The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective

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1. Introduction

Facebook¹ and other internet-based² social networking sites (SNSs)³ have revolutionised modern communications.⁴ Each month more than a billion people actively use Facebook.⁵ Facebook activity is global in scope but disproportionately

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¹ For a description of how Facebook operates, see Smith v Trafford Housing Council [2012] EWHC 3221 (Ch) at paras 26–29.
² The total number of internet users worldwide is now estimated at over two billion. See La Rue, Report of the Human Rights Council’s Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27, 16 May 2011, at para 2. The Report explores key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the internet.
⁴ Human Rights Committee, General Comment 34: Freedoms of opinion and expression, CCPR/C/GC/34 (GC 34) 12 September 2011, at para 15 states: ‘[I]nternet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries.’ See also O’Flaherty, ‘Freedom of Expression: Article 19 of the ICCPR and the Human Rights Committee’s General Comment No 34’ (2012) 12 Human Rights Law Review 627.
⁵ Lee, ‘Facebook Surpasses One Billion Users as It Tempts New Markets’, BBC News, 5 October 2012, available at: http://www.bbc.co.uk/news/technology-19816709 [last accessed 29 January 2013]. Six hundred million users are accessing the site via a mobile device, see ibid. Facebook has overtaken Myspace, with twenty-five million registered users, as the leading SNS.
focused on the Americas, Europe and Australasia. Some major human rights institutions and organisations use SNSs. In some countries local networks remain dominant. In Russia, the VKontakte network has more than one hundred million members, compared with Facebook's seven million Russian members. In China, RenRen has more than thirty million users. Twitter, created in 2006, is an online SNS and microblogging service that enables its users to send and read text-based messages of up to one hundred and forty characters, known as 'tweets'. As of 2012 it reportedly had over five hundred million active users generating over three hundred and forty million tweets daily and handling over 1.6 billion search queries per day. Twitter users include presidents, prime ministers and the Pope. In China, the Twitter-like service Sina Weibo has more than three hundred million users.

These developments obviously post-date the principal international human rights treaties that contain norms relating to freedom of expression. However, these provisions are often widely framed. Article 10(1) of the European Convention on Human Rights (ECHR), for example, provides: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. It encompasses a diverse variety of forms and means in which information and ideas are manifested, transmitted and received. The European Court of Human Rights (ECtHR) has dealt with some aspects of internet communications, but not issues arising from SNSs. For contracting parties to the ECHR, even if the ECtHR might deem some SNS speech of little value, SNS regulation will have to comply with the rigorous demands of Article 10(2) of the ECHR. The ECtHR's longstanding jurisprudence is that the right to freedom of expression includes the right to say

6 The percentage of the population using Facebook are North America (44.97%), South America (33.92%), Europe, the largest market with 243 million users (29.96%), Australia and Oceania (42.14%), Asia (66.8%) and Africa (5.1%). In terms of individual countries the biggest users are Brazil, India, Indonesia, Mexico, the United States and the UK. On the 'digital divide', see La Rue, supra n 2 at para 61.


9 See Vajic and Voyatis, 'The Internet and Freedom of Expression: A “Brave New World” and the ECtHR’s Evolving Case Law’, in Casadevall et al. (eds), Freedom of Expression (Oisterwijk: Wol, 2012) 391; and Ahmet Yildirim v Turkey Application No 3111/10, 18 December 2012 (restriction of internet access without a strict legal framework regulating the scope of the ban and affording the guarantee of judicial review to prevent possible abuses violated Article 10 ECHR).

10 Von Hannover v Germany 40 EHRR 1; Standard Verlags GmbH v Austria (No2) Application No 21277/05, Merits, 4 June 2009, at paras 42 to 56. Cf Campbell v MGN [2004] UKHL 22 at 149.

things or express opinions ‘that offend, shock or disturb the state or any sector of the population.’\textsuperscript{12} The United Nations Special Rapporteur on Freedom of Expression has asserted the same approach.\textsuperscript{13} Article 19(2) of the International Covenant on Civil and Political Rights (1966) (ICCPR), to which the United Kingdom (UK) is a party, provides:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

In its practice and jurisprudence the Human Rights Committee (HRC) has had no conceptual difficulty in applying that provision to freedom of expression on the internet.\textsuperscript{14} Means of expression are considered to include ‘all forms of electronic and internet-based modes of expression.’\textsuperscript{15} The HRC recommended that States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of Article 19(3), which provides:

The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which the various media converge.\textsuperscript{16} Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with Article 19(3).\textsuperscript{17} The HRC has considered that journalism is a function shared by a wide range of actors, including bloggers and others who engage in forms of self-publication on the internet or elsewhere.\textsuperscript{18}

\textsuperscript{12} Handyside v United Kingdom A 24 (1976); 1 EHRR 737, at para 49.
\textsuperscript{13} La Rue, supra n 2 at para 37.
\textsuperscript{14} See also ibid. at 6–9 on ‘General principles on the right to freedom of opinion and expression and the Internet’; and Human Rights Council, Resolution 20/8, A/HRC/RES/20/8, 16 July 2012, at para 1.
\textsuperscript{15} GC 34, supra n 4 at para 12.
\textsuperscript{16} Ibid. at para 34.
\textsuperscript{17} Ibid. at para 43.
\textsuperscript{18} Ibid at para 44.
The Facebook network is mainly reliant on self-policing by its users. Twitter has a free speech policy that means it does not interfere in disputes or restrict what it describes as ‘controversial content’. Moreover, the very nature of internet-based communications inevitably poses challenges for legal systems in terms of both applicable law and connection with territorially bounded jurisdictions. There have been an extensive number of legal challenges to internet service providers such as ‘Google’ and web hosts in attempts to hold them liable for unlawful third-party content that passes through an internet service provider’s (ISP) network and to address privacy and data protection concerns relating to the operation of SNSs. There are also increasing regulatory controls relating to child and consumer protection. In the UK and elsewhere the

19 See Davison v Habeeb [2011] EWHC 3031 (QB) (an order permitting service of a libel claim on Google Inc out of the jurisdiction was set aside where the claimant failed to disclose a real and substantial tort within the jurisdiction). Facebook and Twitter are US-based companies. See Chrisafis, ‘Twitter at Odds with French Over High-trending ‘Hate’ Tweets’, The Guardian, 10 January 2013. In 2012 Twitter complied with a request from the German authorities to block the account of a banned neo-Nazi group. All users of Facebook outside of the United States and Canada have a contract with Facebook’s Irish subsidiary Facebook Ireland Limited.

20 See Bunt v Tilley [2006] EWHC 407 (QB); [2007] 1 WLR 1243 (ISPs have a qualified immunity provided they do not perform an editorial function); Godfrey v Demon Internet Service [2001] QB 201 (it is possible for an ISP to be liable for the content of sites which it hosts); and Tamiz v Google Inc [2012] EWHC 449 (QB) (an order permitting service of a libel claim out of the jurisdiction was set aside where the defendant, as the provider of an internet platform for blogging, could not be regarded as a publisher).

21 There is some evidence that SNS users do value privacy but more with respect to social privacy—the use made of their information, rather than institutional privacy. While people are often concerned about privacy in the abstract, they seem less concerned about privacy in practice, see Raynes-Goldie, ‘Aliases, Creeping and Wall Cleaning: Understanding Privacy in the Age of Facebook’ (2010) 15 First Monday available at: http://www.uic.edu/bitbin/cgiwrap/bin/ojs/index.php/fm/article/view/2775/2432 [last accessed 29 January 2013].

