Staff, Social Media and Misconduct

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Author
Alistair Macpherson, Managing Director
Alistair.macpherson@corneyandlind.com.au

Level 4, Royal Brisbane Place
17 Bowen Bridge Rd Herston Q 4029
Phone: (07) 3252 0011
Fax: (07) 3257 7890
www.corneyandlind.com.au

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1 INTRODUCTION

The case of Israel Folou over the last few weeks has brought to the foreground the reality that an employee's personal life, portrayed through social media accounts, can have a significant impact on both their professional life, and the professional reputation of their employer. Of course, Israel Folou, as one of the highest paid sporting stars in the country, and with a significant social media following, posted his religious beliefs regarding condemnation and hell. This was not the first time he had engaged in such social media activity, and it appears that Rugby Australia made it an express term of his contract that he would not further make publications of this nature. With a termination of his contract now likely, and the prospect of protracted and public litigation between the parties, one conclusion that must be made is that an employee can no longer assume that "what happens at home, stays at home", and an employer should no longer blindly accept such an assertion.

So, then, what are the ramifications for staff when using social media? This paper will consider this from the following perspectives:

- When use of social media adversely impacts on the employment relationship, and what the employer can do in response;
- When use of social media adversely impacts on the teacher/student professional relationship, and the consequent implications for the teacher and the school;
- When use of social media can give rise to other legal risks, such as defamation claims and vicarious liability for staff conduct, and breach of the employee's privacy or confidentiality; and
- Policies that will help minimise these risks.

2 WHEN SOCIAL MEDIA ADVERSELY IMPACTS ON THE EMPLOYMENT RELATIONSHIP

A key question here is whether the employment relationship, and the employer's expectations regarding an employee's conduct, can extend into their private life. Historically, Courts have considered that the employer can control the employee in the context of their work performance, but that this should not extend to their private pursuits (*Australian Tramways Employees' Association* v *Brisbane Tramways Co Ltd* (1912) 6 CAR 35). More recently, however, Court and Tribunals have been willing to allow such intrusion by the employer, and consequential termination of employment, where the employer can demonstrate that the employee's conduct has caused serious harm to the employer's enterprise, or where the employee's conduct is contrary to clearly understood policies of the employer.

Of course, ever employment relationship is governed by the Contract of Employment, with both a mix of express terms, implied terms and, depending on the employer's level of sophistication, employment policies and procedures. So, for example, in the case of Israel Folou, and according to media reports, his

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contract specifically includes prohibitions regarding his use of social media (which is an express term of the contract).

Even where a written contract does not exist, or is insufficient detailed, certain obligations will be assumed as a matter of law. In the context of the employee's obligations and duties, these will include:

- the duty to obey all lawful and reasonable orders, where "lawful and reasonable" means directions which fall within the scope of the employment (and employment policies are often expressed as "lawful and reasonable directions" to avoid incorporating them into the contract of employment);

- the duty to exercise reasonable care and diligence in the performance of their work, and

- the duty of good faith and fidelity.

Prior to 2014, there was considerable debate about whether a term of mutual trust and confidence could also be implied into every employment contract. If such a term could be implied into the employment contract, it is conceivable that social media usage, in personal time, could depending on the circumstances destroy this mutual trust and confidence. So, for example, the Federal Magistrates Court considered in 2012 whether an employee's decision to lie on a personal tax return destroyed the necessary trust and confidence between the employee and employer (and in that case the Court decided that it did not, because there was no rational connection between this conduct and the employee's duties as an employee - *Bowlby* v *Thinking Synergy Pty Ltd* [2012] FMCA 1061). In another pertinent case, an employee (who was a Managing Director) told his clients in an email about his drug use over the weekend. Interestingly, the culture of this workplace included taking clients to strip clubs, and so the Court concluded that admissions regarding recreational drug use could not further damage the Employer's (*Sharma* v *Bibby Financial Services Pty Ltd* [2012] NSWSC 1157).

The High Court clarified this approach in 2014, by confirming that a term of mutual trust and confidence was not implied into every employment contract (*Commonwealth Bank of Australia v Barker* [2014] HCA 32). The Court considered implying such a term would be a "step beyond the legitimate law-making function of the courts" and that the complex policy considerations meant that it was a matter which was more appropriate for the legislature than for the courts to determine. That decision has put this particular line of authority to rest.

