Journal* 170, 172.

²¹⁶ Sam H Dekay, 'How Large Companies React to Negative Facebook Comments' (2012) 17(3) *Corporate Communications: an International Journal* 289, 294.

One of the first things that a judicial officer should consider doing when they learn about malicious or contemptuous comments about them on social media is to take screenshots of the comments and save them.²¹⁷ A screenshot is a copy of what appears on a computer screen. If a judicial officer takes a screenshot, this ensures that they have a copy of the comments in case they are deleted. To take a screenshot on a Windows computer, a judicial officer would need to press the 'print scrn' button on their keyboard while they are on the relevant social media page. Next, they would need to open a Microsoft Word document and press 'paste'.²¹⁸ It is also easy to take screenshots while using an Apple computer or other Apple products.²¹⁹ The judicial officer may want to inform other judicial officers and the media and information technology staff at their court to decide what to do about the malicious or contemptuous posts and show them the screenshots of them.

The judicial officer can ignore the malicious or contemptuous comments or post a response. Millions of people may be able to see the malicious or contemptuous posts, in addition to the judicial officer's response.²²⁰ If the judicial officer responds, this could encourage further negative comments.²²¹

The judicial officer can send a private personal message to the person who posted the comments by social media²²² or by email²²³ and ask them to delete the comments. If the judicial officer contacts the person who wrote the comments and the person deletes them, that is a fantastic result. However, contacting the person who posted the comments can be risky. If the judicial officer contacts the person who wrote the comments and asks them to remove them and the person refuses, this could incite the person who wrote the comments to write more comments, or worse. The judicial officer can search for information about the person who made the comments. The judicial officer may find this information helpful to decide whether to contact the person who wrote the comments. For example, if the judicial officer learns that the person who wrote the malicious or contemptuous comments has a lengthy criminal history filled with violent crime, then the judicial officer would not want to contact them. If the judicial officer searches for information about the person who posted the comments, this

²¹⁷ Ellyn Angelotti, *How to Handle Personal Attacks on Social Media* (20 August 2013) <<http://www.poynter.org/2013/how-to-handle-personal-attacks-on-social-media/219452/>>.

²¹⁸ Microsoft Windows, *Take a Screen Capture (Print your Screen)* <<http://windows.microsoft.com/en-au/windows/take-screen-capture-print-screen#take-screen-capture-print-screen=windows-7>>.

²¹⁹ See, for example, Apple, *How to Take a Screen Shot on your Mac* <<https://support.apple.com/en-au/HT201361>>.

²²⁰ 'How to Deal with Negative Comments on your Brand's Page', *Social Times* (online), 29 September 2014 <<http://www.adweek.com/socialtimes/how-to-deal-with-negative-facebook-comments/301063>>.

²²¹ Ellyn Angelotti, *How to Handle Personal Attacks on Social Media* (20 August 2013) <<http://www.poynter.org/2013/how-to-handle-personal-attacks-on-social-media/219452/>>; Sam H Dekay, 'How Large Companies React to Negative Facebook Comments' (2012) 17(3) *Corporate Communications: an International Journal* 289, 294.

²²² Angelotti, above n 217.

²²³ Law Institute Victoria, *Dealing with Negative Feedback How To Handle it* <<http://www.liv.asn.au/PDF/Practice-Resources/Social-Media/Dealing-with-negative-feedback.aspx>>.

assumes that the person used their real name on their social media site - they may have used a fake one. If the person who wrote the comments used a fake name on their social media site, then it may be very difficult for the judicial officer to find any accurate information about them, but the police can still track them down. This issues paper will discuss tracking down people who appear anonymous on social media later on.

If the malicious or contemptuous comments were made on the judicial officer's social media page, then the judicial officer can remove them right away, or right after taking screenshots of them.²²⁴ However, even if they do so, it's still possible that people will have seen the comments before they were removed and that people can see them even after they are removed.

The California Judges Association Formal Opinion on the issue states that there is a positive obligation on a judicial officer to 'delete, hide from public view or otherwise repudiate demeaning or offensive comments made by others that appear on the judge's social networking site' because if the judicial officer does not, then others may think that the judicial officer agrees with the comments.²²⁵ Certainly, the public may not necessarily think that the judicial officer agrees with the comments. However, the public's confidence in the judiciary may be affected by the comments and the actions that the judicial officer takes regarding the comments.