22 See Lloyd, Information Technology Law, 6th edn (Oxford: Oxford University Press, 2011) at 86–122; Simmons, ‘Facebook and the Privacy Frontier’ (2012) 33 Business Law Review 58; La Rue, supra n 2 at paras 53–59; Mendel, infra n 82 at 50–94; and Lanois, ‘Privacy in the Age of the Cloud’ (2011) 15 Journal of Internet Law 3. See also Morley v Information Commissioner EA/2011/0173, 31 May 2012, First Tier Tribunal (Information Rights) (names of youth councillors including minors, involved in a planning application were not exempt from disclosure under Section 40(2) Freedom of Information Act 2002, as they were on the youth councils Facebook page).

23 In a number of jurisdictions Facebook has settled lawsuits or made settlements with regulatory agencies, see Tofalides and Colclough, ‘Can Facebook and User Privacy Co-exist?’ (2012) Intellectual Property Magazine 54; on the problems Facebook has had with privacy laws in the United States and EU, see ‘Note on Lane v Facebook Inc’ (2010) 16 Computer and Telecommunications Law Review N5-6 (on the 2009 settlement of a class action lawsuit over privacy issues brought against Facebook in the US District Court for the Northern District of California, relating to the sending of reports on members’ browsing activities on affiliates’ websites and their publication on Facebook).

new forms of communication are impacting on legal procedures, legal processes and raising novel investigatory and evidential issues. Examination of the social media profiles of applicants could become relevant to admission to the legal profession. The application of some existing laws to social networking, often based on earlier legislation, has arguably been inappropriate but the nature and speed of growth of social networking has made it difficult for the law to keep pace.


26 See Salib, 'Coming Soon: Service via Facebook?' (2009) Civil Justice Quarterly 297, considering the decision of the Australian Capital Territory Supreme Court in MKM Capital v Corbo (2008), which authorized a default judgment relating to the repossession of a house to be served via a private message on Facebook; and XY v Facebook Ireland Ltd [2012] NIQB 96 (interim injunction granted requiring Facebook to remove from its site a page entitled 'Keeping Our Kids Safe from Predators'. This was the fourth interim injunction granted by Northern Ireland's High Court against Facebook).


28 On the proposal of the Florida Board of Bar Examiners (FBBE) to screen the social network accounts of certain applicants to the Florida Bar, see O'Brien, 'Facebook v the Florida Bar' (2011) 1 International Journal of Public Law and Policy 127 (suggesting that FBBE's draft guidelines are unduly vague in terms of the definition of 'personal websites' and the standards of appropriate social network service use). More generally, employers can investigate prospective job applicants' SNS activities and comments about them. The UK Information Commissioner's Office has warned employers in the UK that it would have very serious concerns if they were to ask for Facebook login and password details from existing or would-be employees. Following reports of such demands in the United States, see Arthur, 'Employers Warned Against Demanding Facebook Details from Staff', The Guardian, 26 March 2012; see also Sprague, 'Rethinking Information Privacy in an Age of Online Transparency' (2009) 25 Hofstra Labour and Employment Journal 395 at 397–400. Sprague notes (at 411–17) that a number of US states specifically restrict the ability of employers from considering off-site, off-work, lawful conduct in hiring decisions.

29 See Rowbottom, supra n 11.

30 For example, section 127 of the Communications Act 2003, considered in Part 2 below, is based on section 43 of the Telecommunications Act 1984.

31 Scaife, 'The Regulation of Social Media' (2012) 14 E-Commerce Law & Policy 6 (current legislation is insufficient to govern the use of social media; there is a need for a consolidated legal framework or significant guidance on the application of existing legislation in order to ensure offenders are dealt with fairly); Edwards, 'Section 127 of the Communications Act 2003: Threat or Menace?' Society of Computers and Law 9 October 2012, available at: http://www.scl.org/site.aspx?i=ed28102 [last accessed 29 January 2013] (Section 127 is not drafted to fit modern guarantees of freedom of speech in public. It was designed primarily to regulate one-to-one communications, rather than one-to-many broadcasting and to safeguard a public utility built with public money. It was now being applied to a privately owned, though publicly accessed, many-to-many communications domain).
For states, SNSs can represent an uncontrolled danger. There was evidence that those involved in riots in the UK in 2011 had used SNS messaging to co-ordinate disturbances across London and other cities. There was also evidence that SNSs have played a significant part in the Arab Spring – the spread of democratic revolutions in the Arab World. Many states have imposed ‘Blocking’ measures taken to prevent certain content from reaching an end-user. These include ‘preventing users from accessing specific websites, Internet Protocol (IP) addresses, domain name extensions, the taking down of websites from the web server where they are hosted, or using filtering technologies to exclude pages containing keywords, such as democracy or human rights, or other specific content from appearing’. For an individual there is an empowering and liberating element in SNSs. Major celebrities can have millions of followers. But non-celebrities can also create and communicate with wide social networks. Perhaps inevitably, the empowerment provided by the internet has proved intoxicating and led individuals to issue communications as though they were within a ‘Wild West’ type, law-free, zone in Cyberspace. In the UK, for a small number of individuals, this has proved to be a catastrophic mistake and they have been left facing a criminal

32 See Meuller, Networks and States: The Global Politics of Internet Governance (Cambridge, MA: MIT Press, 2010). In December 2012, the Chinese Government issued new rules requiring Internet users to provide their real names to service providers, while assigning Internet companies greater responsibility for deleting forbidden postings and reporting them to the authorities: see Bradsher, ‘China Toughens Its Restrictions on Use of the Internet’, The New York Times, 28 December 2012.

33 See R v Blackshaw [2011] EWCA Crim 2312. Though representatives from Blackberry, Facebook and Twitter argued before the UK Home Affairs Select Committee that social media were a ‘force for good’ during the riots as they were used by innocent people to ensure their friends were safe; they were also used by the police themselves. The Select Committee considered that it would be ‘actively unhelpful to switch off social media during times of widespread and serious disorder’. See Policing Large Scale Disorder: Lessons from the Disturbances of August 2011, Sixteenth Report of Session 2010–12, HC 1456-I, 27–30 at 30.

34 It has been suggested that Wael Ghonim’s tweet for people to join him in an Egyptian village square lead to the downfall of Egypt’s political powers. He was hailed on Facebook and Twitter as a hero: see O’Loughlin, ‘Revolution 2.0 by Wael Ghonim’, The Telegraph, 13 January 2012.

35 La Rue, supra n 2 at paras 29–32.

36 Lady Gaga is reported to have a following of more than thirty million, see ‘The Twitaholic.com Top 100 Twitterholics Based on Followers’, available at: http://twitaholic.com/ [last accessed 29 January 2013].