However, the High Court noted that this conclusion did not mean that there was no implied term of Good Faith and Fidelity, and it is possible that such an implied term could extend to an employee's conduct outside of work hours. As distinct from "mutual trust and confidence", good faith is essentially an agreement by the parties to the contract that they will perform their contractual obligations in a manner that is not arbitrary, capricious or with intent to cause harm, so that the parties act with due respect for the intent of the bargain, rather than the form of the agreement. Historically, this has extended to the employee not competing with the employer (in limited circumstances, where the employee's outside activity presents a real and sensible risk of conflict with the employer's business interests), not appropriating the employer's property or confidential information, and not accepting bribes or secret commissions. From the employer's perspective, it has extended to the way in which the employer carries

out workplace investigations. Perhaps, although it is untested, it could extend to an employee's social media activity, where it causes significant damage to the employer (for example, where the social media activity is demonstrating that the employee is competing with the employer, or where the employee is using the employer's computer for the purposes of making the social media posts (and those posts are harmful to the employer).

Putting that possible implied term aside, it seems that the better option for an employer to rely upon is the employee's duty to obey lawful and reasonable orders (with the Employer essentially embedding these directions within employment policies). As already noted, whilst the duty to obey reasonable and lawful directions was historically limited to the employee's work context (and not their private life), more recent case law has permitted such intrusion.

So, for example, an employee who used his laptop computer at night to view pornography was validly dismissed, because the employer argued that the laptop was provided to the employee for both personal and business use (*Griffiths v Rose* [2011] FCA 30). Likewise, an employer can validly direct an employee to not have contact with co-workers outside of work, where the contact is causing damage to a co-worker, or constitutes harassment of the co-worker (*McManus* v *Scott-Charlton* (1996) 140 ALR 625,

So what does this practically look like in the context of social media posts by an employee? The best way to appreciate this is by looking at how the case law has developed in this area. As a general rule, an employee's after hours conduct, even where it is in breach of company policy, is not grounds for dismissal (except in exceptional circumstances). The test for assessing these exceptional circumstances was set out by Vice President Ross of the then AIRC (*Rose v Telstra Corp* (1998) AILR 3-966), who noted that:

- the conduct, viewed objectively, must be likely to cause serious damage to the relationship between the employee and employer;
- the conduct damages the employer's interests; or
- the conduct is incompatible with the employee's duty as an employee.

As the use of social media has developed, it is interesting to see how the Courts have responded to it; at first affording employee's a degree of leniency, before more recently expecting employee's to not cause damage to the employer.

So, for example, in the 2011 decision of Escape Hair Design v Fitzgerald [2011] FWAFB 1422, a hairdresser's comments about her workplace (in circumstances where the post did not identify the employer) did not damage the employer's trust and confidence in the employee, and the dismissal was unfair.

Then, in the 2012 decision of *Linfox v Stutsel* [2012] FWAFB 7097, where the employee posted racially and sexually offensive comments about his managers on Facebook, it was held to not justify termination. In that case, the lack of a social media policy, the employee's age, length of employment and belief that

his settings on Facebook were private and not intended to be read by the managers, and that it happened outside of work hours, were significant factors in favour of the employee. Interestingly, a subsequent decision involving Linfox upheld the dismissal of an employee who refused to sign a Social Media Policy (and the FWC noted in this decision that Linfox had been criticised previously for failing to have a Social Media Policy) (*Pearson v Linfox Australia* [2014] FWC 446). The employee's argument that the Social Media Policy infringed on his freedom of speech was rejected, with the Commissioner noting that the policy was a "legitimate exercise in acting to protect the reputation and security of the business."

In a decision involving an ATO employee inappropriately sending emails from his work account to personal account, and storing inappropriate material on his work computer, the dismissal was upheld because of the employee's knowingly flagrant breach of the employer's policies (in circumstances where he had received training and received a prior warning) (*Vu v Commonwealth of Australia* [2104] FWC 755).

Also in the context of the Commonwealth public service, a dismissal was considered to be for a valid reason where the employee made disparaging comments about clients of the department on social media. In that case, however, mitigating circumstances for the client (such as his length of tenure, significant remorse, difficulty in finding alternative employment and unlikelihood of reoffending, meant that the dismissal was still harsh, unjust or unreasonable) (*Starr v Department of Human Services* [2016] FWC 1460).