The judicial officer can report the comments to the social media site that they were posted on and ask them to remove the posts.²²⁶ Twitter has a form that permits people to report 'abusive or harassing behavio[u]r'.²²⁷ Twitter can then compel the relevant person to delete the comments or take other serious action.²²⁸ Facebook also permits users to report comments that violate its policies. Facebook can remove the relevant comments and warn the person who posted them not to do so again. They can also remove the user's ability to use Facebook or their ability to use certain Facebook features.²²⁹ If a judicial officer reports the malicious or contemptuous comments to the social media site and asks the social media site for assistance, this does not guarantee that the social media site will assist, nor does it guarantee that the social media site will respond promptly to the judicial officer.

²²⁴ 'How to Deal with Negative Comments on your Brand's Page', *Social Times* (online), 29 September 2014 <<http://www.adweek.com/socialtimes/how-to-deal-with-negative-facebook-comments/301063>>; Mitz Pantic, *How to Handle Negative Comments about you and your Business* (22 July 2013) <<http://www.socialmediatoday.com/content/how-handle-negative-comments-about-you-and-your-business>>.

²²⁵ California Judges Association, *Judicial Ethics Committee, Opinion 66, Online Social Networking* (23 November 2010).

²²⁶ Angelotti, above n 217.

²²⁷ Twitter, *How Can We Help?* (2016) <<https://support.twitter.com/forms/abusiveuser>>.

²²⁸ Shreyas Doshi, *Policy and Product Updates Aimed at Combating Abuse* (21 April 2015) <<https://blog.twitter.com/2015/policy-and-product-updates-aimed-at-combating-abuse>>.

²²⁹ Facebook, *What Happens After you Click "Report"* (19 June 2012) <<https://www.facebook.com/notes/facebook-safety/what-happens-after-you-click-report/432670926753695/>>.

In the United Kingdom, two brothers, Daniel Sledden and Samuel Sledden, pleaded guilty to being concerned in the supply of cannabis. Judge Beverly Lunt gave them suspended sentences. Forty minutes later, Daniel Sledden wrote ‘Beverly Lunt go suck my ****’ on his Facebook wall.²³⁰ The same day, Samuel Sledden commented on Daniel Sledden’s Facebook post ‘[b]et we wouldn’t get a chance like this agen [sic], thumbs up’.²³¹ Judge Lunt then changed the brothers’ sentences to two years in jail immediately because of their Facebook posts. Judge Lunt stated that the brothers’ Facebook posts ‘were placed on Facebook with the intention that others should and would read them and, if they wished, would share them. So it was a limitless audience.’²³² It was important for Judge Lunt to punish the Sleddens for their comments. It sent an important message to offenders and the public generally that posting malicious or contemptuous comments about the judiciary on social media is unacceptable.

Members of the public may also make physical threats to the judiciary on social media. While threatening the judiciary is not new, social media provides a platform for an extremely large audience to read the physical threats and to comment on them.²³³ A judicial officer should report physical threats to the police immediately²³⁴ and take screenshots of them. The police can tell the judicial officer whether they should contact the social media site to ask them to delete the threats and other actions that the judicial officer should take. Members of the public can also post ‘personal information’ about a judicial officer on social media, such as a judicial officer’s physical address, and others can easily see it.²³⁵ This occurred in an incident involving Santo Bonacci. Mr Bonacci

²³⁰ Jon Macpherson, ‘Judge Mocked by Brothers after Sparing them Jail Sends them to Prison after their Cocky Facebook Post’, *The Mirror* (online), 26 February 2016 <<http://www.mirror.co.uk/news/uk-news/judge-mocked-brothers-after-sparing-7449509>>. For a case in the United Kingdom in which an expletive about a judicial officer was posted on social media beside a photograph of a judicial officer, see: ‘Two Teens Face Jail over Abusive Facebook Posts About Judge’, *Sunday World* (online), 16 March 2016 <<http://www.sundayworld.com/news/two-teens-face-jail-over-abusive-facebook-posts-about-judge>>.

