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## Opinion [Confidential]

ORTFOLITO OMMITTEE ON

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

LIAMENTCOPY.

THE SECRETARY TO PARLIAMENT

DATE:

7 MAY 2007

OF THE FSUBJECT:

NT BILL, 2006

THE CONSTITUTIONALITY OF THE FILMS AND PUBLICATIONS AMENDMENT BILL, 2006

ADHIKARLEGAL ADVISERS:

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Committee on Hor**To**Affairs, Mr P

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

Opinion

Legal Services Office

Opinion [Confidential]

HAIRPERSON CHATE: PORTFOLIZ May 2007 TEE ON OME AFFAIRS, MR P CHAUKE MP

CHAIRPERSON OF THE PORTFOLIGION HOME AFFAIRS, MR P CHAUKE, MP

e Films and PISUBJECT:

The constitutionality of the Films and Publications 2006] RETARY TO PARLIAMENTAmendment Bill, 2006 [B27-2006] RETARY TO PARLIAMENT COPY

istitutionality of the Films You requested us to advise you on the constitutionality of the Films and 12006 (The Bill"). We Publications Amendment Bill, 2006 [B27-2006] (The Bill"). We have about specific provisionsperused the Bill and will comment only about specific provisions the the submissions. constitutionality of which was challenged in the submissions.

DATE:

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THE CONSTITUTIONALITY OF THE FIGURE

IBLICATIONS AMENDMENT BILL. 2006

PUBLICATIONS AMENDMENT BILL, 2006 Films and Publications Clause 2 seeks to amend section 2 of the Films and Publications Act, Act") by providing that 1996 (Act 65 of 1996) ("the principal Act") by providing that the ongst others to regioniective of the principal Act is, amongst others, to regulate broadcasting of certain films, interactive computer games and publications by means of classification.

tution of RSA, 1998. Inhterms of section 192 of the Constitution of RSA, 1996 ("the establish an independentitution") national legislation must establish an independent ublic interest, and to enauthority to regulate broadcasting in the public interest, and to ensure representing South Affairness and a diversity of views broadly representing South African society.

ty of South Africa A4. The Independent Communications Authority of South Africa Act, 2000 establish the Indepen(Acti 13 of 2000) was promulgated to establish the Independent ica ("ICASA") to amocommunications Authority of South Africa ("ICASA") to amongst lic interest, and to enothers, regulate broadcasting in the public interest, and to ensure representing South Affairness and a diversity of views broadly representing South African society as is required by the Constitution.

mandated to undertake the mandated to undertake the ims and Publications Bregulation of broadcasting, and that the Films and Publications Board ne principal Act. By sequithe FPB") administers the provisions of the principal Act. By seeking bringing the regulation of regulate broadcasting, the Bill will be bringing the regulation of broadcasting within the ambit of the FPB.

the FPB.

dealing with functions Clause 13 seeks to insert section 15A dealing with functions and property agraph (ii) of section powers of compliance officers. Subparagraph (ii) of section 15A three Clauses of compliance officers to enter examine and inspect premises. camine and inspect premempowers compliance officers to enter, examine and inspect premises for compliance with conditions imposed by the FPB.

ince efficer obtain a 7/a The Bill does not require that the compliance officer obtain a warrant before such entry.

gal material is found in this provision will cause problems if illegal material is found in the Material found may not be AIRPERSON C ve been obtained withcadmitted into evidence since it would have been obtained without a ME AFFAIRS. he constitutionality osearch warrant. o publications

The constitutionality of the Films and Pu mendment Bill, 2008 [B27 12006] RETARY TO PARLIAMENT Amendment Bill, 2006 [B27 12006] RETARY

us to advise you on the constitutionality of the Films You requested us to advise you on the constitutionality of the Meridment Bill, 2006 [B277-M2006] (The Bill"). We Publications Ameridment Bill, 2006 [B277-M2006] (The Bill" he principal Act. Segic Clause 20 seeks to repeal section 21 of the principal Act. Section 2 pout / ecific pro by a decision of the FPP for any person who is aggrieved by a decision of the FPB to lodge an appeal in the High Court. HE FLORE TO BE TO BE THE TOTAL OF THE PARTY OF T

U.K. he right to access to our view that this does not infringe the right to access to courts have since a person aggrieved by the decision of the FPB will still have the ight and the right in temconstitutional guarantee, the common law right and the right in terms of Act, 2000 to take suthe Promotion of Administrative Justice Act, 2000 to take such a decision to the High Court on review. publications by means of classification.

