



# SOUTH AFRICA 2019 ELECTIONS

HANDBOOK FOR JOURNALISTS

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 **SANEF**  
SOUTH AFRICAN NATIONAL EDITORS' FORUM  
It's about South Africa.



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This handbook is part of a comprehensive set of online election resources which will be updated from time to time in the run-up to the 2019 elections. For further information on the 2019 elections, please visit <http://sanef.org.za/elections-2019/>.

SANEF is thankful to its partners for their assistance with this handbook:



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## LIST OF ACRONYMS

<b>ACHPR</b>	African Commission on Human and Peoples' Rights
<b>ANC</b>	African National Congress
<b>API</b>	Application programme interface
<b>AU</b>	African Union
<b>BCCSA</b>	Broadcasting Complaints Commission of South Africa
<b>CCC</b>	Complaints and Compliance Committee of ICASA
<b>COPE</b>	Congress of the People
<b>CPJ</b>	Committee for the Protection of Journalists
<b>EMB</b>	Election management body
<b>EU</b>	European Union
<b>IABSA</b>	Interactive Advertising Bureau of South Africa
<b>ICASA</b>	Independent Communications Authority of South Africa
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>IEC</b>	Independent Electoral Commission of South Africa
<b>MMA</b>	Media Monitoring Africa
<b>NCOP</b>	National Council of Provinces
<b>PAIA</b>	Promotion of Access to Information Act 2 of 2000
<b>ROC</b>	IEC Results Operation Centre
<b>SABC</b>	South African Broadcasting Corporation
<b>SANEF</b>	South African National Editors' Forum
<b>UN</b>	United Nations



## FOREWORD

The South African National Editors' Forum (SANEF) champions media freedom and the protection of journalists under threat. We promote ethical journalism and constantly lobby for our members and journalists in our industry to abide by the code of ethics that is sacrosanct to excellence in journalism.

We strive to be a representative and credible voice of journalism in society, to facilitate diversity in newsrooms and reporting, enable a culture of real debate and promote free and independent journalism of the highest standard. We campaign for the elimination of legislation and commercial pressures that restrict media. Finally, we support the establishment of editors' forums in the region and the continent.

This handbook is yet another significant milestone in our organisation's 23-year history. It forms part of a collection of online election materials that we have designed to support journalists. We encourage journalists from around the country, region and continent to use this book as a resource. Further, SANEF will be running elections workshops in all nine provinces to build journalists skills to cover, in particular, the 2019 elections.

SANEF believes that media freedom runs hand-in-hand with the pursuit of ethical reporting and given the recent ethical breaches in our media we know that public trust in the media has been eroded. Our election workshops and materials thus include a focus on ethics and have further been supplemented with a land mark 'Media freedom is your freedom' campaign – to restore faith in our industry, promote the importance of the media in elections and fight disinformation.

Elections in South Africa have often seen journalists caught in the cross fire of fierce electioneering. In the run up to past elections we have seen the intimidation of journalists and the reality of no-go areas in highly contested regions such as the 'hot spot' province of KwaZulu-Natal. Hence the safety of journalists remains a critical issue on the election reporting agenda –and is also a clear focus area of this manual.

In a democracy such as ours the media has multiple roles to play in the election process. This includes voter education, equitable coverage of all the participants in the election – the people and the parties contesting. Also, journalists must adhere to professional standards and ethics and show impartiality. Finally, the media must be trusted and must be in a position to present a diversity of views, analysis and commentary. We hope that this election handbook will contribute to journalists playing all these roles with competence and enthusiasm.

With best wishes for a safe, free and fair 2019 election.

**Mahlatse Mahlase – SANEF Chair**  
**Kate Skinner – SANEF Executive Director**  
**Mary Papayya – SANEF Media Freedom Chair**  
**Izak Minnaar – SANEF Council**

To contact SANEF, please visit: [www.sanef.org.za](http://www.sanef.org.za).

## ABOUT THIS HANDBOOK

The importance of the role played by the media during elections cannot be gainsaid. Indeed, the media is indispensable to ensuring that elections are free, fair and credible, and more broadly to safeguarding a democratic society. As the Constitutional Court of South Africa highlighted in *Khumalo and Others v Holomisa*:<sup>1</sup>

“In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16 [of the Constitution].”

This handbook – prepared for the upcoming 2019 general election in South Africa – is aimed at assisting members of the media to fulfil this constitutional mandate. In doing so, it provides both the legal underpinnings that apply to the media, as well as practical guidance to ensure that the task of election coverage is fulfilled effectively. Although it focuses specifically on the legal framework for the national and provincial elections, it is hoped that the content and guidance contained in this handbook will be of broader relevance to members of the media for future elections, including local elections.

This handbook is divided into four modules:

- **Module I** provides an overview of how elections in South Africa work, including the system of voting, election milestones and key institutions governing elections.
- **Module II** highlights specific aspects relevant to the media during elections, including the applicable legal and self-regulatory frameworks, the publication of opinion polls and practical guidance for journalists on the ground.
- **Module III** addresses the issue of so-called ‘fake news’ during the elections, and possible strategies that members of the media can follow to address the negative impact that this can have on the outcome of the elections.
- **Module IV** considers the safety of journalists, both on- and offline, and the measures that journalists can take to protect their rights.

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<sup>1</sup> *Khumalo and Others v Holomisa* [2002] ZACC 12 at para 24.

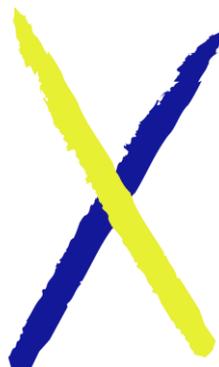
While the modules seek to highlight the issues that we consider to be most pertinent to the upcoming elections, it is not possible to cover every aspect. As such, each module contains a list of suggested resources for further reading that can be relied on if more detailed information on a particular topic is needed.

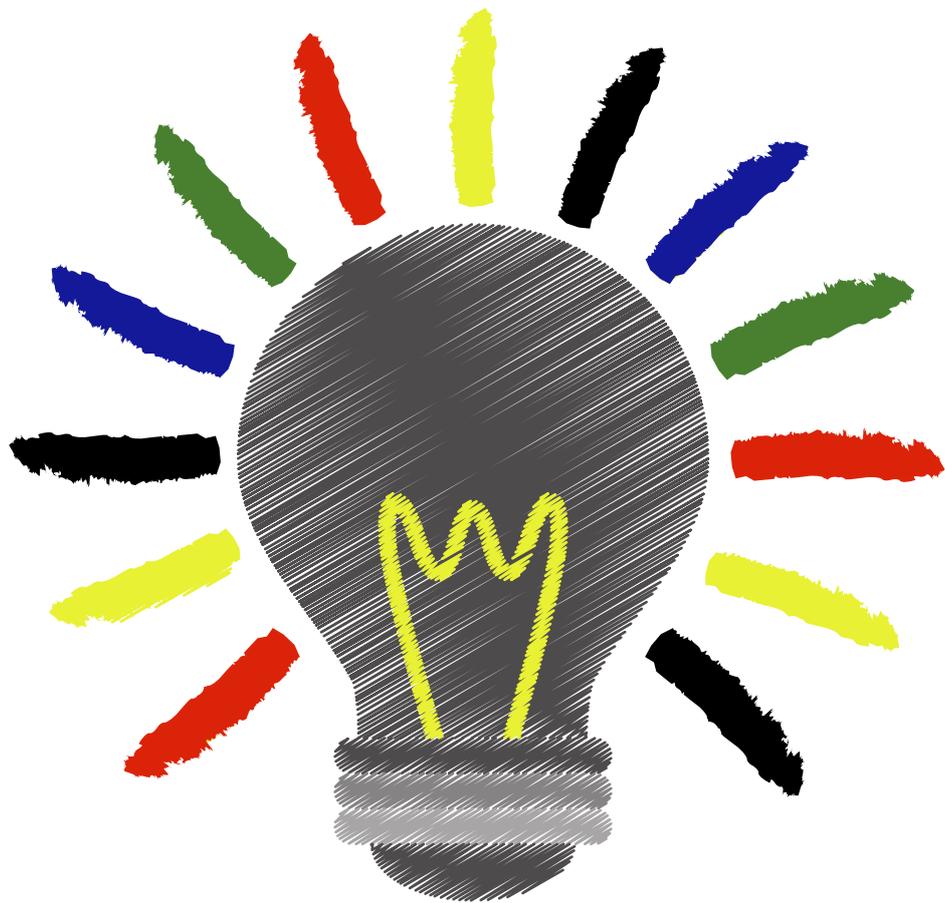
This handbook is also complimented by other tools and resources:

- An online resource specifically developed for this handbook to increase accessibility, and that contains further resources that can be downloaded: <http://sanef.org.za/elections-2019/>.
- A slideshow presentation that can be downloaded from the above resource and used within media organisations to conduct their own workshops on this handbook. The slides contain suggested questions for discussion and group exercises to help facilitate discourse on key issues.
- A series of workshops across all nine provinces to provide in-person training on this handbook.
- An online resource for the upcoming elections to provide support and assistance to journalists facing threats or harassment, and to track the nature and extent of the threats being faced. This is accessible here: <http://sanef.org.za/elections-2019/#reporting>.

In general through this handbook, we use the term 'media' to refer generally to the print, broadcast and online media. Where necessary – for example, where a particular law applies to a specific segment of the media – we will note this accordingly. Further, in reference to the Independent Electoral Commission of South Africa, we use the terms 'Commission' and 'IEC' interchangeably.