²³¹ Jon Macpherson, ‘Judge Mocked by Brothers after Sparing them Jail Sends them to Prison after their Cocky Facebook Post’, *The Mirror* (online), 26 February 2016 <<http://www.mirror.co.uk/news/uk-news/judge-mocked-brothers-after-sparing-7449509>>.

²³² Press Association, ‘Drug-Dealing Brothers Jailed After Mocking Judge on Facebook’, *The Guardian* (online), 27 February 2016 <<http://www.theguardian.com/technology/2016/feb/26/drug-dealing-brothers-jailed-after-mocking-judge-on-facebook>>.

In New Zealand, an occurrence similar to the Sleddens posting negative comments on social media about Judge Beverly Lunt took place. Troy LaRue posted insulting comments about Judge Allan Roberts on Facebook and then appeared before Judge Roberts days later. Mr LaRue’s comments were read in Court before His Honour sentenced Mr LaRue for unpaid fines, see: *LaRue v Ministry of Justice Collections Unit* [2016] NZHC 666 (13 April 2016); Andrew Owen, ‘Judge Allan Roberts has his Day in Court as he Sentences Man who Insulted him on Facebook’, *The Sydney Morning Herald* (online), 18 April 2016 <<http://www.smh.com.au/world/judge-allan-roberts-has-his-day-in-court-as-he-sentences-man-who-insulted-him-on-facebook-20160418-go96c4.html>>.

²³³ Andrea Henson-Armstrong, ‘Suffering in Silence: the Dark Side of Judging in 2013’ (2013) 63 *Syracuse Law Review* 253, 267.

²³⁴ Angelotti, above n 217.

²³⁵ Henson-Armstrong, above n 233, 267.

encouraged Australians over online radio to try to influence Judge Geoffrey Chettle while His Honour presided over a drug matter in 2013. Mr Bonacci posted the email addresses for the Chief Judge of the County Court of Victoria, his associate and four of His Honour's staff members on Facebook. He encouraged people to contact the aforementioned people, and they did. Justice Stephen Kaye found Mr Bonacci to be in contempt of court for his actions.²³⁶

Judicial officers can consider taking some of the actions that were suggested regarding when a member of the public posts malicious or contemptuous posts about them on social media when someone posts their personal information on social media.

Peter James Jamieson allegedly threatened Tasmanian Magistrate Michael Brett on his Facebook page. Jamieson was charged with three counts of using a carriage service to make a threat to cause serious harm. Jamieson posted a photograph of shells from a shotgun on his Facebook page, with the words: "Thanks honourable Judge Brett, you've really made things so good for my family. I'll get you..."²³⁷ The charges also related to threats that Jamieson made regarding another one of his family members.²³⁸ Such threats can understandably cause judicial officers and their families considerable stress and it is important that such threats are taken seriously and promptly reported to police to prevent them from being acted upon.

A judicial officer may be able to commence defamation proceedings against a person who made malicious or contemptuous posts about them. A judicial officer who commences such proceedings is in a similar position to other plaintiffs who commence defamation proceedings against people who are not judicial officers. If judicial officers commence defamation proceedings, it may discourage the public from criticising judicial officers reasonably.²³⁹ Further, people could already have seen the relevant posts well before the judicial officer commenced the lawsuit,²⁴⁰ so the damage to the public's confidence in the judiciary may have already occurred.

²³⁶ 'Self-Styled "Astro-Theologist" Santo Bonacci in Contempt of Court for Facebook Campaign against Judge', *The Age* (online), 7 April 2015 <<http://www.theage.com.au/victoria/selfstyled-astrotheologist-santo-bonacci-in-contempt-of-court-for-facebook-campaign-against-judge-20150404-1mekeb.html>>; Shannon Deery, 'Abusive Fine-Dodger Guilty of Contempt of Court after Attacking Judge', *The Herald Sun* (online), 7 April 2015 <<http://www.heraldsun.com.au/news/law-order/abusive-finedodger-guilty-of-contempt-of-court-after-attacking-judge/news-story/daac08b9b79d290669744092527d086f>>.

