SOCIAL MEDIA'S LEGAL CRITERIA

by

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There once was a time, not long ago, when geeks governed the internet and laws of the physical world did not apply.

These days are gone. Now more and more frequently internet and, in particular, social media users are finding themselves in legal strife.

This affects the majority of adult New Zealanders. Social media monitoring company Social Baker estimates 2,279,540 Kiwis are on Facebook alone. Accounting and payroll software company MYOB estimates 20% of New Zealand's businesses are using social media as a marketing platform.

With the majority of adult New Zealanders using this medium, lawyers need to be aware of the potential legal risks associated with social media.

Social media has created a situation where personal and professional identities are increasingly entwined. A search for someone's professional details will often simultaneously give information on their personal lives.

On social media sites, the sharing of personal information is highly encouraged. Facebook invites all members to share at the top of their profile, their sexuality, relationship status, religious beliefs, political views, age, workplace, schools and place of birth. Family members can also be flagged.

It is against Facebook's Terms and Conditions to become a member of their website under a false name. This raises questions over whether an

employee's work profile can be distinguished from their personal profile online.

Simpson Grierson partner Shan Wilson, who specialises in employment law, emphasises it is important to try and keep personal and professional boundaries - although this is often difficult when people include workmates as social media "friends".

"Difficulties can arise when someone criticises their employer on their Facebook page and does not take into consideration that their workmates are part of their community," Ms Wilson says.

Sharing information about your personal life, and any excesses within that, can also put work colleagues in a difficult position, where the information could raise issues about whether that person is fit for work.

Ms Wilson cites an instance in the United States, where knowledge through Facebook of an employee's repeated intoxication in his life outside work became a legal issue.

In this case an employee who was employed as a driver and friends on Facebook with most of the Company's workers, regularly posted about binge drinking habits. From the employee's comments, co-workers could surmise their colleague would have been driving under the influence during work hours.

The employee crashed, while driving drunk at work and seriously injured a third party. The employer was sued for negligent retention, on the basis the employer knew or should have been aware the employee had drink driving issues. In New Zealand a matter such as this could arise as a liability for an employer under the Health and Safety in Employment Act 1992, around whether they had taken all practicable steps to minimise a

workplace risk.

Staff members venting personal views on social media can also cause employers legal and reputational problems.

DLA Phillips Fox partner John Hannan says there is no doubt staff can damage their employer's reputation with misplaced comments and, to counter this, employers need well defined policies to control staff's social media use both inside and outside work hours.

"If staff make derogatory comments about customers, colleagues or their workplace, New Zealand businesses can be damaged. If they make remarks reflecting adversely on their fitness for their role, their continued employment may also be called in to question," Mr Hannan says.

"This is an important issue, and it needs to be spelled out so that the staff member understands it, possibly even in a separate document, which is acknowledged or signed by the employee."

However, when drafting social media policies, employers may have to consider freedom of speech parameters, Bell Gully solicitor Anna Holland says.

The National Labor Relations Board in the United States recently ruled that under the National Labor Relations Act workers' comments on social media that amount to "concerted activity" for "mutual aid" in relation to the terms and conditions of their employment are protected on social media.

"While the issue has not yet been tested in New Zealand, the position in the United States is certain. The National Labor Relations Board has said quite clearly that it recognises free speech to the extent that an employee

has a right to discuss working conditions freely online. An effective social media policy is tailored to the employer's interests, and should not place a blanket ban over all online activity. For example, an employer should not simply claim that all information relating to work is confidential," Miss Holland says.

An inevitable tension also exists in drafting a social media policy between making it specific enough to be enforceable, yet flexible enough to adjust to the rapid rate of technological change, Miss Holland says.

She cites an Australian decision in which the bench of Fair Work Australia said that over time the ability for an employee to plead "ignorance" in relation to behaviour on social media will decrease. In *Linfox Australia Pty Ltd v. Glen Stutsel* [2012] FWAFB 7097, a truck driver was found to be unfairly dismissed after he made offensive comments about colleagues on a public Facebook page. The dismissal was held to be unfair partly because the employer did not have a social media policy but also because the staff member was "unaware" the page was public.

"The responsibility that an employee has in managing a social media page will increase. An employee really does have responsibility for their personal social media page as if they own it, which means they are even responsible for posts made by third parties," Miss Holland says.

Reference checking

Because people often list personal views and are open about their personal lives online, recruiters now have an unprecedented ability to find out information on job applicants.

