

2007 05 08
Home Affairs



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

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Opinion
[Confidential]

**TO: PORTFOLIO COMMITTEE ON
HOME AFFAIRS, MP**

**CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON
HOME AFFAIRS, MR P CHAUKE, MP**

LIAMENT COPY:

THE SECRETARY TO PARLIAMENT

DATE:

7 MAY 2007

**OF THE FILMS AND
CENSORSHIP BILL, 2006**

SUBJECT:

**THE CONSTITUTIONALITY OF THE FILMS AND
PUBLICATIONS AMENDMENT BILL, 2006**

ADHIKARIE

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Parliamentary Legal Advisers

Parliamentary Legal Advisers

AGENT

MEMORANDUM

OF THE REPUBLIC OF SOUTH AFRICA

FORM 35 OF 1997
REV. 27 (2) 1997
www.parliament.gov.za

Committee on Home Affairs, Mr P

Chairperson of the Portfolio Committee on Home Affairs, Mr P Chauke, MP

Opinion
[Confidential]
FROM:

Legal Services Office

Opinion
[Confidential]

DATE: 7 May 2007

CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON HOME AFFAIRS, MR P CHAUKE, MP

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the Films and Publications Act, 1996

SUBJECT: The constitutionality of the Films and Publications Amendment Bill, 2006 [B27 - 2006]

SECRETARY TO PARLIAMENT

You requested us to advise you on the constitutionality of the Films and Publications Amendment Bill, 2006 [B27 - 2006] (the Bill). We have perused the Bill and will comment only about specific provisions the constitutionality of which was challenged in the submissions.

DATE:

THE CONSTITUTIONALITY OF THE FILMS AND PUBLICATIONS AMENDMENT BILL, 2006

THE CONSTITUTIONALITY OF THE FILMS AND PUBLICATIONS AMENDMENT BILL, 2006

2. Clause 2 seeks to amend section 2 of the Films and Publications Act, 1996 (Act 65 of 1996) ("the principal Act") by providing that the objective of the principal Act is, amongst others, to regulate broadcasting of certain films, interactive computer games and publications by means of classification.

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3. In terms of section 192 of the Constitution of RSA, 1996 ("the Constitution") national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

4. The Independent Communications Authority of South Africa Act, 2000 (Act 13 of 2000) was promulgated to establish the Independent Communications Authority of South Africa ("ICASA") to amongst others, regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society as is required by the Constitution.

5. It is our view that ICASA is constitutionally mandated to undertake the regulation of broadcasting, and that the Films and Publications Board ("the FPB") administers the provisions of the principal Act. By seeking to regulate broadcasting, the Bill will be bringing the regulation of broadcasting within the ambit of the FPB.

dealing with functions and powers of compliance officers. Subparagraph (ii) of section 15A empowers compliance officers to enter, examine and inspect premises for compliance with conditions imposed by the FPB.

The Bill does not require that the compliance officer obtain a warrant before such entry.

This provision will cause problems if illegal material is found in the premises and the business is prosecuted. Material found may not be admitted into evidence since it would have been obtained without a search warrant.

CLAUSE 20

Clause 20 seeks to repeal section 21 of the principal Act. Section 21 provides for any person who is aggrieved by a decision of the FPB to lodge an appeal in the High Court.

It is our view that this does not infringe the right to access to courts since a person aggrieved by the decision of the FPB will still have the constitutional guarantee, the common law right and the right in terms of the Promotion of Administrative Justice Act, 2000 to take such a decision to the High Court on review.

CLAUSE 21

Clause 21 seeks to amend section 22 of the principal Act by, amongst others, withdrawing the exemption that newspapers published by members of Newspaper Press Union of South Africa (now Newspaper Association of South Africa) ("NASA") were not subject to the provisions of the principal Act. This means that newspapers will also have to be submitted for examination and classification in terms of the Act.

If the Bill is passed in its current form, all newspapers will be subject to section 16 (2) which requires any person who, for distribution or exhibition in the Republic, creates, produces, publishes and advertises any publication that contains visual presentations, descriptions or representations of or amounting to sexual conduct, propaganda for war, incitement to imminent harm or the advocacy of hatred on any identifiable group characteristics, to submit such publication for

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classification office before examination and classification to the classification office before the publication is distributed or exhibited.

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13. It is our view that the practical effect of the provision will infringe the right to freedom of expression as contained in section 16(1) of the Constitution. The press will either choose not to write about certain stories for which they will need classification (which would amount to censorship) or will not print such stories once classified because they will be too late and defeat the purpose of current news.

14. It is trite that none of the rights in the Bill of rights is absolute, they are all subject to the limitation clause as contained in section 36 of the Constitution.

15. However, this provision will not pass constitutional muster as expressed in the limitation as the Constitutional court has expressed itself in the *Unity Convention v Independent Broadcasting Authority and others* 2002 (5) BCLR 433 (CC) that the right to freedom of expression is one of the essential foundations of democracy, which makes it an important right.

16. Moreover, important as the purpose of the limitation is, the extent of the limitation amounts to a complete deprivation of the right, whereas there are less restrictive means of achieving the purpose intended.

17. It is our view therefore the Bill is not a reasonable and justifiable limitation in an open and democratic society based on human dignity, equality and freedom as set out in section 36 of the Constitution.

CLAUSE 22

CLAUSE 21

18. Clause 22 seeks to amend section 23 by, amongst others, deleting subsection (3) which exempts any person who holds a broadcasting licence from the classification made by the FPB. This means that broadcasters will be required to submit all films they intend to exhibit for examination and classification in terms of intended section 18.

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19. In terms of section 1 of the principal Act film means any sequence of visual images recorded on any substance, whether film, magnetic tape, disc or any other material, in such a manner that by using such substance such images will be capable of being seen as a moving picture.

20. This means that broadcasters will have to submit almost all material they intend to exhibit for examination and classification, so long as that material is a film in terms of the principal Act.

