

Teachers and Social Networking Sites:

Think Before You Post

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Abstract

Social networking sites are highly popular and have profoundly changed the way people, including educators, communicate and interact. For many teachers the use of Facebook and MySpace is seen as a valuable educational tool and an integral part of their private social interaction. However, the exponential growth in the use of social networking sites by students and teachers alike has presented new legal, ethical and professional challenges for teachers and school administrators. Teachers might argue that their social networking sites are personal websites but they are ultimately very public spaces that leave an electronic trail that can have serious, albeit unintended, consequences for teachers who breach professional codes of conduct and education laws. Teachers face the risk of censored speech, professional misconduct and possible dismissal for posting inappropriate information including comments and pictures on these websites. The purpose of this article is to examine the legal and professional risks for teachers using social networking sites and it offers suggestions that school administrators might incorporate in their policies with regard to teachers' use of social networking sites. The first part of the article reviews relevant US cases and the second part focuses on the following legal issues – free speech, privacy and security of information, professional conduct, and the implications for teachers and school administrators in the US, Australia and New Zealand. Included in the second part are some practical recommendations for teachers and their lawyers as they develop policies addressing the use of social networking websites in the educational workplace.

Introduction

Social networking sites such as MySpace and Facebook have become a significant social phenomenon that attracts millions of users worldwide. They have profoundly changed the way people, including teachers, communicate and interact. The social and educational advantages of social networking sites have been widely promoted and debated in the media. However, the exponential growth in the use of social networking sites by students and

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teachers alike has presented new legal, ethical and professional challenges for school officials.⁴ As stated by an attorney for the National School Boards Association in the United States: ‘This is a new frontier in education, where technology and social norms are outpacing law and policy’.⁵

For many teachers the use of Facebook and MySpace is seen as a valuable educational tool and an integral part of their private social interaction. However, the privacy and professional risks for teachers are potentially high. Teachers might argue that their social networking sites are personal websites, but they are ultimately very public spaces that leave an electronic trail, which can have serious, albeit unintended, consequences for teachers who breach professional codes of conduct and education laws. Teachers face the risk of professional misconduct and possible dismissal for posting inappropriate information, including comments and pictures, on these websites. The purpose of this article is to examine the legal and professional risks for teachers using social networking sites and offer suggestions that school administrators might incorporate in their policies with regards to teachers’ use of social networking sites. The first part of the article reviews relevant cases from the United States.⁶ The second part focuses on the following legal issues—free speech; professional conduct and privacy; and the implications for teachers and school administrators in the United States, Australia and New Zealand. Included in the second part are some practical recommendations for teachers and their lawyers as they develop policies addressing the use of social networking websites in the educational workplace.

The tale of two teachers

This section outlines the cases of two teachers in the United States, one a non-tenured teacher and one a student teacher, and their use of MySpace within the school context. The brief facts of each case are provided, followed by a discussion of key legal and professional issues.

The first case is *Spanierman v Huges (Spanierman)*,⁷ which concerns a non-tenured English teacher at Emmett O’Brien High School in Ansonia, Connecticut. The plaintiff opened a MySpace account and created several profiles, one of which was called ‘Mr Spiderman’. It is stated that the plaintiff ‘used his MySpace account to communicate with students about homework, to learn more about the students so he could relate to them better, and to conduct casual non-school related discussion’. The guidance counselor at the school was informed about the plaintiff’s MySpace account and after viewing the profile page advised the plaintiff that the content was not appropriate. For instance, the profile page included a picture of the plaintiff when he was ten years younger, under which were pictures of Emmett O’Brien students. Near the pictures of the students were pictures of naked men with what was

⁴ For recent, as yet unresolved, controversies not involving educators, see Dionne Searcy, ‘Employers Watching Workers Online Spurs Privacy Debate’, *Wall Street Journal*, 23 April 2009 that includes details of disputes involving police officers suspended for making lewd remarks about a town’s mayor on a Facebook account, and two restaurant employees fired for comments made on a password protected MySpace account after a co-worker alleged that supervisors coerced her to reveal the password <http://online.wsj.com/article_email/SB124045009224646091-1MyQjAxMDI5NDEwNTQxNTUwWj.html> at 15 August 2009.

⁵ Fred Clasen-Kelly, ‘Attorney: Teacher’s Facebook comments not intended for public view’, *The State.com*, 14 November 2008 < <http://www.thestate.com/136/story/589649.html>> at 13 July 2009.

⁶ To date there are no reported cases in Australia and New Zealand; however, similar situations have arisen in schools in Australia and New Zealand. See, for example, ‘Students see teacher’s lewd photos on Facebook’, *The Daily Telegraph*, 14 August 2008, <http://www.dailytelegraph.com.au/news/national/teachers-lewd-photos-on-facebook/story-e6freuzr-1111117190624>.

⁷ *Spanierman v Hughes*, 576 F Supp 2d 292 (D Conn 2008).

considered ‘inappropriate comments’ underneath them. The counsellor also noted that the plaintiff’s conversations with his students on MySpace were ‘very peer-to-peer like’, with ‘students talking to him about what they did over the weekend at a party, or about their personal problems’.⁸

Following the conversation with the school guidance counsellor, the plaintiff deactivated the profile. However, a new profile called ‘Apollo68’ was created that was nearly identical to the ‘Mr Spiderman’ profile. The matter was reported to the principal. The plaintiff was required to deactivate the profile and was placed on administrative leave with pay. An Education Labor Relation Specialist was assigned to investigate the plaintiff’s MySpace profiles. The plaintiff was duly informed that the Department of Education would not be renewing his contract. When the plaintiff filed a civil action against school officials claiming they had violated his First Amendments rights to free speech and freedom of association, as well as his right to due process, the federal trial court in Connecticut granted the defendant’s motion for summary judgment. The order was on the basis that the plaintiff had failed to prove a connection between a protected free speech right and the non-renewal of his contract.