²³⁷ ABC News, 'Man Accused of Threatening to 'Get' Tasmanian Magistrate in Facebook Post', *ABC News* (online), 14 January 2015 <<http://www.abc.net.au/news/2015-01-14/man-accused-of-threatening-tasmanian-magistrate-on-social-media/6017676>>.

²³⁸ ABC News, 'Man Accused of Threatening to 'Get' Tasmanian Magistrate in Facebook Post', *ABC News* (online), 14 January 2015 <<http://www.abc.net.au/news/2015-01-14/man-accused-of-threatening-tasmanian-magistrate-on-social-media/6017676>>. The author of this issues paper was unable to find the outcome of the charges against Jamieson when she finalised this issues paper.

²³⁹ Ronald Sackville J, 'How Fragile are the Courts? Freedom of Speech and Criticism of the Judiciary' [2005] *Federal Judicial Scholarship* 11. Also see: Aarushi Sahore, *An Awkward Situation: The Courts' Approach to a Judicial Officer Suing for Defamation* (Honours Thesis, University of Sydney Law School, 2014).

²⁴⁰ Angelotti, above n 217.

Another possible repercussion that people who make malicious or contemptuous comments on social media about judicial officers could face is that they are charged with a unique criminal code offence for maliciously attacking the judiciary on social media.²⁴¹ This is a highly novel suggestion. Such an offence may help to deter the public from committing these actions. However, due to the instantaneous nature of social media it is possible that such a deterrent may not be helpful. A discussion of additional criminal charges that people who post malicious or contemptuous comments about judicial officers could face is outside the boundary of this issues paper.

The Law Institute of Victoria has recommendations for lawyers about the actions that they should take when a member of the public posted negative social comments about them on social media. One of the recommendations is that if the person who posted the comments wrote about a mistake that the lawyer made, then the lawyer can correct it. If the person who posted the comments is simply ‘attacking to get a response’, then the lawyer does not need to respond.²⁴² These recommendations can be applied to judicial officers when such comments are posted about them on social media.

A judicial officer can use different methods to find out about whether someone wrote malicious or contemptuous comments about them on social media. A judicial officer can create Google alerts so that they receive an email when their name is mentioned online, including being mentioned on social media.²⁴³ Judicial officers can use Hootsuite’s ‘social media monitoring’ to check several social media platforms to see what is posted about them.²⁴⁴ Social Mention is another program that judicial officers can use to see what is posted about them on many social media sites.²⁴⁵ Courts can allocate staff who can use the aforementioned programs to search for posts about judicial officers on social media and alert judicial officers when they find such posts.

It is also possible that people may pose as a judicial officer on the internet or social media and write malicious or defamatory comments. This happened to a lawyer, Josh Bornstein, from Maurice Blackburn Solicitors, Victoria. Mr Bornstein is highly active on social media. A fraudster stole his identity and wrote a highly malicious and defamatory

²⁴¹ Senator The Hon George Brandis QC, ‘Symposium: Social Media and Courts & Tribunals – A View from Government’ (Speech delivered at A Symposium: Challenges of Social Media for Courts & Tribunals, Radisson on Flagstaff Gardens, Melbourne, 27 May 2016).

²⁴² Law Institute Victoria, above n 223.

²⁴³ Ellyn Angelotti, *How to Handle Personal Attacks on Social Media* (20 August 2013) <<http://www.poynter.org/2013/how-to-handle-personal-attacks-on-social-media/219452/>>;

Law Institute Victoria, *Dealing with Negative Feedback How To Handle it* <<http://www.liv.asn.au/PDF/Practice-Resources/Social-Media/Dealing-with-negative-feedback.aspx>>.

²⁴⁴ Hootsuite, *Online Reputation Management: Extremely Important and Surprisingly Easy* (25 June 2014) <<https://blog.hootsuite.com/online-reputation-management-for-business/>>.

