

---

## **GUIDELINES TO DETERMINE WHETHER CONTENT IS HARMFUL**

---

### **1. INTRODUCTION**

The Film and Publications Board (FPB) is an Online Content Regulatory Authority established in terms of the Film and Publication Act 65 of 1996 as amended (Act). The mandate of the FPB is to regulate the creation, production, possession and distribution of films, games, certain publications and the internet by way of classification of content. The Act prohibits sharing of harmful and/or prohibited content such as child pornography, revenge porn, hate speech and content which amounts to propaganda for war, incitement of imminent violence, advocacy of hatred that is based on an identifiable group characteristic, and that constitutes incitement to cause harm.

In terms of the Act, "harmful" means causing emotional, psychological or moral distress to a person, whether it be through a film, game or publication through any on or offline medium, including through the internet and "harm" has the corresponding meaning

### **2. PURPOSE**

The purpose of the guideline is to assist the Appeal Tribunal to determine what constitute harmful and prohibited content.

### **3. CONSTITUTIONAL FRAMEWORK.**

When determining whether speech is harmful, it is essential to consider the legal framework and principles that guide freedom of expression. In South Africa the Constitution of the Republic of South Africa, 1996 (Constitution) protects freedom of speech, subject to certain limitations outlined in the law.

## **2. GENERAL STEPS**

The general steps to follow when assessing whether speech is harmful is as follows:

- a) Understand the constitutional framework;
- b) Identify potentially harmful speech;
- c) Analyse the context;
- d) Refer to legislation;
- e) Assess for hate speech; and
- f) Consider limitations on freedom of expression.

It is important to note that the above steps provide a general framework, and legal advice from experts should always be sought in specific cases to ensure compliance with South African law and judicial interpretations.

### **2.1. UNDERSTAND THE CONSTITUTIONAL FRAMEWORK**

The constitutional framework in South Africa to assess whether speech is harmful is primarily based on the provisions of the Constitution.

In addition to the constitutional framework, specific legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (PEPUDA), provide further guidance on identifying and addressing harmful speech, particularly hate speech and discrimination.

When assessing whether speech is harmful, these constitutional provisions and related legislation are considered, and courts interpret and apply them in specific cases.

The interpretation and application of these provisions by the courts contribute to the evolving understanding of harmful speech and its limitations within the South African legal framework.

## **2.2. IDENTIFY POTENTIALLY HARMFUL SPEECH**

To determine the nature of the speech in question and assess whether it falls within the scope of speech that may cause harm, you can consider the following factors:

### **a) Content and Language**

Analyse the content of the speech and the language used. Look for elements that may indicate hate speech, incitement to violence, defamation, discriminatory remarks, or speech that infringes on the rights of others. Evaluate whether the speech targets individuals or specific groups based on race, ethnicity, religion, gender, or other protected characteristics.

### **b) Intent and Context**

Consider the intent behind the speech. Assess whether there is an intention to harm, demean, or incite violence against individuals or groups. Examine the context in which the speech was made, including the platform, audience, and historical or social backdrop. Context can help determine the potential impact and harm caused by the speech.

### **c) Effects and Consequences**

Evaluate the potential effects and consequences of the speech. Consider whether it has the potential to cause real harm, such as physical violence, discrimination, or damage to the reputation and well-being of individuals or communities. Assess whether the speech could lead to an escalation of tensions, conflict, or harm to public order.

**d) Legal Standards and Precedents**

Refer to legal standards and precedents established by courts in South Africa. Judicial decisions and interpretations of the law provide guidance on what constitutes harmful speech, including hate speech and incitement to violence. Consider relevant legal definitions and principles to assess whether the speech aligns with these standards.

**e) Social Impact and Community Perception**

Take into account the broader social impact and community perception of the speech. Consider whether it contributes to fostering an environment of tolerance, respect, and inclusivity or if it has the potential to fuel division, hostility, or discrimination. Assess whether the speech undermines social cohesion or threatens the rights and dignity of individuals or groups.

### **2.3. ANALYSE THE CONTEXT**

**Considering the context in which the speech was made is crucial when assessing whether it may cause harm.**

To effectively evaluate the context, you can take the following factors into account:

**a) Platform or Setting**

Consider the platform or setting where the speech occurred. Different contexts, such as public rallies, social media, academic discussions, or private conversations, may influence the impact and potential harm caused by the speech.

**b) Audience**

Analyze the intended audience of the speech. Assess whether the speech was directed towards a specific group or a wider audience. Understanding the characteristics, beliefs, and vulnerabilities of the audience can help determine the potential impact and harm caused by the speech.

**c) Historical and Social Background**

Consider the historical and social backdrop against which the speech was made. Historical tensions, conflicts, or inequalities may heighten the potential harm caused by certain types of speech. Assess whether the speech exacerbates existing divisions or conflicts in society.

**d) Speaker's Position and Influence**

Evaluate the position and influence of the speaker. Assess whether the speaker holds a position of authority or has a significant following that could amplify the impact of their speech. Consider the potential consequences of the speech in light of the speaker's influence on public opinion and behaviour.