The second case is *Snyder v Millersville (Snyder)*.⁹ Stacey Snyder was a full-time student at Millersville University, Pennsylvania, studying for a Bachelor of Sciences in Education. As part of the course requirements, Ms Snyder was required to successfully complete a student teacher placement at a school. This was also a requirement for teacher registration with the Pennsylvania Department of Education.¹⁰ In January 2006, Ms Snyder was assigned to teach at Conestoga Valley High School, Pennsylvania. During her time at the school, Ms Snyder taught a full load of courses and was responsible for preparing lessons and administering examinations. She also participated in various school activities as a member of staff. During her placement it was reported that Ms Snyder had difficulty managing students; her teaching content was not up to standard and she had problems maintaining a ‘formal teaching manner’ with students and setting ‘proper teacher–student boundaries’.¹¹ This became a problem with Ms Snyder’s use of her MySpace webpage to communicate with her students, even though the university and the school had warned student teachers against using such social networking sites. On several occasions Ms Snyder told the students about her webpage and shared personal information with students. Ms Snyder’s cooperating (supervising) teacher at the school advised Ms Snyder not to use her MySpace account, warning that ‘it was not proper to discuss her MySpace account with students, and urging [her] not to allow students to become involved in her personal life’.¹²

Ms Snyder did not heed this warning and continued to engage with her students on MySpace; she included postings with negative references to the school and criticisms of her supervising teacher. Arguing that her engagement with students on MySpace had ‘crossed the line of professionalism’, officials barred Ms Snyder from continuing her practicum. In her final evaluation Ms Snyder’s professionalism was rated ‘unsatisfactory’. She was also rated ‘unsatisfactory’ in several areas of preparation. As a result of this grading and the fact that she could not complete her practicum Ms Snyder did not fulfil the mandatory requirements for obtaining a Bachelor of Science in Education and could not register as a teacher. This

⁸ At 3.

⁹ *Snyder v Millersville* WL 5093140 (ED Pa 2008).

¹⁰ See, for example, teacher certification for the Pennsylvania Department of Education <[http://www.teaching.state.pa.us/teaching/cwp/view.asp?a=90&Q=32511&g=140&teachingNav=|93|94|&teachingNav=|1904|1911|](http://www.teaching.state.pa.us/teaching/cwp/view.asp?a=90&Q=32511&g=140&teachingNav=|93|94|&teachingNav=|1904|1911|>)> at 19 October 2009.

¹¹ *Snyder v Millersville* WL 5093140 (ED Pa 2008) at 6 and 7.

¹² *Ibid.*

outcome resulted in Ms Snyder unsuccessfully bringing a civil action against the university based on a violation of her First Amendment right to freedom of expression.

When Ms Snyder sued the university, a federal trial court in Pennsylvania rejected all three of her claims. First, the court ruled that since the plaintiff was more of a teacher than a student insofar as her duties arose entirely from her position as a student teacher, she could be disciplined in the same manner as other employees for the inappropriate postings. Second, the court refused to order university officials to award the plaintiff a degree in teacher education or to provide her with a recommendation that would have allowed her to earn certification because she failed to complete her assignment. She did earn a degree in English. Third, in the aspect of the case most relevant to this article, the court rejected the plaintiff's claim that officials violated her First Amendment rights to free speech. In so deciding, the court evaluated the plaintiff's allegations under a line of cases¹³ dealing with the rights of teachers rather than students, thereby affording her a lower standard of protection for her postings. The court thus concluded that since the plaintiff's comments were concerned with and made in the context of her position with the district, rather than as a student, she was properly subjected to discipline.

These two cases raise a number of legal issues relating to the professional risks of teachers using social networking sites in the school context. Although teachers are just as entitled as any other employee to have a MySpace or Facebook account, these cases serve to demonstrate the potential legal and professional risks they face. In the ensuing discussion, the following three questions will be addressed with reference to the position in the United States, Australia and New Zealand:

- (a) Are teachers' personal social networking accounts protected by free speech?
- (b) What are the professional risks?
- (c) Are teachers' personal social networking accounts personal spaces and protected by privacy rights?

Teachers' social networking sites and free speech

In both the *Spanierman* and *Snyder* cases the plaintiffs claimed that their right to free speech had been violated. The plaintiffs argued that the First Amendment right to free expression protected the text and photographs. Essentially they both argued that their MySpace accounts were personal and private spaces. Neither plaintiff seemed to consider that the content, including certain photos and images, was inappropriate. However, in both instances the court dismissed their claims. In its most relevant passage, the First Amendment, enacted in 1791 as part of the Bill of Rights (the first ten Amendments to the Constitution of the United States), provides that: 'Congress shall make no law ... abridging the freedom of speech'.

The right of teachers to free speech has been addressed in a number of cases.¹⁴ In general the courts have recognised that teachers have the right to speak out on legitimate matters of public concern as a private citizen. In *Connick v Myers*¹⁵ the court established a two-step test to evaluate whether speech is entitled to First Amendment protections. First, the court indicated that the judiciary must consider whether the speech involved an issue of public concern by

¹³ See note 11 below.

¹⁴ See also *Pickering v Board of Education of Township High School District 391 US 563* (1968); in *Mt Healthy City Board of Education v Doyle (Mt Healthy)* 429 US 274 (1979); *Givhan v Western Line Consolidated School District* 439 US 410 (1979); *Connick v Myers and Garcetti v Ceballos* 461 US 138 (1983).

¹⁵ *Connick v Myers* 461 US 138 (1983).

examining its content and form along with the context within which it was expressed. Second, the court posited that if speech does deal with a matter of public concern, courts must balance the interests of employees as private citizens in speaking out on matters of public concern against those of employers in promoting effective and efficient public services.