²⁴⁵ *SocialMention*, <<http://socialmention.com/about/>>. For a list of additional programs that judicial officers can use to check their social media reputation, see: Melissa O’Connor, *10 Top Social Media Monitoring & Analytics Tools* <<http://tweakyourbiz.com/marketing/2013/03/06/10-top-social-media-monitoring-analytics-tools/>>.

article in an online newspaper and used his name. The fraudster also created a Twitter account in Mr Bornstein's name and wrote similarly malicious and defamatory tweets. Mr Bornstein persuaded the online newspaper to delete the article. He also convinced Twitter to remove the defamatory and malicious content with others' help. Mr Bornstein asked the police to help him, but they were not of great assistance. A law student and a journalist tracked down the fraudster in the United States.

Mr Bornstein's experience is highly relevant to the issue of people writing contemptuous or malicious content posing as a judicial officer. If people do so, this could lower the public's confidence in the judiciary and it may be necessary to track down the culprit. However, this raises the question of whether the courts have the resources to engage people to take such action. It also raises the question of who should be responsible for taking this action: the courts, the police or another entity? Certainly if it's a physical threat, then the police should take action. Mr Bornstein's experience also highlighted the heightened vulnerability of judicial officers/lawyers who actively participate in social media. It raised the question about whether this behaviour should be discouraged and whether limitations should be placed on it.²⁴⁶

b. How have Australian courts dealt with this issue to date

Australian courts have also dealt with malicious or contemptuous comments on their social media pages. This section will use information from the previously mentioned 2015 survey that the author of this issues paper undertook.

Many people posted comments on the New South Wales Supreme Court's social media account that are critical of the Court's decisions or activities. Only one person wrote a comment on the Court's Facebook page that breached the Court's General Terms of Use. The comment

contained expletives criticising the judicial system and the judiciary and was considered obscene and offensive. It was a random comment, in the sense that it was posted to a

²⁴⁶ Josh Bornstein, 'When Judicial Officers and Tribunal Members (and their Families) Personally Use Social Media - the Potential Benefits and Risks' (Speech delivered at A Symposium: Challenges of Social Media for Courts & Tribunals, Radisson on Flagstaff Gardens, Melbourne, 26 May 2016). Also note that the Family Court of Australia was able to track down 'Violence Hurts', which tweeted malicious comments about the Court. Denise Healy, 'When Social Media is Used Maliciously or Contemptuously to Denigrate, Threaten or Cyberstalk Judicial Officers or Tribunal Members: the issues involved, Can Judicial Officers and Tribunal Members be Protected, and the Potential for Government Response' (Speech delivered at A Symposium: Challenges of Social Media for Courts & Tribunals, Radisson on Flagstaff Gardens, Melbourne, 26 May 2016). John-Paul Cashen, Macpherson Kelley Lawyers, spoke about how he also tracked down people who appeared to be anonymous on social media as a result of one of his clients: John-Paul Cashen, 'When Social Media is Used Maliciously or Contemptuously to Denigrate, Threaten or Cyberstalk Judicial Officers or Tribunal Members: the issues involved, Can Judicial Officers and Tribunal Members be Protected, and the Potential for Government Response' (Speech delivered at A Symposium: Challenges of Social Media for Courts & Tribunals, Radisson on Flagstaff Gardens, Melbourne, 26 May 2016). Mr Cashen stated that in some cases, he wrote a letter to people who were anonymous on social media once he discovered their identity. In the letter, he asked them to stop their behavior. Some of them did.

picture of a new courthouse that was uploaded-not in response to a post by the Court about a particular decision or event.²⁴⁷

The Court deleted the comment. The author of the comment did not write any further offensive posts. The Court has also received negative comments (that did not breach its General Terms of Use) such as comments about the litigation involving Gina Rinehart and the Court's website. The Court found that when the public comments on their social media it is usually positive.²⁴⁸ The Court receives more negative and derogatory comments on its Twitter page than its Facebook page. The Court's experience to date is that as a demographic it appears the Facebook users are more respectful and restrained in their interaction with the Supreme Court than Twitter followers. This experience has been contrary to what was expected.²⁴⁹

