How Should Australian Courts Approach the Use of Live Text-based Communications in Court?

Steve Hind considers the use of live text-based communications in court, as well as the risks posed and the approaches taken towards it in various jurisdictions.

Introduction

Writing extra-judicially in 2006, Spigelman CJ, likened those who were instinctively hostile to new Internet technologies to the Dominican friars who opposed the Germans who brought the printing press to Italy in the late 15th century.[1] Fra Filippo di Strata, he said, thought the Germans were "vulgarising intellectual life", distorting the subtlety of the Latin text and providing the word of God to common people without a priest to intermediate.[2]

the Criminal Bar Association said that with Twitter there is the risk "that often things are tweeted that might have been said, but probably would not have been written, had the person had time to reflect".

Similar attitudes have been expressed in relation to live text-based communication technologies (***LTBC***), especially social networking sites like Twitter and Facebook. The Lord Chief Justice of the United Kingdom, in a Consultation Paper about LTBC released this year (the ***Consultation Paper***) noted that posts on Twitter are often written "in a trivial manner, even when they relate to a serious subject matter."[3] In response to the Consultation Paper, the Criminal Bar Association said that with Twitter there is the risk "that often things are Tweeted that might have been said, but probably would not have been written, had the person had time to reflect".[4]

The use of LTBC in court is a real phenomenon. During the 2009 hearing of *Roadshow Films Ptd Ltd v iiNet Limited (No. 3)*,[5] journalists from ZDNet and *The Australian* tweeted coverage of the trial. Some tweets, it was reported, even provoked chuckles in the gallery.[6] Cowdroy J was said to be "well aware" of the tweeting and had done nothing to stop it.[7] Greens staffer and political blogger Ben Raue tweeted during the New South Wales Supreme Court's hearing of Pauline Hanson's abortive electoral fraud suit this year.[8] Raue said he did not ask for permission to tweet, and that he was one of five people doing so at the time.[9] National Media Director for activist group GetUp!, Paul Mackay, posted Twitter updates while the High Court heard *Rowe v Electoral Commissioner*[10] last year. Unable to bring any device with a sim card into the court, Mackay stepped out to post updates.[11] At least to some extent, the cat is out of the bag.

Although the hostility towards it may be unwarranted, LTBC is not without its risks. This article examines the different types of LTBC, the approaches taken towards LTBC in the United States, the United Kingdom and Canada to date, and the risks posed by LTBC. This article also suggests policy responses in light of the foregoing analysis. Discussion of the challenges that LTBC pose to the law of contempt of court is beyond the scope of this paper.

What are live text-based communications?

Various platforms and methods can be used to transmit text live from court. As the Lord Chief Justice noted in the Consultation Paper, longer battery life and improvements in mobile Internet make it easier than ever to operate smartphones and tablet, netbook or laptop computers in court.[12] Information posted via LTBC can be classified as private, mediated public or direct public.

Private posts include text messages sent from mobile phones, emails to specific addressees and private messages accessible only by selected recipients on Facebook, Twitter and the like. Given that these have an intentionally limited audience, they are less relevant than the following categories.

Mediated posts are those sent by a journalist to an editor before publication. In the case of mediated posts, reporters will gener-

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1 J.J. Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006), 29(2) *UNSW Law Journal* 147, 166.

2 Ibid.

3 Lord Chief Justice of England and Wales, 'A Consultation on the Use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting' (Consultation Paper issued by the Judicial Office for England and Wales, 7 February 2011), paragraph 5.4. ('The Consultation Paper').

4 Criminal Bar Association, 'Response on the Use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting' (Response to Consultation Paper issued by the Judicial Office for England and Wales, 2011).

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

6 Margaret Simons, 'Court reporting in 140 character tweets' *Crikey* (12 October 2009) (http://www.crikey.com.au/2009/10/12/court-reporting-in-140-character-tweets/)

7 Ibid.

8 See, for example: http://mobile.twitter.com/benraue/status/80538250447568896.

9 Interview with Ben Raue (@benraue), conducted via Twitter (18 August 2011).

10 [2010] HCA 46.

11 Interview with Paul Mackay (@plmky), conducted via Twitter (18 August 2011).

12 The Consultation Paper, above n 3, paragraph 2.2.

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ally file their copy from court, which an editor then posts online. This only differs slightly from the current situation, where reporters leave court to file their copy by email or telephone, in that it increases the frequency of updates.