As noted in *Snyder*, following a line of cases starting with *Pickering*,¹⁶ free speech claims trigger different tests, and for public employees like teachers the test is whether the speech ‘touched on matters of public concern’. The question to be first answered is whether the ‘plaintiff expressed his views as a citizen, or as a public employee pursuant to his official duties’.¹⁷ In *Snyder* it was submitted that ‘so long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively’.¹⁸ Likewise it was noted in *Spanierman* in following Supreme Court decisions ‘when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline’.¹⁹

Therefore, if the plaintiffs were public employees or teachers when the MySpace postings were created they would need to show that the social networking postings related to a matter of public concern to attract First Amendment protection: ‘speech on “any matter of political, social, or other concern to the community” is protected by the First Amendment’.²⁰

However, in both *Snyder* and *Spanierman* it was held that the posting ‘raised only personal matters’. In *Snyder*, the following example of a posting was considered inappropriate, especially since Snyder had been instructed not to post such comments on MySpace:

Snyder: Bree said that one of my students was on here looking at my page, which is fine. I have nothing to hide. I am over 21, and I don't say anything that will hurt me (in the long run). Plus, I don't think that they would stoop that low as to mess with my future. So, bring on the love! I figure a couple of students will actually send me a message when I am no longer their official teacher. They keep asking me why I won't apply there. Do you think it would hurt me to tell them the real reason (or who the problem was)?

Likewise, in *Spanierman*, the postings were personal. Postings such as the following exchange between Spanierman and a student, using the profile name ‘repko’, were considered inappropriate and disruptive to the school environment:

Plaintiff: Repko and Ashley sitting in a tree. K I S S I N G. 1st comes love then comes marriage. HA HA HA HA HA HA HA!!!!!!!!!!!!!!!!!!!!!!!!!!!!!! LOL

repko: dont be jealous cause you cant get any lol :)

Plaintiff: What makes you think I want any? I'm not jealous. I just like to have fun and goof on you

¹⁶ *Pickering v Board of Education of Township High School District* 391 US 563 (1968).

¹⁷ *Spanierman v Hughes*, 576 F Supp 2d 292 (D Conn 2008) at 28.

¹⁸ *Snyder v Millersville* WL 5093140 (ED Pa 2008) at 25.

¹⁹ *Spanierman v Hughes*, 576 F Supp 2d 292 (D Conn 2008) at 28.

²⁰ At 30.

In *Spanierman*, the court held that it was not unreasonable for the defendants to find that the plaintiff's conduct on MySpace was disruptive to school activities: 'The above examples of the online exchanges the plaintiff had with students show a potentially unprofessional rapport with students, and the court can see how a school's administration would disapprove of, and find disruptive, a teacher's discussion with a student about "getting any" (presumably sex), or a threat made to a student (albeit a facetious one) about detention'. The court concluded that 'almost none of the contents of the plaintiff's profile page touched matters of public concern'.²¹ Although a poem written by the plaintiff as a war poem in protest against the Iraq war and posted on MySpace was liberally construed as a political statement and therefore protected speech under the First Amendment, the claim failed. The issue considered by the court was whether there was a causal connection between the plaintiff's war poem and the decision not to renew the contract. The plaintiff failed to prove a causal link.

In Australia there is a very limited right to free speech. The Australian Constitution does not have an express provision relating to freedom of speech.²² Freedom of speech is protected through common law in areas such as defamation²³ and vilification or hate speech laws.²⁴ However, since 1992 the Australian High Court has recognised an implied right to freedom of expression and communication on matters relating to politics and government.²⁵ This implied freedom is limited to protection against government control. Moreover, although Australia is a signatory to the United Nations *International Covenant on Civil and Political Rights 1966* (ICCPR) that provides the right to freedom of expression (article 19), an international convention must be enacted in domestic law to be enforceable by Australian courts.²⁶ The Australian Capital Territory has enacted a *Human Rights Act 2004* (ACT) which does provide that 'everyone has the right to hold opinions without interference' and 'everyone has the right to freedom of expression'.²⁷ Such a right is similarly contained in section 15 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*. Whether other states and territories will follow suit with similar legislation remains to be seen.²⁸ Therefore, for Australian teachers using social networking sites in the workplace there is very limited protection under

²¹ *Spanierman v Hughes*, 576 F Supp 2d 292 (D Conn 2008) p 31.

²² In October 2009, the National Human Rights Consultation Committee published its report on a Human Rights Act for Australia. The Report recommends such an act for Australia, which would include the right to free speech <<http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report>> at 20 October 2009.

²³ *Lange v ABC* (1997) 189 CLR a defamation case that arose out of an ABC television program on the former New Zealand Prime Minister Mr David Lange. In this case the High Court reaffirmed the implied freedom of political communication in the context of defamation law. The Court rejected the notion that a personal right to free speech for individuals could be implied in the Constitution. The Constitution does not confer personal rights but it does provide limited freedom of communication on political and government matters.

²⁴ See, for example, the *Racial Discrimination Act 1975* (Cth) s 18C; the *Anti-Discrimination Act 1977* (NSW) s 20D; and the *Racial Vilification Act 1996* (SA).

²⁵ See, eg *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* [1992] 177 CLR in which the High Court first recognised an implied freedom of communication on political matters based on the principle of representative government.

²⁶ The High Court of Australia has held that ratification of an international instrument creates a 'legitimate expectation': *Minister of Ethnic Affairs v Teoh* (1995) 128 ALR 353. However, this decision has been criticised by the same court in a later decision: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502. A proposed Bill introduced by the Federal Government to reverse the decision in *Teoh* did not proceed to enactment, leaving the issue of the place of international instruments in Australian law largely unresolved. See Jackson J (2005) Rights to Education under Australian Law 1(1-2) *International Journal for Education Law and Policy*, 4. Some parts of the ICCPR have been implemented into law, for example, in the *Human Rights Commission Act 1981* (Cth).