Fast-forwarding to 2018, the employee of a Stevedoring company sent a pornographic message late at night via Facebook Messenger to various friends (including work colleagues). Whilst no colleague formally complained about the message (although there was evidence that a female colleague was offended by it and asked it not be sent again), the Commissioner concluded that a complaint was not necessary, and that there was a sufficient nexus between the out of hours conduct and the employer's interests, given it was sent to his work colleagues. The Commissioner noted that

> "*where there is a relevant nexus of connection between the out of hours conduct and the interests of the employer (with those interests promulgated in the policies and code) an employer is warranted in conducting an investigation into those matters. The sending of the video, the evidence establishes, had the potential to feed into the employment considered in terms of the respondent's policies and code. The out of hours conduct by the applicant has a relevant nexus with the employment relationship, and that can be, and was, relief upon by the respondent.*"

Whilst the Policies and Code did not specifically reference out of hours conduct, the Commissioner consider the employee's conduct was still contrary to these policies (when read in a purposive fashion) (*Collwell v Sydney International Container Terminals* [2018] FWC 174.)

In the context of the school environment, therefore, the take home principles would seem to be:

- If the improper conduct involves the use of a school computer, there is more likely to be a nexus between the employer and employee sufficient to justify termination;

- If the improper conduct involved a colleague or student/parent of the school, there is more likely to be a nexus between the employer and employee sufficient to justify termination;

- Otherwise, where the conduct is of such seriousness that it is likely to cause serious damage to the employment relationship or reputation of the employer, it may be sufficient to justify termination; and

- The existence of a Social Media Policy and Use of Company Property Policy will always bolster the school's position (and particularly where the Policy specifically references expectations out of work hours, and where the school can demonstrate that the breach is serious and that the employee has received training regarding the policy).

3 WHEN SOCIAL MEDIA ADVERSELY IMPACTS ON THE PROFESSIONAL RELATIONSHIP

Whilst historically there have only been three professions (medical practitioners, lawyers and the clergy), it is now accepted that there is a broader group of professions, and that this would include the teaching profession.

In this regard, whilst there is no strict legal definition of a profession (as membership shifts with changing community expectations), it is generally regarded as having the following characteristics, many of which would equate with teaching professionals:

- Professionals apply a specialised skill which enables them to offer a specialised service.

- The skill has been acquired by intellectual and practical training in a well-defined area of study.

- The service provided by a professional calls for a high degree of detachment and integrity on the part of the professional in exercising personal judgment on behalf of a client.

- The service involves direct, personal and fiduciary relations with the client.

- The practitioners in a particular profession collectively have a particular sense of responsibility for maintaining the competence and integrity of the occupation as a whole.

- Professionals tend, or are required, to avoid certain methods of attracting business.

- Professionals are organised into bodies which, with or without legislative intervention, provide machinery for testing competence and regulating standards of competence and conduct within the particular profession.

Importantly, membership within a profession brings with it licencing, registration and regulation expectations, to ensure the conduct and ethical standards of the class members meet a particular standard, both for their own protection and in the interests of the public using their services. Hence, teachers in Queensland are registered and overseen by the Queensland College of Teachers, and can be subject to discipline action pursuant to section 92(1)(h) of the *Education (Queensland College of Teachers) Act 2005* where he or she "behaves in a way, whether connected with the teaching profession or otherwise, that does not satisfy the standard of behaviour generally expected of a teacher". This is replicated throughout other states and territories (albeit with legislation relevant to that particular jurisdiction).

What is becoming increasingly apparent is that conduct outside of work hours, and particularly conduct through social media, can be a ground for disciplinary action, depending on the circumstances.

A recently published decision of the Queensland Civil and Administration Tribunal highlights this, in circumstances where the Social Media posts were done under an anonymous profile, and did not even involve students or colleagues of the teacher. In that matter, the teacher made posts derogatory of other faiths (including Islam and Buddhism), as well as being extremely critical of the teaching profession (noting that it was dominated by liberal retards that neutered male students by not holding them accountable for their actions). Once the Tribunal was satisfied to the requisite standard of proof that the teacher made the Facebook posts, they concluded that "these communications had the capacity to compromise the Respondent's professional standing as a teacher and betray the trust and power granted to him. The community expects a teacher to have sufficient insight to know that this conduct could potentially harm young people." He was prohibited from applying for registration as a teacher for a period of 18 months, and then only on demonstrating his fitness to be re-registered (with a supporting Psychological assessment) (*Queensland College of Teachers v CQS* [2019] QCAT 71). What is particularly interesting in this case is that the posts were made anonymously, and did not involve contact with students. However, it was the content of the posts which was incompatible with the teacher's ongoing registration.