37 See Yen, ‘Western Frontier or Feudal Society? Metaphors and Perceptions of Cyberspace’ (2012) 17 Berkeley Technology Law Journal 1207. A common error has been for individuals to assume that once information is on the internet it can be republished because it has already been published in the public domain, whereas the issue is ‘whether, notwithstanding some publication, there remains a reasonable expectation of some privacy’. See CTB v News Group Newspapers Limited and Imogen Thomas [2011] EWHC 1232 (QB) at para 28; and Smartt, ‘Twitter Undermines Superinjunctions’ (2011) 16 Communications Law 135.
prosecution. In some cases this has led to a conviction.\(^\text{38}\) For others it has led to disciplinary measures and even dismissals.\(^\text{39}\)

### 2. Criminal Prosecutions

The potential implications on freedom of expression in relation to SNSs and other internet communications are most obvious when speech or expression is criminalised.\(^\text{40}\) This section considers prosecutions in the UK. UK prosecutors and courts are public authorities under the Human Rights Act 1998 (HRA 1998) and it is unlawful for them to act incompatibly with Convention rights.\(^\text{41}\) There is also an obligation on UK courts to interpret legislation compatibly with Convention rights if it is possible to do so.\(^\text{42}\) Relevant UK legislation includes the Protection from Harassment Act 1997,\(^\text{43}\) the Crime and Disorder Act 1998,\(^\text{44}\) the Public Order Act 1986,\(^\text{45}\) and, the most commonly

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38 See R v Blackshaw [2011] EWCA Crim 2312, where B had a page on Facebook entitled 'The Warrington Riots'. So too in other jurisdictions: see Clinch and Liu, 'Taiwan: Infidelity and Facebook Lead to Criminal Convictions' (2012) 28 Computer Law & Security Review 246 (defendant charged with four offences after he used his own and his sister's Facebook accounts to disseminate his girlfriend's private emails, obtained after he gained the password to her personal email account, showing that they were not in a monogamous relationship in order to encourage other users to comment on what he called her immoral behaviour).


41 See Section 6 HRA 1998.

42 See Section 3 HRA 1998.

43 The Act has been used successfully on several occasions to charge trolls who send repeated upsetting or vile messages to users on sites such as Facebook and Twitter. It prescribes that any two 'acts' which form a course of harassing conduct can be charged as a crime. In the first half of 2012 four UK politicians complained to police that they were being harassed by internet 'trolls': see Beckford, 'Two MPs and Two Peers Go to Police Over Twitter Abuse', The Telegraph, 21 September 2012. It has been reported that Nicola Brookes, an alleged victim of vicious trolling on Facebook, obtained a Norwich Pharmacal order against Facebook in order to reveal the true names of, and start proceedings against, her online trolls under the 1997 Act.

44 In 2012, Liam Stacey, aged 21 years, was convicted of an offence under the Crime and Disorder Act 1998 for making a series of 'racially aggravated comments' (tweets) about footballer Fabrice Muamba who had collapsed on a football pitch and was believed to have died. He was sentenced to fifty-six days in jail.

45 See Bailin, supra n 40; and Seymour, 'Azhar Ahmed – Charged with Treason Over Facebook Comments?', The Guardian, 15 March 2012. Ahmed was actually prosecuted for a 'racially aggravated public order offence' over a statement about the British Army in Afghanistan that appeared on his Facebook page. It included the comment that 'all soldiers should die and go to hell'. He was convicted and sentenced to two hundred and forty hours of community service.
used provision, Section 127(1)(a) of the Communications Act 2003. The number of proceedings in Magistrates’ Courts in England and Wales for offences under Section 127(1)(a) from commencement (25 July 2003) to 31 December 2011 was 3,345. Section 127(1)(a) makes it an offence to send a message using a ‘public electronic communications network’ if that message is ‘grossly offensive or of an indecent, obscene or menacing character’. It can be used as an alternative offence to such crimes, for example, as hate crime (including race, religion, disability, homophobic, sexual orientation and trans-phobic crime), hacking offences, cyber bullying and cyber stalking, amongst others. The offence is committed once the message is sent, irrespective of whether it is received by any intended recipient or anyone else.

A. ‘Grossly Offensive’

The test for ‘grossly offensive’ is whether the message would cause gross offence to those to whom it relates, who need not be the recipients. In Director of Public Prosecutions v Collins the House of Lords considered that it was justifiable under Article 10(2) of the ECHR to prosecute somebody who has used the public telecommunications system to leave racist messages. In July 2012 Daniel Thomas (T), a semi-professional footballer, posted a homophobic message on Twitter. This related to the UK Olympic divers Tom Daley and Peter Waterfield. This became available to his ‘followers’. Someone else distributed it more widely. T was arrested and interviewed. The matter was then referred to CPS Wales to consider whether T should be charged with a criminal offence. The case attracted international publicity and in response, Keir Starmer, the Director of Public Prosecutions (DPP), issued a ‘Statement on Tom Daley case and social media prosecutions’. The key question addressed was whether the message was so ‘grossly offensive’ as to be criminal and, if so, whether a prosecution was required in the public interest. The DPP had no doubt that the message posted by T was offensive and would be regarded as such by reasonable members of society. But the critical question was whether it was so

47 Combining figures from Crispin Blunt (Parliamentary Under Secretary of State (Prisons and Probation), Hansard, HC Deb, Vol 511, col 322W (14 June 2010); and Wright, Hansard, HC Vol 552, col 824W, 9 November 2012. The annual number increased from 498 in 2007 to 1,286 in 2011.
50 Ibid.
‘grossly offensive’ that criminal charges should be brought. The distinction was an important one and not easily made. The ECtHR’s statement in *Handyside* that the right to freedom of expression included the right to say things or express opinions that offended people was recalled. Context and circumstances were highly relevant and in this case included that: (a) however misguided, T intended the message to be humorous; (b) however naïve, T did not intend the message to go beyond his followers, who were mainly friends and family; (c) T took reasonably swift action to remove the message; (d) T had expressed remorse and was, for a period, suspended by his football club; (e) neither Daley (D) nor Waterfield (W) were the intended recipients of the message and neither knew of its existence until it was brought to their attention following reports in the media; (f) it was, in essence, a one-off offensive *Twitter* message, not part of a campaign, and not intended to incite others. On a full analysis of the context and circumstances in which this single message was sent, the Prosecutor decided that it was not so grossly offensive that criminal charges needed to be brought. Before reaching a final decision, D and W had been consulted and both indicated that they did not think this case needed a prosecution.

The timeliness of the DPP’s Statement was quickly highlighted by subsequent cases. In September 2012 the police arrested Neil Swinburne, aged 22 years, over an offensive *Facebook* tribute page set up following the fatal shooting of two female police officers in Manchester. In October 2012 Matthew Woods, aged 19 years, pleaded guilty to making ‘grossly offensive’ remarks about a missing five-year-old girl, April Jones, on his *Facebook* page. He was sentenced to twelve weeks in prison.