²⁷ *Australian Capital Territory Human Rights Act 2004* (ACT) s 16.

²⁸ In 2007 the Consultation Committee for a proposed Human Rights Act for Western Australia published its report, but there have been no further developments <http://www.department.dotag.wa.gov.au/_files/Human_Rights_Final_Report.pdf> at 16 August 2009.

freedom of speech. At best teachers might rely on the implied right to freedom of expression and would need to demonstrate that the speech or communication related to government and political content.²⁹ This resonates with the position in *Spanierman*.

Unlike Australia, New Zealand does have a bill of rights that protects free speech.³⁰ Section 14 of the *New Zealand Bill of Rights Act 1990* provides that ‘Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form’. A teacher in a public school in New Zealand may argue that any disciplinary action taken against them for inappropriate postings on a social networking site is an infringement of their right to freedom of expression. However, it is likely their argument would be treated in a similar way to those in *Snyder* and *Spanierman*. There is a distinction to be drawn between postings that contain social and political comment, which people in a free and democratic society are entitled to make, and postings that could be said to be ‘misconduct’ of the type that invites censure under Part 10A of the *Education Act 1990* (NZ).³¹

Although teachers might argue that social networking sites are personal spaces, it remains possible for school administrators to censor and regulate teachers’ speech on social networking sites, especially when there is a nexus between the speech and the school context. In the United States at least, the use of social networking sites has been seen to fall within the realm of behaviour requiring professional standards and compliance with professional codes of conduct.

Professional risks

These two cases demonstrate the professional risks to teachers when using social networking sites, whether as a student teacher, non-tenured teacher or tenured teacher. In *Snyder* the student teacher failed to qualify and obtain teacher certification, and in *Spanierman* the non-tenured teacher’s contract of employment was not renewed. It is further safe to argue that a tenured teacher’s contract of employment could also be terminated on the basis of unprofessional conduct, which was at the heart of the *Snyder* and *Spanierman* decisions. In *Snyder* the plaintiff was considered to have acted unprofessionally in the use of her MySpace account and for criticising the supervising teacher in a MySpace posting. In both cases, the content, both written and pictorial, was considered inappropriate and disruptive to students. The teachers concerned had failed to maintain a professional relationship with the students by being too personal, familiar and ‘very peer-to-peer like’.

It is evident from these two examples that teachers may face serious professional consequences for the inappropriate use of social networking sites. Common to the United

²⁹ In NSW a group of prison guards who posted negative comments about the Correction Services and their employer face dismissal for misconduct. It is reported that they are accused of making ‘unauthorized public comment’ on their department’s work and ‘comment to the media without permission’. It is unclear how the prison authorities accessed the information on Facebook, but this demonstrates that online information is not necessarily private and may be accessed. ‘Prison guards go to court for Facebook rights’, *Msnbc.com*, 17 September 2009, <http://www.msnbc.msn.com/id/32893562/ns/technology_and_science-security> at 20 September 2009.

³⁰ It must be remembered that the *NZBORA*, unlike the US Constitution, is not supreme law. So even though in the early stages of its inception the New Zealand Court of Appeal accorded it considerable status, see *Simpson v Attorney General* [1994] 3 NZLR 667, the protection it offers remains within a piece of legislation that is not entrenched.

³¹ See the discussion relating to ‘serious misconduct’ below.

States, Australia³² and New Zealand³³ is the regulation of the teaching profession by teacher certification and professional codes of conduct. In all three jurisdictions, teachers must meet certain qualifications and be registered with a teaching registration authority. Teachers are also subject to various professional codes of conduct and ethical standards, and a teacher's employment may be terminated on the basis of professional misconduct.³⁴

In the United States, the professional status of teachers is regulated largely by state law and regulations. All teachers in the United States are required to be certified (or licensed). Although each of the fifty states is responsible for its own teacher certification and requirements, in general all states require teachers to complete a state approved education program, a teaching practicum, academic and professional skills based tests, and obtain police clearance. State legislation and regulation also govern the professional conduct of teachers. Teachers are required to comply with a code of professional practice and conduct or professional standards (which vary in name state to state),³⁵ and a violation of such a code may result in the refusal, suspension or revocation of a certificate, as was demonstrated in the *Snyder* case. Maintaining a professional relationship with students inside and outside of school is a core tenet of professional standards. Teachers are reasonably expected to conduct themselves with honesty and integrity, and exercise sound professional judgement. Teachers are role models and held to a high standard, and are expected to conduct themselves in such a way as to maintain the respect and confidence of the community.³⁶ Teachers who conduct themselves in a manner that is 'unbecoming to the profession', or with 'moral turpitude'³⁷ may raise questions about their professional conduct and moral character. Therefore, teachers who post inappropriate content and communication on personal social networking sites that reflect poorly on their professional status and judgement may face disciplinary action for misconduct (or 'conduct unbecoming'). In balancing the right to free speech and the professional responsibilities of educators in *Spanierman*, the court concluded that:

It is reasonable for the Defendants to expect the Plaintiff, a teacher with supervisory authority over students, to maintain a professional, respectful association with those students. This does not mean that the Plaintiff could not be friendly or humorous; however, upon review of the record, it appears that the Plaintiff would communicate with students as if he were their peer, not their teacher. Such conduct could very well disrupt the learning atmosphere of a school, which sufficiently outweighs the value of Plaintiff's MySpace speech.³⁸

³² See note 36 below.

³³ See note 44 and 45 below.

³⁴ The Pennsylvania Code of Professional Practice and Conduct, for example, describes professional practice as 'behaviours and attitudes that are based on a set of values that the professional education community believes and accepts. These values are evidenced by the professional educator's conduct towards students and colleagues, and the educator's employer and community' (s 235.4).