Likewise, inappropriate social media contact between teachers and students can also give rise to suspension and disciplinary outcomes (although often, the social media contact is accompanied by sexual relations between the teacher and student, making it difficult to conclude that the disciplinary outcomes are based on social media publishing alone). However, one recent example did only relate to social media contact. In that matter (*Queensland College of Teachers v BZV [2018] QCAT 460)*, QCAT noted that

> *"the Snapchat screenshots provided by the complainant student paint a disturbing picture. If it was the teacher who was the person communicating with the student, I would have no hesitation in continuing the suspension. The communications suggest a teacher with no regard for professional boundaries, including a willingness to engage in some sort of intimate relationship with a year 9 student."*

Although in this particular case, the Tribunal was ultimately unable to be satisfied that the teacher had made the publications through social media, it is still apparent that such conduct, where proven to the appropriate standard, can result in disciplinary action.

Helpfully, various jurisdictions have published guidelines for teachers regarding social media usage (and these guidelines would undoubtedly be relied upon by decision making bodies in that jurisdiction when determining disciplinary consequences).

So, for example, the Teacher Registration Board of Western Australia, in considering Social Media use by teachers, states that while social media may be an essential tool that enables teachers to communicate with their students regarding educational resources, there needs to be a clear distinction between professional and private use of social media. They note that social media, by its very nature, exposes both teachers and students to fairly significant risks when it comes to respecting the boundaries between teachers and students, and that the teachers' responsibilities as professionals extend beyond the end of the day when their teaching or school-based duties are over. They recommend that:

- Teachers reject requests on social media from students to be a 'friend' on their personal accounts.

- Communications with students must focus solely on educational issues. Teachers should not engage in online discussions with their students that are not the type of discussions they would engage in with students in class settings.

- If teachers are considering using social media as part of their professional practice, they might ask themselves
    - How can I use this media appropriately?
    - What are the risks?
    - What are the benefits?
    - What protocols/permissions need to be considered?
    - Are there other ways that I can achieve the objectives without using social media?
    - Is it appropriate for me to share this account with other teachers?
    - Have I provided one or more senior teachers with access so that the interaction is always able to be checked by senior staff?
    - Is it clear to students that this account is monitored by several staff members, even if they don't use it to communicate?

  See: http://www.trb.wa.gov.au/SiteCollectionDocuments/Publication-Teacher-Student-Professional-Boundaries-A-Resource-For-WA-Teachers.pdf

Of course, the consequences for a teacher's unprofessional conduct or misconduct will largely rest with the teacher. It will be their livelihood, and capacity to continue to be registered as a teacher, that will be placed at jeopardy. However, there will still be reputational risks for the school to manage; damaged reputation with affected students and parents, colleagues and the broader community, adverse media

attention etc. A school will want to act swiftly in order to minimise these reputational risks, and this might need to include engaging the services of public relations consultants, to assist in public communications and media liaison.

But how does the school respond to the teacher alleged to have engaged in this misconduct? Can the school terminate the employment relationship because of a Professional Body's decision to suspend the teacher, or a decision of the police to charge the teacher with a criminal offence? Recent decisions of the Full Federal Court and the Fair Work Commission suggest that this is a complex course of action for a school to take, and well-considered advice is a necessity before taking this course of action.

Mahoney v White; O'Connell v White [2016] FACFC 160

This decision of the Full Federal Court involved two teachers employed by the Catholic Education Office in NSW. In both cases, the Full Federal Court was asked to determine whether the Employer had terminated the employment of the teachers, and in consequence thereof, whether these employees could bring applications for unfair dismissal. The Employer argued that the employment came to an end because of the operation of Child Protection legislation, and the inability of these teachers to continue to be employed as teachers. If this approach was correct, a jurisdictional objection could be taken by the employer (essentially that the employer had not terminated the employee's employment).

