



# **Film and Publication Board Draft Internet Regulation Policy – Framing Discussion**

20 May 2015

# Overview

- Nature of the Draft Internet Regulation Policy
- Constitutional Concerns
- ICT Policy Review Process
- Practicality Concerns
- Absence of Authority on the part of the FPB to make the Draft Regulations



# Nature of the Draft Internet Regulation Policy

- Not policy
- In fact draft regulations
- Imposes legal obligations and makes provision for sanctions for non-compliance

# Constitutional Concerns

- S. 16 of the Constitution protects freedom of expression including the right to receive information.
- Draft Internet Regs almost certainly unconstitutional violates this right in a number of ways:
  - Section 5
    - Requires any person who wishes to distribute a film, game or publication to register as a distributor
    - Imposes obligation of displaying FPB classification rating and logo on digital content
    - No online distributor may distribute digital content unless it has been classified

# Constitutional Concerns

- S. 16 of the Constitution protects freedom of expression including the right to receive information.
- Draft Internet Regs almost certainly unconstitutional violates this right in a number of ways:
  - Section 7: Empowers the FPB to order an administrator of an online platform to take down content that the FPB deems potentially harmful and disturbing to children
- Draft Internet Regs allow for FPB to regulate IPTV broadcasters – violates s192 of the Constitution on independent regulation



# ICT Policy Review Process

- ICT Policy Review process has dealt with appropriate ways of regulating Internet content
- Draft Internet Regulation Policy makes no mention of the process and does not seek to align itself with developments

# Practicality Concerns

- Massively increased ambit of material to be classified means the Draft Regulations are unworkable:
  - Impacts all video content uploaded onto the Internet from SA
  - Also, potentially all video content uploaded from anywhere
  - Impossible to enforce

# Absence of Authority to Make these Draft Regulations

- The Constitution confers national law-making powers upon the legislature.
- Subordinate law-making powers eg regulation-making must be in accordance with governing legislation
- Film and Publications Act, 1996 is governing legislation
- Only authority to make regulations actually granted is sufficient authority



# Absence of Authority to Make these Draft Regulations

- Film and Publications Act
  - Only requires pre-classification of publication in exceptional circumstances eg types of sexual conduct, or propaganda for war, incitement to violence, and hate speech
    - So regulations requiring prior classification for any other kind of publication is *ultra vires* ie lacks authority
  - Only requires distributors of films and games to register as distributors
    - So regulations requiring all distributors of online content to register as distributors of publications is *ultra vires* ie lacks authority

# Absence of Authority to Make these Draft Regulations

- Film and Publications Act
  - Specifically exempts broadcasters from classification obligations of the FPB
    - So regulations requiring classification for television films and content, including in respect of IPTV is *ultra vires* the Act as ICASA has stated that these are broadcasting services
  - Contains no provisions empowering FPB to engage in auditing, monitoring and enforcement
    - So regulations giving such powers to the FPB are *ultra vires* the Act



**Thank you  
Questions?**