³⁵ See, eg, 'Massachusetts Professional Standards for Teachers'; 'Rhode Island Educator Code of Professional Responsibility'; 'Standards of conduct for North Carolina Educators'.

³⁶ Brevard officials in Florida have said that employees 'should abide by the district's code of ethics', which reads, in part, 'It is the responsibility of all individuals associated with the Foundation to act in a manner that will ensure the public's trust as well as the trust of colleagues and peers'. Online, teachers walk a fine line, *FloridaToday.com*, 20 October 2009,

<<http://www.floridatoday.com/article/20091018/NEWS01/910180320/1006>> at 20 October 2009.

³⁷ 'Standards of Conduct for North Carolina Educators'.

³⁸ *Spanierman v Hughes*, 576 F Supp 2d 292 (D Conn 2008) at 37.

In Australia, all states have a teacher registration authority that manages a registration process for teachers and develops professional teaching standards.³⁹ In 2003, all Australian states and territories, through the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), agreed to a professional standards framework that provides the basis for expectations of teacher performance in Australia.⁴⁰ For example, in Western Australia, all teachers working in WA classrooms must be registered. The Western Australian College of Teaching (WACOT) was established in 2004 under the *Western Australian College of Teaching Act 2004* and the *Western Australian College of Teaching Regulations 2004* (WA) as an independent professional body to recognise, promote and regulate the teaching profession in Western Australia. The College *Code of Ethics* expects teachers to ‘act with professional integrity’ and to ‘enhance the status of the profession’.⁴¹ Recently, the disciplinary committee of WACOT indicated that the Code of Ethics needed to be updated to deal with issues relating to social networking websites. Under proposed changes teachers would be banned from becoming ‘friends’ with students on their sites. This proposal comes after some 10 teachers were apparently reprimanded in the past by the disciplinary committee for inappropriate online interaction with students, which included teachers sharing private photos with students.⁴² Under the terms of the Act, the College may order disciplinary action to be taken against a member who has engaged in ‘unprofessional conduct’.⁴³ Unprofessional conduct is when a person has engaged in serious misconduct the nature of which renders the person unfit to be a teacher; a person has been seriously incompetent as a teacher; or a person has contravened a condition of the person’s membership relating to the way he or she practises teaching.⁴⁴ According to the Regulations, a person has engaged in serious misconduct the nature of which renders the person unfit to be a teacher if ‘despite being warned or counselled by a supervisor, the person has consistently or repeatedly used language or engaged in behaviour that is offensive, indecent or improper, having regard to the standard of conduct expected of a teacher by members of the teaching profession’.⁴⁵ In addition to this legislative scheme, section 80 of the *Public Sector Management Act 1994* (WA) provides that an employee, which includes teachers in the public sector, commits a breach of discipline if they commit an act of misconduct or contravene a public sector standard or code of ethics.⁴⁶ A breach of discipline may lead to suspension or dismissal. Therefore, as in the cases of *Snyder* and *Spanierman* in the United States, teachers in Australia who use social networking sites in such a way that can be construed as an act of misconduct, a breach of professional standards or a breach of discipline, could face deregistration from the profession, suspension or dismissal.

³⁹ New South Wales Institute of Teachers; Victorian Institute of Teaching (VIT); Queensland Board of Teacher Registration; South Australia Teacher Registration Board; Tasmanian Teacher Registration Board; Western Australian College of Teaching. The Northern Territory also has the Teacher Registration Board. The ACT does not yet have a teacher registration body.

⁴⁰ Ministerial Council on Education, Employment, Training and Youth Affairs, ‘A National Framework of Professional Standards for Teaching, 2003’

<http://www.mceetya.edu.au/verve/_resources/national_framework_file.pdf> at 12 July 2009.

⁴¹ WA College of Teaching ‘Code of Ethics’. <<http://www.wacot.wa.edu.au/index.php?section=39>> at 12 July 2009.

⁴² Anthony Deceglie, ‘Pupils off limits’, *The Sunday Times (Perth)*, 22 November 2009, 6.

⁴³ *Western Australian College of Teaching Act 2004* (WA) s 62.

⁴⁴ *Western Australian College of Teaching Act 2004* (WA) s 63.

⁴⁵ *Western Australian College of Teaching Regulations 2004* (WA) reg 21(2).

⁴⁶ Similar provisions are found in legislation in other Australian states and the territories: *Public Sector Management and Employment Act 1998* (Vic); *Public Service Management Act 2002* (NSW) Pt 2.7; *Public Sector Act 2009* (SA) ss 3 and 55; *State Service Act 2000* (Tas) ss 9 and 10; *Public Sector Ethics Act 1994* (QLD) s 24; *Public Sector Employment and Management Act* (NT) s 49; *Public Sector Management Act 1994* (ACT) ss 178 and 186.