**e) Tone and Rhetoric**

Examine the tone and rhetoric used in the speech. Assess whether it is inflammatory, derogatory, or dehumanizing. Evaluate whether the speech promotes understanding, dialogue, and respect, or if it fosters hostility, discrimination, or violence.

f) **Immediate Context**

Consider the immediate circumstances surrounding the speech. Analyse whether there were any specific events, incidents, or controversies that may have influenced the speech. Evaluate whether the speech was a response to a particular situation or if it was spontaneous.

By considering these contextual factors, you can gain a better understanding of the potential impact and harm caused by the speech. It is important to note that context alone cannot determine whether speech is harmful, but it plays a significant role in assessing the overall effect and implications of the speech in question.

## **2.4. ASSESS FOR HATE SPEECH**

Determining whether speech qualifies as hate speech requires an assessment based on legal definitions and principles. In the South African context, hate speech is defined and regulated by various laws and legal precedents. Here are some steps to consider when determining whether speech qualifies as hate speech:

a) **Review Legal Definitions**

Familiarise yourself with the legal definitions of hate speech as outlined in legislation and court rulings. In South Africa, hate speech is typically defined as speech that propagates, incites, or justifies violence or discrimination based on race, ethnicity, gender, religion, or other protected grounds.

**b) Assess Intent**

Examine the intent behind the speech. Hate speech often involves the intentional promotion of hatred, animosity, or prejudice against a specific group. Consider whether the speech seeks to demean, dehumanize, or marginalize individuals or communities based on their protected characteristics.

**c) Evaluate Targeted Group**

Identify the group targeted by the speech. Determine whether the speech is directed at a specific racial, ethnic, religious, or other protected group. Consider whether the speech seeks to foster hostility, prejudice, or discrimination against that group.

**d) Analyse Content and Language**

Scrutinize the content and language used in the speech. Look for derogatory, offensive, or degrading statements targeting the protected group. Evaluate whether the speech employs stereotypes, slurs, or inflammatory rhetoric that promotes hatred or discrimination.

**e) Consider Context**

Assess the context in which the speech was made. Contextual factors, such as the platform, audience, historical background, and social impact, can contribute to determining the harm caused by hate speech. Consider whether the speech is likely to incite violence, discrimination, or hatred within the specific context.

**f) Consult Legal Precedents**

Examine relevant legal precedents established by courts in hate speech cases. Courts' interpretations and decisions can provide guidance on the threshold for hate speech and the factors considered in determining its presence.

**g) Seek Legal Advice**

If you are uncertain about whether the speech qualifies as hate speech, it is advisable to consult legal experts or organizations specialising in freedom of expression and discrimination law. They can provide specific guidance based on the legal framework and precedents.

Remember that the assessment of hate speech is a nuanced and complex task, and legal experts should be consulted for precise interpretations and guidance based on the specific circumstances and legal framework in South Africa.

## **2.5. CONSIDER LIMITATIONS ON FREEDOM OF EXPRESSION**

Evaluating whether speech falls within the boundaries of constitutionally permissible limitations on freedom of expression requires a careful analysis of the specific circumstances and legal framework.

Steps to consider are as follows:

**a) Understand Constitutional Provisions**

Familiarize yourself with the relevant constitutional provisions that outline the limitations on freedom of expression. In South Africa, section 16(2) of the Constitution sets out the permissible limitations on freedom of expression, including restrictions on hate speech, incitement to violence, and advocacy of hatred based on protected characteristics.



**b) Assess Legitimate Purposes**

Determine whether the limitation on freedom of expression serves a legitimate purpose recognised by the Constitution. Legitimate purposes may include protecting the rights and reputation of others, maintaining public order, safeguarding national security, or preventing incitement to violence or harm.

**c) Proportionality**

Consider whether the limitation on freedom of expression is proportional to the importance of the purpose it seeks to achieve. Assess whether the restriction is necessary and reasonable in achieving the legitimate purpose and whether it goes no further than what is required to achieve that purpose.

**d) Judicial Precedents**

Examine relevant judicial precedents and court decisions related to the limitations on freedom of expression. Courts' interpretations and rulings provide guidance on the scope and boundaries of permissible limitations. Consider how courts have applied the constitutional provisions in similar cases.

**e) Balancing of Rights**

Evaluate the balancing of competing rights and interests. Freedom of expression must be balanced with other constitutional rights, such as the right to dignity, equality, and non-discrimination. Assess whether the limitation on freedom of expression strikes an appropriate balance between these rights.

**f) International Human Rights Standards**

**Consider international human rights standards and treaties to which South Africa is a party. These standards may provide additional guidance on permissible limitations on freedom of expression.**

**g) Consult Legal Experts**

If you are uncertain about the evaluation or application of the constitutional limitations, seek legal advice from experts in constitutional law or human rights. They can provide specific guidance based on their expertise and knowledge of the legal framework.

Remember that the evaluation of permissible limitations on freedom of expression requires careful consideration of the specific circumstances and legal context. Legal experts should be consulted for precise interpretations and guidance based on the particular case and the evolving legal framework.

### **3. CONCLUSION**

This guideline assists to determine whether speech is harmful, and in doing so it is essential to consider the legal framework and principles that guide freedom of expression.