



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

To: Nonkqubela Thathakahle Jordan-Dyani
Director-General of the Department of Communications and Digital Technologies

Per email: fwpsa2025@dcdt.gov.za

Re: **FW de Klerk Foundation Submission on the Draft White Paper on Audio and Audio Visual Media Services and Online Safety**

Date: 23 September 2025 (**Deadline for comments: Friday, 26 September 2025**)

INTRODUCTION

Dear Director-General

1. We refer to the [invitation](#) by the Department of Communications and Digital Technologies ("the Department") for written submissions on the Department's [Draft White Paper on Audio and Audio Visual Media Services and Online Safety](#) (the "Draft Online Harm White Paper").
2. The FW de Klerk Foundation ("the Foundation") is a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Our vision is to make our constitutional democracy a reality for all South Africans.
3. To this end, the Foundation seeks to promote the Constitution and monitors developments, including legislation and policy, that may affect the Constitution. The Foundation does so in the interest of everyone in South Africa.
4. As such, the Foundation welcomes the opportunity to make this concise written submission to the Department, trusting it will be of assistance.

SUBSTANTIVE COMMENTS:

Policy to be explicitly cognisant of South Africa's censorship history

5. The Foundation notes the Draft Online Harm White Paper's commitment to the right to freedom of expression, plurality and diversity.¹ As well as the fact that it seeks to specifically protect both children and consumers from online harm.²
6. South Africa's history of censorship explains the importance of the right to freedom of expression and what it means to South Africans: The apartheid state exercised strong censorship. The law³ gave it the power to censor movies, plays, and books with the authority to decide what South Africans could watch, read, or listen to.⁴ People found to be in possession of such "banned information" could be fined or imprisoned.⁵
7. The result is that huge swaths of information were as a result, completely inaccessible to South Africans.
8. In stark contrast, as a constitutional democracy, South Africa explicitly entrenches the freedom to receive or impart information or ideas⁶ as part of the justiciable⁷ right to freedom of expression.⁸ The Constitutional Court held citizens "*need to be able to hear, form and express opinions and views freely on a wide range of matters*".⁹ Indeed, this exchange of ideas is "*crucial to the development of a democratic culture*".¹⁰ And the right to freedom of expression includes that society has to be tolerant of different view.¹¹
9. **Importantly, the Constitutional Court has also held that this right should be**

¹ Draft Online Harm White Paper at page 7, para 4.

² Draft Online Harm White Paper at page 7, para 4.

³ [Publications Act](#) 42 of 1974.

⁴ See, for example, sections 8, 9, 19, 30 and 34 of the Publications Act.

⁵ See, for example, *S v Russell* 1981 (2) SA 21 (C), *S v Simoko and Another* 1985 (2) SA 263 (E), *S v Melk* 1988 (4) SA 561 (A).

⁶ Section 16(1)(b) of the Constitution. See also, for example, *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at para 22.

⁷ Section 38 of the Constitution.

⁸ Section 16(1) of the Constitution.

⁹ *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at para 7.

¹⁰ *Khumalo and Others v Holomisa* at para 24. [Own emphasis.]

¹¹ *South African National Defence Union* at para 8. See further *Moyo and Another v Minister of Justice and Constitutional Development and Others* 2018 (2) SACR 313 (SCA) at para 42.

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broadly interpreted, and applies even to ideas that “*offend, shock or disturb*”.¹²

10. The Court also affirmed that “[s]ociety must be exposed to and be tolerant of different views, and unpopular or controversial views must never be silenced”.¹³

11. Thus, the Foundation believes that any policy and/or any other official documents need to explicitly take note of this history and the decisive break from it ushered in by the advent of constitutional democracy.

12. Additionally, the Foundation urges the Department to ensure that any training for officials must incorporate this history and decisive break in order to anchor officials in their mandate. Namely that their job is not to censor, but to foster an environment that allows for “a free and open exchange of ideas, free from censorship, no matter how offensive, shocking or disturbing these ideas may be.”¹⁴

Regulating forms of speech excluded from constitutional protection

13. The Constitution¹⁵ only excludes three (3) forms of speech from constitutional protection:

- a. propaganda for war;
- b. incitement of imminent violence; and
- c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.¹⁶

¹² *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC) (2003 (12) BCLR 1333) at para 49.

¹³ *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC) at para 81 quoting *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 (CC) at para 155. [Own emphasis.]

¹⁴ *Qwelane* at para 74.

¹⁵ Section 16(2) of the Constitution.

¹⁶ Commonly known as “hate speech”, which is “*the antithesis of the values envisioned by the right to free speech – whereas the latter advances democracy, hate speech is destructive of democracy.*” (*Qwelane* at para 78).

14. The state may regulate the above excluded forms of speech without needing to justify such regulation under section 36 of the Constitution: *“Any regulation of expression that falls within the categories enumerated in section 16(2) would not be a limitation of the right in section 16 [but that] [w]here the State extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution.”*¹⁷
15. Such regulation of the above excluded forms of speech, will however, still need to abide by the Republic’s founding values of *inter alia* constitutional supremacy and rule of law.¹⁸
16. *“[U]nless an expressive act is excluded by section 16(2) it is protected expression.”*¹⁹
17. Should the state wish to regulate constitutionally protected speech – i.e. speech that does not fall within the Constitution’s narrow forms of speech excluded from protection under section 16(2)- it must show that such regulation passes constitutional muster.
18. **To reiterate: If the state seeks to regulate forms of expression that are protected by the Constitution, it must demonstrate that such regulation is reasonable and justifiable in terms of section 36.**
19. It has been argued that recent laws imposing criminal sanctions²⁰ - which must be distinguished from laws imposing civil sanctions only²¹ - may not pass constitutional muster due to their broad definitions.²² This is because, these broad

¹⁷ *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at paras 33 and 34.

