

# Inappropriate use of social media

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## Where a member is attacking another member, staff or board member, or other staff member (“complainant”) via social media what can the complainant, or the Trustee Board do?

An online attack can result in serious emotional stress and harm, especially where the sender is anonymous and your online peers, friends and loved ones can see it.

While there are obstacles in addressing these situations there are legal and non-legal avenues which the complainant and/or the Trustee Board can pursue in order to alleviate the harm the complainant is experiencing.

The enactment of the Harmful Digital Communications Act 2015 provides victims of harmful social media and electronic communications with more options to remedy the harm.

The legal and non-legal avenues available to the complainant and/or the Trustee Board are as follows:

1. Online reporting and other non-legal approaches for having the material removed;
2. Use of the new protections under the Harmful Digital Communications Act 2015;
3. A claim brought by the complainant under the tort of defamation; and
4. If the offending material is sufficiently serious, reporting the matter to the police.

These are set out in more detail below.

### 1. Online reporting (Non-legal remedies):

Often, the best avenue to pursue where a member, board member, General Manager, or other member of staff is experiencing attacks via social media is online reporting.

Online reporting is often the fastest and cheapest way of removing offending material from the online community and reducing the harm caused to the complainant. This is often the most important goal for victims of online abuse.

As Facebook and other social media sites do not actively screen all user generated content prior to publication, offending posts will be unknown to the publishing website. Facebook, Twitter and the like rely on a combination of contractual “terms and conditions” and community moderation to establish and maintain civil behaviour on their sites.

#### a. Facebook

Facebook requires users to agree to detailed terms and conditions (Statement of Rights and Responsibilities) before posting content on their sites. In addition Facebook has devised simple sets of “community standards”.

Facebook’s “community standards” set out the type of content which may be reported and removed. Communication which amount to: violence and threats, self-harm, bullying and harassment, hate speech, communication containing graphic content, nudity and pornography, will amount to a breach of Facebook’s community standards and may be reported and removed. While Facebook allows users to speak freely on matters and people of public interest Facebook does not tolerate bullying or harassment and will take action on all reports of abusive behaviour directed at private individuals.

Where any person believes they are being bullied on Facebook they should report this to Facebook. The Facebook Help Center provides instructions on how to report a post.

#### b. Twitter

While Twitter is a strong proponent of freedom of speech, it also sets rules for published content. If these are breached then Twitter may remove the post and/or suspend or terminate the account.

The rules prohibit violent threats, harassment, targeted abuse, hateful conduct based on race, ethnicity, gender, religion, age, disability, disease, or age, or private information, or graphic content.

A Twitter post can be reported by following the instruction on the Twitter Help Center site.

### c. Other websites

NetSafe, found online at <http://www.netsafe.org.nz> provides useful advice, information, and helpful links to assist with reporting online abuse. The orb website ([www.theorb.org.nz](http://www.theorb.org.nz)) has been developed by NetSafe to offer all New Zealanders a simple and secure way to report their concerns about online incidents. NetSafe works with other agencies to direct reports through to the organisation best able to investigate or advise on various types of online incidents.

### d. Letter from the Trustee Board to the offending person

As well as online reporting the Trustee Board should write a cease and desist letter to the offending parent/person. This letter should request that they remove the offending material from the internet. This provides the person the chance to remove the offending material at will, without receiving a warning from the social media website. This may be beneficial to the complainant as it may result in the material being removed quickly.

### e. Letter from a lawyer

If the offending material is not removed, or if the person continues to post such comments online, then a sterner letter from a lawyer may be necessary. A letter from the NZPF Legal Advisor stating, for example, that their behaviour may amount to a breach of the law of defamation may be enough to make the person see sense and tone down their behaviour.

### f. Downside of online reporting

The Harmful Digital Communications Act 2015 imposes new duties on online content hosts like Facebook and Twitter to promptly notify publishers of complaints and remove content in certain circumstances.

However, there is still a risk that the online content host will be unresponsive, especially if they are small, emerging in popularity or are not properly managed.

## 2. Harmful Digital Communications Act 2015

The Harmful Digital Communications Act 2015 (“HDCA”) provides a number of useful options for victims of harmful digital communications to have offending material removed. The HDCA also introduces a new criminal offence for serious harmful digital communications, and a civil redress option for less serious harmful digital communications

Most of the provisions of the HDCA came into force on 3 July 2015. Those due to come into force at a later time have now all done so.

The HDCA provides members, Trustee Board and staff with avenues to remove and redress harmful digital communications targeted at them. However, it is important to note that the HDCA only protects natural persons and not organisations themselves or body corporates.