**B. ‘Of an Indecent, Obscene or Menacing Character’**

Contracting states to the ECHR are accorded a margin of appreciation but a prosecution for sending an ‘indecent’ or ‘obscene’ message would almost

53 *Handyside v United Kingdom*, supra n 12.
54 A number of professional associations and sports teams in the UK have fined players for issuing homophobic comments or bringing the game into disrepute: see, for example, ‘Man Utd’s Federico Macheda Fined for Homophobic Tweets’, 5 March 2012, available at: http://www.bbc.co.uk/sport/0/football/17178936 [last accessed 29 January 2013].
55 The victims in SNS cases will always have the dilemma that prosecution will inevitably give rise to even wider publication of the relevant statements. It is not normal to consult victims on whether individual defendants should be prosecuted. The implication of the statement (supra n 52) seems to be that the victims’ views went to the question of whether it was in the public interest to prosecute, rather than whether the message was grossly offensive.
inevitably raise an Article 10 of the ECHR issue given longstanding jurisprudence that the right to freedom of expression includes the right to say things or express opinions ‘that offend, shock or disturb the state or any sector of the population’. ‘Obscene’ messages may pass scrutiny with less difficulty than ‘indecent’ ones. By contrast it is not too difficult to envisage that a prosecution for sending a message of a ‘menacing character’ might be ECHR compliant in some circumstances. In *Chambers v Director of Public Prosecutions*, C, aged 26 years, had sent a message sent on Twitter in January 2010. In it he threatened to blow up an airport that C was due to travel from to meet someone, but which had closed because of weather problems. C was convicted of sending a message of a ‘menacing character’. The Crown Court upheld this on the basis that the message was ‘menacing per se’ and that C was aware that his message was of a menacing character. However, the Divisional Court of the High Court quashed the conviction on the basis that the message was not of a menacing character because it was intended as a joke. Before concluding that a message was criminal on the basis that it represented a menace, its precise terms, and any inferences to be drawn from its precise terms, needed to be examined in the context in and the means by which the message was sent. The offence was not directed to the inconvenience which may be caused by the message. The message did not represent a terrorist threat, or indeed any other form of threat. It was posted on ‘Twitter’ for widespread reading, a conversation piece for C’s followers, drawing attention to himself and his predicament. It was not sent to anyone at the airport or anyone responsible for airport security, or indeed any form of public security. The grievance addressed by the message was that the airport was closed when C wanted it to be open. The language and punctuation were inconsistent with C intending it to be or to be taken as a serious warning. Moreover, it was unusual for a threat of a terrorist nature to invite the person making it to be readily identified, as this message did. It was difficult to imagine a serious threat in which warning of it is given to a large number of tweet ‘followers’ in ample time for the threat to be reported and extinguished. Significantly, the Divisional Court upheld the Crown Court ruling that although Twitter was a private company, the

58 *Handyside v United Kingdom* supra n 53; and *Perrin v United Kingdom* Application No 5446/03, Admissibility, 18 October 2005 (concerning prosecution for obscene material published on the internet, held inadmissible).
59 [2012] EWHC 2157 (Admin) DC.
61 *Chambers v DPP*, supra n 59 at para 31. Although C’s appeal was successful he was sacked from his job and banned from the airport concerned for life.
messages were processed through the internet and the internet was inherently a 'public electronic communications network'.

C. The DPP's Interim Guidelines

The DPP's Statement on social media prosecutions noted that the Crown Prosecution Service (CPS) was considering a growing number of cases involving the use of social media and that there were likely to be many more. It observed that the context in which this interactive social media dialogue took place was quite different to the context in which other communications took place and that the task for the CPS involved 'balancing the fundamental right of free speech and the need to prosecute serious wrongdoing on a case by case basis.' That often involved very difficult judgment calls and, in the largely unchartered territory of social media, the CPS was proceeding on a case-by-case basis. In some cases it was clear that a criminal prosecution was the appropriate response to conduct that was complained about. For example, where there was a sustained campaign of harassment of an individual, where court orders were flouted or where grossly offensive or threatening remarks were made and maintained. But in many other cases a criminal prosecution would not be the appropriate response. If the fundamental right to free speech was to be respected, the threshold for criminal prosecution had to be a high one and a prosecution had to be required in the public interest. The DPP also announced that he intended, after consultation, to issue guidelines on social media cases for prosecutors. More generally though he suggested that social media was a new and emerging phenomenon that raised difficult issues of principle. The 'time has come for an informed debate about the boundaries of free speech in an age of social media.'

The DPP published Interim Guidelines on prosecuting cases involving communications sent via social media on 19 December 2012 and they applied with immediate effect. It is striking how much the Guidelines are directed

63 DPP Statement, supra n 52.
64 Ibid.
65 Ibid.
67 The CPS is responsible for England and Wales. The Crown Office in Scotland has decided not to issue similar guidelines but stated that it would continue to take a 'robust approach' to offensive material. There have been a number of prosecutions in Scotland for material posted on SNS sites: see Procurator Fiscal at Edinburgh v Raymond Strachan, 17 July 2011, available at: http://www.crownoffice.gov.uk/News/Releases/2012/07/Procurator-Fiscal-Edinburgh-v-Raymond-Strachan [last accessed 29 January 2013].
towards ensuring compliance with Article 10 of the ECHR. They distinguished between two categories of cases. The first included communications that constituted credible threats of violence to persons or damage to property (this would include menacing communications), which specifically targeted one or more individuals and those which might amount to breach of a court order. All of these were to be prosecuted robustly. In the second category were those which may be considered grossly offensive, indecent, obscene or false. These cases ‘will be subject to a high threshold and in many cases a prosecution is unlikely to be in the public interest.’ The rationale for this was the potential for a ‘chilling effect’ of prosecutions for social media communications on free speech. With respect to the high threshold it was stressed that the criminal law provisions had to be interpreted consistently with the free speech principles in Article 10 of the ECHR as interpreted by the ECHR. It was suggested that the common law took a similar approach. The requirement that a communication be ‘grossly’ offensive was highlighted as was the importance of context. Prosecutors should have regard to the fact that the context in which interactive social media dialogue takes place was quite different to the context in which other communications take place: ‘Access is ubiquitous and instantaneous. Banter, jokes and offensive comments are commonplace and often spontaneous. Communications intended for a few may reach millions.’ Reference was made to the description of Eady J in Smith v ADVFN in relation to comments on an internet bulletin board: ‘[they are] like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or “give and take”.’ Against this background, prosecutors should only proceed with cases under Section 1 of the Malicious Communications Act 1988 and Section 127 of the Communications Act 2003 where they were satisfied that the communication in question was ‘more than offensive, shocking or disturbing; or satirical, iconoclastic or rude comment; or the expression of unpopular or unfashionable opinion about serious or trivial matters, or banter or humour, even if distasteful to some or painful to those subjected to it.’ Even if so satisfied, prosecutors should go on to consider whether a prosecution was required in the public interest. As both provisions engaged Article 10 of the ECHR no prosecution should be brought unless it could be shown on its own facts and merits to be both necessary and proportionate. A prosecution was unlikely to be both necessary and

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68 Interim Guidelines, supra n 66 at paras 12–23.
69 Ibid, para 13 (emphasis in original).
70 Ibid, para 29.
71 Ibid, para 35.
72 [2008] EWHC 1797 (QB).
73 Interim Guidelines, supra n 66 at para 36.
proportionate where the suspect had swiftly taken action to remove the communication or expressed genuine remorse; swift and effective action had been taken by others, for example, service providers, to remove the communication in question or otherwise block access to it; the communication was not intended for a wide audience, nor was that the obvious consequence of sending the communication; particularly where the intended audience did not include the victim or target of the communication in question; or the content of the communication did not obviously go beyond what could conceivably be tolerable or acceptable in an open and diverse society which upholds and respects freedom of expression.74 The age and maturity of suspects should be given significant weight, particularly if they were under the age of 18 years. Children may not appreciate the potential harm and seriousness of their communications and a prosecution was rarely likely to be in the public interest.75