The Family Court of Australia has generally had 'a very positive' experience with Twitter, with the exception of a relatively small number of negative tweets. The Court identified that a litigant was the author of hundreds of tweets that were 'usually criticising the Court' and were published on that person's (anonymous) Twitter account but many tweets would include the Family Court of Australia's Twitter handle. Some of the tweets were repeats of earlier tweets. The Court did not take any action regarding the relevant Tweets as they were from that person's Twitter account, not the Court's account. It simply continued to use social media as usual. The litigant's inclusion of the Court's Twitter handle within their tweets has become less frequent.²⁵⁰

c. Are any regulations available that can be applied to deal with individual members of the public

The Australian Communications and Media Authority can take action if different 'prohibited content' on the internet is published by a host that is located in Australia.²⁵¹ This action includes issuing a 'take-down notice',²⁵² which would require the business that hosts the comment to remove it. 'Prohibited content' involves content that the Classification Board has classified as 'RC', 'X18+', 'R18+', 'MA15+'.²⁵³ General malicious or contemptuous content against judicial officers on social media does not appear to fall under this scheme.

²⁴⁷ Survey of the Chief Justice's Research Director and the Court's Media Managers, Supreme Court of New South Wales (by email, 16 October 2015).

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Survey of the National Media and Public Affairs Manager, the Family Court of Australia (by email, 23 October 2015). A YouTube Channel called "Anonymous" posted videos that attacked the Family Court, stated by The Hon Justice Sharon Johns, 'When Social Media is Used Maliciously or Contemptuously to Denigrate, Threaten or Cyberstalk Judicial Officers or Tribunal Members: the Issues involved, can Judicial Officers and Tribunal Members be Protected and the Potential for Government Response (Speech delivered at A Symposium: Challenges of Social Media for Courts & Tribunals, Radisson on Flagstaff Gardens, Melbourne, 27 May 2016).

²⁵¹ *Broadcasting Services Act 1992* (Cth) sch 5.

²⁵² Ibid sch 7.

²⁵³ Ibid sch 7.

Conclusion

Judge Gibson stated, '[j]udges will be expected not only to know about, but also to be able to use, social media. Personal use is the main area of difficulty, in terms of the potential for attracting criticism of what a judge says or does in his or her personal capacity.'²⁵⁴ It is hoped that this issues paper and the Symposium have provided useful and practical information to help judicial officers to use social media in their personal capacity if they so choose and guidance to deal with malicious or contemptuous comments about them on social media. It is also hoped that this issues paper and the Symposium have provided useful and practical information to judicial officers in other areas that involve the courts and social media.

If judicial officers are knowledgeable about social media, this can help them to take advantage of the opportunities that social media offers and prevent the dangers that social media can cause from occurring. This may impact upon the public's confidence in the judiciary. While this issues paper dealt with several important topics concerning how social media impacts upon the courts, it is not exhaustive. There are other important topics in this area that judicial officers may want to consider (such as whether uniform guidelines for judicial officers regarding social media use are necessary). More materials and training for judicial officers regarding social media may be necessary in the future as new issues are identified and current issues change. The author of this issues paper notes that she is always happy to discuss the topic of social media and the courts with members of the judiciary, lawyers, academics and other relevant stakeholders from around the world. Such discussions are helpful to ensure that her research is relevant and practical and that she shares it with the people who benefit from it the most.

The introduction of this issues paper stated that social media has had a profound impact on Australian courts in a short period. It will be important to observe whether (or more likely how) this profound impact will manifest itself in the future.

²⁵⁴ Judge Judith Gibson, above n 11, 253.

Annexures

Annexure A: Selected Social Media Policies of Australian Courts

Courts Administration Authority of South Australia Twitter Policy

<http://www.courts.sa.gov.au/Pages/Twitter.aspx>

[Home](#) > Twitter

Introduction

This is how the Courts Administration Authority (CAA) uses Twitter.

Content

If you follow us on Twitter ([@CourtsinSA](#)) you can expect news and information from the CAA and its participating Courts. This includes notification of public announcements, media releases, certain outputs of participating Courts (e.g. notices of inquest findings being handed down) and administrative matters.

Following and retweets

The CAA follows organisations or individuals of relevance to the CAA and may retweet suitable content. The fact that the CAA follows a Twitter account or retweets content does not imply endorsement of any kind by the CAA and its participating Courts.