In both cases, the teachers had been employed over a lengthy period of time. They had both been charged with child sexual offences. They both pleaded not guilty to these offences, and had communicated this to their employer. They had both proposed that they either be redeployed to alternative roles, suspended with pay, or be placed on leave without pay.

In the case of Mahoney, the Employer terminated his employment because of the charges he was facing, the employer's obligations under child protection legislation, the need for a high level of trust and confidence, and the employer's general responsibility to the public. Before the FWC, the employer argued that the employment had been frustrated (that is, through no fault of the employer, the contract could not be performed and had come to an end). This was based on the employer's argument that Mahoney could no longer perform the role (teacher) he was employed to do because of the criminal charges and the application of the Child Protection legislation. This was rejected by the FWC at first instance, on the basis that the termination was indeed at the initiative of the employer.

On appeal to the Full Bench of the FWC, it was held that continued employment was inconsistent with the Child Protection Legislation. Mahoney then appealed this decision to the Full Federal Court.

In the case of O'Connell, the employee was terminated on the basis that it was not lawful to continue the employment (which, relying on the Full Bench decision in Mahoney, was seemingly correct at the time). However, the Full Bench, when considering this appeal, concluded that the meaning of "employ" (as that term was used in the Child Protection legislation) meant "make use of or utilise". It did not mean to simply employ under a contract of employment. His termination was not required, and the dismissal was at the employer's initiative. The result was two conflicting decisions of the Full Bench.

When both matters were heard by the Full Court, they concluded that both terminations were the deliberate and considered act of the CEO, and that this act resulted in the termination of the employee's employment. There was therefore no jurisdictional objection, and both matters could be heard by the Commission.

The Full Court deliberately did not consider the meaning of "employ" (as that term was used in the Child Protection legislation). They formed the view that this would be a matter for consideration by the Commission in the context of the entire case (and particularly the relevant factors in section 387 of the Fair Work Act), and it would be unfair to give one party a "head start" in this regard.

Unfortunately, the outcomes of both cases on re-hearing do not appear to have been reported. However, we do have a later reported decision involving the same employer.

Toohey v White [2017] FWC 4722

This recent decision involved a teacher accused of indecent assault of a colleague. He was charged, and on the basis of the charges, the employer terminated his employment. Again, the employer argued the employment was frustrated because of the charges, and the implications for his clearance to work as a teacher. The employee pleaded not guilty and the charges were ultimately dismissed.

Before the FWC, the employer's argument of frustration was rejected. It was held that the employment was at the initiative of the employer.

However, the Commissioner then held that there was a valid reason for dismissal, being Mr Toohey's inability to perform his role as a teacher for the indeterminate period, and the operational difficulties this would cause for the employer. The Commissioner noted that this was finely balanced, but tipped in favour of the employee.

However, when the other factors under section 387 of the Fair Work Act were considered, the Commissioner concluded that the dismissal was unfair (in that the employer was not given an opportunity to respond before the decision to terminate was made) and harsh (in that, given the impact termination would have on the teacher, consideration should have been given to redeployment or leave without pay). The Commissioner ordered reinstatement of the employee, with back-pay (less a small amount he earned in the intervening period).

What this means is that, if an employee is charged (or is accused of committing) serious criminal offences (whether through on-line activity or in person), any decision to terminate must still follow an appropriate natural justice process, and the Employer should still have regard to all the factors in section 387 of the Fair Work Act. Whilst there may be a valid reason to dismiss, consideration will still need to be given to leave without pay, for example.

Where there is clear evidence of the offending behaviour (such as social media posts that can be clearly attributed to the employee), a better course of action may be to follow a Show Cause process based upon that behaviour, giving the employee an opportunity to respond, rather then simply relying on the bringing

of criminal charges. If the offending behaviour can be proved to the requisite standard, this may support a termination decision, without needing to rely on any unresolved criminal charged. Legal advice at this point is a necessity, as the Show Cause process will be complex and need to be carefully managed to protect the school's interests.

4 OTHER LEGAL RISKS

Risk of Defamation

Depending on the content of a social media post, it can give rise to defamation proceedings by an impugned individual or corporation (depending on the type of corporation).