¹⁸ Section 1(c) of the Constitution.

¹⁹ *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) at para 47

²⁰ Including, but not limited to, the Films and Publications Act, 1996 (“the FPA”) and the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023 (“the Hate Speech Act”).

²¹ E.g. the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (the “Equality Act”).

²² The FPA defines “harm” and “harmful” as “causing **emotional, psychological or moral distress** to a person...”

The FPA’s definition “hate speech” **borrowes heavily from the Equality Act**: “any speech, gesture, conduct, writing, display or publication, made using the internet, which is prohibited in terms of section 16 (2) of the Constitution of the



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definitions risk criminalising constitutionally protected speech in a manner that cannot be justified under section 36. This has opened these laws up to be constitutionally challenged.

20. Regulating speech in the open and democratic society envisaged by our Constitution, where **freedom is a founding value**,²³ must always take place with the greatest caution, being as limited, clear and invulnerable to abuse as possible, because the *“Constitution duly empowers everyone to speak their mind without fear of undue retribution.”*²⁴
21. Thus, the Foundation submits that any definition of “harm”, “hate speech”, “prohibited speech” etc. adopted in the final version of the policy, a bill and/or any other official documents need to be as close to the Constitution’s wording and as narrow as possible to avoid constitutional challenges.

Republic of South Africa, 1996, which propagates, advocates or communicates words against any person or identifiable group, **which words could reasonably be construed to demonstrate a clear intention to be harmful, to incite harm and promote or propagate hatred against the said person or identifiable group**”. [Own emphasis.]

Such borrowing is despite the FPA imposing criminal sanctions of up to two years imprisonment (section 24G), while the Equality Act imposes mere civil sanctions.

Similarly, the Hate Speech Act defines “harm” as “substantial **emotional, psychological, physical, social or economic detriment** that objectively and severely undermines the human dignity of the targeted individual or groups”.

The Hate Speech Act defines “hate speech” **borrowes heavily from the Equality Act**: “Any person who intentionally publishes, propagates, advocates, makes available or communicates anything to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to (i) be harmful or to incite harm; and (ii) promote or propagate hatred, based on one or more of the grounds, is guilty of the offence of hate speech. (b) Any person who intentionally distributes or makes available an electronic communication which that person knows constitutes hate speech as contemplated in paragraph (a), through an electronic communications system which is (i) accessible by any member of the public; or (ii) accessible by, or directed at, a specific person who can be considered to be a victim of hate speech, is guilty of an offence.”

Such borrowing is despite the Hate Speech Act imposing criminal sanctions of up to five years imprisonment (section 6(3)), while the Equality Act imposes mere civil sanctions.

²³ Sections 1(a) and 7(1) of the Constitution of the Republic of South Africa, 1996.

²⁴ *Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others* 2020 (1) SACR 373 (CC) at para 26.

Clear and narrow powers

22. The Foundation also notes the intention of the Department to create an ombudsman for online safety and media regulation. The Foundation submits that any such ombudsman must be created by statute to avoid abuse. Such statute must expressly, clearly and narrowly set forth the ombudsman's purpose, independence, powers, jurisdiction, functions and reporting obligations.
23. Considering both South Africa's censorship history and its constitutional framework, the ombudsman's bill must expressly state that the ombudsman must foster an environment that allows for "*a free and open exchange of ideas, free from censorship, no matter how offensive, shocking or disturbing these ideas may be.*"²⁵
24. Additionally, such bill must specify that ombudsman officials must be trained to ensure the ombudsman does not inadvertently revert to censorship.

Digital literacy

25. Finland made the news this year for training six-year-olds to [spot fake news](#).
26. The Foundation encourages the Department to examine the [Finnish Framework for Digital Competence](#). This model is used by Finland to educate its children in [basic media literacy](#), including the ability to critically evaluate information allowing Finish children to identify and analyse disinformation or fake news etc.
27. Media literacy offers an excellent opportunity to integrate training on the responsible use of artificial intelligence. It can also be used to promote greater online vigilance against exploitation and human trafficking.
28. The Department is urged to collaborate with the Department of Basic Education to implement a similar framework through all grades in South African schools to ensure that the future South African society is resilient and that disinformation has a harder time gaining a foothold in national discourse.

²⁵ Qwelane at para 74.



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RECOMMENDATIONS

29. Any bill, policy, official documents and/or training for officials must explicitly incorporate South Africa's censorship history and explain the constitutional democracy's decisive break from such censorship to an environment that allows for *"a free and open exchange of ideas, free from censorship, no matter how offensive, shocking or disturbing these ideas may be."*²⁶
30. The final policy, bill and/or any other official documents' definitions of "harm", "hate speech", "prohibited speech" etc. need to be as close to the wording in section 16(2) of the Constitution to avoid constitutional challenges.
31. The Department is urged to examine the Finnish Framework for Digital Competence and to collaborate with the Department of Basic Education to implement basic media literacy through all grades in South African schools.

Sincerely,

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END.

²⁶ Qwelane at para 74.