Replies

Please note that the CAA cannot enter into any discussion about a case or a decision, ruling, penalty, verdict, sentence or judgment.

The CAA does not provide legal advice or respond to individual questions about personal circumstances or cases.

Sending messages to the CAA Twitter feed is not considered contacting the CAA or individual State Courts for any purpose. To contact the Courts in an official way, use existing contact mechanisms, which are shown on the CAA website (www.courts.sa.gov.au Contact us)

Your privacy

Any posts you make on Twitter are publicly viewable and searchable. Posts may remain online indefinitely and can be found by search engines.

Do not post personal information of any kind on the CAA twitter page. Please note penalties exist for publishing material subject to statutory and court-ordered suppression orders.

Inappropriate material

Any posts that are abusive, threatening, appear to be defamatory, discriminatory, hateful toward any group or person or are in any way unlawful will be deleted as soon as possible. The CAA may block users who post material of this nature.

Please also note that Twitter has terms and conditions by which its users are bound.

Official Use of Twitter by the Family Court

<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/about-social-media/>

The Family Court has an official Twitter account — [@FamilyCourtAU](#). Currently this is the only official social media account of the Court.

What you can expect from us

If you follow us on Twitter, you can expect short updates with the latest news, information, services and judgments (at least three times per week). This includes notification of:

- judgments
- registry closures
- legislation and rules changes
- selected job vacancies
- new publications and forms and changes to existing ones, and
- media releases.

While the Court endeavours to ensure the information published on our Twitter feed is current and accurate at the time of publication, we advise you to always verify its currency and relevance for your purposes as it could be subject to change over time.

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. Unlike other jurisdictions, very strict rules apply to repeating information about family law proceedings and the disclosure of personal or identifying information about parties to family law matters under the *Family Law Act 1975 – SECT 121*. Penalties of up to one year imprisonment can apply.

The Family Court records all information posted to the Court's Twitter page and use that information for the purpose of administering the Twitter page and considering and/or addressing any comments made.

If you have a question about your personal circumstances, or want to make a formal enquiry, comment or provide feedback to the Court, contact the Court's National Enquiry Centre by email enquiries@familylawcourts.gov.au or phone 1300 352 000.

Reporting and publication of family law matters.

The Family Law Act restricts how court proceedings are recorded and what information can be published or broadcast, including on social networking sites.

Section 121 of the *Family Law Act 1975* makes it an offence to publish proceedings or images that identify people involved in family law proceedings unless a Publication Order has been made or another s 121 exemption applies.

Section 97 of the Family Law Act provides that all proceedings are held in open court unless the Court decides otherwise.

Penalties of up to one year imprisonment can apply for breaches of s 121.

Your privacy

The Family Court respects your right to privacy and the security of your information. We ask that you protect your personal privacy and the privacy of others by not posting personal information on the Court's Twitter feed or any other social networking accounts.

Postings will be regularly reviewed during business hours. Posts that contain personal information and/or inappropriate language and are potentially offensive or defamatory will be removed.

The Court's Privacy Policy applies to the use of Twitter. The Court is not responsible for the privacy practices or content of Twitter or any linked websites.

You can read more about the Court's commitments and legal obligations in the fact sheet 'The Courts and your privacy'. The fact sheet includes details about information protection under the privacy laws and where privacy laws do not apply.

Social media disclaimer

Twitter is an external site and when using it you are bound by the terms and conditions of use of that site. We encourage you to review the legal policies of that site for further information. The Court does not endorse, and is not accountable for any views expressed by third parties using that site.

Court staff may use social media for personal and professional reasons, however are not representing the Court when doing so. All court staff are governed by the Court's social media policy. The use of social media by public servants is also governed by the APS Values and Code of Conduct. Public servants are expected to maintain the same high standards of conduct and behaviour online as would be expected through other channels.

Supreme Court of Tasmania Social Media Policy

http://www.supremecourt.tas.gov.au/about_us/technology/social_media_policy

Supreme Court of Tasmania
Social Media Policy
@SCTasmania

Introduction

This document sets out how the Supreme Court of Tasmania uses social media. The Court currently uses Twitter as its social medium.