Lastly, we note that every effort has been made to ensure the accuracy of this handbook at the time of publication. However, both the electoral and the media landscapes are dynamic and will inevitably evolve over time. Should you require any clarity on any aspect contained in this handbook, please contact SANEF at [admin@sanef.org.za](mailto:admin@sanef.org.za).





**/ ELECTIONS 2019:  
HOW THE ELECTIONS  
WORK**

## MODULE I | ELECTIONS 2019: HOW THE ELECTIONS WORK

### Overview of this module

- **The constitutional rights of voters, and the constitutional and legislative framework applicable to elections.**
- **The role and functions of the key electoral institutions, namely the Electoral Commission and the Electoral Court.**
- **How the voting system of proportional representation works in South Africa.**
- **What the key milestones are during the election period.**

### The constitutional framework

Democracy is a fundamental and indispensable principle of government in South Africa. The preamble to the Constitution of the Republic of South Africa, 1996 provides that government must be based on the “will of the people”. Furthermore, section 1 of the Constitution sets out the values on which South Africa is founded: this includes universal adult suffrage, a national common voters’ roll, regular elections, and a multi-party system of democratic government.

In an open and democratic society, citizens express their will through elections. In this regard, elections are based on – and must be conducted in accordance with – the above democratic values. Political rights are particularly important given South Africa’s history in which the majority of its citizens were denied political rights.<sup>2</sup>

Section 19 of the Constitution provides as follows:

- “(1) Every citizen is free to make political choices, which includes the right--
- (a) to form a political party;
  - (b) to participate in the activities of, or recruit members for, a political party; and
  - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right--
- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
  - (b) to stand for public office and, if elected, to hold office.”

These rights and values are safeguarded by a number of civil and political rights in the Constitution. For example, the right to freedom of expression, contained in section 16 of the Constitution, includes the right to receive and impart information, which can in turn be relied on to ensure that voters are able to make informed choices and hold political representatives to account. The right also contains an express protection of media freedom, which is integral to a democratic society.

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<sup>2</sup> See *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31 at para 64.

The exercise of these rights facilitates citizen involvement in government through a democratic process that is representative, participatory and direct. While no right is absolute, it must be remembered that the limitation of any right must comply with the stipulations of section 36 of the Constitution in order for it to be a justifiable: that a right may only be limited in terms of a law of general application to the extent that it is reasonable and justifiable in an open and democratic society.

### WHAT RIGHTS DO VOTERS ENJOY?

Section 19, read with section 1(d) of the Constitution, facilitate both the representative and participatory elements of democracy. According to the IEC, the key rights that each voter enjoys include:<sup>3</sup>

- The right to free and fair elections.
- The right to vote.
- The right not to vote.
- The right to spoil one's vote.
- The right to vote once at one's registered voting station.
- The right to one's own free choice of party or candidate.
- The right to a secret vote.
- The right to get help to vote.
- The right to vote safely.
- The right to make a complaint about harassment or intimidation.

### The legislative framework

There are a number of laws that apply during the elections; while particular attention is drawn to certain laws that are of significance for elections, this of course does not mean that any others should be overlooked. First, the **Electoral Commission Act 51 of 1996**, which expands on the establishment of the Commission and details its composition, administrative structure, power, duties and functions.

Second, the **Electoral Act 73 of 1998**, as amended, is often referred to as the instruction manual for elections. It provides for the various operational and administrative aspects relevant to elections, including the registration of voters and the voters' roll, the accreditation of observers, and the determination and declaration of final results. Part I of Chapter 7 of the Electoral Act sets out what conducted is prohibited in terms of the legislation. This is dealt with in more detail below.

At the time of publication, the Electoral Laws Amendment Act 1 of 2019 has been signed into law, but has not yet come into force. The Electoral Laws Amendment Act seeks to implement key changes to the Electoral Commission Act, the Electoral Act and the Local Government: Municipal Electoral Act 27 of 2000. For instance, in respect of the Electoral Act, this includes amendments to clarify that the voter's roll to be used in an election must be that certified by the chief electoral officer for that election; to repeal the requirement that the identity document of a voter must be stamped as proof of voting; to provide for different voting procedure for voters without addresses on the voter's roll; and to limit the class of persons who may apply for accreditation to provide voter education for an election to juristic persons.

<sup>3</sup> IEC, 'Municipal elections handbook', (2016) at pp 51-52 (accessible [here](#)).

Third, the **Electoral Code of Conduct**, which is contained in Schedule 2 of the Electoral Act. It is required in terms of section 99(1) of the Electoral Act that the Code of Conduct must be subscribed to by every registered party and every candidate before being allowed to contest the elections or be placed on the list of candidates, respectively. The Electoral Code of Conduct is aimed at promoting conditions that are conducive to free and fair elections, in which there is a climate of tolerance, free political campaigning and open public debate.<sup>4</sup>

#### WHAT DOES THE ELECTORAL CODE OF CONDUCT REQUIRE FROM PARTIES AND CANDIDATES?

- Speak out against political violence and threats against other parties, the Commission, members of the public and the media.
- Let the authorities know about planned marches or rallies.
- Communicate with other political parties about planned political events.
- Recognise the authority of the Commission.
- Work with the Commission structures and allow them to perform their duties.
- Work with the police in their investigation of election crime and violence.
- Accept the results of the election or challenge the result in court.

Notably, in terms of section 2 of the Code of Conduct, every registered party and candidate must promote the purpose of the Code of Conduct, publicise it widely in election campaigns, and promote and support efforts to educate voters. Further, in terms of section 4(1) of the Code of Conduct, registered and parties must also inform the public that all people have the right to, amongst others, freely express their political beliefs and opinions, challenge and debate the political beliefs and opinions of others, and hold public meetings. Section 4(2) of the Code of Conduct provides further that every registered party and candidate must publicly condemn any action that may undermine the free and fair conduct of elections.

The specific provisions of these laws in relation to the media are dealt with in more detail in Module II.

A further law of relevance is the **Political Party Funding Act 6 of 2018**, which was signed into law on 22 January 2019, contains a wide range of accountability measures, including a requirement for the disclosure of donations above a prescribed threshold. However, at the time of publication, the Political Party Funding Act is not yet in force.

Sections 2 to 3 of the Political Party Funding Act establishes two political party funds: (i) Represented Political Party Fund to enhance multiparty democracy by providing for the funding of represented political parties through funds appropriated by legislation; and (ii) Multi-Party Democracy Fund for the purpose of funding represented political parties from private sources. The Political Party Funding Act imposes a wide range of accountability measures, including the prohibition contained in section 8 regarding certain donations made directly to political parties, such as funds from foreign governments or foreign government agencies; and the disclosure requirement contained in section 9 for the disclosure of donations above a prescribed threshold. Once in force, this will repeal the Public Funding of Represented Political Parties Act 104 of 1997.

<sup>4</sup> IEC, above n 3 at p 18.

## The role of the Electoral Commission

The Constitution lists the Commission under Chapter 9 of the Constitution as a state institution supporting democracy. Section 181(2) of the Constitution provides that these institutions are independent, subject only to the Constitution and the law, and further that they must be impartial and exercise their powers and functions without fear, favour or prejudice.

The Commission consists of five members – one of whom must be a judge – each appointed by the President for a term of seven years.<sup>5</sup>

### MEMBERS OF THE COMMISSION FOR THE 2019 GENERAL ELECTIONS

The five members of the Commission for the 2019 General Election are as follows: Mr Glen Mashinini (Chairperson); Ms Janet Love (Vice Chairperson); Dr Nomsa Masuku; Mr Mosotho Moepya; Judge Dhaya Pillay. The Chief Electoral officer is Mr Sy Mamabolo.

The Commission, through the Office of the Chief Electoral Officer, has three main functions set out in section 190(1) of the Constitution, including to manage the elections and ensure they are free and fair. The further functions of the Commission are set out in section 5(1) of the Electoral Commission Act.

## The Electoral Court

The Electoral Court is established in terms of section 18 of the Electoral Commission Act. The role of the Electoral Court is to review the decisions of the Commission relating to an electoral matter, and to hear appeals and reviews of decisions made by the Commission. The powers, duties and functions of the Electoral Court are set out in section 20 of the Electoral Commission Act. All matters must be conducted on an urgent basis and disposed of as expeditiously as possible.<sup>6</sup>

The Electoral Court is also empowered to hear and determine any matter that relates to the interpretation of any law referred to it by the Commission,<sup>7</sup> and to investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission and make a recommendation to the National Assembly accordingly.<sup>8</sup>

For instance, in the decision of *Kham and Others v Electoral Commission and Another*, the Constitutional Court noted that:<sup>9</sup>

“The jurisdiction to review any decision of the IEC relating to an electoral matter affords the Electoral Court a power of judicial oversight over the activities of the IEC. The Electoral Court can examine any decision by the IEC and substitute it with its own. The range of electoral matters may be great. Certainly all the issues arising in the present case relate to electoral matters. They concern who may vote and whether all those who voted were entitled to do so.”

<sup>5</sup> Sections 6(1) and 7(1) of the Electoral Commission Act.

<sup>6</sup> Section 20(1) of the Electoral Commission Act.

<sup>7</sup> Section 20(6) of the Electoral Commission Act.

<sup>8</sup> Section 20(7) of the Electoral Commission Act.

<sup>9</sup> [2015] ZACC 37 at para 42.

## The voting system

The Parliament of South Africa consists of two houses and a total of 490 seats: (i) the National Assembly, referred to as the lower house, represents 400 seats; and (ii) the National Council of Provinces (NCOP), referred to as the upper house, represents 90 seats comprising ten members from each of the nine provinces.<sup>10</sup> Organised local government is also represented in the NCOP through the South African Local Government Association (SALGA), which is entitled to ten representatives who may participate in the debates and other activities of the NCOP, but not vote.

