

Social Media

Social Media – Staying Out of Trouble in the Workplace.

Ian Latham 27 March 2021

Social media service

(1) For the purposes of this Act, social media service means:

(a) an electronic service that satisfies the following conditions:

(i) the sole or primary purpose of the service is to enable online social interaction between 2 or more end-users;

(ii) the service allows end-users to link to, or interact with, some or all of the other end-users;

(iii) the service allows end-users to post material on the service;

(iv) such other conditions (if any) as are set out in the legislative rules; or

(b) an electronic service specified in the legislative rules;

but does not include an exempt service (as defined by subsection (4) or (5))....

What is social media? [Enhancing Online Safety Act 2015](#)

Online networks where both adolescents and young adults go to express one of two statements:

1) "I'm complaining about my boring life." Used as an alternative to actually making life interesting.

2) "Look how superior my boring life is to your boring life"

Used to passively belittle the only 250 people the individual knows.

Also used by middle aged adults mostly to post pictures of cats.

Urban Dictionary

What could possibly go wrong?

Meaning of sexual harassment

(1) For the purposes of this Division, a person sexually harasses another person (the *person harassed*) if:

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated...

(1) A worker is bullied at work if:

(a) while the worker is at work in a constitutionally-covered business:

- (i) an individual; or
- (ii) a group of individuals;

repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and

(b) that behaviour creates a risk to health and safety.

(1) A [person conducting a business or undertaking](#) must ensure, so far as is [reasonably practicable](#), the [health](#) and safety of:

- (a) [workers](#) engaged, or caused to be engaged by the person; and
- (b) [workers](#) whose activities in carrying out work are influenced or directed by the person;

while the [workers](#) are at work in the business or undertaking.

And that's only the beginning

474.17 Using a carriage service to menace, harass or cause offence

(1) A person commits an offence if:

(a) the person uses a carriage service; and

(b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

When a defendant commercially operates an electronic bulletin board and posts material that, more probably than not, will result in defamatory material, the commercial operator is “promoting” defamatory material and ratifying its presence and publication.

But, there's more

Crimes (Domestic and Personal Violence) Act 2007 s 13

A person who stalks or intimidates another person with the intention of causing the other person to fear physical or mental harm is guilty of an offence.

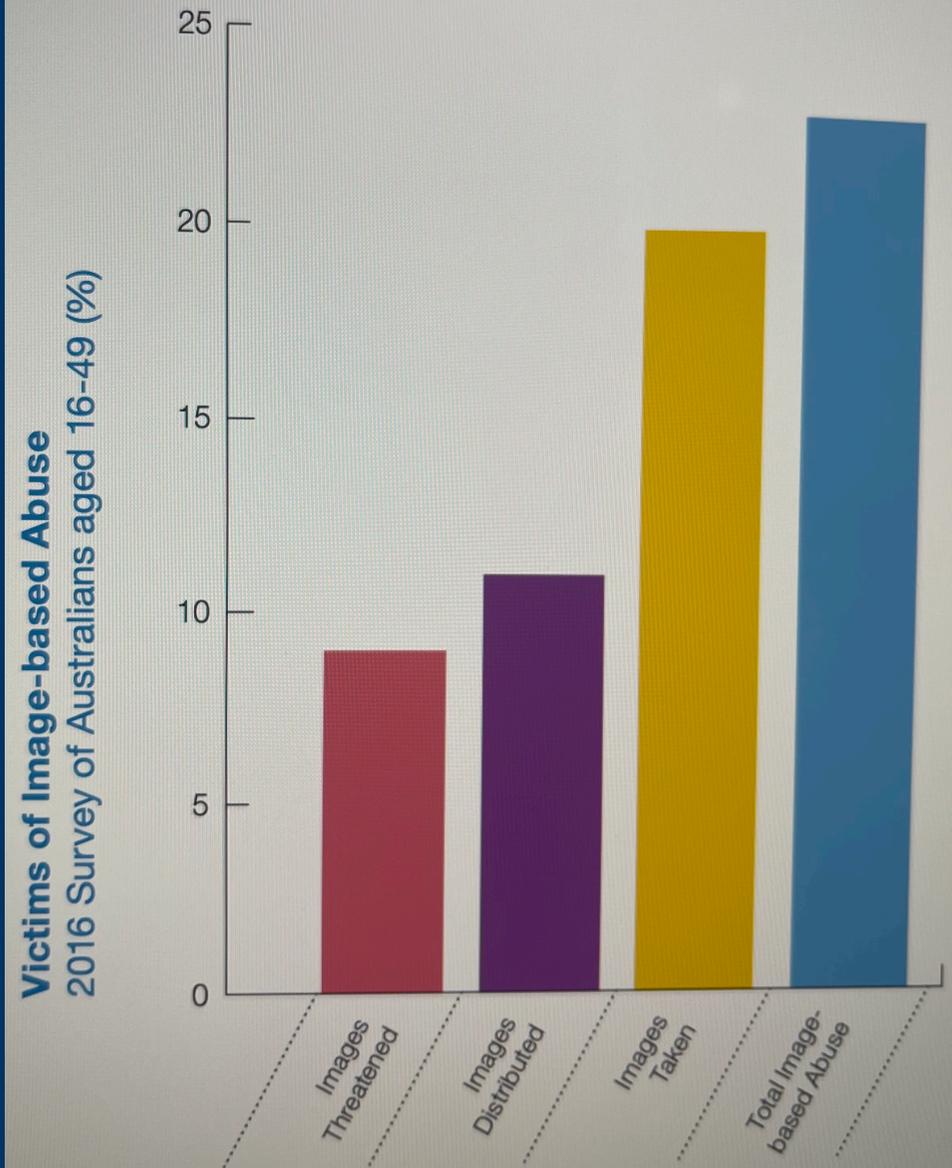
Crimes Act 1900 s 587C(2)