D. Lessons from Criminal Jurisprudence

In terms of criminal law one cannot but admire the common sense approach of the DPP and the Interim Guidelines in relation to social media cases and his call for an ‘informed debate about the boundaries of free speech in an age of social media’.76 It is clear that consideration of all of the factors in the Interim Guidelines, particularly the idea of a high threshold and the strong indications of where there is unlikely to be a public interest in prosecuting, will assist in ensuring that any prosecutions are consistent with Article 10 of the ECHR and Article 19 of the ICCPR. Such sensible and detailed prosecutorial guidance may mitigate dated legislation whose application could otherwise be incompatible with human rights standards.77 However, the rise in prosecutions and the astonishing growth in the quantity of SNSs would suggest that the relevant statutory provisions need to be thoroughly modernised to ensure their compatibility with international human rights standards. The prosecution in Chambers,78 in particular suggests that relying on the exercise of good sense carries unacceptable risks in human rights terms. Laws that clearly interfere with rights to privacy and freedom of expression, including religious views, need to be accessible and foreseeable so that individuals can know and understand, or at least get advice on, the risks they run.79 The debate needs to be

74 Ibid. para 36.
76 See supra n 65.
77 See Scaife, supra n 31; Edwards, supra n 31; and Rowbottom, supra n 11.
78 See supra n 59.
informed by a proper understanding of the massive sociological and societal effects of SNSs. The informed debate may well reveal that there is simply much greater societal acceptance of quite a high level of offensive content on SNSs. At least those who actually engage in Facebook activity may have to meet the argument that there might be a deemed element of knowledge or acceptance of exposure to a high threshold of offensiveness. If so, the law needs to reflect this.

3. Civil Actions

A. Defamation, Privacy, Discrimination and Harassment

In the UK, publication on the internet in general, and on SNSs in particular, can constitute defamation or breach informational privacy rights.

80 Cf Levmore and Nussbaum (eds), Offensive Internet: Speech, Privacy, and Reputation (Cambridge, MA: Harvard University Press, 2010).

81 The analogy might be with attending a movie rated as ‘18’.


protected by Article 8 of the ECHR, or constitute unlawful discrimination or harassment. Two or more sets of postings on a SNS may be considered to be one continuous act up until the last posting occurred and so the of limitation period may run from the time of the last posting.

In the aftermath of a story on BBC’s Newsnight in 2012, thousands of people wrote or re-tweeted a false accusation that Lord M was a child abuser. The allegation was based on a mistaken identity. The BBC settled the defamation claim in relation to Newsnight for some £185,000, but Lord M threatened legal action against those who had tweeted the allegation. In February 2013 the threat of legal action against those with fewer than five hundred Twitter followers was dropped in return for a modest charitable donation to Children in Need. People with more than five hundred Twitter followers who tweeted the peer’s name, including Sally Bercow, the wife of the Speaker of the House of Commons, and George Monbiot, a columnist for The Guardian newspaper, face individual action. Bercow apologised but argued that her tweet was foolish rather than libelous. She is now the focus of legal action. Monbiot apologised unreservedly. The Guardian newspaper would not pay Monbiot’s legal costs as he was not a member of its staff and was tweeting in a personal capacity.

(i) Employee cases

A small but growing number of cases in the UK have concerned disciplinary action taken by an employer against an employee because of comments posted on Facebook. In Preece v J.D.Wetherspoon Plc, P, who worked in a pub, was fairly dismissed for offensive comments that she posted on Facebook concerning customers. Although P did not mention the workplace by name, the comments she made were clearly in relation to her work. In Stephens v Halfords Plc S created a Facebook page entitled, ‘Halford workers against
working three out of four weekends’ recording his dissatisfaction at proposed workplace changes. S realised that the page breached the company’s policy and quickly took it down. The page was considered not to be grossly offensive. S fully acknowledged that he should not have done what he did and gave a full apology saying in mitigation that he had been off ill with stress and his judgment had been clouded. S also confirmed during the internal disciplinary process that it would never happen again. The Tribunal held S had been unfairly dismissed. In Whitham v Club 24 Ltd (t/a Ventura),92 W, who worked for a company that provided customer services for Volkswagen, was unfairly dismissed for misconduct after posting comments about her workplace on Facebook. Her comments were visible to her Facebook friends including colleagues but not to the general public. The comments were relatively mild, were not about Volkswagen as such and did not involve any confidential information. Moreover, it was considered to be highly unlikely that such mild comments by a junior employee could jeopardize the commercial relationship between her company and Volkswagen. The dismissal was held to fall outside the band of reasonable responses. Similar cases can be found in other jurisdictions including Ireland,93 Canada,94 the United States95 and France.96 It would appear that an employee who is unrepentant in his or her belief that his or her behaviour was not misconduct may lead the employer to the reasonable conclusion that the same thing might happen again in future. However, if an employee recognises that his or her actions were wrong and confirms

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92 Case No ET/1810462/10, September 2011.
93 See Azad v Tesco Ireland Ltd (2012) (EAT Ireland), available at: http://thepeninsulaireslandblog.files.wordpress.com/2012/10/azad-v-tesco-ireland-ud2311-2010.pdf [last accessed 29 January 2013], where an employer was ordered to pay EUR 7,500 for dismissing an employee for gross misconduct without following due procedure when investigating the alleged misconduct.
94 Lougheed Imports Ltd (t/a West Coast Mazda) v United Food and Commercial Workers International Union British Columbia Labour Relations Board, Local 1518, 2010 CanLII 62482, 22 October 2010 (upholding the termination of two employees by a car dealership over comments they posted on Facebook about their employer. The Board concluded that the employees had no reasonable expectation of privacy in comments made on SNSs. Furthermore, when those comments were damaging to the employer’s business or insubordinate in nature, the employer may have just cause for termination). The decision is one of the first in Canada to deal with termination on the basis of postings to an SNS.
96 See Mitchell, ‘France: Internet: French Labor Panel Upholds Dismissals Based on Facebook “Conversation”’ (2010) 5 World Communications Regulation Report 13 (discussing the decisions in Barbera v Societe Alten SIR and Southiphong v Societe Alten SIR on whether (i) posts on Facebook amounted to a public conversation and were therefore admissible as evidence, where recipients included ‘friends of friends’; and (ii) the posts were jests, where the employer alleged ‘incitement to rebellion against management’ and ‘denigration of the company’).
that there will be no repetition, the employer will find it harder to dismiss him or her fairly.

The growing number of cases highlights the importance for employers of having clear policies regarding the use of SNSs at work and outside of work and then following their proper investigatory and disciplinary procedures. It is clear that that even if the comments are made outside of work and in the employee’s own time they can be relied upon by employers and used to fairly dismiss. In *Teggart v TeleTech UK Limited*, TeleTech UK Limited employed T as a customer service representative at its Belfast call centre. He posted an obscene comment on his Facebook page from home about the promiscuity of a female colleague. The comment included reference to TeleTech and was read by Facebook friends including work colleagues but not the female colleague mentioned. The woman subsequently heard about it and told T’s girlfriend to ask him to remove it. This request offended T who then posted further obscene comments about her on his Facebook page. After a disciplinary hearing TeleTech concluded that T’s conduct amounted to gross misconduct and that he had brought the company into disrepute. T was dismissed. T argued his comments were meant to be a joke and that he regularly mocked people on Facebook. He had also not intended to harass anyone. He complained, *inter alia*, that there had been a violation of his human rights under Articles 8, 9 and 10 of the ECHR.