While the National Assembly is filled in accordance with the votes cast in the general election by the electorate, the members of the NCOP are instead provincial delegates nominated by each provincial legislature.<sup>11</sup>

At the general election, voters elect the national and provincial legislatures simultaneously. Voters vote for parties, not individuals, and it is the parties' prerogative who it wants in the legislatures.<sup>12</sup> For the National Assembly, only the national ballot is relevant. The seats in the National Assembly are filled in two tiers: 200 seats are regional seats and filled by reference to regional votes and regional lists (national votes counted by province); and the other 200 seats are national seats and filled by reference to national votes and national lists (or entirely from regional lists if a party did not submit a separate national list).<sup>13</sup>

Since 1994, South Africa has followed a proportional representation system (also known as the party list system). The proportional representation system is entrenched in sections 46(1)(d) and 105(1)(d) of the Constitution, read with section 57A of the Electoral Act. At present, there is no enabling legislation for independent candidates to contest the national and provincial elections.

### ALLOCATION OF SEATS IN THE NATIONAL ASSEMBLY

In terms of the proportional representation system, the seats in the National Assembly are allocated in direct proportion to the number of votes a party has received. The total number of votes a party gets decides the number of seats that are allocated. Parties draw up lists of candidates, and the number of individuals allocated seats is decided by the number of seats the party wins.

By way of example, for the National Assembly:

- If Party A receives 60% of the votes, it will be allocated 60% (240) of the 400 seats.
- If Party B receives 25% of the votes, it will be allocated 25% (100) of the 400 seats.
- If Party C receives 15% of the votes, it will be allocated 15% (60) of the 400 seats.

In line with this example, the first 240 people on Party A's list will be allocated seats in the National Assembly, as will the first 100 people on Party B's list and the first 60 people on Party C's list.

In the 2014 general election, a party needed approximately 45 000 votes nationally to get one seat in the National Assembly.

<sup>10</sup> Helen Suzman Foundation, 'The South African electoral system', (20 March 2014) (accessible [here](#)).

<sup>11</sup> Id. In respect of provincial legislatures, the Constitution provides that each province has its own legislature consisting of 30 to 80 members, elected in terms of proportional representation. For more information about provincial legislatures, see: <https://www.gov.za/about-government/government-system/provincial-government>.

<sup>12</sup> Helen Suzman Foundation, above n 10.

<sup>13</sup> Id.

In January 2019, the Commission published an invitation to the public to make representations on the proposed formula for the distribution of regional seats to the National Assembly. At present, the current formula is prescribed in terms of item 2(a) of Schedule 1A of the Electoral Act and is based on a proportional allocation of regional seats according to the number of registered voters per province. At the time of publication, it remains unclear what changes, if any, the Commission intends to implement.

### Key milestones during the election period

To be eligible to vote, citizens must register to vote. To register, a person must be a South African citizen, 18 years on the date on which the election was proclaimed by the President, have a valid bar-coded identity card, and be registered on the roll.<sup>14</sup> The voters' roll closes on the day of proclamation, and must thereafter be made publicly available after being certified by the Commission.<sup>15</sup>

To contest an election, registered political parties must pay a deposit for each election that they want to contest, and have submitted candidate lists to the Commission.<sup>16</sup> To be registered, a political party must submit the name of the party, the party's symbol in colour, the party's abbreviation and the party's constitution. Failure to satisfy any one of these requirements may result in a refusal of registration. For example, after the establishment of COPE in 2008, the ANC objected on the basis that COPE's name was closely associated with the ANC's own history. COPE was allowed to keep its name following a court ruling that the 1955 Congress of the People in Kliptown was not the exclusive preserve of the ANC and its history.

The President is required to proclaim the election date – in other words, publish the election date in the Government Gazette – after consultation with the Commission, which is required to compile and publish an election timetable.<sup>17</sup> At the time of publication, the President had not yet formally proclaimed the election date or published the election timetable in the government gazette, but indicated in the State of the Nation Address that the election date would be 8 May 2019. Thereafter, a number of key milestones follow. These milestones are as follows:

ELECTION MILESTONES		
	<i>Milestone</i>	<i>Tentative dates</i>
1	Proclamation of the election	26 February 2019
2	Provisional voters' roll becomes available for inspection	1 March 2019
3	Cut-off for objections to the voters' roll	8 March 2019
4	Submission of list of candidates	13 March 2019
5	Notifications to vote outside of the country	13 March 2019
6	Certification of voters' roll	18 March 2019
7	Closing of applications for special votes	18 April 2019
8	Publication of lists of candidates	23 April 2019
9	Voting at South Africa's foreign missions	27 April 2019
10	Special voting days	6-7 May 2019
11	<b>Election day</b>	<b>8 May 2019</b>

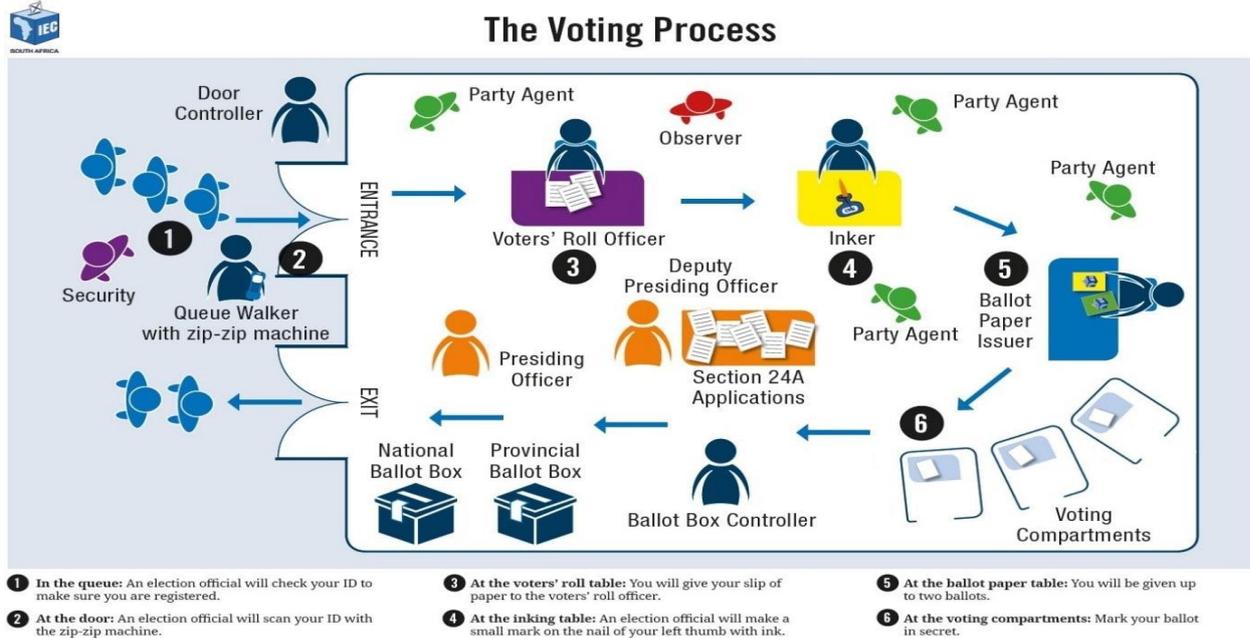
<sup>14</sup> Sections 6 and 7 of the Electoral Act.

<sup>15</sup> Section 16 of the Electoral Act.

<sup>16</sup> Sections 26 and 27 of the Electoral Act.

<sup>17</sup> Sections 18 and 20 of the Electoral Act. The election timetable includes, for instance, the cut-off date for objections to the voter's roll; the deadline for the certification of the voter's roll; and the closing date for applications for special votes.

(i) Voting procedures



Source: IEC, 'Voting procedures', accessible [here](#).

In order to vote, a voter must produce his or her voter's identity document to the presiding officer or a voting officer,<sup>18</sup> his or her name must be reflected in the certified segment of the voters' roll for the voting district<sup>19</sup> concerned and the voter must not have voted in the election.<sup>20</sup>

**HOW DOES VOTING TAKE PLACE?**

Voting takes place as follows:

- The voter receives the ballot papers for the national and provincial elections from the presiding officer or voting officer.
- The voter must enter an empty voting compartment, mark the ballot papers in a way that indicates the registered party that the voter wishes to vote for, and fold the ballot paper to conceal the vote.
- The voter must take the ballot papers to the ballot boxes for the respective national and provincial elections and show it to the presiding officer or a voting officer in a way that the officer can see the mark made by the voting officer.
- The ballot papers must be placed in the ballot boxes.
- The voter must leave the voting station without delay.
- Disabled voters may be assisted to vote by a presiding officer or voting officer if they request it and in the presence of an accredited observer or two agents from different parties, if available.

<sup>18</sup> The Commission has developed a set of criteria for the appointment of presiding and deputy presiding officers, including that they should not have held political office or been politically active in the preceding five years.

<sup>19</sup> A voting district is the geographical area, drawn by the Commission, in an effort to minimise fraud and make administration more efficient. For more about voting districts and stations, see: <http://www.elections.org.za/content/Voters-Roll/About-voting-districts-and-stations/>.

<sup>20</sup> Section 38(3) of the Electoral Act.