action 192 of the CLAUSE 21 of RSA, 1996 (rithterms of section 192 of the Constitution of RSA, national legislation of the Constitution of RSA, national legislation of the constitution of RSA, national legislation must establish and independent tution. It is not to ensure that the product of the public interest, and to ensure the product of the public interest, and to ensure the product of the public interest, and the public interest, and the public interest in the public interest. ne principal Act by, an Clause 21 seeks to amend section 22 of the principal Act by, amongst newspapers published thers, withdrawing the exemption that newspapers published by buth Africa (now Newspaper Press Union of South Africa (now Newspaper were not subject to Association of South Africa) ("NASA") were not subject to the UCCOUSTICING s that newspapers will provisions of the principal Act. This means that newspapers will also classification in terms of the well of the submitted for examination and classification in terms of the well of the submitted for examination and classification in terms of the well of the submitted for examination and classification in terms of the well of the submitted for examination and classification in terms of the well of the submitted for examination and classification in terms of the well of the submitted for examination and classification in terms of the well of the submitted for examination and classification in terms of the well of the submitted for examination and classification in terms of the well of the submitted for examination and classification in terms of the well of the submitted for examination and classification in terms of the well of the submitted for examination and classification in terms of the well of the submitted for examination and classification in terms of the well of the submitted for examination and classification in the submitted for examination and classification and classificati diversity of views broadly representing South Africanness and a diversity of views broadly representing Sou

swspapers will be subject to on who, for distributionection 16 (2) which requires any person who, for distribution or is, publishes and adverexhibition in the Republic, creates, produces, publishes and advertises mandated to und sentations, descriptionany publication that contains visual presentations, descriptions or and Publicati Il conduct, propagand representations of or amounting to sexual conduct, propaganda for a principal Act. 8 advocacy of hatred onwar, incitement to imminent harm or the advocacy of hatred on any bringing the rec bmit such publicationidentifiable group characteristics, to submit such publication for

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

he provision will infing the sour view that the practical effect of the provision will infringe the eating with fun ned in section 16(1) of the raph (ii) of the raph (iii) of the raph

before such entry.

of rights is absolute, the limitation clause as contained in section 36 of the limitation clause as contained in section 36 of the limitation clause as contained in section 36 of the limitation clause as contained in section 36 of the limitation clause as contained in section 36 of the limitation of the business is prosecuted. Material found to

widence since it would have been obtained withcatmitted into evidence since it would have been obtained constitutional muster 15. However, this provision will not pass constitutional muster as a expressed itself in the Islamic asting Authority and others readom of expression is 2002 (5) BCLR 433 (CC) that the right to freedom of expression is one which makes it an important right.

inpitation is, the extent of the principal Act. Sequentials 20 seeks to repeal section 21 of the principal Act. Inpitation is, the extent of the principal Act. In of the right whereas the purpose intended. The purpose intended.

at this does not infringe the right to access the Billais out view that this does not infringe the right to access ateasonable, and justifiable the FPB will still based on human dight that have a set out in section 36 of the Constitution of the PBB will still be a set out in section 36 of the Constitution of the PBB will still be a set out in section 36 of the Constitution of the PBB will still be a set out in section 36 of the Constitution of the PBB will still be a set out in section 36 of the Constitution of the PBB will still be a section as set out in section 36 of the Constitution of the PBB will still be a section as set out in section 36 of the Constitution of the PBB will still be a section as set out in section 36 of the Constitution of the PBB will still be a section at the right court of the PBB will still be a section at the right court of the PBB will still be a section at the right court of the PBB will still be a section at the right court of the PBB will still be a section at the right court of the PBB will still be a section at the right court of the PBB will still be a section at the right court of the PBB will still be a section at the right court of the PBB will still be a section at the right court of the r

## CLAUSE 22

## the CLAUSE 21

who holds a broadcasting property of the FPB. This means that the process will be required to submit all films they intend to exhibit the for examination and classification in terms of intended section 18. For examination and classification in terms of intended section 18. At a principal Act. This means that page 18.