Similarly, in New Zealand a teacher must be registered in order to be employed by any state or private school.⁴⁷ The Teachers Council, set up under the *Education Standards Act 2001* (NZ)⁴⁸ is charged with the registration and deregistration of teachers. This Act provides that where the Teachers Council receives a complaint of serious misconduct against a teacher it must refer the complaint to the Complaints Assessment Committee for investigation.⁴⁹ The powers of this committee are restricted to censure, the imposition of conditions on a teacher's registration or suspension of that registration, but not deregistration. If this committee believes that the 'serious misconduct' may warrant further action, it may refer the matter to the Disciplinary Tribunal for hearing.⁵⁰ The power of deregistration lies with this Tribunal only after hearing. 'Serious misconduct' is defined in section 139AB as conduct that 'adversely affects, or is likely to adversely affect, the wellbeing or learning of one or more students' or 'reflects adversely on the teacher's fitness to be a teacher' and is of 'a character or severity that meets the Teachers Council's criteria for reporting serious misconduct'.⁵¹ Until recently, such specified criteria included actions from inappropriate relationships with students, abuse, neglect and ill-treatment, theft or fraud. The criteria have now been significantly widened to include 'any act or omission that brings, or is likely to bring, discredit to the profession'.⁵² Such wide criteria are clearly designed to catch all types of misconduct not specifically defined, and could be said to envisage types of conduct connected with the 'virtual world' such as postings on social networking sites. It is clearly capable of catching speech and expression. In the absence of any clear direction as to the meaning of the word 'discredit', it has been seen 'to attempt to "discipline" teachers' personal, private and virtual lives ...'.⁵³ The truth of this assertion is yet to be tested in any matter before the Disciplinary Tribunal. In a matter before the Tribunal prior to this amendment, which was an action against a teacher who had posted explicit sexual material on the Internet, it was conceded by the complainant that the behaviour did not, at that time, come within any of the criteria for serious misconduct in Rule 9(1) despite the acceptance by the Respondent that his behaviour could have the effect of bringing the teaching profession into disrepute. Importantly however to this discussion, the Tribunal drew a distinction between the rights of teachers to engage in whatever conduct they wished within the privacy of their own homes, and the publishing of those activities on the Internet and so bringing them into the public domain. It held that this activity had the potential to adversely affect the wellbeing and learning of one or more students, so while it amounted to 'misconduct' it fell short of the criteria for 'serious misconduct' warranting deregistration.⁵⁴ Such a case would now be caught under Rule 9(1)(o) and could amount to 'serious misconduct', potentially resulting in deregistration.

Any discussion in this area has at its core the delineation between private rights and public responsibilities, private space and public space; a distinction inevitably blurred by the use of cyberspace.

⁴⁷ *Education Act 1990* (NZ) ss 120A and 120B.

⁴⁸ Now contained within Parts 10 and 10A of the *Education Act 1989* (NZ).

⁴⁹ *Education Act 1989* (NZ) s 139AS.

⁵⁰ *Education Act 1989* (NZ) s 139AT.

⁵¹ Such criteria is set out in Rule 9(1) *New Zealand Teachers Council (Making Reports and Complaints) Rules 2004*.

⁵² *New Zealand Teachers Council (Making Reports and Complaints) Rules 2004*, rule 9(1)(o) inserted by a 2008 amendment.

⁵³ J O'Neill and P Adams, Editorial, 'Any Conduct that Brings or is Likely to Bring Discredit to the Profession' (2008) 5 *New Zealand Journal of Teachers' Work*, 1:01-02.

⁵⁴ NZTDT 2007 - 06, 13 <www.teacherscouncil.govt.nz/cnc/process/dtdecisions> at 14 August 2009.

Private v Public Spaces

The tension between the right of free speech and what may or may not amount to unprofessional conduct is strongly intertwined with issues of privacy in the distinction between teachers' private lives and public duties. This is a distinction that often becomes muddled in the school context, particularly more so now because of the 'seamless' transfer and availability of information afforded by technology. In *Snyder* and *Spanierman*, the teachers concerned crossed the line of professional integrity and conduct when they invited students to their MySpace webpages and shared personal information that was not appropriate to the professional relationship. Although both teachers seemingly considered their MySpace sites as personal and private spaces, and as a means of creating an online community of friends, by inviting students as 'friends' and by using the sites as an 'educational tool' they blurred their private life with their public life of a school teacher. In such circumstances teachers can reasonably be expected to maintain a high level of professionalism and responsibility. This was also demonstrated in a South Carolina case in which several teachers were suspended from a school for inappropriate postings on Facebook. Postings included sexually suggestive photos of female teachers, and one teacher posted the comment that she was 'teaching chitlins in the ghetto of Charlotte'.⁵⁵ An attorney for one of the teachers commented that 'she never intended for the public to view negative comments she made about students on Facebook' and that she 'only meant to share her comments with friends with access to her page'.⁵⁶ In another more recent case, a secondary schoolteacher has filed a lawsuit in the Barrow County Superior Court for constructive dismissal. The teacher claims that Apalachee High School put pressure on her to resign after they found pictures of her holding alcoholic beverages and posting a message about a "Bitch BINGO" event on her Facebook profile. She is requesting the court to order the Barrow County Board of Education to hold a hearing, as well as back pay from the day she resigned and court costs. The teacher contends that she was not aware of her rights when she resigned and that her Facebook profile is private and should not have been visible to students and their parents.⁵⁷

However, while teachers might argue that MySpace or Facebook comments are not intended for public view, the reality is that social networking sites are very much public domains, despite the tools to restrict access and protect privacy.⁵⁸ There is also the risk that content, including photos and images, might be accessed and distributed without the knowledge or consent of the person concerned. Moreover, although there are privacy policies and procedures for the removal of information on social networking sites,⁵⁹ there is no real guarantee that the information disappears altogether.⁶⁰

⁵⁵ Fred Clasen-Kelly, 'Attorney: Teacher's Facebook comments not intended for public view', *The State.com*, 14 November 2008 < <http://www.thestate.com/136/story/589649.html> > at 13 July 2009.

⁵⁶ *Ibid.*

⁵⁷ Joe Vanhose, 'Winder teachers sues over dismissal', *Online Athens.com*, 10 November 2009 < http://www.onlineathens.com/stories/111009/new_514612877.shtml > at 16 November 2009.

⁵⁸ This was vividly demonstrated in a recent episode in the UK involving the publication of personal details of the head of MI6 and his family on his wife's Facebook, which was subsequently taken down. Kirsty Walker, 'Farce of the Facebook spy: MI6 chief faces probe after wife exposes their life on Net', *Mail Online*, 6 July 2009 < <http://www.dailymail.co.uk/news/article-1197757/New-MI6-chief-faces-probe-wife-exposes-life-Facebook.html> > at 31 July 2009.