The industrial tribunal dismissed his claim for unfair dismissal and also held, following the approach in *X and Y*, that his rights under the various articles of the ECHR were not engaged. The disciplinary panel’s findings of harassment were considered reasonable as T’s Facebook comments satisfied the definition of harassment in TeleTech’s dignity at work policy as they were unwanted, violated the woman’s dignity and created a degrading and humiliating environment. It also held that harassment could occur where comments were directed to others and did not have to be made directly to the particular victim. The decision to find T guilty of bringing TeleTech into disrepute though was seriously flawed. The disciplinary panel had not dealt with the serious element of this charge. The supposed member of the public had not been interviewed or given a statement and there was little or no evidence that TeleTech had been brought into disrepute. However, the tribunal was satisfied that the disciplinary appeal panel would have decided to dismiss for the harassment charge alone and that this would have been reasonable.


100 *Teggart*, supra n 98 at para 16.
The tribunal considered that the nature of the comments, their vulgarity and coarseness, the intention to create a vulgar distaste for A, the use of some of the postings as a retaliatory measure against the claimant when she sought to have the comments removed, the behaviour that was implied about A in the comments, the reluctance to withdraw them when it was clear that A had been offended, the dissemination of the comments among fellow employees of both the claimant and A, all added together put the sanction of dismissal for this act of harassment within the band of reasonable responses. Articles 8, 9 and 10 of the ECHR were not engaged. T abandoned any Article 8 right to consider that his comments were 'private' comments to his circle of friends when he posted them on his Facebook pages, to which members of the public could have access. ‘Belief’ in Article 9 was ‘intended to refer to a philosophy, set of values, principles, or mores to which an individual gives his intellectual assent or which guides his conduct or behaviour’. It did not extend to a belief about the promiscuity of another person. Finally, the right to freedom of expression in Article 10 brought with it the responsibility to exercise that right in a way that was necessary for the protection of the reputation and rights of others. The right did not entitle T to make comments that damaged the reputation or infringed the rights of A. A’s reputation had been harmed on the basis of a joke or fun. Furthermore, she had the right not to suffer harassment.

(ii) Smith v Trafford Housing Trust

In UK terms the High Court decision in November 2012 in Smith v Trafford Housing Trust is the most important case to date. It highlighted the human rights dimension of decisions based on material appearing in SNSs. S was employed by Trafford Housing Trust as a housing manager. After reading on his computer a news article on the BBC news website headed ‘Gay church “marriages” set to get the go-ahead’, he posted a link to the BBC article on his Facebook wall page, together with the following comment, under his name: ‘an equality too far’. S had over two hundred Facebook friends. Most were fellow employees of the claimant and A, all added together put the sanction of dismissal for this act of harassment within the band of reasonable responses.

101 Ibid. at para 18.

102 In these kinds of circumstances employees will find it difficult to establish that they have a reasonable expectation of privacy under Article 8 ECHR. Tweets are directed to the world at large and so there can be no reasonable expectation of privacy. See also Crisp v Apple Retail UK ET/1500258/2011, November 2011 (although Article 10 ECHR was engaged by an employee’s posts on Twitter, the employer could rely on them to justify disciplinary action to the extent that to do so was proportionate to the potential harm to its reputation).

103 Teggart, supra n 98 at para 19. It cited the statement in Allen, Employment Law and Human Rights, 2nd edn (Oxford: Oxford University Press, 2007) at 214 that ‘[t]he limits to this concept lie in a requirement of a serious ideology, having some cogency and cohesion’.

104 It is implicit in this holding that Article 10 was engaged by T’s comments on Facebook.

105 Teggart, supra n 98.

106 [2012] EWHC 3221 (Ch).
Christians, forty-five of them were fellow employees. Most of S’s entries concerned sport, food, motorcycles and cars. His Facebook profile identified his employer and his job title. Miss S, a colleague of S’s, posted a comment on S’s Facebook wall asking him if this meant he did not approve. S replied as follows:

[N]o not really. I don’t understand why people who have no faith and don’t believe in Christ would want to get hitched in church. The bible is quite specific that marriage is for men and women. [I]f the state wants to offer civil marriage to same sex then that is up to the state; but the state shouldn’t impose its rules on places of faith and conscience.108

For his two comments S was suspended. Disciplinary proceedings concluded that he had been guilty of gross misconduct for which he deserved to be dismissed. Only on the basis of his long record of loyal service was he demoted to a non-managerial position with a forty per cent reduction in pay. M sought damages for breach of contract. He did not commence proceedings for unfair dismissal in the Employment Tribunal, and did not claim to have been dismissed at all. Although Judge Briggs accepted that S’s rights to freedom of expression and to manifest his religious beliefs (S was a Christian)109 were undoubtedly relevant in the context of the interpretation of his employment contract with the Trust, he considered this was not a case in which his Convention rights were sought to be enforced directly, since the Trust, a private housing trust was not a public authority for the purposes of Section 6 of the HRA 1998.110

For the Judge the first two critical questions concerned (i) the application of the Trust’s Code of Conduct and Equal Opportunities Policy to S’s use of his Facebook account, and (ii) whether, if applicable, the code of conduct or the policy were contravened by S making the two postings. Context was considered vital to an understanding and determination of these issues.111 Judge Briggs analysed the Trust’s case under three parts.

107 Facebook users commonly provide this information.
108 Smith v Trafford Housing Trust, supra n 106 at para 4.
110 Smith v Trafford Housing Trust, supra n at para 8. No explanation of this is given. Housing Trusts have been held to be public authorities in some cases, see London and Quadrant Housing Trust v Weaver [2009] EWCA Civ 587; [2009] 4 All ER 865.
111 Ibid. at para 10.
S’s postings were ‘activities which may bring the Trust into disrepute’ contrary to the Code of Conduct

Judge Briggs accepted that the Trust was entitled, after the event, to form its own view as to whether particular actions of an employee did or did not constitute misconduct, rather than to have to specify every possible aspect of prohibited conduct in advance, in detail. However, a code or a policy had to be interpreted as a whole, and particular forms of behaviour might constitute misconduct even though not precisely specified and prohibited. Nonetheless codes and policies which formed part of a contractual framework (in the sense that the employee was required to observe and abide by them) had to be objectively construed, by reference to what a reasonable person with the knowledge and understanding of an employee of the type in question would understand by the language used. If an employee was liable to be demoted and to have his salary substantially reduced as a result of misconduct, he must be entitled to ascertain from the codes and policies to which he is subjected what he was and was not permitted to do, and to understand the extent to which those obligations extended beyond the workplace into his personal or social life.112

The Trust argued that by identifying himself in the abbreviated CV under his name on his Facebook wall as a manager of the Trust, S thereby created a real risk that readers of his two postings about gay marriage in church would think that he was expressing views on the Trust’s behalf. This would undermine the Trust’s sensible determination to maintain neutrality on contentious matters of religious belief and politics. The Judge rejected this argument. He found that S’s postings about gay marriage in church were not such as did, or even could, bring the Trust into disrepute.113 The critical factors were that no reasonable reader of S’s Facebook wall page could rationally conclude that his two postings about gay marriage in church were made in any relevant sense on the Trust’s behalf. S’s brief mention at the top of the page that he was employed as a manager by the Trust (as part of a note from his CV which also identified his school, his place of residence, his marital status and his date of birth) could not possibly lead a reasonable reader to think that his wall page consisted of, or even included, statements made on his employer’s behalf. A brief mention of the identity of his employer was in no way inconsistent with the general impression to be gained from his Facebook wall, that it was a medium for personal or social, rather than work-related, information and views. Viewing the entries on S’s wall for the period in question as a whole, it was obvious, and would have been obvious even to a casual reader, that he used Facebook for personal and social rather than work-related purposes. The

112 Ibid. at para 53.
113 Ibid. at paras 55–64.
gay marriage postings would have appeared automatically on the newsfeed pages of S's Facebook friends. They would be divorced from the context of the contemporaneous postings about sport, food and motor vehicles, but also from S's reference at the top of his wall page to being a manager at the Trust. In that context there would be no basis for the reader to make any connection between the postings and the Trust.