This can cause potential discrimination issues. Although it is not illegal

to Google search or Facebook search anyone, Ms Wilson recommends that organisations have a policy as to how, and if, they look prospective employees up online.

She says it is important to ask: “What am I going to do with the information I find out? If it is a personal matter in private time, then it is not necessarily fair that the employer takes it into account.”

Brand management

Senior associate at Buddle Findlay in Auckland, Allan Yeoman says that over the last 12 months the firm has been developing more and more internal policies for clients.

This has been driven by clients’ experience, the New Zealand Advertising Standards Authority (ASA) guidelines released last year, and a growing sense that users are becoming more sceptical with how brands are using social media and their personal information.

“It seems that at the moment every time you pick up a paper there is some sort of backlash against social media sites or with brands doing something wrong,” Mr Yeoman says.

This requires a balance between striking the right tone in online relationships with customers as well as maintaining legal obligations such as the ASA guidelines, privacy law and the Fair Trading Act 1986, he says.

The ASA guidelines followed an Australian Advertising Standards Bureau decision last year that upheld a complaint against Fosters Australia, Asia & Pacific that sexism, racism, and other forms of discrimination or vilification on a Facebook page by a third party were the responsibility of

the page owner.

Mr Yeoman says currently businesses are asking themselves: “How do we as an organisation deal with this?”

As with employment issues related to social media, the answer lies in good policies, he says.

However social media brand management policies are not a one-size-fits-all solution. They need to be unique, with a high degree of collaboration with a client’s marketing and public relations teams.

“Of the policies we have developed, no two are alike because every client is different,” Mr Yeoman says.

“They are all in different industries, they all want to manage their brand differently; some want to be edgy, some want to be very conservative and all of those things will play into whether they should even be on social media in the first place.”

Social media platforms have also become a place where activist groups (for instance Greenpeace and PETA) and customers can discuss and protest a business’s actions.

The nature of social media has meant sometimes a brand may be better off foregoing a legal action, such as a relatively minor trademark infringement, because of far-reaching public relations implications.

A lawyer’s role is increasingly weighing up adding potential brand damage risks into the equation when recommending whether or not a brand should take legal action.

“[Legal] actions from companies don’t go unnoticed any more. It’s the

kind of thing that will easily be pulled into the spotlight and discussed more openly on Facebook and on Twitter," Mr Yeoman says.

"It's a brand management issue. A lot of clients have invested a hell of a lot of money in developing a brand that conveys a certain message and has a lot of value tied to it. It doesn't take long for an errant tweet or Facebook post or a badly managed page to destroy all that."

Social media has also become a hunting ground for reporters trying to create news or find stories.

Special counsel at Duncan Cotterill Jonathan Forsey says: "Every tweet is news, so regular mainstream news media will report tweets as being newsworthy, or the substance of the story.

"Kim Kardashian tweets something about her baby name, or something, and it's the lead story in a newspaper for days. It's just bizarre. I am taking an extreme example, but not that extreme."

Followers and connections as assets

Internationally, former employees and employers have been locked in legal battles over who owns the rights to social media connections.

Dan Winfield, associate at Duncan Cotterill, advises that before having staff embark on using social media as an advertising tool it is important that controls over the accounts are clear.

The importance of clarity is outlined in a recent United States case *Eagle v. Morgan*, No 11-4303 (ED Pa Oct 4, 2012).

In this instance an individual took legal action against her former employer EdComm for taking control of a Linked In account in her name

after she left the company.

The Pennsylvania court ruled that because the employer had a clear policy that it "owned" the Linked In accounts of employees, including after their departure, it could therefore mine the information and incoming traffic.

Implications for small business

On face value, social media appears to be a financially accessible marketing platform for small business.

However, clients should be aware that although it is free to create an account, resource needs to be put into its management. Before business owners, of any size, start to use social media there are necessary legal implications to consider.

"If you are the little baker in Taranaki you are now pushing yourself out to a wider audience," Dan Winfield says.

"But mixed with that is [the question] are you free to use your brand nationally? A bakery in Taranaki didn't used to have to think about that."

Also, like larger brands, the small business owner must monitor all comments on their page as they are potentially liable for any offensive or defamatory comment made by a third party.

There are also the legal obligations that come under privacy laws and data collection laws (if, say, the same bakery decided to collect email addresses to let their regulars know of specials).