As soon as a ballot box is full, the presiding officer, in the presence of any agents present, must seal the ballot box and allow those agents to affix their seals to it.<sup>21</sup> When the voting station closes, the presiding officer must, in the presence of agents, seal each unused ballot box, and seal in separate containers the certified segment of the voters' roll for that voting district, the unused ballot papers entrusted to that presiding officer, the cancelled ballot papers, and the written record of any objections concerning voting.<sup>22</sup>

### ***(ii) Counting of votes***

Votes must be counted at the voting station at which those votes were cast, unless the Commission determines otherwise.<sup>23</sup> This must begin as soon as the station is closed for voting.<sup>24</sup> After sorting the ballot papers, and before counting, the counting officer must reject any ballot paper that indicates the identity of the voter or on which a vote is cast for more than one registered party or that is unmarked or marked in such a way that it is not reasonably possible to determine the voter's choice or that is not marked by the presiding officer or voting officer or that is not an official ballot paper.<sup>25</sup>

After determining the results for the national and provincial elections at a voting station, the counting officer must announce the result of the count at the voting station to members of the public and agents present at the voting station and inform the Commission.<sup>26</sup>

### ***(iii) Objections and appeals concerning verification***

Any interested party may lodge an objection with the Commission that is material to the determination of the final result of the election at the voting station, in respect of voting procedures and counting of votes.<sup>27</sup> The Commission must decide the objection and notify the objector and other parties involved of its decision. The objector or other party may, if aggrieved by the Commission's decision, appeal to the Electoral Court, which must consider and decide the appeal and notify the parties to the appeal of its decision.<sup>28</sup>

Should the Commission or Electoral Court decide that a serious irregularity has occurred concerning any aspect of an election, the Commission or the Electoral Court may order that the votes cast at a particular voting station do not count in whole or part, or that the votes cast in favour of a registered party at a particular voting station must be deducted in whole or in part from the votes cast in favour of that registered party in that election.<sup>29</sup>

### ***(iv) Declaration of final result***

Only the Commission has the legal authority to announce the election results.<sup>30</sup> The Commission is required to determine and declare the result of an election by adding together the results received from all voting stations within seven days after the voting day.<sup>31</sup> However, the IEC has managed in all recent elections to make the final results announcement on the Saturday after the Wednesday elections.

<sup>21</sup> Section 42 of the Electoral Act.

<sup>22</sup> Section 43(1) of the Electoral Act.

<sup>23</sup> Section 46(1) of the Electoral Act.

<sup>24</sup> Section 46(2) of the Electoral Act.

<sup>25</sup> Section 47(3) of the Electoral Act.

<sup>26</sup> Section 50(2)-(3) of the Electoral Act.

<sup>27</sup> Section 55 of the Electoral Act.

<sup>28</sup> Section 55(3)-(6) of the Electoral Act.

<sup>29</sup> Section 56 of the Electoral Act.

<sup>30</sup> IEC, above n 3 at p 69.

<sup>31</sup> Section 57(1)(2) of the Electoral Act.

### HOW DOES THE PROCESS WORK?

Source: IEC, 'Municipal elections handbook', (2016) at p 69 (accessible [here](#)).

"The tabulation of results takes place at the voting station. [Results] for each voting station are displayed outside the voting station when counting is finished. The results from each voting station are also sent to the municipal electoral offices, where they are verified and then scanned, captured and transmitted to the Electoral Commission's central results system.

The dual scan-capture feature of this system makes the image of the original results slip available, together with the captured result. Moreover, the capturing entails a double-blind process and validations, and is audited by independent auditors.

The overall election results will be worked out at centralised [ROCs] under the control of the Electoral Commission: one national ROC based in Pretoria, Tshwane, and one provincial ROC in each province."

Accredited media, observers, party agents and candidates are permitted to be present at the Results Operation Centres (ROCs).<sup>32</sup> The Commission may determine and declare the result of an election without having received the results of all voting stations, if waiting for all results would unduly delay the declaration of the final result and the outstanding results are not likely to materially influence the overall result of that election.<sup>33</sup>

### Electoral offences

Electoral fraud – which refers to illegal interference with the process of an election through deliberate wrongdoing – is a matter of particular concern, and is a crime.<sup>34</sup> Electoral fraud can take place throughout the election period, both inside and outside of voting stations.<sup>35</sup>

### EXAMPLES OF ELECTORAL OFFENCES

Source: IEC, 'Municipal elections handbook', (2016) at pp 52-53 (accessible [here](#)).

It is an electoral offence to force anyone to do any of the following:

- To register to vote or not to register to vote.
- To vote or not to vote in an election.
- To support or not to support a political party or candidate.
- To vote or not to vote for a political party or candidate.
- To attend or not to attend a political event or rally of a political party.
- To interfere with the fairness or independence of the Commission or any officer of the Commission.

Sections 87-94 of the Electoral Act set out the prohibited conduct. This includes, for instance, offences of undue influence, impersonation, intentional false statements, infringement of secrecy, and contraventions of the Electoral Code of Conduct. Any person who contravenes one of these sections is guilty of an offence, and if convicted may be liable to a fine or imprisonment.

<sup>32</sup> IEC, above n 3 at p 69.

<sup>33</sup> Section 57(3) of the Electoral Act.

<sup>34</sup> IEC, above n 3 at p 52.

<sup>35</sup> Id. at pp 52-53.

## Suggested resources

- Guidelines on Access to Information and Elections in Africa (accessible [here](#)).
- Government Communications, *Government system* in 'South African yearbook 2017/2018', (2018) (accessible [here](#)).
- Helen Suzman Foundation, 'The South African electoral system', (accessible [here](#)).
- IEC, 'Media guide: National and provincial elections', (2014) (accessible [here](#)).
- IEC, 'Municipal elections handbook', (2016) (accessible [here](#)).
- Open Society Foundation for South Africa, 'A touchpad for our future: An election resource for journalists (municipal elections 2011)', (March 2011) (accessible [here](#)).





# X THE ROLE OF THE MEDIA DURING ELECTIONS

## MODULE II | THE ROLE OF THE MEDIA DURING ELECTIONS

### RESOURCES FROM THE PRESS COUNCIL OF SOUTH AFRICA FOR THE UPCOMING ELECTION

The Press Council of South Africa (Press Council) has recently published two key resources that will be of relevance for journalists in the upcoming elections:

- Press Council, 'Code of Conduct and Ethics for the South African Print and Online Media: Decoding the Code sentence by sentence', (1 January 2019) (accessible [here](#)).
- Press Council, 'Guidance notes: A brief for journalists covering the elections', (February 2019) (accessible [here](#)).

#### Overview of this module

- **The international law framework on the role of the media and the importance of access to information during elections.**
- **The regulatory framework and key provisions on elections relating to the print and online media.**
- **The regulatory framework and key provisions on elections relating to the broadcast media.**
- **Practical guidance for journalists covering the elections, including frequently asked questions.**

#### Importance of the media during elections

The media plays a pivotal role in elections. As noted by the ACE Electoral Knowledge Network:<sup>36</sup>

“The media are essential to democracy, and a democratic election is impossible without media. A free and fair election is not only about the freedom to vote and the knowledge of how to cast a vote, but also about a participatory process where voters engage in public debate and have adequate information about parties, policies, candidates and the election process itself in order to make informed choices. Furthermore, media acts as a crucial watchdog to democratic elections, safeguarding the transparency of the process. Indeed, a democratic election with no media freedom, or stifled media freedom, would be a contradiction.”

The media plays the following roles in enabling full public participation in elections: educating voters on how to exercise their democratic rights; reporting on the development of an election campaign; providing a platform for the political parties and candidates to communicate their message to the electorate; providing a platform for the public to communicate their concerns, opinions, and needs to the parties and candidates, the election management body, the government and other voters, and to interact on these issues; allowing parties and candidates to debate with each other; reporting results and monitoring vote counting; scrutinising the electoral process in order to evaluate the fairness of the process.<sup>37</sup>

<sup>36</sup> ACE Electoral Knowledge Network, 'Media and elections', (accessible [here](#)).

<sup>37</sup> Id.

The media is expected to maintain a high level of professionalism, accuracy and impartiality in their coverage during the elections. Different regulatory frameworks exist to guide the media's conduct in this regard. There are different obligations that apply to different platforms, and it bears mention that broadcast media has far more stringent obligations than print media in respect of election coverage.

Members of the media should also exercise appropriate diligence when using social media. Although social media platforms can be a quick and effective way to reach wide audiences and provide up-to-date information, journalists should still apply a professional standard when using such platforms – whether in their personal accounts or for the media organisation – and ensure that any election coverage provided via social media meets the required standards of professionalism, accuracy and impartiality.

#### TIPS FOR EDITORS AND REPORTERS TO STAY ON TOP OF THE 24/7 NEWSROOM

Source: Thomson Foundation, 'Covering elections' (accessible [here](#)).

- Monitor the social media universe, as social media can act as early warning indicators. However, this must be applied with caution. Social media can be a tool to collect news, but it can also be a source of rumours, lies and hatred. Comments should be independently and rigorously verified.
- Journalism is increasingly online, even in traditional media. The internet provides infinite opportunities for reporting, commenting and interacting with the public. Consider different formats to undertake civic education online.
- If social media is being used as a source for news, every link should be followed through the internet to its source and the original material evaluated. For example, avoid sharing links that have not been read in full.
- Look out for fake accounts, and do some research before spreading research from an account that you are not familiar with.

#### International law framework

There are three key treaties at the international level that have been ratified by South Africa that are of particular relevance to the role of the media during elections:

- **International Covenant on Civil and Political Rights**, which enshrines the right to freedom of expression in article 19 and the right to participate in public affairs and vote in article 25.
- **African Charter on Human and Peoples' Rights**, which enshrines the right to freedom of expression in article 9 and the right to participate freely in government in article 13.
- **African Charter on Democracy, Elections and Governance**, which provides in article 27(8) that in order to advance political, economic and social governance, state parties must commit themselves to promoting freedom of expression, in particular press freedom, and fostering professional media.