Direct public posts are those placed on blogs or social networking sites (for example, Facebook and Twitter) that are potentially accessible by a large audience. This article focuses on public posts because these tend to have the greatest impact on the court process due to their potentially limitless availability.

Some qualifications must be made about what exactly is meant by public. Most blogging platforms enable users to restrict their accounts or posts to approved subscribers (or categories of subscribers). This means that it is rare that a person's status update will actually be available to the world at large.

However, despite the existence of mechanisms to restrict access, it is unlikely that a person would use a private account to tweet from court, particularly where that person is a journalist tweeting for the purpose of broad publication. Tweets sent from open accounts are accessible by anyone with Internet access. Individual tweets have a unique URL, like blog posts, though most people are likely to see a tweet when it appears a Twitter 'feed'.[13]

A Twitter user can 're-tweet' so that the original tweet appears in the feeds of the people who follow their account. It is in this manner that a tweet can be reproduced at an exponentially increasing rate, "so that it may achieve an audience of thousands or even millions very rapidly".[14]

International approaches

Other major jurisdictions are yet to establish firm rules about LTBC. In the United States, the US Judicial Conference has no settled policy, though several federal judges have allowed reporters to tweet from court.[15] Where they have been allowed, in at least one case the reporter was required to sit at the back of the gallery to minimise disruption.[16] Last year, Judge Vaughn Walker allowed Twitter to be used in court while hearing *Perry v Schwarzenegger,*[17] otherwise known as the Prop 8 trial.[18] While covering the trial, reporter Dan Levine, using the handle '@fedcourtjunkie', gathered thousands of followers on Twitter.[19]

The issue for policy makers in the United States is that "historically, case law has generally supported the view that the freedom of press does not include the right to broadcast, record or photograph."[20] As a result, in U.S. v Shelnutt,[21] it was held that tweeting from court was prohibited under Federal Rule of Criminal Procedure 53, which bans broadcasts from court. It has been observed that this decision lacked any analysis of why tweeting is similar or dissimilar to the broadcasting of audio or visual information that previous cases had considered.[22]

The United Kingdom is currently reviewing its approach to LTBC. Courts in the United Kingdom are generally subject to similar principles to Australia courts. Under an Interim Practice Guidance issued in February,[23] mobile phones must be switched off in court but the media may request that they be allowed to use them.[24] Further, in the UK, the *Contempt of Court Act 1981* (UK) requires reporting from court to be "fair and accurate". As a result, the Consultation Paper emphasises that the focus of their inquiry is whether accredited members of the media should be permitted to use LTBC.[25] This approach has been criticised in responses to the Consultation Paper.[26]

The UK Supreme Court is already exempt from bans on audiovisual broadcasting, and it was specifically noted in the Interim Practice Guidance that it rarely hears evidence from witnesses and does not have a jury. Under the policy, LTBC can be used by any person where they are silent and do not cause disruption. Anyone using LTBC must abide by any reporting restrictions imposed by the judge.[27]

Notwithstanding that Canada has a similar legal background to Australia, the use of Twitter in court is already relatively common in Canada, where reporters have tweeted from, amongst other trials, the murder trial of Bandidos motorcycle gang members and the highly controversial murder trial of former army officer Russell Williams.[28] However, the Canadian Broadcasting Commission was denied permission to tweet from the murder trial of filmmaker

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13 A feed is a list of tweets, generated either because everyone has included the same 'hash tag' in the text of the tweet, or because the person viewing the feed has elected to 'follow' the tweets of every user in the feed.

14 Criminal Bar Association, above n 4, paragraph 24.

15 Lynn Marek, 'Judges Split on Courtroom Blogging, Twitter Use', *The Connecticut Law Tribune*, 16 March 2009.

16 Ibid.

17 704 F. Supp. 2d 921 (N.D. Cal. 2010).

18 Adriana C. Cervantes, ' Will Twitter Be Following You in the Courtroom?: Why Reporters Should Be Allowed to Broadcast During Courtroom Proceedings' (2011) 33 *Hastings Communication and Entertainment Law Journal* 133, 135.

19 Ibid, 135.

20 Ibid, 137.

21 No. 4:09-CR-14 (CDL). Nov 2, 2009.

22 Cervantes, above n 18, 149.

23 The Supreme Court of the United Kingdom, 'Policy on the Use of Live Text-Based Communications from Court', (Interim Practice Guidance, The Supreme Court of the United Kingdom, February 2011). ('The Interim Practice Gudiance').