Digital harm

"Previously people thought if they said something on Facebook or on

Twitter they were somehow immune to legal ramifications," Mr Forsey says.

"The courts have taken a different view. They don't distinguish between social media and traditional forms of communication. If you say something so outrageous that it causes such offence that it motivates someone to do something about it then you can get clobbered for defamation.

"In saying that, getting posts removed by various IP providers is very laborious and very costly and people like Yahoo and others, for example, are very hard to get hold of, and if the IPs are hosted overseas they don't usually care what is posted on them."

"Although this could be changing, because internationally cases have said if you are visible in a jurisdiction and you offend someone's reputation there then you can still face legal action in that jurisdiction."

In the United Kingdom, the Crown has sought to clarify when social media communication is illegal through releasing *interim* guidelines on prosecuting cases involving communications sent *via* social media just before Christmas last year.

The Director of Public Prosecutions outlined the guidelines intended to "set out the approach that prosecutors should take when making decisions in relation to cases where it is alleged that criminal offences have been committed by the sending of a communication *via* social media".

"The guidelines are designed to give clear advice to prosecutors who have been asked either for a charging decision or for early advice to the police, as well as in reviewing those cases which have been charged by the police."

In the New Zealand Law Commission Ministerial Briefing *Harmful Digital Communications: The adequacy of the current sanctions and remedies*, the Commission recommended that New Zealand create a new criminal offence tailored for digital communication.

The recommendations included amendments to the Harassment Act 1997, the Human Rights Act 1993, the Privacy Act 1993 and the Crimes Act 1961 to ensure that the provisions of these Acts can be readily applied to digital communications.

The establishment of a Communications Tribunal to provide citizens harmed by digital communications with speedy, efficient and cheap access to remedies such as takedown orders and "cease and desist" notices and new legal requirements for all New Zealand schools to help combat bullying of all kinds, including cyber-bullying, was also recommended.

Chief technology officer at Netsafe, Sean Lyons, says that if there is legislative change Netsafe would expect to see a lot of people put their hands up to make a complaint.

"Because of the cases where we have told someone that there is not much they can do, there is a lot of pent up frustration there. There are a lot of people who feel things have not been resolved in their favour. There're a lot of people that feel they have been hugely victimised and not supported," he says.

"If the changes do happen, I don't think we will see a few cases this year and then next year a few more. We know there is a degree of dissatisfaction out there amongst some individuals who have experienced significant harm and have not found any remedy at any point to deal with

this. And so in some cases they have gone on to experience further harm. I think there will be a number of people that want to see some action taken."

ASA social media guidelines

The New Zealand Advertising Standards Association (ASA) released a guidance note on social media in October last year. It aimed to clarify social media's place within New Zealand advertising.

The guidance note is available at www.asa.co.nz/revisedcodes.php.

Review of Regulatory Gaps and the New Media

The Law Commission's Ministerial Briefing Paper, *Harmful Digital Communications: The adequacy of the current sanctions and remedies*, outlines the Commission's recommendations for how cyber bullying should be dealt with.

It is available online at www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media?quicktabs_23=ministerial_briefing.

Interim guidelines on prosecuting cases involving communications sent *via* social media

The Director of Public Prosecutions (United Kingdom) has released *interim* guidelines on prosecuting cases involving social media.

These guidelines are available online at www.cps.gov.uk/consultations/social_media_consultation.html.

Third party comment (Australia)

The Australian Advertising Standards Authority decided in August last

year that an advertiser can be held responsible for third party comments on a social media site.

The Facebook page for VB featured questions posted by the advertiser and comments from members of the community. The comments included coarse language and sexual references.

The decision is at http://122.99.94.111/cases/0271-12.pdf.

Social media ownership

For more information on overseas decisions involving former *employee v. employer* disputes over social media ownership the following cases could be of interest.

PhoneDog LLC v. Kravitz, No 11-cv-03474-MEJ (ND Cal) PhoneDog LLX sued employee Noah Kravtiz for taking Twitter followers when he left. PhoneDog was unsuccessful.

More information is at www.dglaw.com/images_user/newsalerts/Litigation_Protect_Your_Tweets_A_Cautionary_Tale.pdf.

Eagle v. Morgan, No 11-4303 (ED Pa Oct 4, 2012).

EdComm sued a former employee for using a Linked In account in the employee's name. EdComm successfully claimed ownership of the social media account. See www.natlawreview.com/article/social-media-account-ownership-big-picture-tips-illinois-employers.

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