Defamation, as a cause of action, is now uniform throughout Australia pursuant to the Defamation Act in each state and territory (with some minor differences). The legislation essentially provides relevant defences, caps payments for general damages (at $250,000), and excludes exemplary damages (but still allows aggravated damages and damages for economic loss).

For a plaintiff to bring an action for defamation, they need to be able to prove that their reputation has been injured by the defamatory publication, and that damages are needed to vindicate their reputation, console them for the hurt caused, and provide reparations for the injury done. Usually defamation actions cannot be brought by corporations, unless they are a non-profit corporation or employ less than 10 people. Otherwise, corporations need to rely upon a separate cause of action known as injurious falsehood, which requires the plaintiff to prove malice on the part of the defendant.

For a publication to be defamatory, the plaintiff needs to prove that the publication tends, in the minds of ordinary reasonable people, to injure his or her reputation, either by disparaging the plaintiff, causing others to shun the plaintiff, or subjecting the plaintiff to hatred, ridicule or contempt. Obviously this would depend upon the content of the publication, and whether it could be regarded as referring to the plaintiff (in the eyes of ordinary reasonable people.

What if the publication refers to a group of people, rather than a specific person (for example, a post that defames people of a particular religion, or a particular sexual preference, or even a group (or sub-group) of employees within a school)? Can a class of people bring a claim for defamation? The answer to that question is generally no. However, an individual who is part of a class (i.e. an employee of a department within a school) can potentially bring a complaint, where the individual can show that the publication can reasonably be understood as referring to himself/herself. Relevant factors will include the size of the class (in the example used, a department within a school is relatively small), and the actual content of the publication.

Of course, a publisher of defamatory material can seek to rely upon certain defences, such as justification (where the publication is substantially true), absolute or qualified privilege, fair comment, triviality and innocent dissemination. It is beyond the scope of this paper to consider the application of defences, other than to acknowledge their presence. Whilst at first blush a defence might be thought to apply, the recent

high profile decision involving Geoffrey Rush highlights the difficulty of relying upon a defence (and particularly a defence of substantial truth, in circumstances where a court will enquire into all the relevant evidence and weigh the evidence of each witness carefully, to determine if the publications are actually true).

But at what point can an employer (or colleagues within a school) become liable for the defamatory publications of an employee. This will depend on a number of factors.

Firstly, all publishers of defamatory material are liable as joint tortfeasors. So, if a number of colleagues are jointly publishing the defamatory material (and potentially where only one employee publishes, and another colleague re-publishes or likes the initial post), they will be jointly liable as joint tortfeasors. For this reason, employees should be careful when they re-post or like the post of another colleague, as they may find themselves as potential joint tortfeasors facing expensive litigation.

Secondly, it is possible for an employer to be vicariously liable for the defamatory posts of an employee, where the post was made in the course of the employee's employment. Such vicarious liability can arise even where the employer has no knowledge of the post being made, and did not authorise the employee to publish the post. Social media posts done during work hours, using school equipment and regarding school activities, could be regarded as having been done within the course of the employee's employment, potentially giving rise to vicarious liability. Posts outside of school hours would arguably be outside of the employee's course of employment, but this could still depend on the nature of the post (i.e. whether it related to students/parents/colleagues of the school, or included content drawn from the school environment). This remains an unresolved area, particularly in light of the recent High Court decision of *Prince Alfred College Incorporated v ADC* [2016] HCA 37. This case clarified the application of vicarious liability in the school context to include criminal acts where the employer has appointed the employee a special role in relation to the victim. Relevant factors determining this included the employee's level of authority, power, trust, control, and intimacy with the victim. Whilst this case pertained to a Boarding Master, similar factors would also extend to a teacher within a school. Whilst this case related to child sexual abuse, it should also apply to complaints of other serious criminal or tortuous behaviour involving a child, including for example, defamation or harassment.

Thirdly, an employer will be liable where it controls a notice board, and fails to remove a defamatory post within a reasonable period of time of the defamatory post being brought to the employer (or staff member's) attention. In such a circumstance, the employer (or indeed any controller or a notice board) will be deemed to have accepted responsibility for the post by their failure to remove it.

Having regard to the risks involved with defamation, schools would be well advised to consider a specific policy addressing it (for the purposes of students, staff and parents). I will discuss the possible contents of such a policy when I discuss the contents of policies generally.