24 Ibid.

25 The Consultation Paper, above n 3, paragraph 1.

26 Criminal Bar Association, above n 4, paragraph 13; British and Irish Legal, Educational and Technology Association, 'Response to the consultation by the Judicial Office of England and Wales on the Use of Live, Text-Based Forms of Communication from Court for the Purposes of Fair and Accurate Reporting' (Response to Consultation Paper issued by the Judicial Office for England and Wales, 2011).

27 Ibid.

28 'Too much tweets? Some loathe, some love Twitter courtroom coverage', Alexandra Zabjek, Postmedia News, 21 March 2011.

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Mark Twitchell.[29] Notably, in the Williams case, the reporter worked in court with an editor next to her so that they could discuss their approach to sensitive parts of the evidence and argument.[30]

The principles of open justice

Earl Loreburn said in *Scott v Scott*,[31] "the inveterate rule is that justice shall be administered in open Court".[32] A 'corollary' of the public's right to attend court is their right to report what is seen and heard in open court, and this right is not limited to the media.[33] In approving the House of Lords' decision in *Scott*, Gibbs J stated in *Russell v Russel*[34] that:

> [t]his rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts.[35]

This year, French CJ said in *Hogan v Hinch*[36] that:

> [t]he open hearing is an essential characteristic of courts, which supports the reality and appearance of independence and impartiality. Its corollary is the freedom to make a fair and accurate report of what transpires in court proceedings…[37]

LTBC offer the press and members of the public a powerful way to exercise their right to report on what they see and hear in court. In doing so, they spread the benefits of that publicity that Gibbs J and French CJ highlighted.

When considering the challenges posed by LTBC, the question should be whether there are grounds to infringe on the principle of open justice, rather than whether this new form publicity should be allowed. A response to the Consultation Paper suggested that by asking whether there was a legitimate demand for the use of LTBC, the Lord Chief Justice miscast the question. Instead he should have asked whether there was a legitimate basis upon which to ban it.[38] This section considers the various justifications for banning or regulating the use of LTBC.

The power to exclude the public

The first exception to open justice that must be examined is the right of judges to exclude the public from court. In *Scott*, the Earl of Halsbury said that the public, or some members of it, could be excluded from court where:

> [t]he administration of justice would be rendered impracticable by their presence, whether because the case could not effectively be tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court.[39]

In that case, Viscount Haldane LC said that a court could not sit in camera "unless it be strictly necessary for the attainment of justice".[40] The *Federal Court of Australia Act 1976* (Cth) establishes this principle for federal courts in section 17(1).

While Parliament has the power to require some hearings be held in camera, it cannot completely do away with the principle of public courts. In *Russell*, the court was asked, inter alia, to consider the constitutional validity of section 97 of the *Family Law Act 1975 (Cth)* which provided that family law proceedings be heard in closed court. In holding that it was invalid, Gibbs J said that while the "category of…exceptions is not closed to Parliament", the requirement that all hearings be held in camera was an attempt by Parliament "to obliterate one of [courts'] most important attributes."[41]

Of course if a court is cleared, it will not matter whether the ejected public are using Twitter. More relevant is the power of courts to exclude certain people and to make non-publication, pseudonym and suppression orders.

Power to exclude certain individuals

The power to exclude certain individuals from court was well summarised by Bowen CJ in *Australian Broadcasting Corporation v Parish*.[42] Witnesses can be excluded so they do not "trim their evidence" as can "demonstrators or rioters" who may disrupt proceedings.[43] The categories are not closed and the discretion will lie with the judge, taking into account the principle of open justice.[44]

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29 Ibid.

30 Ibid.

31 [1913] AC 417.

32 Ibid, 445.

33 *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55 (Kirby P).

34 (1976) 134 CLR 495.

35 Ibid, 520.

36 [2011] HCA 4.

37 Ibid, [46].

38 British and Irish Legal, Educational and Technology Association, 'Response to the consultation by the Judicial Office of England and Wales on the Use of Live, Text-Based Forms of Communication from Court for the Purposes of Fair and Accurate Reporting' (Response to Consultation Paper issued by the Judicial Office for England and Wales, 2011), paragraph 2. ('BILETA Response')

39 *Scott v Scott*, above n 31, 446.

40 Ibid, 437.

41 *Russell v Russell*, above n 34, 520.

42 (1980) 43 FLR 129.