Content

If you follow us on Twitter @**SCTasmania** you can expect regular updates with news and information from the Court. This includes notification of:

- judgments handed down
- sentencing comments
- administrative announcements
- new publications and speeches
- Practice Directions
- Circulars to Practitioners
- media releases

Following

The Supreme Court follows organisations or individuals of relevance to it. The fact that we follow a Twitter account does not imply endorsement of any kind by the Supreme Court of Tasmania.

Replies

We welcome your feedback. However we do not have the resources to reply individually to all messages we receive via Twitter.

Please note that the Court cannot enter into any discussion about a case before it, or about a judgment that has been published, or a sentence that has been imposed.

You should also be aware that the Court cannot offer legal advice or respond to individual questions about your personal circumstances or case. Sending messages to our Twitter feed will not be considered contacting the Court for any official purpose. If you need to contact the Court for an official purpose please visit our [Contact Us](#) page.

Your Privacy

Remember that any posts you make on a social networking site, including Twitter, are publicly viewable and searchable. Your posts may remain online indefinitely and can be found through search engines.

We ask that you protect your personal privacy and the privacy of others by not posting personal information on the Court's Twitter page. You should be aware that penalties may apply to disclosing personal information in some circumstances, including information that identifies people who are victims of sexual assault, or are involved in a family law proceeding; and information about a case which is covered by a suppression or non-publication order.

The Supreme Court of Tasmania respects your right to privacy. Postings are regularly reviewed during business hours. Posts that contain personal information may be removed.

Inappropriate Material

The Supreme Court of Tasmania is committed to protecting your rights and safety. We welcome debate but will delete all posts that are abusive, offensive, threatening, or appear defamatory, discriminatory, hateful towards any group, or that are in any way unlawful.

Please note that we may block users who post material of this nature.

You should also be aware that Twitter is an external site and that when using it you are bound by the [terms and conditions of use](#) of that site.

Availability

Twitter may occasionally become unavailable. The Supreme Court of Tasmania does not accept responsibility for lack of service due to Twitter downtime.

Annexure B: Table of Types of Social Media that Australian Courts are Using

Two stars beside the name of the court means that the court did not complete the survey of the author of this Issues Paper because the survey was not sent to them or for some other reason.

Court	Twitter	Facebook	YouTube	LinkedIn	Other
County Court of Victoria	x				
District Court of New South Wales	x				
Family Court of Australia	x		x	X	x live chat
Magistrates' Court of Victoria	x				
New South Wales Civil and Administrative Tribunal**	x	x			
South Australian Courts	x		x		
Supreme Court of New South Wales	x	x			
Supreme Court of Tasmania**	x				
Victoria Supreme Court	x	x			

Annexure C: Table of URLs of Courts and Tribunals that are Using Social Media

Two stars beside the name of the court means that the court did not complete the survey of the author of this Issues Paper because the survey was not sent to them or for some other reason.

Court	URLs
County Court of Victoria	https://Twitter.com/CCVMedia https://VicCourtsTribunalsTV
District Court of NSW	https://mobile.twitter.com/NSWDstCt
Family Court of Australia	https://mobile.twitter.com/FamilyCourtAU https://m.youtube.com/user/familycourtAU http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/contact-us/national-enquiry-centre https://www.linkedin.com/company/family-court-of-australia
Magistrates' Court of Victoria**	https://mobile.twitter.com/MagCourtVic ²⁵⁵
New South Wales Civil and Administrative Tribunal**	https://mobile.twitter.com/NCATNSW https://www.facebook.com/ncatnsw
South Australian Courts	https://www.youtube.com/user/CourtsAdminAuthority https://mobile.twitter.com/CourtsinSA
Supreme Court of New South Wales	https://mobile.twitter.com/NSWSupCt www.facebook.com/SupremeCourtNSW
Supreme Court of Tasmania	https://twitter.com/SCTasmania
Victoria Supreme Court	https://twitter.com/SCVSupremeCourt https://www.facebook.com/SupremeCourtVic

²⁵⁵ Ibid.

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