### a. New Criminal Prohibitions

It is now a criminal offence for a person to intentionally post a digital communication that would cause a reasonable person in the victim’s shoes serious emotional distress, and actually causes serious emotional distress to a person.

Under the HDCA, it is an offence for a person to post a digital communication which:–

- Is intended to cause serious emotional distress to the victim; and
- Would cause serious emotional distress to an ordinary reasonable person in the position of the victim; and
- Actually causes serious emotional distress to the victim.

**Posts a digital communication** means transfers, publishes, disseminates or otherwise communicates by means of digital communication –

- any information, whether truthful or not, about the victim; or
- an intimate visual recording of another individual.

However, whether a reasonable person would suffer serious emotional distress depends on the circumstances. Factors in determining this include the age or vulnerability of the victim, whether the communication was repeated, whether extreme language was used, and/or how widely the communication is circulated.

Note that, even if a digital communication is true, the offence may still be triggered.

This offence carries heavy **penalties** of imprisonment for up to 2 years or a fine of up to \$50,000 for an individual, or up to \$200,000 for a body corporate.

## b. Civil Prohibitions

These are now civil options for victims to redress harmful digital communications.

The HDCA introduces **Communication Principles** that state that a digital communication should not -

1. disclose sensitive personal facts about an individual;
2. be threatening, intimidating, or menacing;
3. be grossly offensive to a reasonable person in the position of the affected individual.
4. be indecent or obscene;
5. not be used to harass an individual;
6. make a false allegation;
7. contain a matter that is published in breach of confidence;
8. incite or encourage anyone to send a message to an individual for the purpose of causing harm to the individual;
9. incite or encourage an individual to commit suicide; or
10. denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.

Since November 2016 a victim of harmful digital communications has been able to lay a complaint with NetSafe, who will consider alleged breaches of these Communications Principles and may investigate, mediate, negotiate and, if possible, resolve the complaint.

NetSafe was appointed by the government to investigate and attempt to resolve complaints under the HDCA. It is an independent non-profit organisation that focuses on online safety and security.

If NetSafe is unable to adequately resolve the complaint, the victim, the victim's parent or guardian, the victim's school (where the victim is a student), or the Police (where safety is threatened) can apply to the District Court for help.

If the District Court is satisfied that there has been a serious or repeated breach of the Communication Principles (above), and the breach is likely to cause serious emotional distress to an individual, then the Court can make some useful orders.

The District Court can order:

- the offending communication/material to be removed/disabled;
- the offending person to stop the offending conduct or stop encouraging other persons to engage in similar conduct;
- a correction to be made
- the victim's reply to be published; and/or
- an apology to be published.

If the offending person fails to comply with the orders then they commit a criminal offence and can face significant penalties including imprisonment.

## 3. Defamation

A claim of defamation cannot be brought by the board of trustees, it must be brought by the complainant in his/her own capacity.

While the law of defamation is capable of addressing the situation where a member is attacking a staff member or board of trustee member via social media, the cost of bringing such legal proceedings can provide a barrier to bringing a claim under defamation. It can also be a long time before the plaintiff receives his/her desired result.

### The law on defamation

There is no doubt that defamation can be committed by those who disseminate information in any form of media, be it on a website, a blog, Facebook, or Twitter. It has been held that publication in cyberspace is just as much publication as other forms of dissemination. Judge Ross has said: "I know of no forum in which an individual has the freedom to say what he likes and in any manner he wishes about another individual citizen with immunity from suit for all consequences. Merely because the publication is being made to cyberspace does not alter this."

Defamation is the branch of law which protects a person's reputation against unjustifiable attack. The Defamation Act 1992 abolished defamation as a criminal offence in New Zealand. Defamation is now only a tort.

The law of defamation requires a balance to be struck between protection of reputation and freedom of expression as protected by s14 of the NZBORA 1990.

The plaintiff in a defamation action must establish that:

1. a defamatory statement has been made

2. the statement was about the plaintiff, and
3. the statement has been published by the defendant

### **1. Defamatory statement has been made**

Defamation has been defined by the common law as: the publication of a statement about someone that lowers him or her in the estimation of right-thinking members of society generally, where no defence is available.

An imputation of incompetence or unfitness for the job is one of the more common grounds of defamation actions.

### **2. Identification of the plaintiff**

To succeed in an action for defamation the plaintiff must prove that the defamatory words were published about him/her: in other words it must be proved that it is the plaintiff who has been defamed. The test is: "are the words such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to?"

### **3. The statement has been published by the defendant**

To succeed the plaintiff needs to show that the publication was conveyed to at least one other person. There is no doubt that publication on the internet is publication for defamation purposes.