Im means any sequipon terms of section 1 of the principal Act film means any sequence of assistation in the whether film, magnetic trisual images recorded on any substance, whether film, magnetic tape, sanner that by using disc or any other material, in such a manner that by using such the being seen as a moving was papers will be capable of being seen as a moving was papers will be which requires any picture. The distribution seems of the principal Act film means any sequence of assistance, whether film, magnetic tape, and substance, whether film, magnetic tape, and substance in any substance such images will be capable of being seen as a moving was papers will be which requires any person who, for distribution as a substance of the principal Act film means any sequence of assistance in the principal Act film means any sequence of assistance in the principal Act film means any sequence of assistance in the whether film, magnetic tape, and the principal Act film means any sequence of assistance in the principal Act film means any sequence of assistance in the whole is a substance of the principal Act film means any sequence of assistance in the whole is a substance of the principal Act film means any sequence of assistance in the whole is a substance of the principal Act film means any sequence of assistance in the whole is a substance of the principal Act film means any sequence of assistance in the whole is a substance of the principal Act film means any sequence of assistance in the whole is a substance of the principal Act film means any sequence of assistance in the whole is a substance of the principal Act film means any sequence of assistance in the whole is a substance of the principal Act film means any sequence of the principal Act film means any sequence of the principal Act film means any sequence of the principal Act film means and the

submit almost all 20. This means that broadcasters will have to submit almost all material entations, described as they intend to exhibit for examination and classification, so long as that, conduct, propared intended in material is a film in terms of the principal Act, imminent harm or the advocacy of nature characteristics, to submit such publication dentifiable group characteristics, to submit such publication dentifiable group characteristics.

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RSA, 1036 thitterms of section 192 of th

to be stedistered a 210 Broadcasters will moreover be required to be registered as either ification office at almost attained attributors or exhibitors and also to submit almost all their content to in terms of the principal the FPB for examination and classification in terms of the principal Act.

hat the practical effect of the provision will infing a like our view that the gractical effect of the provision will d teads accompanies a 22. This amounts to regulation, which in turn leads to confusion as to theed in section 4 a broadcasting within Fregulation of broadcasters dralso brings broadcasting within FPB's not to write ab he constitutional mandate of a which would graph& above uch storie ICASA. In this regard we refer you to paragraph 5 above uch stories once classified be and defeat the purpose of our rectionwish at the committee too rate and defeat the purpose of correctionwish at the

one of the rights in CLAUSE 24 ghts is absolute, they take trite that none of the rights in the Bill of rights is absolute ne limitation blause as contained in section 36 of the ubject to the limitation related as contained in section

and they not rethiske and the business is project Constitution, found may makemises and the pusiness is pr C which deal with 230This clause inserts sections 24A, B and C which deal with offences. Which deal with offences blication film or interactive was distributing a publication film or interactive. ied X18 or which computer game which has been classified X18 or which contains 1 &cette sexual conduct to a pedepictions, description or sequences of sexual conduct to a person person 433 COOLINE the right under the age of 18 years an offence CLR 433 (CO) that the right to free

foundations of democracy, with makes it an important essential foundations of democracy, with depictions, descriptions or descriptions, descriptions or les it an offence to distrisequences of sexual conduct" the Bill makes it an offence to distribute cations which contain stillms, interactive computer games or publications which contain sexual persons under the age conduct including sexual intercourse, to persons under the age of 18 I give by the FPB to years even if in terms of the classification given by the FPB to such roose intended ication it is acceptable interactive computer game or publication it is acceptable for this goes not to seed to the Billian accertain persons under the age of 18 years to see it the Billian of a reasonable, and open and democratic sporely based on human signification in an open and democratic society based on human

and descriptions of sec25. For instance, if the film contains depictions descriptions or sequences of the Constitution the provision makes of sexual conduct, but is classified PG16, the provision makes it an old since he is under theoffence to distribute such film to a 17 year old since he is under the age the drafter. of 18 years. This cannot be the intention of the drafter.

It be required to submit all films, they intend to extradocasters will be required to submit all films, they intend and classification in terms of intended section 18.5 for examination and classification in terms of intended section at the west spine is of the puncipal vist. This means that he range as will providing of the principal Act. I ion I of the previous Act from means any sequesterms of section 1 of the principal Act from means any se corded on any substance, whether film, magnetic testial images recorded on any substance, whether film, magnetic ier material, in such a manner that hy dising sies or any other material, in such a manner that hy it

1230 Calo Des. 18 Blasse 22-seeks to amend section 23 by, amongst others which exempts a Ms R Mathabathe/ Adv Z Adhikarie section, (3) which exempts any person who helds a bro

e classification Parliamentary Legal Advisers sticence Inom the classification made by the FRB. This pri

intages will be isopable of being seen as a mostilestance such images will be trapable of being seen as Libylicgersion 13 (2) which requires any ppicture who afor distributionersion 16 (2), which requires a t broadcasters will have to submit almost all guitphis means that broadcasters will have to submit almost a

chibit for examination and classification, or long asthey intend to exhibit for examination and classification, so is in terms of the principal Acto immunent name or imaterial is a film in terms of the principal Acto immunent name