The Trust also argued the expression of views by a manager that could cause distress to other employees or even customers could of itself bring the Trust into disrepute, even if those persons did not believe that S was in any sense speaking on the Trust's behalf. In support of the Trust's view it referred to the risk that the Trust might lose its recently won accreditation from the Albert Kennedy organisation (which supports lesbian, gay, bisexual and trans young people), the implication being that for the Trust to employ as a manager a person with S's views would undermine its reputation for the encouragement and support of equal treatment of gay and lesbian people. This argument was also rejected. The Judge could not envisage how any such loss of reputation would arise in the mind of any reasonable reader of S's postings, whether in the Albert Kennedy organisation or otherwise. The Trust prided itself on encouraging diversity both among its customers and its employees, and that encouragement of diversity formed part of its well-deserved reputation. But the encouragement of diversity in the recruitment of employees inevitably involved employing persons with widely different religious and political beliefs and views, some of which, however moderately expressed, might cause distress among the holders of deeply felt opposite views. On the assumption that S was not reasonably to be taken as seeking to express the Trust's own views, his moderate expression of his particular views about gay marriage in church, on his personal Facebook wall at a weekend out of working hours, could not sensibly lead any reasonable reader to think the worst of the Trust for having employed him as a manager.

Whether S was by his postings promoting his religious views contrary to that part of the Code of Conduct dealing with relationships with customers, members of the public and colleagues

The Judge referred to the relevant passage in the Code of Conduct stating that 'The Trust is a non-political, non-denominational organisation and employees should not attempt to promote their political or religious views.' Neither of S's comments could sensibly be described as 'promotion'. The question raised was the extent to which a reasonable managerial employee would think that this

114 Ibid. at para 62.
purported to lay down any rule or instruction about how he (or she) should behave outside the workplace or the work context. The right of individuals to freedom of expression and freedom of belief, taken together, meant that they were in general entitled to promote their religious or political beliefs, providing they did so lawfully. An employer could legitimately restrict or prohibit such activities at work, or in a work-related context, but it was described as 'prima facie surprising to find that an employer had, by the incorporation of a code of conduct into the employee's contract, extended that prohibition to his personal or social life.\footnote{Ibid. at para 66.}

The Trust argued that, to S's knowledge, some forty-five of his Facebook friends were fellow employees of the Trust and one of them was both a board member and customer of the Trust. This necessarily created a 'work-related context' to any use by him of his Facebook pages, sufficient to attract the prohibition against promotion of religious or political views in the Code of Conduct and the Equal Opportunities Policy. On the basis of an interpretation of those documents, and of their application in a fact intensive context, the Judge rejected this argument.\footnote{Ibid. at paras 67-79. For the Judge (at para 68) the question was ‘what do the particular provisions of these documents mean, rather than what extent of interference in an employee's personal and social life is permissible to a private (rather than public body) employer.' The latter question would be more directly raised if the employer was a public authority for the purposes of the HRA 1998, see supra n 110.} The prohibition on the promotion of political or religious views lay very much at the work-related end of the spectrum. That was because of its obvious potential to interfere with the employee's rights of freedom of expression and belief. It had been conceded that the Code did not in any way prohibit S from preaching in church, even if a number of his work colleagues chose to attend. Nor would it prohibit an employee from canvassing for a political party, merely because a number of his work colleagues happened to live in the residential area allocated to him for canvassing purposes. The prohibition could not be rigidly confined to the workplace, or to working hours. For example, an employee might compose a piece of political or religious promotion and send it by email targeted at his work colleagues. He would not escape the prohibition in the Code merely by doing so in the evening from his home, rather than from his work computer. However, S's Facebook wall was inherently non-work related. While identifying himself as a manager at the Trust, he plainly and visibly used it for the expression of personal views about matters that had nothing whatsoever to do with his work. His Facebook was 'an aspect of his social life outside work, no less than a pub, a club, a sports ground or any other physical (or virtual) place where individuals meet and converse.'\footnote{Ibid. at para 75.} Although S's Facebook wall was not purely private, in the sense of being available only to his invitees (due to its 'friends of friends' extension), it was not in any sense a medium by which S could, or did, thrust
his views upon his work colleagues, in the sense in which a promotional email sent to all their addresses might fairly be regarded. His Facebook wall was primarily a virtual meeting place at which those who knew of him, whether his work colleagues or not, could at their own choice attend to find out what he had to say about a diverse range of non-work-related subjects. Even to the extent that his Facebook wall was accessible to friends of friends, actual access would still depend upon the persons in that wider circle taking the trouble to access it.118 It made no difference to that analysis that postings on S’s wall would appear automatically on the newsfeed pages of his friends’ Facebooks.119

The critical difference between a targeted email or inviting his workplace colleagues for a drink at the local pub for the purpose of enabling religious or political promotion outside work and S’s Facebook was that it was his colleagues’ choice, rather than his, to become his friends, and that it was the mere happenstance of their having become aware of him at work that led them to do so. He was in principle free to express his religious and political views on his Facebook, provided he acted lawfully, and it was for the recipients to choose whether or not to receive them.120

S was failing to treat fellow employees with dignity and respect, including being non-judgmental in approach and that he was engaging in conduct which may make another person feel uncomfortable, embarrassed or upset, contrary to the Equal Opportunities Policy as well as contrary to the Code of Conduct.

The Judge reached the conclusion that with respect to this aspect of the Code and the Policy, S’s Facebook was also not sufficiently work-related. He stressed the importance of freedom of speech:

The frank but lawful expression of religious or political views may frequently cause a degree of upset, and even offence, to those with deeply held contrary views, even where none is intended by the speaker. This is a necessary price to be paid for freedom of speech. To construe this provision as having application to every situation outside work where an employee comes into contact with one or more work colleagues would be to impose a fetter on the employee’s freedom of speech in circumstances beyond those to which a reasonable reader of the Code and Policy would think they applied.121

The Judge accepted that Facebook could be used, for example, to pass judgment on the morality of a named work colleague, which would contravene this part...

