

Case Study

Warning Employers - Employee's hate speech on social media... or yours?

In order to uphold and safeguard the constitutionally entrenched rights of equality and dignity, the South African legislature has recently promulgated the Prevention and Combatting of Hate Crimes and Hate Speech Bill, 2018 ("**the Bill**"). The Bill has not yet been passed into law. However, it is important for employers to take note thereof in order that they may mitigate against any potential risk in the meanwhile.

The Bill is different from the Promotion of Equality and Prevention of Unfair Discrimination Act in that it will expressly criminalize acts which constitute hate crime and hate speech.



Hate crime:

In terms of the Bill, a hate crime is an offence which is recognized under any law, the commission of which is motivated by the perpetrator's prejudice or intolerance towards certain characteristics or perceived characteristics of the prospective victim/s. A victim can be both natural and juristic persons. The characteristics referred to are listed in the Bill and includes, but is not limited to, race, culture, ethnic or social origin, gender or gender identity, sex (which includes intersex) and sexual orientation.

Hate speech:

The Bill provides that an act of hate speech is perpetrated by an individual who intentionally publishes, propagates or advocates anything or communicates to any person in a manner which could reasonably be construed to demonstrate a clear intention to:

- (i) be harmful or incite harm; or
- (ii) promote or propagate hatred based on any of the listed grounds which are largely similar to those characteristics referred to above.

Furthermore, a person who intentionally distributes or makes available an electronic communication which they know constitutes hate speech through an electronic communication system can also be guilty of an offence.

Proposed statutory exceptions to hate speech:

As is the case with most laws, there are exceptions to the general rule and the rule prohibiting the use of hate speech is no different. An act of hate speech will not be an offence if it is done in good faith in the course of engagement in –

- Any good faith artistic creativity, performance or expression to the extent that it does not advocate hatred that constitutes incitement to cause harm based on one of the listed grounds;
- Any academic or scientific enquiry;
- Any fair and accurate reporting or commentary in the public interest or publication of material in accordance with the Constitution (the right to freedom of expression); or
- The *bona fide* interpretation and proselytization or espousing of religious material to the extent that it does not advocate hatred that constitutes incitement to cause harm based on one of the listed grounds.

Sanctions:

In the event that someone is convicted of an offence of hate speech they will be liable to a fine or to imprisonment not exceeding three years or both in the case of a first conviction.

In the case of any further conviction, they will be liable to a fine or imprisonment not exceeding five years or both.

Commentary on the potential risk to employers:

It is important for an employer to appreciate the risk which the digital age poses. An employer could be held to be vicariously liable for the acts of its employees. Indeed, an employer could also suffer damage to its reputation as a result of its employees' inappropriate use of social media in the workplace.

The Bill makes it an offence for an individual to intentionally disseminate material which constitutes hate speech. This dissemination will include postings on social media platforms. As a result, employers should seek advice on ways in which to manage social media usage in the workplace so as to avoid facing criminal penalties and/or reputational and/or incidental financial harm as a result of its employees' (potential) misconduct.

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