Breach of Privacy

A further issue for consideration is whether an employee potentially breaches the *Privacy Act* by accessing and downloading social media posts by employees.

In this regard, the National Privacy Principles generally oblige an entity (i.e. an employer) to only collect personal information necessary for its purposes, and to ordinarily obtain consent from the owner of personal information, before collecting that personal information.

The recent Victorian Supreme Court decision of *Jurecek v Director, Transport Safety Victoria* [2016] VSC 285 is of particular relevance to this issue. That matter involved an employee who had made allegations of workplace bullying. She had then engaged in various Facebook communications with another employee, which included various remarks regarding her employment. The colleague reported these posts to the employer, who then commenced an investigation into the posts. As part of the investigation, the employer collected the posts, before subsequently putting the matters to Ms Jurecek. She then made a complaint regarding a breach of her privacy, which resulted in an appeal to the Victorian Supreme Court.

Her complaints included:

- That the collection of the Facebook posts was not necessary for the Respondent's functions and activities. In this regard, the Supreme Court concluded that "necessary" did not mean "essential or indispensible", but rather "reasonably appropriate" and "purposive, not an end in itself". The Court considered that the collection was reasonably necessary for the purpose of carrying out a misconduct investigation, and that this was a function or activity of the organisation;

- That she was not told of the collection within a reasonable period of time. The Supreme Court rejected this, noting that the officers carrying out the investigation informed her of the collection at the appropriate time;

- That the information was collected unlawfully. The Supreme Court rejected this, noting there was no evidence of hacking her account;

- That is was reasonable and practicable to obtain the information from her directly. Again the Court rejected this, noting that this would have potentially jeopardized the investigation.

Given this decision, it seems that an employee is justified in taking steps to investigate inappropriate social media posts by an employee, on the basis that it amounts to an investigation of misconduct, and that this would extend to collecting the social media posts through means unrelated to the employee (provided these means are not otherwise unlawful, i.e. through hacking the employee's social media account). Of course, at the appropriate juncture, the employer will need to disclose the collection of the social media posts to the employee.

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Breach of Confidentiality

Where an employer is accessing the private social media posts of an employee without consent, could the employee also claim a breach of confidentiality? If such a cause of action could be pursued, it would need to fall within an equitable claim for breach of confidence.

In order to bring such a claim, the employee firstly must prove that the employer received information of a confidential nature (that is, the information is in the nature of a secret, although it need not be completely secret). Often this applies in the commercial setting, in order to protect an individual or company's trade secrets. However, secret information can also extend to an individual's personal life also (i.e. information that pertains to a person's sexual practices). So, for example, where a former partner disclosed sexually intimate video recordings, the plaintiff was able to successfully bring a claim for breach of confidence, and receive damages for the emotion distress incurred as a result, on the basis that the recordings contained secret information about herself (*Gillet v Procepets* (2008) 24 VR 1). An older decision also is authority for the proposition that personal confidences disclosed in personal letters can also be confidential in nature (and this would be akin to private social media posts in the current digital age) (*Philip v Pennell* [1907] 2 CH 577).

Where the information is placed in the public domain, it may lose its confidential nature (of course, this would also depend on whether it is placed in the public domain as a breach of confidence). However, if it is only in the public domain in a limited way (i.e. the publication is limited in content or scope), the information may still be held to be sufficiently secret. This will depend upon the circumstances, so in the context of a social media post, consideration would need to be given to how broadly the post is made available, or whether it can still only be seen by a small group of people.

Secondly, the employee would need to prove that the information was received in circumstances of confidence. Obviously this will be more apparent where the information is of a commercial nature and clearly communicated in confidence (and marked in such a way). However, where this is not clear on the face of the material, such an obligation can still arise where it can be shown that a reasonable person, standing in the shoes of the recipient, would have realised that the information was given in confidence. Taking the *Gillet v Procepet* case study, video of intimate sexual activities is clearly received in circumstances of confidence, even if it is not marked in such a way.

Should the employee be able to prove these two elements, the recipient can be held accountable for any misuse that causes detriment to the discloser (including economic loss and damages for emotional distress). Where the information is subsequently passed on to a third party (i.e. an employer), and that party is aware of the circumstances of confidence, the third party can also be held accountable for any misuse. Remedies available to a plaintiff can include damages and injunctions to prevent the further misuse of the confidential information.