There are further a number of declarations and guidelines that are also of relevance. Although these are not directly binding under international law, they are of relevance as a reflection of good practice and recognised principles:

- **Declaration of Windhoek on Promoting an Independent and Pluralistic African Press** (Windhoek Declaration), which is a statement of principles aimed at the promotion of an independent and pluralistic press.

- **African Charter of Broadcasting**, adopted by media practitioners at the ten-year celebration of the Windhoek Declaration, in an effort to expand the relevance of the Windhoek Declaration to address the need for independence and pluralism in radio and television broadcasting.
- **Declaration of Principles on Freedom and Expression in Africa**, which recognised the key role of the media and other means of communications in ensuring the full respect for freedom of expression, promoting the free flow of information and ideas, assisting people to make informed decisions, and facilitating and strengthening democracy. At the time of publication, the African Commission on Human and Peoples' Rights (ACHPR) is currently in the process of updating this document to make it more relevant in the digital era.
- **Guidelines on Access to Information and Elections in Africa** (ACHPR Guidelines), which focuses on access to information during elections. In addition to the guidelines for other stakeholders, it also includes guidelines for media and internet regulatory bodies, and for the media and online media platform providers.

### ACHPR GUIDELINES AND THE MEDIA

As mentioned above, the ACHPR Guidelines provide guidance to a number of different stakeholders in order to meaningfully give effect to the right of access to information during elections. This includes guidelines for media and internet regulatory bodies, and for the media and online platform providers.

**In respect of media and internet regulatory bodies:** The ACHPR Guidelines provide that such bodies should adopt regulations on media coverage during elections that ensure fair and balanced coverage of the electoral process, as well as transparency about political advertising policy on media and online media platforms.

**In respect of the media and online media platform providers:** The ACHPR Guidelines set out a list of information that print, broadcast and online media – both publicly and privately owned – should proactively disclose. This includes, for instance, editorial and ethical codes or guidelines; criteria and allocation of airtime or news coverage for political campaign advertisements and activities; and a plan for transparent repository of all political advertisements.

### The right of access to information during elections

The right of access to information is enshrined in section 32 of the Constitution, and given effect to through the Promotion of Access to Information Act 2 of 2000 (PAIA). The importance of the right is underscored by the fact that it is cross-cutting right that is necessary for the realisation of other rights. As noted in the ACHPR Guidelines:

“For elections to be free, fair and credible, the electorate must have access to information at all stages of the electoral process. Without access to accurate, credible and reliable information about a broad range of issues prior, during and after elections, it is impossible for citizens to meaningfully exercise their right to vote in the manner envisaged by Article 13 of the African Charter [on Human and Peoples' Rights].”

The ACHPR Guidelines provide direction to different stakeholders in the electoral process who have a responsibility to proactively disclose information in their possession or control that is necessary for safeguarding the integrity and legitimacy of the electoral process. This includes the following stakeholders: election management bodies (EMBs) and the authorities responsible for appointing them; political parties and candidates; law enforcement agencies; election observers and monitors; media and online media platform providers; media regulatory bodies; and civil society organisations.

The IEC has published an access to information manual in terms of section 14 of PAIA.<sup>38</sup> Chapter 2, in particular, sets out the provisions relating to access to records, including the records kept in accordance with legislation; the categories of records held by the IEC that must be formally requested; and the automatic disclosures that is made available without formal request on the IEC's website and in the form of brochures. It further sets out the request procedure to be followed.

### PUBLICLY AVAILABLE API FOR ELECTION DATA

Accessible [here](#).

An important development during recent elections has been the decision by the Commission to make a live feed in the form of an API publicly available in order to provide election data in real-time to the media and other interested parties. The source data includes real-time voter and voting station information, as well as election results data. Requests for a username and password should be sent to [webmaster@elections.org.za](mailto:webmaster@elections.org.za).

It should be noted that the right of access to information should be balanced against the right to privacy contained in section 32 of the Constitution. The Protection of Personal Information Act 4 of 2013 sets out requirements that must be complied with for the permissible processing of personal information, although at the time of publication the substantive provisions were not yet in force. In addition to the Protection of Personal Information Act, the constitutional and common law framework for the right to privacy is well-entrenched under South African law, and it remains necessary to give appropriate effect to this right. In light of the reams of personal information collected and used during the election period, including voter information, the respect and protection of the right to privacy during the election period is critical.

### The Electoral Code of Conduct

An introduction to the Electoral Code of Conduct has been provided in Module I. Notably, the important role of the media during elections has given rise to express recognition and protection of the media within the electoral law framework. However, as is to be expected, there are likewise specific rules and expectations of conduct with which the media is expected to comply.

Section 8 of the Electoral Code, in particular, requires political parties and candidates to respect the role of the media during elections. It provides as follows:

“Every party and every candidate –

- (1) must respect the role of the media before, during and after an election conducted in terms of [t]he Electoral Act];
- (2) may not prevent access by members of the media to public political meetings, marches, demonstrations and rallies; and
- (3) must take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters.”

<sup>38</sup> IEC, 'Access to information manual', (February 2015) (accessible [here](#)).

In terms of section 94 of the Electoral Act, no person or registered party bound by the Electoral Code of Conduct may contravene or fail to comply with a provision of the Code. In terms of section 98(a) of the Electoral Act, a conviction for a contravention or non-compliance with the Electoral Code of Conduct may be sentenced to a fine or imprisonment of up to ten years. In practice, political parties that breach the Electoral Code of Conduct can, for instance, have to give up the party's election deposit; be stopped from working in an area; have their votes in an area cancelled; or have their party registration cancelled.

## Print and online media

### *(i) The Press Code of Ethics and Conduct for South African Print and Online Media*

The Press Council and the Interactive Advertising Bureau of South Africa (IABSA) have adopted the Press Code of Ethics and Conduct for South African Print and Online Media (the Press Code) applicable to print and online media. As noted in the preamble to the Press Code: "As journalists we commit ourselves to the highest standards, to maintain credibility and keep the trust of the public. This means always striving for truth, avoiding unnecessary harm, reflecting a multiplicity of voices in our coverage of events, showing a special concern for children and other vulnerable groups, and exhibiting sensitivity to the cultural customs of their readers and the subjects of their reportage, and acting independently."

The Press Code sets out the standard expected of the print and online media, including in respect of the gathering and reporting of news;<sup>39</sup> privacy and the protection of personal information;<sup>40</sup> children;<sup>41</sup> and violence and graphic content.<sup>42</sup> Further, section 2 of the Press Code set sets out the provisions regarding independent and conflicts of interest. Regarding payment for information, the Press Code provides that the media must avoid "shady journalism" in which informants are paid to induce them to give the information, unless the material concerned ought to be published in the public interest and the payment is necessary for this to be done.<sup>43</sup>

Complaints against the media for contraventions of the Press Code are dealt with in terms of the Complaints Procedures (effective from 1 January 2016). If a finding is made against a publication that has voluntarily become subject to the jurisdiction of the Press Ombud, the Complaints Procedure sets out the sanctions that may be applied, including a caution or reprimand to the publication; a direction that a correction, retraction or apology be published; or a complainant's reply be published.<sup>44</sup>

### *(ii) Specific requirements for printed election material: Section 107 of the Electoral Act*

Section 107 of the Electoral Act places specific controls on printed election media from the time the election is called to the date the election results are announced. During this period:

- Any billboard, placard, poster or pamphlet intending to have an effect on the outcome of the election must clearly state the full name and address of the printer and publisher.<sup>45</sup>
- The publisher of any publication must put a heading on articles saying 'advertisement' if an article is paid for and comes from the following: (i) a registered party (including office-bearers; (ii) members and supporters; or (iii) a party list candidate contesting elections (including supporters).<sup>46</sup>

<sup>39</sup> Section 1 of the Press Code.

<sup>40</sup> Sections 3-4 of the Press Code.

<sup>41</sup> Section 8 of the Press Code.

<sup>42</sup> Section 9 of the Press Code.

<sup>43</sup> Section 12 of the Press Code.

<sup>44</sup> Section 7(2) of the Complaints Procedure.

<sup>45</sup> Section 107(2) of the Electoral Act.

<sup>46</sup> Section 107(3) of the Electoral Act.

## Broadcast media

### (i) *The regulatory framework*

There are a number of pieces of legislation of relevance to the broadcast media. This includes the following:

- **The Broadcasting Act 4 of 1999:** The stated objects of the Broadcasting Act, as contained in section 2, include to establish and develop a broadcasting policy in the public interest; to safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa; to ensure plurality of news, views and information; and to establish a strong and committed broadcasting service that will service the needs of all South African society. Chapter IV of the Broadcasting Act provides for the incorporation of the SABC and for the Charter of the SABC.
- **The Independent Complaints Commission of South Africa Act 13 of 2000 (ICASA Act):** Section 3 of the ICASA Act establishes Independent Communications Authority of South Africa (ICASA) as a juristic person that is independent and subject only to the Constitution and the law, and which is required to be impartial, perform its functions without fear, favour or prejudice, and which must function without any political or commercial influence. As set out in section 2 of the ICASA Act, ICASA is required to regulate broadcasting in the public interest and to ensure fairness and diversity of views broadly representing South African society; regulate telecommunications in the public interest; and achieve the objects in the underlying statutes.
- **The Electronic Communications Act 36 of 2005:** The aims of the Electronic Communications Act include to promote convergence and set up a legal framework for bringing together the broadcasting, broadcasting signal distribution and telecommunications sectors. In respect to media coverage, the Electronic Communications Act deals with party election broadcasts;<sup>47</sup> political advertising on broadcast services;<sup>48</sup> and equitable treatment of political parties by broadcasting service licenses during the election period.<sup>49</sup>

### SECTIONS 57-59 OF THE ELECTRONIC COMMUNICATIONS ACT

Sections 57-59 of the Electronic Communications Act are of particular relevance to the elections as they set out particular responsibilities during the election period.