43 Ibid, 132.

44 Ibid.

Reporting restrictions such as suppression, non-publication and pseudonym orders all modify the principle of open justice and, specifically, the right of people to report on what they see in open court.

In the Consultation Paper, the Lord Chief Justice saw a risk of disruption in interference by mobile internet with the court's amplification and sound recording equipment, and by having a gallery full of people using phones and computers that may ring, make noises or be noisy to use.[45] In a response to the Consultation Paper, a group of information technology law academics said that in their experience there was a "high likelihood" that courtroom speakers would suffer from interference,[46] and a room full of people typing on noisy laptop keyboards could be disruptive.[47] Lord Chief Justice's Interim Practice Guidance on the LTBC in December 2010 said the number of people using the technology could be limited solely on the potential for disruptions of this kind.[48]

It seems unduly restrictive to ban LTBC purely because of the risk of noise or audio interference. Instead a judge could adopt an approach taken recently in the United States and request that those using LTBC sit at the back of the gallery.[49] More generally, judges could monitor any disruption and only require that LTBC not be used in the event that the disruption significantly impairs the proceedings.

Reporting restrictions, witnesses and jurors

Reporting restrictions such as suppression, non-publication and pseudonym orders, all modify the principle of open justice and, specifically, the right of people to report on what they see in open court. They also prevent those present in court from reporting on names, identities, information evidence that is disclosed in open court. Understanding why these orders are made will be useful in showing how that rationale can be extended to support different orders or legislation aimed at limiting the risks associated with LTBC.

The High Court considered the validity of suppression orders this year in *Hogan v Hinch*. Considering some conflicting authority, French CJ concluded that there was inherent jurisdiction to restrict publications but that the power must be justified by reference to what is necessary in the interests of the administration of justice.[50] This mirrored the tests proposed by McHugh JA in *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales*[51] and by Mahoney JA in *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v Local Court of New South Wales* (1991).[52]

The utility of such orders and the reason why they fit with the logic of the principle of open justice was explained by Lord Widgery CJ in *R v Socialist Workers Printers and Publishers Ltd.*[53] Orders that control what can be published mean that the presence of the public can still supervise and impose discipline on the courts, without the risk that the administration of justice will be frustrated in ways that might otherwise justify hearings being held in camera.

Legislatures across Australia have granted judges statutory powers to make suppression orders. The resulting powers are, in the words of some commentators, "too numerous and various to mention".[54] French CJ confirmed in *Hogan v Hinch* that a statutory discretion to make suppression orders would be unlikely to deprive the court "of an essential characteristic of a court."[55]

Legislation conferring a power to make suppression orders to deal specifically with risks posed by LTBC would be of limited utility. The relevant issue is not whether an order should be made but how its terms should be crafted and conveyed in the presence of those using LTBC. Legislation that permits judges to make such orders, or that specifies the manner in which such orders should be made,[56] would be otiose as judges are well aware of the existing principles governing the making of such orders.

To understand how such orders can be crafted to mitigate risks of LTBC, it is necessary to lay out the risks posed. These can be divided into three broad categories: the live reporting of evidence that is later contradicted or ruled inadmissible, witnesses seeing reports of testimony of other witnesses, thereby allowing them to 'trim their evidence', and jurors accessing and reading reports of evidence that may not be admissible. In analysing these risks two questions must be asked. First, to what extent are these risks increased by LTBC in court? Second, to what extent can those risks be managed by judicial orders?

Live reporting of evidence

As the Lord Chief Justice noted in the Consultation Paper, sensitive information frequently emerges during trial without its sensitivity being immediately apparent. Where this occurs, a judge may subsequently ask the media to omit such information from their reports.[57] However, the response to the Consultation Paper by the British and Irish Law, Education and Technology Association[58] notes that in the case of live reporting of evidence that may later be contradicted or ruled in admissible, damage to the reputation of

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45 Ibid.

46 BILETA Response, above n 38, 3.

47 Ibid, 5.

48 Interim Practice Gudiance, above n 26, paragraph 15(b).

49 Lynn Marek, 'Judges Split on Courtroom Blogging, Twitter Use', *The Connecticut Law Tribune*, 16 March 2009.

50 Ibid [26].

51 (1986) 5 NSWLR 465, 476.

52 26 NSWLR 131, 161.

53 [1975] Qb 637.