Because of these risks, care must be taken when seeking to take action against an employee because of their social media posts. The first question that must be asked is whether the information being obtained and used could be subject to an obligation of confidence, with consequent restrictions on the employer's

access and use. Clearly this will depend upon the circumstances of the social media post (i.e. was the post to a limited class of people, was it marked confidential (or disclosed with expected obligations of confidence), etc).

If there is evidence supporting obligations of confidentiality, the employer will then need to consider whether any possible defences could apply to the use.

Of course, mandatory reporting obligations (pursuant to statute) generally include an express defence against a claim for breach of confidence (although in some legislation, this defence may also be subject to the discloser acting honestly and reasonably, so specific advice may still need to be taken in this regard).

An alternative defence can apply where the disclosure is in the public interest. Certainly in the case of criminal activity, disclosure to law enforcement authorities would generally be in the public interest. In this regard, where ASIS agents were suspected of being involved in criminal activity, the disclosure of their identity to Victoria Police was in the public interest, as the interests of justice required a proper investigation by authorities (*A v Heydon* (1984) 156 CLR 532). Similarly, disclosure of a psychologist's medical report in respect of a violent prisoner to the prison superintendant, and subsequent use of that report, was held to be in the public interest. This was because protecting persons from harm outweighed the prisoner's interest in the report being kept confidential (*W v Egdell* [1990] Ch 359). You would expect, based upon this line of authority, that disclosure of an employee's social media posts, where it disclosed a possible criminal offence or serious misconduct that deems the person unfit to be a teacher, would also be in the public interest, provided the disclosure was limited to the appropriate statutory authorities.

5 SUGGESTED SCHOOL POLICIES TO MANAGE THE RISK

Taking this all into account, an important step for schools to take is to ensure that you have sufficient policies in place, so that staff can be clear on the schools expectations (both within the school environment and externally). The benefit of such policies is that you will have a consistent expectation throughout your organisation regarding staff behaviour, which will be clearly articulated and accepted by all employees, and then (hopefully) fairly applied.

Of course, merely having a policy will not protect your school. Training your staff is a vital part of policy communication and implementation. If an employee brings a complaint of unfair dismissal, the FWC will invariably enquire into whether the school put resources into the training of staff regarding the policy.

As a general rule, it is better to enforce policies as "reasonable lawful directions" to employees, rather than seeking to embed policies within the employment contract (either expressly or by reference). The difficulty with the latter approach is that it makes it difficult to vary the policies (which would require the consent of the employee), and potentially exposes the employer to breach of contract claims should the employee assert the employer is in breach of a policy.

Policies that schools should consider implementing (in the context of social media use) include:

- Code of Conduct, setting out behaviour expectations, ethical obligations, and broader expectations regarding demonstrating respect towards colleagues, students, parents and the broader community. Template Codes of Conduct can be easily obtained online, and samples used by Government Education Departments and Teacher Registration Bodies would be a good starting point for your school;

- Sexual and Racial Harassment Policy, proving a definition for both sexual and racial harassment, that it can include out of hours conduct towards colleagues or students (including conduct through social media), and providing a complaints pathway for victims (including nominating specific complaint handling officers who are trained in this area, and the procedure for investigating and responding to complaints). Again, sample policies can be obtained on-line;

- Workplace Bullying Policy, defining workplace bulling and setting out a grievance procedure;

- Use of Information Technology Policy, setting out what is acceptable use of schools resources, and what use is unacceptable. It should be made clear to employees that their use of external websites for non-work purposes must not indentify themselves as employees of the school. Employees should also be made aware of how their usage will be monitored, and the consequences of misuse (including possible reporting of misuse to authorities).

- Use of Social Media Policy, addressing both usage within the employment relationship, and personal usage outside of work hours that could bring the school into disrepute. For out of hours usage, a school might assert the possibility of disciplinary consequences where the post identifies the school, or otherwise might damage the reputation of the school (i.e. where the post contains material that is obscene, offensive, discriminatory, harassing or defamatory). Staff can also be reminded in the policy of their ethical obligations as teachers, and the possible adverse consequences on their professional registration for misconduct through social media.

- Defamation Policy, providing a definition of defamation, and making it clear to all members of the school community that the publication of defamatory material (about the school or other members of the school community) may lead to disciplinary consequences.

Questions?