- **Party election broadcasts:** Section 57 of the Electronic Communications Act provides that a public broadcasting service licensee must permit a party election broadcast only during an election broadcast period, and only if the broadcast is produced on behalf of a political party at the instance of its duly authorised representative. It further requires ICASA to determine the time to be made available to political parties for this purpose, and permits ICASA to impose any conditions on a public service broadcasting licensee with respect to party election broadcasts as it considers necessary. No party election broadcast may be broadcast later than 48 hours prior to the commencement of the polling period. Commercial or community media licensees are not required to broadcast party election broadcasts, but must comply with the provisions of this section if they elect to do so.

<sup>47</sup> Section 57 of the Electronic Communications Act.

<sup>48</sup> Section 58 of the Electronic Communications Act.

<sup>49</sup> Section 59 of the Electronic Communications Act.

- **Political advertising on broadcasting services:** Section 58 provides that a broadcasting service licensee is not required to broadcast a political advertisement; however, in the event that the licensee elects to do so, the licensee must afford all other political parties a similar opportunity if they request it. A broadcasting service licensee may broadcast a political advertisement only during an election period and only if the broadcast is produced on behalf of a political party at the instance of its duly authorised representative. No political advertisement may contain any material that may reasonably be anticipated to expose the broadcasting service licensee to legal liability if broadcast. No political advertisement may be broadcast later than 48 hours prior to the commencement of the polling period. In making advertising time available to political parties, no broadcasting service licensee may discriminate against any political party or make or give any preference to any political party or subject any political party to any prejudice.
- **Equitable treatment of political parties by broadcasting service licensees:** Section 59 provides that if during an election period the coverage of any broadcasting service extends to the field of elections, political parties and issues relevant to this, the broadcasting services licensee must afford reasonable opportunities for the discussion of conflicting views and must treat all political parties equitably. If criticism is levelled against a political party during a programme without them having been afforded an opportunity to respond in the programme or without the view of the political party being reflected in the programme, the broadcasting services licensee must afford the party a reasonable opportunity to respond to the criticism. Further, if within 48 hours before the commencement of the polling period or during the polling period, a broadcasting services licensee intends broadcasting a programme in which a particular political party is criticised, the licensee must ensure that the political party is given a reasonable opportunity to respond, either in the same programme or as soon as is reasonably practicable thereafter. This does not apply in respect of any party election broadcast or political advertisement contemplated in sections 57 and 58 of the Electoral Act, respectively.

In 2014, ICASA published the **Regulations on Party Election Broadcasts, the Equitable Treatment of Political Parties by Broadcasting Licensees and Related Matters** (Election Broadcasting Regulations) (accessible [here](#)), published in terms of the ICASA Act read with the Electronic Communications Act.<sup>50</sup> The Election Broadcasting Regulations are applicable as follows: (i) during an election period; (ii) to broadcasting service licensees; and (iii) to political parties contesting the national and provincial elections. The Election Broadcasting Regulations provide a more detailed framework in respect of sections 57 to 59 of the Electronic Communications Act for party election broadcasts and political advertising. In respect of equitable treatment, ICASA provides the following guidance to broadcasters:

- Broadcasting service licensees' role during elections does not differ from their normal journalistic role during non-election periods. Normal ethical considerations continue to apply.
- A distinguishing feature of the election period is the obligation to achieve equitable coverage of political parties without abdicating news value judgements.

<sup>50</sup> GN 101 of 2014 in GG No. 37350 (17 February 2014).

- Each broadcasting service licensee should be consistent in its treatment of contesting parties and of conflicting views.<sup>51</sup>
- With regard to rhetorical criticisms, broadcasting service licensees must have the flexibility to incorporate responses into their formal news patterns. With regard to damaging criticisms, broadcasting service licensees should give the offended party an opportunity to respond at the earliest and most appropriate opportunity to do so.<sup>52</sup>
- Broadcasting service licensees need to ensure that, during the election period, they do not afford the policies of incumbent parties greater legitimacy than they would afford those policies or actions if the party was not in government.<sup>53</sup>
- Broadcasting service licensees, particularly the public broadcasting service licensee, have an obligation to inform the electorate of the election results, as they become available. Special care should be taken to ensure the accuracy of all results broadcast.<sup>54</sup>

### PRINCIPLES OF FAIRNESS IN ELECTION COVERAGE

Guideline 4(1) of the Election Broadcasting Regulations sets out the following principles of fairness:

- All news coverage should be fair to all interests concerned.
- Care should be taken to balance the exposure given to the non-political activities of candidates (such as attendance at functions, sporting events, and so on).
- All parties should receive equitable treatment on current affairs programmes. If the programme intends to feature party representatives, parties contesting the elections must be invited, with reasonable notice, to participate either in the same programme or in a series of programmes.
- The requirement that broadcasters give an opportunity for conflicting views to be heard should not be interpreted as a requirement that all parties be heard on any subject, only that all views be heard. Nor is it a requirement that all views be heard on the same programme.

There is currently a draft amendment to the Election Broadcast Regulations, which was published for comment in August 2018. At the time of publication, the draft amendment had not yet been finalised. The amendment does not propose any changes to the guidelines regarding editorial matters, equitable treatment or the principles of broadcasting that must be adhered to (such as regulation 4(1) set out above).

<sup>51</sup> Regulation 3 of the Election Broadcasting Regulations provides:

**“3. EQUITABLE TREATMENT**

**3.1 Equitable treatment means fair treatment**

Each broadcasting service licensee will be expected to treat parties fairly. Equitable treatment is unlikely to be achieved in a single programme but can be achieved in a series of programmes. Each broadcasting service licensee should be consistent in its treatment of contesting parties and of conflicting views.

**3.2 Broadcasting service licensee must seek out information**

Broadcasting service licensees should recognise their obligation to the electorate to provide a full and accurate record of events and developments. Broadcasting service licensees should not rely on political parties to bring information to them, but should actively seek out information. Failure to do so will give parties with greater resources inequitable amounts of news coverage.”

<sup>52</sup> Regulation 4(2) of the Election Broadcasting Regulations.

<sup>53</sup> Regulation 4(3) of the Election Broadcasting Regulations.

<sup>54</sup> Regulation 4(5) of the Election Broadcasting Regulations.

Lastly, it is worth noting that in addition to the regulatory framework set out above, broadcasting licensees must also follow the **Code of Conduct for Broadcasting Services** (Broadcasting Code), issued in terms of the Electronic Communications Act.<sup>55</sup> The purpose of the Broadcasting Code is to set the standards according to which broadcasting service licenses will be monitored by ICASA. The Broadcasting Code expressly indicates that during any election period, sections 56, 57, 58 and 59 of the Electronic Communications Act apply. For licensees under the jurisdiction of the Broadcasting Complaints Commission of South Africa (BCCSA), they are also required to follow the BCCSA Code.

### ***(ii) Community Radio Election Guidelines***

The Community Radio Election Guidelines were developed by the National Community Radio Forum in 1999, and have later been adapted for subsequent elections. While community media organisations are still required to follow all applicable broadcast and electoral laws and regulations that affect elections, the Community Radio Election Guidelines are aimed specifically at assisting community radio stations to entrench their role.<sup>56</sup> The guiding principles include to contextualise and present news honestly; to be committed to the community's right to know the truth; and to ensure open dialogue with listeners as part of accountability to the community.

In terms of programming, it further sets out particular considerations on which stations should base their election programming. This includes, for instance, focusing on their local community during the election; using languages preferred by their community; and ensuring that the community is informed about local day-to-day election developments. The Community Radio Election Guidelines contain similar provisions to the Election Broadcasting Regulations on the principles of equitability in broadcasting.

### ***(iii) Complaints against broadcast media: ICASA and the BCCSA***

ICASA consists of monitoring officers – who check whether broadcasters are following the terms, conditions and duties of their licences – and complaints officers – who receive complaints from the public about broadcasters and arrange hearings before the Complaints and Compliance Committee (CCC). The CCC is a seven-person committee, and is empowered to decide on complaints from the public about broadcasters not following licence conditions, hold hearings with complainants and broadcasters, and make recommendations to the ICASA Council on action to be taken against broadcasters.

In respect of the Election Broadcast Regulations, any person aggrieved by a party election broadcast or political advertisement may lodge a complaint with ICASA within 48 hours after the broadcast.<sup>57</sup> ICASA is required to communicate the outcomes of the complaint to the parties within 48 hours of receiving the complaint.<sup>58</sup>

<sup>55</sup> GN 958 of 2009 in GG No. 32381 (6 July 2009).

<sup>56</sup> IEC, 'Media guide: National and provincial elections', (2014) at p 79 (accessible [here](#)).

<sup>57</sup> Regulation 7(1) of the Election Broadcast Regulations.

<sup>58</sup> Regulation 7(3) of the Election Broadcast Regulations.