A person who publishes an indecent article is guilty of an offence.

How common is it?

Not Just 'Revenge Pornography', RMIT

RMIT University



What is the workplace?

“The definition of “workplace” in s 28B(7) is cast in wide terms. A “workplace” is not confined to the place of work of the participants but extends to a place at which the participants work or otherwise carry out functions in connection with being a workplace participant.”

It is clear that in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited:

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

Rose v Telstra Corp Ltd [1998] IRCommA
1592

It was inevitable with the seismic shift to the phenomenon of social media as a means of widespread instantaneous communication, that it would lead to new issues in the workplace. These include the extent of the use of social media while at work, the content of such communications and whether they be work or non-work related. Employers have had to respond to the new phenomenon with appropriate policies and codes of conduct - just as they had to respond to employees using work provided computers to receive, store or distribute inappropriate or non-work-related material.

[A new world?: Little v Credit Corp Group Limited \[2013\] FWC 9642](#)

The material sent to employees by the applicant through the use of Messenger as out-of-hours conduct had the likely effect of presenting spillage or potential spillage into the workplace – where the employees would then work cheek-by-jowl together – and this in circumstances where they have received induction and instruction as to the values and culture that the respondent was endeavouring to engender.

Where does the workplace end? *Colwell v Sydney International Container Terminals Pty Limited* [2018] FWC 174

From the general evidence about Facebook filed on this motion it is clear that Facebook is not used as a means by which account holders carry on monologues with themselves; it is a device by which users share with others information about who they are, what they like, what they do, and where they go, in varying degrees of detail. Facebook profiles are not designed to function as diaries; they enable users to construct personal networks or communities of “friends” with whom they can share information about themselves, and on which “friends” can post information about the user.

Is social media inherently public? [Linfox Australia v Stutsel \[2012\] FWAFB 7097](#)

The relevant behaviour is not limited to the point in time when the comments are first posted on Facebook. The behaviour continues for as long as the comments remain on Facebook. It follows that the worker need not be 'at work' at the time the comments are posted, it would suffice if they accessed the comments later while 'at work', ...

Bullied at work? *Zwarts v DP World Melbourne Ltd* [\[2014\] FWCFB 9227](#)

It never ceases to amaze me that employees often plead a lack of training of self-evident unacceptable conduct, such as bullying or harassment, to justify, in some bizarre way, their behaviour. This is particularly so given the extensive media and community focus on the effects of threatening or harassment behaviour in life generally and the workplace specifically. In my view, an employee does not need training to know that you do not accuse a subordinate of damaging your vehicle, without a skeric of evidence. ... No employee needs training to know that it is wrong, offensive and inappropriate to Facebook friends to accuse a subordinate of malicious damage, without any evidence and refer to that person as a 'little f***er' (knowing that your Facebook friends will know who it is referring to).

The need for training? *Natoli v Anglicare* [2018] FWC 2180

I accept the applicant's characterisation of the group chat as being private in that it was intended for only those who were invited into it. However, it ought to have been apparent to those participating in the forum, including the applicant, that by virtue of its form (written transmitted messages) and the number of participants in the group (approximately 19 people), there was a very real risk that the communications could cease to be private and be disseminated outside the group. In fact, there was no evidence of there being anything other than an implicit understanding of the applicant that the messages in the group were private.

What of 'private' social media?: Calvin Dunne v Commissioner of Police [2021] NSWIRComm 1020

While there has not been a victim impact statement given in these proceedings, the harm to the victim is not difficult to contemplate: embarrassment, humiliation and anxiety at not only the viewing of the images by persons who are known to her but also the prospect of viewing by those who are not. It can only be a matter for speculation as to who else may have seen the images, and whether those images have been stored in such a manner which, at a time the complainant least expects, they will again be available for viewing, circulation or distribution.

And the victim? *Police v Ravshan Usmanov* [2011] NSWLC 40

Section 42 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* states that:

42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:

42.1.1 discrimination,

42.1.2 sexual harassment, or

42.1.3 workplace bullying.

Section 42 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

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