

PROPOSED ONLINE CENSORSHIP OF SOUTH AFRICA: DRAFT FILMS AND PUBLICATIONS AMENDMENT REGULATIONS

The South African Film and Publication Board (SAFPB) recently published the *Draft Films and Publications Amendment Regulations* for public comment. The Regulations - which would be promulgated under the Films and Publications Amendment Act 11 of 2019 (the FPAA) - will be administered by the Board - and apply to the sale, hiring and streaming of content on the internet and various other digital platforms in South Africa.

The Foundation has submitted comments to the SAFPB in which it has warned that, in their current form, the draft regulations would amount to digital censorship and would have significant constitutional and other implications not only for online distributors but *all* South Africans.

The Films and Publications Amendment Act was passed by Parliament in 2019 after heavy criticism from opposition parties. Although it has been signed by the president, it will only come into operation on a yet-to-be proclaimed date.

Critics called the legislation the “**Internet Censorship Bill**”. They argued that the SAFPB’s attempt to regulate ‘harmful content’ on the internet directly contravened the right to freedom of expression in section 16(1) of the Constitution. However, on 18 August the Minister - Stella Ndabeni-Abrahams - assured the DA, in response to a parliamentary question, that the final version of the regulations will not infringe on the constitutional right to freedom of expression.

If this is, indeed, the government’s intention the draft regulations will require very extensive revision - since in their present form they seriously undermine not only the “freedom to receive or impart information or ideas” but also the political right of citizens to “campaign for a political party or cause”. In so doing the draft regulations would pose a direct threat to the foundational value in section 1(e) of the Constitution that requires “a multi-party system of democratic government to ensure accountability, responsiveness and openness”.

While exemptions are created for media who are members of the Press Council of South Africa or advertisers who are members of the Advertising Standards Authority (now known as the *Advertising Regulatory Board*), the law and Regulations as currently worded would, in effect, give the FPB jurisdiction over the internet communication of everyone else in South Africa - including political parties, NGOs, religious organisations and citizens.

Apart from this, the draft Regulations would be impossible to administer: millions of South African citizens, companies and organisations post material on public platforms and websites every day, including comments and videos, that would presumably have to comply with the onerous procedures set out in the draft regulations. The regulations would involve unaffordable costs for the state and would result in unsupportable interference and delays in the legitimate communication and business of individuals, organisations and companies. They would accordingly fail the test of rationality.

Finally, the severe limitation of core constitutional rights posed by the Regulations cannot be permissible in terms of section 36 of the Constitution since they would not be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. This is particularly the case because of the centrality of the affected rights to constitutional democracy and because of the availability of less restrictive means to prohibit hate speech and harmful content.



Robust dialogue and the dissemination of views, ideas and comments on the internet - which is now the main source for the public communication of information - is crucial to a healthy multi-party system of democratic government. The Foundation is of the firm view that the Regulations as proposed would pose a direct threat to this *foundational* constitutional value.

The draft regulations should be withdrawn in their entirety.

Issued by the FW de Klerk Foundation
20 August 2020