### WHAT IS THE RELATIONSHIP BETWEEN ICASA AND THE BCCSA DURING ELECTIONS?

The National Association of Broadcasters established the BCCSA as a self-regulatory body that receives and decides on complaints from the public about its members. The BCCSA has its own constitution, code and procedure, as well as its own complaints mechanism. However, for election-related matters, section 14 of the of the BCCSA’s Free-to-Air Code of Conduct for Broadcasting Service Licensees provides that:

“During any election period, as defined in the Act, sections 56, 57, 58 and 59 of the Act and regulations issued in terms thereof apply. The BCCSA does not have jurisdiction in these matters and complaints must be directed to the Complaints and Compliance Committee of the Independent Communications Authority of South Africa.”

Notably, the BCCSA’s Code of Conduct for Subscription Broadcasting Service Licensees does not contain an equivalent provision.

#### Practical tips for the media for election coverage

FAQs FOR ELECTION COVERAGE	
<b>Q: Do I need accreditation for voting or counting stations?</b>	Media representatives do not need formal accreditation from the Commission to get access to voting or counting stations, but are required to be clearly identified as a member of the media. This is done by presenting a valid press identity card, or alternatively a signed letter from the editor on the organisation’s letterhead with an identity document or passport. If any difficulties are encountered, the presiding officer or counting officer should be approached for assistance. <sup>59</sup> . Queries that fall outside of the mandate of the presiding officer will be escalation to the official spokesperson of the Commission at the ROCs, either nationally or for the province.
<b>Is the presiding officer obliged to grant me access to a voting station?</b>	The Commission has indicated that access to a voting station is at the discretion of the presiding officer, and the Commission has presiding officers are under no obligation to grant the media access or to discuss activities in the voting station. If a member of the media is of the view that access has been unreasonably withheld, it is possible to appeal to the provincial electoral officer.
<b>Do I need accreditation for access to the Results Operation Centres?</b>	Members of the media will need accreditation for all Results Operation Centres. The Commission will make available a list of contact persons for the national and provincial Results Operation Centres prior to the election date.

<sup>59</sup> IEC, above n 56 at p 50.

<p><b>Who am I allowed to interview at the voting station?</b></p>	<p>With the exception of the presiding officer, no interviews may be conducted with any other staff of the voting station or the Commission at a voting station. According to the guidance received from the Commission, presiding officers are mandated to discuss voter turnout and arrangements for voting at their station. Voters, party agents, candidates and accredited observers have to be interviewed outside of the boundaries of a voting station.</p>
<p><b>Are there any visuals that are not permitted?</b></p>	<p>The publication of the following images or visuals by any person – including the media – is prohibited: An image of a marked ballot; Any visuals inside the boundaries of a voting station without the permission of the affected voter and the presiding officer; any visuals where the secrecy of a voter’s ballot may be compromised.<sup>60</sup></p>
<p><b>Am I entitled to have access to the results slips?</b></p>	<p>Although copies of the results slips will not be made available to the media, a copy of the results slip for each election in each voting district is placed on the door of the voting station at the close of counting of ballots, which will enable the media to have access to the results slips. The electronic results will be available on the IEC website as soon as the results have been verified and entered by the IEC’s municipal offices.</p>
<p><b>Can I report on opinion polls?</b></p>	<p>There is no prohibition on the publication of opinion polls. However, caution should still be exercised. Questions to consider include: (i) who was interviewed; (ii) under what conditions were the interviews conducted; (iii) when was the poll conducted; (iv) who conducted the poll; and (v) what was the percentage of error?<sup>61</sup> It is good journalistic practice to disclose sample size, polling methodology and margin of error if opinion poll data is used.</p>
<p><b>Can I report on exit polls?</b></p>	<p>Section 109 of the Electoral Act provides that no persons – including the media – may print, publish or distribute any exit polls taken in the elections in process during the hours of voting.</p>
<p><b>What role do observers play?</b></p>	<p>An observer is a neutral outsider who is present and sees what happens during voting, counting, and the determination and declaration of results, and can tell the world that the process was transparent, free and fair – or not. Observers may be members from civil society organisations, or from regional or international bodies such as the African Union (AU) or the Commonwealth, and can offer advice and support to the Commission. Observers are accredited in terms of the Regulations on the Accreditation of Observers, 1999, which includes a code of conduct for observers.</p>

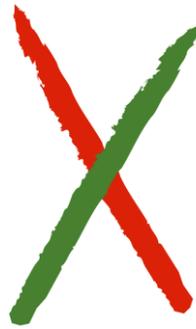
At the time of publication, the Commission had not yet published its media guide for the 2019 general election. While it is not anticipated that there are likely to be any significant changes from the Commission’s approach in the recent preceding elections, it is advisable that all members of the media covering the elections familiarise themselves with the 2019 media guide once it is made available.

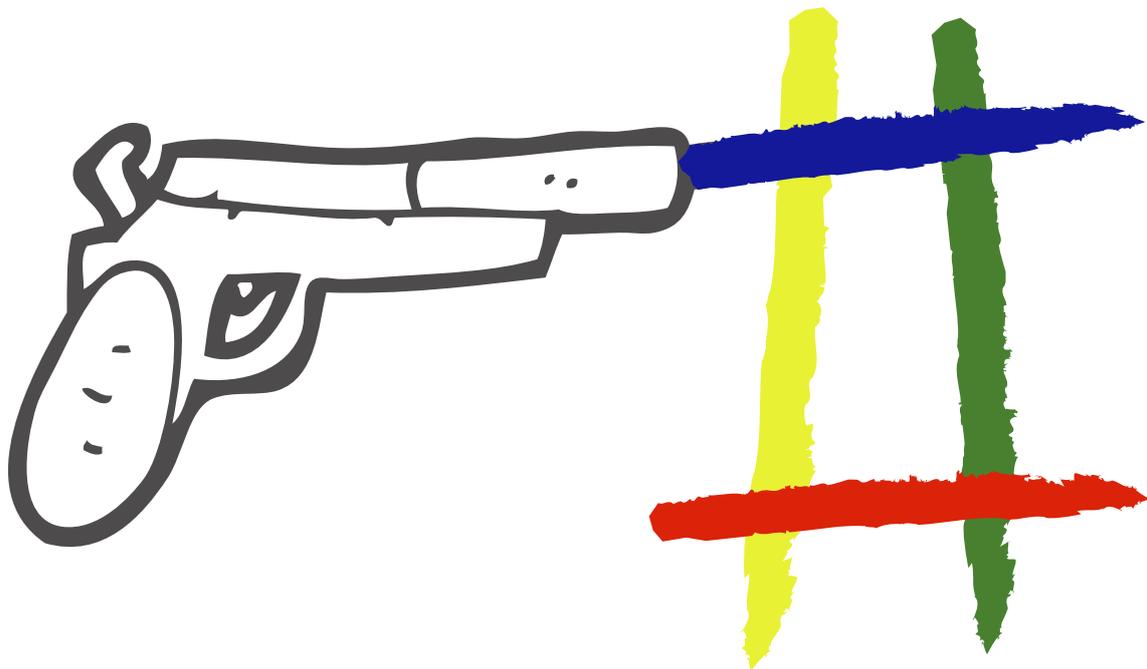
<sup>60</sup> IEC, above n 3 at pp 59.

<sup>61</sup> Constitutional Rights Foundation, ‘Election central: Assessing public opinion polls’, (2019) (accessible [here](#)).

## Suggested resources

- Africa Check, 'Guide: Understanding and reporting on opinion polls', (5 March 2014) (accessible [here](#)).
- ESOMAR and WAPOR, 'Freedom to conduct opinion polls: A 2017 worldwide update', (2018) (accessible [here](#)).
- ICASA, 'Regulations on Party Election Broadcasts, the Equitable Treatment of Political Parties by Broadcasting Licensees and Related Matters', (2014) (accessible [here](#)).
- IEC, 'Access to information manual', (2015) (accessible [here](#)).
- IEC, 'Media guide: National and provincial elections', (2014) (accessible [here](#)).
- IEC, 'Municipal elections handbook', (2016) (accessible [here](#)).
- Windhoek Declaration (1991) (accessible [here](#)).
- Press Council, 'Code of Conduct and Ethics for the South African Print and Online Media: Decoding the Code sentence by sentence', (1 January 2019) (accessible [here](#)).
- Press Council, 'Guidance notes: A brief for journalists covering the elections', (February 2019) (accessible [here](#)).





 **DISINFORMATION  
DURING ELECTIONS**

## MODULE III | DISINFORMATION DURING ELECTIONS

### RESEARCH BY MEDIA MONITORING AFRICA REGARDING DISINFORMATION

Media Monitoring Africa (MMA) has undertaken extensive research in respect of disinformation and possible strategies and approaches for the upcoming elections. This includes a discussion document titled 'Disinformation and 'fake news' during elections: Proposals for the upcoming 2019 General Elections in South Africa'. More about MMA's work on disinformation and 'dodgy news' can be accessed here: <https://www.mediamonitoringafrica.org/>.

#### Overview of this module

- **The shortcomings of the term 'fake news', and the alternative terminology to be used.**
- **The different regional and regulatory responses to address disinformation, and the measures being implemented in South Africa to address disinformation online during the elections.**
- **The standard of care required by the media and the importance of media credibility.**
- **The important role of the media in publishing counter-narratives, fact-checking and verification, and practical guidance for journalists.**

#### The scourge of so-called 'fake news'

It is imperative in order for elections to be free, fair and credible that the electorate has access to accurate, credible and reliable information. The spread of so-called 'fake news' during the election period threatens to directly undermine this. Disinformation, misinformation and 'fake news' during election periods is a scourge that has affected the fairness and credibility in a number of countries around the world. For instance, in June 2018, the President of the Superior Electoral Court in Brazil declared that the interference caused by 'fake news' online with the electoral process could lead to the elections being annulled.<sup>62</sup> Although not necessarily a new phenomenon, social media platforms have amplified the ease and reach of such information, which has made it imperative for measures to be put in place to respond to such challenges in a timely and effective manner.