⁵⁹ See, eg, MySpace privacy policy at <<http://www.myspace.com/index.cfm?fuseaction=misc.terms>> 27 July 2009.

⁶⁰ This is even noted in MySpace's terms of use: 'Please note that we cannot guarantee the security of member account information. Unauthorized entry or use, hardware or software failure, and other factors may compromise the security of member information at any time'. MySpace.com.

It is also now not uncommon for employers to surf the web seeking out existing and prospective employees' social networking sites to get information about the person and to monitor if there is any inappropriate content about the employer on the website.⁶¹ Some employers will now view and monitor social networking sites as part of their 'due diligence' to protect the employers' reputation and to find suitable people to hire. Certainly in the *Spanierman* case, the employer monitored and reviewed the teacher's profiles and postings, with serious professional consequences for the teacher. Social networking sites are thus indeed borderless and very public.

In Australia there is no constitutional right to privacy and the common law does not recognise a general right to privacy, although evolving jurisprudence indicates that this is changing.⁶² There are nonetheless various pieces of legislation that cover the protection of personal information (data) that are important for the protection of information on the Internet. The *Federal Privacy Act 1988* (Cth) (*Privacy Act*) is the primary piece of legislation relating to information privacy at a Federal level, but it is limited in scope and application as it does not regulate state or territory agencies, except for the ACT. Therefore, the *Privacy Act* will apply to private schools that are not small businesses and commonwealth education employers, but it does not apply to state departments of education and public schools, which are covered by state legislation. The states and territories do however have their own privacy or information protection laws that regulate the collection, use and disclosure of personal information.⁶³

Although the *Privacy Act* might apply to social networking sites, it is significant that it does not apply to individuals acting in a personal capacity. To be covered by the *Privacy Act*, an organisation must be based in Australia, so if a social networking site is based in another country, such as the United States, teachers do not have privacy rights under the Australian privacy law, although other laws might apply. Furthermore, if the organisation is based in Australia and it is not a small business (an organisation with an annual turnover of A\$3 million or less) then the *Privacy Act* may apply.⁶⁴ While organisations covered by the *Privacy Act* or the applicable state legislation may not collect, store or distribute the information, there is nothing to prevent an employer organisation from merely viewing teachers' personal social networking sites and possibly making decisions based on the information they have gleaned from the site.⁶⁵ Therefore, if an employer organisation collects and stores and uses information from a personal social networking sites and it is an organisation that is covered

⁶¹ Wei Du, 'Job candidates getting tripped up by Facebook', *Msnbc.com*, 14 August 2007

<<http://www.msnbc.msn.com/id/20202935/>> at 1 August 2009; Carrie-Ann Skinner, 'Employers admit checking Facebook before hiring', *PC World Business Centre*,

<http://www.pcworld.com/businesscenter/article/151044/employers_admit_checking_facebook_before_hiring.html> at 28 July 2009.

⁶²See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 208 CLR 1999; *Grosse v Purvis* [2003] QDC15; *Jane Doe v ABC* [2007] VCC 281. See also Jonathan Horton, 'Common law right to privacy moves closer in Australia' [2001] *Privacy Law and Policy Law Reporter* 62 <<http://www.austlii.edu.au/au/journals/PLPR/2001/62.html>> at 31 July 2009. The recent reports of Australian Law Reform Commission (ALRC) *Report 108. For your information: Australian Privacy Law and Practice* (2008) and the NSW Law Reform Commission *Report 120 – Invasion of Privacy* (2009) propose laws against 'offensive' invasions of privacy.

⁶³ *Privacy and Personal Information Protection Act 1998* (NSW); *Information Privacy Act 2000* (VIC); *Freedom of Information Act 1992* (QLD); *Freedom of Information Act 1992* (WA); *Freedom of Information Act 1991* (SA); *Personal Information Protection Act 2004* (TAS); *Information Act 2002* (NT); *Privacy Act 1988* (ACT).

⁶⁴ Privacy Commissioner of Australia <<http://www.privacy.gov.au/faq/individuals/sn-q3>> at 31 June 2009.

⁶⁵ *Privacy Act 1988* (Cth), National Privacy Principle 1: Principle 1.2 states that 'An organisation must collect personal information only by lawful and fair means and not in an unreasonably intrusive way'.

by the *Privacy Act*, then the employer must comply with the National Privacy Principles that set out how personal information should be managed.

New Zealand has legislation aimed at the protection of personal information collected by an ‘agency’ from misuse and disclosure.⁶⁶ An ‘agency’ is defined as any person or body of persons whether in the public or private sector.⁶⁷ It follows that an agency must have in place such reasonable ‘security safeguards’ as to protect against unauthorised access to private information.⁶⁸ In a Report following an investigation of a privacy complaint made against Facebook under equivalent legislation in Canada, the Office of the Privacy Commissioner of Canada found Facebook to lack safeguards in relation to the storage and use of personal information provided by users.⁶⁹ Moreover, the New Zealand legislation specifically excludes unsolicited information provided by an individual. It would therefore be difficult for any person, let alone one bound by a code of professional ethics such as a member of the teaching profession, to argue breach of privacy in relation to personal information they have voluntarily posted on a website. The same argument goes for any application of the principles relating to the fledgling tort of invasion of privacy.⁷⁰ In New Zealand for an allegation of breach of privacy to be sustained at common law it is necessary for a person to demonstrate that they had a reasonable expectation of privacy and that publication would be highly or significantly offensive to an objective reasonable person.⁷¹ It is questionable whether the law should intervene to assist those who freely post private material on the Internet. It is difficult to see how such activity would fit within the ambit of the justification for such a tort, which is to prevent the wrongful publication of private facts.⁷² There is much truth in the contention that in the area of technological development the ‘net result is an ever shrinking field of “reasonable expectations” as people prioritize the freedom offered by technology over the protection of their individual rights’.⁷³

It is essential that teachers think carefully about the value of their communication and of the potential uses of such personal information. Any information posted online may be difficult if not impossible to retrieve. It is important for teachers to weigh up the value of the information posted against the possibility of it being used against them.