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118 Ibid. at para 76.
119 Ibid. at para 77.
120 Ibid. at para 78.
121 Ibid. at para 82.
of the Code and the Policy. Prohibitions upon certain kinds of conduct might be of wider application to managers than to other employees. Nonetheless some objectivity needed to be applied to the analysis of S's postings, even if a ‘real risk’ test was applied to the prohibition on causing upset. Statements about religion or politics may be more prone to misinterpretation than others, but it could not be considered a reasonable interpretation of those provisions that they should be taken to have been infringed if language which was non-judgmental, not disrespectful nor inherently upsetting nonetheless caused upset merely because it was misinterpreted. S's postings about gay marriage in church were not, viewed objectively, judgmental, disrespectful or liable to cause upset or offence. As to their content, they were widely held views frequently to be heard on radio and television, or read in the newspapers. The question remained whether the manner or language in which S expressed his views about gay marriage in church could fairly or objectively be described as judgmental, disrespectful or liable to cause discomfort, embarrassment or upset. The Judge thought not. He was mainly responding to an enquiry as to his views, and doing so in moderate language. Miss S's interpretation was understandable but not objectively reasonable. Nor was that of another employee who viewed the tone of the postings was offensive. S's postings did not disclose homophobia.

(iii) The outcome for Smith

In the result Judge Briggs held that the Trust did not have a right to demote S by reason of his Facebook postings and that the demotion imposed by way of purported disciplinary sanction constituted a breach of contract. The Trust immediately accepted the Court's decision and made a full and sincere apology to S. It might reasonably be suggested that S's comments were mildly formulated, diplomatically expressed and supported the existing state of the law. The Trust's response was an over-reaction that brought it no credit. Even the leading gay activist Peter Tatchell regarded the Trust's approach as wrong.

122 Teggart v TeleTech UK Limited, supra n 98, could be considered as an example of this.
123 Smith, supra n 106 at para 83.
124 Ibid. at para 84.
125 Ibid. at para 85. It was noted that S supported same-sex civil marriages by the state.
126 S was awarded damages of just under £100. As noted, S did not bring unfair dismissal proceedings which would have seen him awarded substantial damages.
It had not credited gay organisations with having the ability to make the sensible judgments about organisations that Judge Briggs did.129

(iv) Lessons from the Civil Jurisprudence

Civil liability and disciplinary actions by employers are also on the rise as the cases examined demonstrate. The Smith case in particular merits close reading for its principled and sensible approach. It rightly gave considerable weight to the importance of freedom of speech. Employers need clear and effective SNS policies governing their use, their monitoring and the implications of not complying with the policy.130 Individuals need to keep their Facebook pages as a medium for social communication as distinct from work-related communications.131 Context, content, tone, manner and language (whether non-judgmental, disrespectful nor inherently upsetting) are crucial and have to be assessed and interpreted objectively: a profile that includes details of where an individual works, which they commonly do, runs at least some degree of risk of association with an employer or other organisation. Repetition of ‘widely held views’, as long as they are not, for example, defamatory, racist or sexist, will not normally put an individual at risk of disciplinary action. However, given the weight accorded to the value of free speech, it is submitted that the repetition of less ‘widely held views’ should not significantly increase the risk. Even if an individual does not explicitly name their employer or organisation it may be implicit in the content of their Facebook pages. Posting communications that potentially bring your employer or organisation into disrepute or are inconsistent with its mission statement, or core values, can lead to disciplinary action and to dismissals that are subsequently be judged not to be unfair by the courts and tribunals.132 Senior employees need to be especially cautious but lower level employees need to exercise caution as well.

4. Concluding Comments

For many individuals the lessons drawn above from the UK’s criminal and civil jurisprudence will suggest the creation of a difficult and wholly artificial divide between their work and their social life.133 This is because their work is
often central to their social life. Particularly for younger generations, SNSs such as Facebook and Myspace are irreplaceable. A lot of their lives are lived online and to be outside SNSs carries a price of social exclusion and non-identity. Notions of choice in this context are increasingly rhetorical. For some SNSs, such as Facebook, there are stronger elements of actual consent in terms of the acceptance of friends. But this breaks down as persons other than friends can access information indirectly. For other SNSs, such as Twitter, the consensual argument is much weaker. The sender has no control over who accesses the communications.

It is a commonplace that the law necessarily struggles to keep up with speed with which technology develops. The rapid evolution of SNSs certainly demands imaginative and informed re-thinking about their legal regulation. In legal terms communicating via SNSs is clearly not the equivalent of oral conversations with friends in a cafe, a bar or a public house. There is a permanent written record. There is also a potentially much wider audience, particularly given ability of search engines to give exponential and long-lasting publicity to a comment on an SNS and the use of automated programmes that ‘mine’ publicly available data on SNSs. Technology has changed the way individuals communicate and engage in public discourse. SNSs may represent the modern equivalent of what had previously been considered to occupy private, familial, close community or domestic spaces where the law tended not to go because it adopts a ‘give and take’ approach. Notwithstanding Facebook’s terms of service that individuals have to use their real names, it is a fact that some users do not. The SNS persona, whether real or imagined, is part of the individual’s persona. Essentially the argument is that the ‘mass adoption of Facebook changes privacy, and thus how users understand and deal with privacy concerns’. For one of the inventors of Facebook there

135 As noted, this was an important element in the Smith Case, see text to supra n 120.
136 See Mueller, supra n 32 at 185–214, on the regulation and censoring of Internet content.
138 See Clift v Clarke [2011] EWHC 1164 (QB) (it was fanciful to suggest that a sensible and reasonable reader would understand two comments posted on a news website as being anything more than ‘pub talk’).
140 Businesses are also relying on SNSs to market their services and to develop relations with clients and customers.
141 See Smith v ADVFN Plc, supra n 72; Rowbottom, supra n 11 at 375–83; and Yalof Garfield, ‘The Death of Slander’ (2011) 35 Columbia Journal of Law & the Arts 17.
142 See Raynes-Goldie, supra n 21.
143 Ibid.
needed to be recognition that privacy was no longer a ‘social norm’ and had evolved over time. In SNS spaces distinguishing between what is offensive and what is an acceptable, but shockingly expressed, argument is difficult.

More generally, legal regulation of SNSs is challenging because it doesn’t fit with the paradigms on which laws relating to freedom of expression have been built. The line between individual and small group communications on one side and mass communication on the other is gradually fading. So too is the line between individual communications and those by organisations and institutions. It is not really credible to apply the high standards of journalism and broadcasting imposed by human rights law on mass communication organisation and institutions. The law will have to adapt. This will have to happen both in terms of substantive law and remedies that afford effective legal protection. An example with respect to the latter is the UK Defamation Bill 2012, which provides for increased protection to operators of websites that host user-generated content, providing they comply with a procedure to enable the complainant to resolve disputes directly with the author of the material concerned. Another idea in remedies terms might be that, instead of damages, a court or tribunal could order the same SNS account (for example, Facebook or Twitter) that carried the message or communication which contravenes the law to have to carry the appropriate apology or explanation in the same way that mass media sometimes provides apologies or clarifications to the same audience. Assuming it is technically possible, that could go some way to ensuring that whoever received the offending or defamatory message also received the follow up communication and did so from the individual responsible. This might well exert a degree of informal control in that the individual is revealed to their friends or followers as legally wrong. In some cases they will also be exposed as foolish and irresponsible. If SNSs are so ‘irreplaceable’ in people’s lives this remedy will not discourage their continued use but might affect a practicable degree of civilisation and responsibility in controlling an ‘element of mob rule’.


For example, some celebrities who work for organisations and institutions, such as BBC television or radio, have SNS accounts.

See Rowbottom, supra n 11 at 370–5.

See supra n 9.

See supra n 147.


See supra n 149.