## **4. Defences**

### **a. Truth**

The publisher will succeed with a defence of truth if the publisher can prove, on the balance of probabilities, that the story was true.

### **b. Honest opinion: True facts + opinion**

Honest opinion is the very essence of freedom of expression: Any individual has a right to express an opinion, even if it is critical of someone and harmful to their reputation. Provided this opinion is honestly held, and the speaker has got his/her facts right, it does not matter how unusual, or extreme, or damaging the opinion may be. The rules regarding honest opinion are as follows:

- the opinions must be clearly comment, not assertions of fact
- the facts must be either: stated in the publication, sufficiently referred to or, sufficiently well known in the public domain
- the facts upon which the opinion is based must themselves be true
- the opinion must be honestly believed by the statement maker
- the opinion must be a matter of public interest

Sometimes allegations of incompetence will be defensible as honest opinion (*Botterill v Whytehead* (1879) 41 LT 588).

### **c. Privilege**

Some statements are protected against liability for defamation even though they are false and harmful. Examples of privileged statements include:

- statements made by members of parliament on the floor of the house of parliament
- statements made by witnesses in court proceedings
- statements made by someone with a social, moral, or legal duty or interest to tell someone something, and they have a corresponding interest in receiving it

## **5. Remedies**

### **a. Damages**

The usual remedy for defamation is an award of damages. Damages for defamation are normally compensatory only, but in exceptional cases an award of punitive damages may be made.

### **b. Compensatory damages**

Compensatory damages are to restore the plaintiff to the position he or she would have been in if the defamation had not occurred.

### **c. Punitive damages**

In exceptional cases, exemplary or punitive damages may be awarded against the defendant. Purpose is to punish and deter the defendant.

#### **d. Injunction**

Injunctions are available but courts will only grant them if convinced that there is no tenable defence.

#### **e. Correction**

The plaintiff may seek a recommendation from the court that the defendant publish, or cause to be published, a correction of the matter that is the subject of the proceedings.

#### **f. Declaration**

Section 24 of the Defamation Act 1992 permits a plaintiff to seek a declaration that the defendant is liable to the plaintiff in defamation. The plaintiff will be awarded solicitor-client costs unless the court orders otherwise.

#### **g. Settlement: Retraction and reply**

At common law it is always open to a defendant to agree to publish a suitable statement by way of retraction, correction, or apology with or without the payment of money in settlement of a defamation claim.

### **4. Criminal law**

If the attack on the complainant was sufficiently serious to amount to a criminal offence then the Trustee Board or complainant should report the matter to the Police.

#### **Threats**

It is an offence to threaten to kill or cause grievous bodily harm to a person. It is also an offence to send a person, or to cause to be received by a person, with knowledge of its contents, any letter or writing that contains a threat to kill or to do grievous bodily harm.

Both these offences are punishable by imprisonment for a term of up to seven years.

A separate offence proscribes sending or causing to be received, and with knowledge of the contents, any letter or writing threatening to destroy or damage any property, or to destroy or injure an animal. The offence is punishable by imprisonment for up to three years.

The generality of these offences means that they will normally be adequate to deal with threats however communicated.

#### **Harassment**

Under the Harassment Act 1997 it is a criminal offence to harass another person with intent to cause that other person to fear for their own safety or the safety of a family member.

Harassment can be constituted by making contact with a person, whether by telephone, correspondence, or in any other way, or giving offensive material to a person or leaving it where it will be brought to the attention of that person.

In order to amount to harassment the person must have engaged in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least two occasions within 12 months.

The Harmful Digital Communications Act 2015 makes it clear that harassment applies to the use of electronic media where it is likely that it will be seen by, or brought to the attention of, that person.

#### **Telecommunications Act 2001**

Section 112 provides that every person commits an offence who uses or causes or permits to be used, any telephone device for the purpose of disturbing, annoying or irritating any person. "Telephone device" is defined as "any terminal device capable of being used for transmitting or receiving any communications over a network designed for the transmission of voice frequency communication."

Whether this applies to any communication via computer is not absolutely clear.

#### **What can the Trustee Board do where a member of staff is placing inappropriate messages, pictures, and/or videos on social media sites?**

Where the Trustee Board is faced with a situation where a member of staff is placing inappropriate messages, pictures and/or videos on social media sites the Trustee Board has a number of options depending on the seriousness of the offending material.

The same reporting mechanisms as set out above are available where a teacher or other member of staff posts inappropriate material on social media sites.

## 1. Online Reporting:

### a. Facebook

Where a member or member of staff posts material on Facebook the material can be removed if the content transgresses Facebook's rules in some way.