In the converse of privacy protection for teachers is the protection of society from the private conduct of teachers, public exposure of which is made possible by postings on social networking sites. This brings the argument back to issues relating to their employment and registration. It is undeniable that, by virtue of their position, teachers must adhere to the highest standards in order to be worthy of and maintain public confidence. In New Zealand this standard is reflected in the Teachers Council Code of Ethics for Registered Teachers:

⁶⁶ *Privacy Act 1993* (NZ).

⁶⁷ *Privacy Act 1993* (NZ) s 2.

⁶⁸ Principle 5(a) *Privacy Act 1993* (NZ) s 6.

⁶⁹ For the report see PIPEA Case Summary #2009-008 (www.priv.gc.ca/cf-dc/2009/2009_008_0716_e.cfm accessed 15/08/09). It is suggested that this Report reaches conclusions and makes recommendations of universal significance. See A Moses, ‘Aussie privacy watchdog puts bite on Facebook’, *Sydney Morning Herald*, 24 July 2009 where it is noted by Dan Svantesson, an academic and member of the Australian Privacy Foundation that: ‘Facebook was by no means the only internet company that has failed to provide users with clear and accessible information about, and appropriate tools to control, the use of their personal information’.

⁷⁰ *Hosking v Runting and Pacific Magazines NZ Ltd* [2004] CA 101-103.

⁷¹ *Hosking v Runting and Pacific Magazines NZ Ltd* [2004] CA 101-103, per Blanchard J para 117.

⁷² For a discussion of this case and the tort of privacy in New Zealand see K Evans (2004) ‘*Hosking v Runting* balancing rights in a privacy tort’, *Privacy Law and Policy Reporter*, 28.

⁷³ Eli Ball, ‘The Devil wears the Emperor’s New Clothes: technology, autonomy and the privacy myth’, (2006) *Computers and the Law*, December, 7–8.

‘Teachers are vested by the public with trust and responsibility, together with an expectation that they will help prepare students for life in society in the broadest sense’.⁷⁴ The possibilities afforded by technology for the public exposure of conduct in breach of such high ethical standards are endless as private life enters the public domain. In 1889, the notion of the teacher as ‘the moral exemplar’ led to the dismissal of a teacher for ‘immoral conduct’ when his horse was seen outside a house of ‘ill-fame’.⁷⁵ While rightly there is now much greater importance placed on individual rights, such as freedom of expression and association, technology leads us into ever greater difficulties with the confluence of these and public expectations and duties.

Conclusion and recommendations

The use of social networking sites both inside and outside the working environment has given rise to many questions for which the law grapples to find answers. In the interim, the emphasis must be on a heightened awareness of teachers to the potential for professional risks and thus on their individual responsibility in terms of what they post and where they post it. Teachers need to be very careful and mindful about what information they post on their social networking sites about themselves, their employer, students and parents. Even though teachers might argue that the sites are personal and for private use, social networking sites are essentially public domains and information on the Internet can remain long after it has been removed. In the United States, Australia and New Zealand, teachers have limited rights to free speech and privacy and are unlikely to successfully assert these rights where postings on their social networking sites reflect negatively on themselves and their employment. Moreover, inappropriate content may result in disciplinary action. In light of the issues discussed above, educational leaders should develop policies designed to encourage employees to engage in the responsible use of the Internet. After all, just as the Internet is constantly expanding, educational leaders owe it to themselves and other school employees to keep pace with legal developments by keeping abreast of the rapid growth and development of technology so as to be able to devote resources to the most effective use in educating students rather than fending off avoidable litigation.

Following *Snyder* and *Spanierman* and other issues associated with free speech and privacy rights of educators in the digital age regardless of where in the world one works, educational leaders should make sure to enact policies that address the following matters:

1. Local school board or school policies should specify that since personal comments and information by student teachers, teachers, and other staff members placed on social networking sites can be accessed on employer-operated systems, users have reduced free speech rights and expectations of privacy than if they were on their home computer. This means that users can be disciplined for the inappropriate content of their postings.
2. Policies ought to explain that users should limit their comments to matters of public concern. More specifically, all users of work computer systems must avoid addressing

⁷⁴ New Zealand Teachers Council (www.teacherscouncil.govt.nz/ethics/code.stm, accessed 14/08/09).

⁷⁵ *Murray v Bragge* (1889) 7 NZLR 252. It has been reported recently in an Australian newspaper that a young female teacher was dismissed by the NSW Department of Education following a nude photo of her and her husband appearing in a weekly magazine. She is reportedly taking her case to the Australian Human Rights Commission on the basis of discrimination, as her male partner, also a teacher, did not suffer the same fate. *Sydney Morning Herald* 15 August 2009.

personal issues, particularly those criticising other staff, students or parents, or questioning board policies on internal operating matters.

3. All users of school computers should be required to sign forms indicating that they agree to abide by the terms of acceptable use policies when working on official Internet systems. Policies should also state that individuals who refuse to sign or fail to comply with their provisions will be disciplined for inappropriate use of facilities. At the same time, educational leaders should consider providing an orientation session for all new employees that explains these provisions in greater detail.
4. Student teachers in particular should be informed that in light of their professional duties such as preparing lesson plans, teaching classes, grading papers and attending faculty meetings, they will be treated as employees rather than students. In other words, since student teachers have less First Amendment free speech protection available in their professional capacities than as students, they should be mindful about the kind of remarks made and material, such as photographs, posted on social networking sites such as MySpace and Facebook, both of which have resulted in litigation.
5. Finally, educational leaders should ensure that their personnel and computer use policies are updated regularly, typically annually, to ensure that they are consistent with changes in the law.