54 David Rolph, Matt Vittins and Judith Bannister, 'Media Law: Cases, Materials and Commentary' (2010) *Oxford University Press*, 401.

55 *Hogan v Hinch* [2011] HCA 4, [27].

56 See, for e.g. *Court Suppression and Non-Publication Orders Act 2010* (NSW).

57 The Consultation Paper, above n 3, paragraphs 6.1-2.

58 ('BILETA').

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witnesses and other individuals, and even damage to the share price of companies may already have occurred by the time such a direction is given.[59]

These risks are clearly associated specifically with the live reporting of evidence. BILETA's suggested solution is for judges to direct those engaging in LTBC not to report until after the examination in chief, cross examination and (where appropriate) re-examination have taken place.[60] A more flexible approach would be for such orders to apply for either all testimony in a case or for particular witnesses, as the circumstances may dictate. Judges could then direct the gallery as to what information, if any, should be withheld from reports. This solution will not prevent every instance in which sensitive information may be broadcast, but it would minimise such instances while allowing more detailed reporting of testimony. Reporters, one imagines, would draft a series of tweets or draft articles and then publish them once the testimony is completed and any necessary changes have been made.

Witnesses 'trimming their evidence'

Judges may require that witnesses not be present in court before they testify. This prevents witnesses hearing the evidence of others and thereby "trimming their evidence."[61] LTBC enables witnesses to easily read the testimony of others online, creating a situation that is the same in effect as if they were present in court.[62]

In this situation, LTBC does not necessarily create a new risk, but may increase the scale of the existing risk. Suppression orders aside, there is nothing to stop a person exiting a courtroom and communicating what they have heard inside to anyone else, including future witnesses.

LBTC therefore makes it easier for nefarious witnesses to trim their evidence and it also increases the chance that witnesses may be influenced by reports of other evidence. While little can be done to stop people intent on trimming their evidence, clear directions to witnesses that they are not to investigate online reports of the trial before they testify could mitigate many of the remaining risks.

Jurors accessing online reports

The problem posed by jurors using the Internet and internet-enabled devices in court and during their deliberations has received academic attention in the United States.[63] Preventing jurors from accessing the Internet seems futile. Instead we should ask whether, given that the risk of Internet use by jurors exists, LTBC make the problem unmanageable.

LTBC has the potential to allow increasing amounts of detailed information to be accessed by jurors in the event that they decide to ignore the directions given to them.

Although jurors are informed by the judge not to conduct independent Internet research,[64] LTBC has the potential to allow increasing amounts of detailed information to be accessed by jurors in the event that they decide to ignore the directions given to them. Since any independent investigations by jurors can render a conviction unsafe,[65] banning LTBC to reduce the amount of information available would not necessarily prevent a mistrial. Again it seems the more effective and proportionate approach would be to give juries clearer and more detailed directions that clarify that they are to avoid researching the case on social networking sites. Spigelman CJ has noted extrajudicially that in Australian courts "there is a greater faith in the ability to ensure a fair trial by means of strong directions" to juries.[66]

Conclusions and recommendations

The use of LTBC in court provides opportunities to engage the public in the business of the courts. However it may also pose risks to the operation of the legal system if it continues unregulated. Given that an outright ban is unlikely to prevent some of the contemplated harms, clear judicial directions and guidance will be necessary. These should encompass how, when and where LTBC can be carried out. Provided that these are sufficiently clear, it may not be necessary to require those engaging in LTBC to nominate themselves, sit in a special area or seek individual permission as is suggested in the Consultation Paper.[67]

Perhaps more importantly, the courts should consider how they communicate with the public about how they may use LTBC in court. Clear and accessible instructions about the rules and procedures should be posted online. Although none of these measures will avoid all problems or mitigate all risks, they should manage those risks sufficiently well to allow LTBC to be used in court.

Steve Hind recently completed a Bachelor of Laws at the University of Sydney, where he has also completed a Bachelor of Economics.

59 BILETA Response, above n 23, 3-4.

60 Ibid, 2.

61 *ABC v Parish* (1980) 43 FLR 129, 132.

62 The Consultation Paper, above n 3, paragraph 4.5.

63 See Frederic, I. Lederer, 'Wired: What We've Learned About Courtroom Technology' (2010) 24 *Criminal Justice* 18.

64 See *Regina v Bilal Skaf* [2004] NSWCCA 37, [280].

65 Ibid, [242]–[277].

66 Spigelman, above n 1, 164.

67 Above n 3.