The following communication may be reported and removed:

- any credible threat to harm another;
- any promotion or encouragement of self-mutilation, eating disorders, or hard drug abuse;
- any bullying, harassing, or abusive behaviour;
- any hate speech, including any attack on a person based on their race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability, or medical condition ;
- any graphic content for sadistic pleasure;
- any pornographic content; or
- where certain limitations are breached, nudity.

### b. Twitter

As already stated, Twitter is more tolerant of material which could be perceived as offensive or inappropriate by some members of society. Twitter's terms of service clearly state that "by using the services, you may be exposed to content that might be offensive, harmful, inaccurate, or otherwise inappropriate." The following publications will however defy their terms and is worthy of reporting:

- publication of private and confidential information about others without authorisation or permission
- publication of threats of violence against others
- publication of obscene or pornographic images

Where a teacher or other member of staff is contravening Facebook's standards or Twitter's terms of service the Trustee Board can report the offending material. If the material is on some other social media site NetSafe or the orb website can be used to report the online material.

## 2. Disciplinary action

### a. The Law in New Zealand

It is now well-established that an employer can discipline or, in repeated or serious cases, dismiss an employee for inappropriate use of social media, even when done outside of work.

Normally, to justifiably dismiss an employee for this type of conduct, it must take place at work, or be directly connected with the employment. This is because in principle an employer hires an employee to provide their labour for a certain period each day and consequently what happens outside that time should be of no concern to the employer.

However, case law now suggest that an employee can be disciplined for their online conduct outside of work if it is sufficiently connected to their work, and it breaches their employment obligations.

The Court of Appeal<sup>1</sup> held that "there must be a clear relationship between the conduct and the employment. It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper discharge of the employee's duties; because it impacts upon the employer's obligations to other employees or for any other reason it undermines the trust and confidence necessary between employer and employee."

The Employment Relations Authority<sup>2</sup> recently confirmed that an employer was justified in dismissing an employee for 'liking' a derogatory Facebook post about their employer and then commenting that the post was 'interesting' and 'informative'.

The Authority held that 'liking' a post was analogous to endorsing and supporting it.

It must be noted that here the employee's job was included on their Facebook profile, the employee's 'liking' and commenting was publically disseminated to a significantly large audience, and the employee was the 'face' of the employer and in a management/leadership position. Further, the employee refused to later accept that she had done anything wrong.

The Authority accepted that a reasonable employee would have reached the conclusion that the employee breached their duties of loyalty, trust and confidence, and could not fulfil essential core functions of their role.

In another case<sup>3</sup>, a government ministry was held to be justified in dismissing an employee who posted comments on Facebook stating that she was ‘a very expensive paperweight who was highly competent in the art of time wastage, blame shifting and stationery theft’.

However, it should be noted that in that case the employee had a history of past behaviour that harmed the relationship of trust and confidence and supported the decision to dismiss.

## **b. Overseas approach**

In Canada<sup>4</sup> an employee was dismissed for posting derogatory comments online about her colleagues and workplace. The employee was held to be justifiably dismissed on the basis that her actions had damaged the employment relationship beyond repair and potentially harmed the employer’s reputation.

## **c. Application of the law**

It is likely that a staff member’s online behaviour, posted in their own time, can be used to justify the Trustee Board taking disciplinary action against the employee where there is a sufficient relationship between the conduct and the employment. This is supported further by the fact that teachers have added obligations regarding their fitness to practice so out of work conduct could more easily be said to reflect on their employment.

## **3 Caution**

While misconduct outside work is not necessarily beyond the reach of an employer, considerable care needs to be taken. An employer’s moral objections to an employee’s conduct should not be grounds for dismissal in the absence of a very clear connection between the conduct and the employment. It is important that the nexus between work and non-work conduct is rigorously scrutinised and any work related consequences clearly justified by being explicitly linked to the employment. Employers should be sure to adopt a fair procedure by thoroughly investigating the suspected misconduct and ensuring the employee is given a fair opportunity to respond to any allegations before any discipline occurs. Only if the requisite connection can be found between an employee’s misconduct and their employment, through the use of a fair process, will an employer be justified in taking disciplinary action.

<sup>1</sup>Smith v Christchurch Press Co [2001] 1 NZLR 407; [2000] 1 ERNZ 624

<sup>2</sup>Blylevens v Kidicorp Limited [2014] NZERA Auckland 373

<sup>3</sup>Dickinson v Chief Executive, Ministry of Social Development [2010] NZERA AA 508/10

<sup>4</sup>Government of Alberta and Alberta Union of Provincial Employees – Grievance of R (Contents of Blog (2008) AGAA No 20)