### CASE STUDY: KENYA ELECTIONS 2017

Source: GeoPoll, 'The reality of fake news in Kenya', (2017) (accessible [here](#)).

According to a study conducted after the 2017 elections in Kenya, the research revealed that so-called 'fake news' was pervasive during the 2017 elections. The study showed the following results:

- 90% of respondents indicated having seen false or inaccurate information.
- 87% of respondents viewing this information as deliberately false.
- 76% of respondents indicated that they trusted mainstream media.
- 67% of respondents actively wanted comprehensive and detailed information.
- 78% of respondents wanted factual and accurate information.

<sup>62</sup> Electronic Frontier Foundation, 'Fake news and elections in Brazil: Several initiatives, no easy answer', (October 2018) (accessible [here](#)).

This challenge is truly a global one, extending beyond the political sphere to all aspects of information, including climate change, entertainment, and so on.<sup>63</sup> However, the consequences of this have arguably most starkly, and most concerningly, been seen in its impact on elections, with there being a real risk that widespread campaigns driven by intentionally false information can affect the outcome of an election. As has been noted, “disinformation hurts democracy by undermining our faith in our institutions, weakening voter competence, and splintering the electorate”.<sup>64</sup>

The global picture is evolving daily, with a number of initiatives from various role-players being developed around the world, including from governments and from the social media platforms. What has emerged is that the purveyors of disinformation prey on the vulnerability or partisan potential of recipients who they seek to enlist to amplify the message through likes, sharing of posts, retweets, and so on.<sup>65</sup> In addition to the impact that this can have on the outcome of an election, it can also have an impact on peace, security and stability in a country during the election period and beyond. For instance, disinformation can breed distrust and a lack of confidence, or even ignite into violence when combined with existing tensions based on, for instance, race, ethnicity or political affiliation; such tensions and conflict can, in turn, result in loss of life, internal displacement and despair, which have often left their mark in the aftermath of contested elections in other countries in the region.<sup>66</sup>

### Defining the terminology

It is important to correctly define the different terms and the scope of what each term seeks to address. While ‘fake news’ has been the popular term, there is an increasing trend to avoid using this. This is because current debates about so-called ‘fake news’ encompass a spectrum of information types, ranging from relatively low-risk forms – such as honest mistakes made by reporters, partisan political discourse, and the use of click bait headlines – to high-risk forms – such as foreign states or domestic groups that would try to undermine political processes through the use of various forms of malicious fabrications.<sup>67</sup> According to UNESCO, the term ‘fake news’ is both inadequate and misleading for the following reasons:<sup>68</sup>

- The term is inadequate to capture the complex problem of disinformation, which involves content that is not actually or completely ‘fake’, but fabricated information blended with facts, and practices that go well beyond anything resembling ‘news’ to include some forms of automated accounts used for networks of fake followers, fabricated or manipulated videos, targeted advertising, organised trolling, and so on. It can involve a range of digital behaviour that is more about circulation of false information rather than the production of false information.
- The term is also misleading, because it has been appropriated by some politicians and their supporters to dismiss coverage that they find disagreeable. It has therefore become a weapon with which powerful actors can interfere in circulation of information and attack and undermine independent news media. Research has shown that citizens often associate the term ‘fake news’ with partisan political debate and poor journalism broadly, rather than more pernicious and precisely defined forms of disinformation.”

<sup>63</sup> UNESCO, ‘Journalism, ‘fake news’ and disinformation’: Handbook for journalism education and training’, (2018) at p 20 (accessible [here](#)).

<sup>64</sup> Wood, Ravel & Dykhne, ‘Fool me once: Regulating ‘fake news’ and other online advertising’ 91 *Southern California Law Review* Vol. 1 No. 6 (2018) at p 3 (accessible [here](#)).

<sup>65</sup> UNESCO, above n 63 at pp 7-8.

<sup>66</sup> UNESCO, above n 63 at pp 7-8.

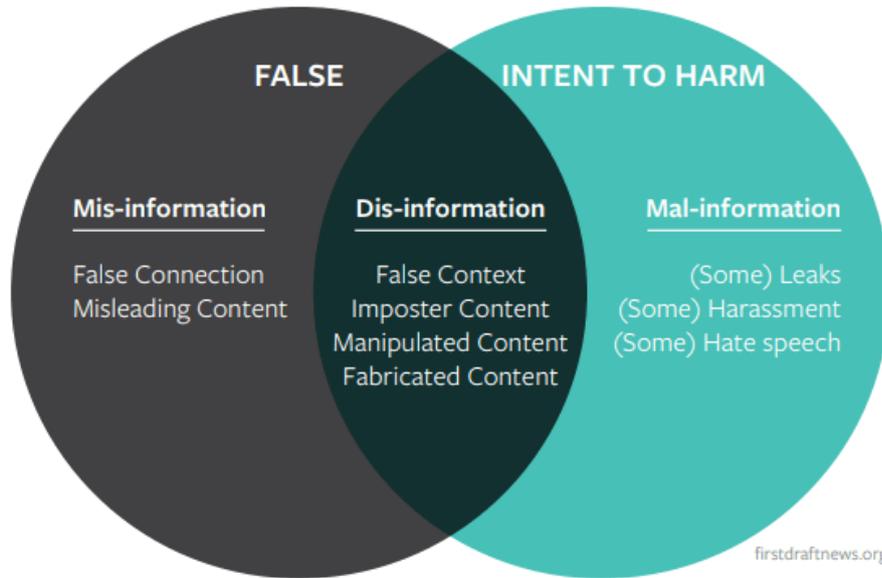
<sup>67</sup> European Commission, ‘A multi-dimensional approach to disinformation: Report of the independent High Level Group on fake news and online disinformation’, (12 March 2018) at p 10 (accessible [here](#)).

<sup>68</sup> Id.

Various other terms have also been used in this regard, with subtle but meaningful differences:

- **Misinformation**, which is generally used to refer to misleading information created or disseminated without manipulative or malicious intent.
- **Disinformation**, which is generally used to refer to deliberate (often orchestrated) attempts to confuse or manipulate people through delivering dishonest information to them.

The distinction in these terms has been illustrated as follows:<sup>69</sup>



**Source: UNESCO, ‘Journalism, ‘fake news’ and disinformation’: Handbook for journalism education and training’, accessible [here](#).**

In general, the term ‘disinformation’ is preferred for regulatory purposes because of two key elements that narrows the scope: (i) it requires intention, and therefore takes into account that people may inadvertently share false information without any untoward intention; and (ii) the required intention is a targeted one – for example, to cause to cause harm or for profit – which both narrows the scope and seeks to address the negative consequences that can arise.

**DEFINITION OF ‘DISINFORMATION’**

Source: European Commission, ‘A multi-dimensional approach to disinformation: Report of the independent High Level Group on fake news and online disinformation’, (12 March 2018) at p 10 (accessible [here](#)).

“[A]ll forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit. It does not cover issues arising from the creation and dissemination online of illegal content (notably defamation, hate speech, incitement to violence), which are subject to regulatory remedies under ... national laws. Nor does it cover other forms of deliberate but not misleading distortions of facts such as satire and parody.”

<sup>69</sup> UNESCO, above n 63 at p 46.

As discussed in more detail in respect of section 89(2) of the Electoral Act below, the term ‘disinformation’ fits best with the South African legal framework.

### Regional responses to disinformation

In recognition of the widespread and multinational scope of disinformation, regional bodies – such as the ACHPR and the European Commission – have sought to develop measures that can offer guidance to states their member states.

For instance, in 2017 the **Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda** (Joint Declaration) was issued by the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, together with the UN Special Rapporteur for Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media and the Organisation of American States Special Rapporteur on Freedom of Expression. The preamble to the Joint Declaration appropriately encompasses the competing concerns that arise when dealing with this issue:

- It is often designed and implemented to mislead a population.
- Some forms of disinformation and propaganda may harm individual reputations and privacy, or incite to violence, discrimination or hostility against identifiable groups in society.
- Some public authorities denigrate, intimidate and threaten the media, including by stating that the media is “the opposition” or is “lying” and has a hidden political agenda, which increases the risk of threats and violence against journalists, undermines public trust and confidence in journalism as a public watchdog, and may mislead the public by blurring the lines between disinformation and media products containing independently verifiable facts.
- It stresses that the human right to impart information and ideas is not limited to correct statements, and that the right also protects information and ideas that may shock, offend and disturb. It states further in this regard that “prohibitions on disinformation may violate international human rights standards, while, at the same time, this does not justify the dissemination of knowingly or recklessly false statements by official or State actors”.

#### KEY PRINCIPLES FROM THE JOINT DECLARATION

There are three key principles that can be distilled from the Joint Declaration:

- Proposals to address disinformation should avoid offering general prohibitions on speech as solutions, as this is unlikely to meet the test for a justifiable limitation of freedom of expression.
- State actors should not make, sponsor, encourage or disseminate disinformation or propaganda.
- In addition to not disseminating disinformation or propaganda, state actors should also take positive steps to disseminate reliable and trustworthy information, including on matters of public interest.

The European Commission has been engaging on an extensive study to develop proposals and measures to be implemented in Europe to tackle disinformation.<sup>70</sup> In line with the above proposals, in September 2018, the European Commission published a Code of Practice on Disinformation, including an Annex of Best Practice and Annex on Current Best Practices from Signatories of the Code of Practice. These documents contain voluntary, self-regulatory standards agreed to by industry stakeholders to address disinformation.

### The challenge of regulating disinformation

The advent of the internet and the exponential increase in popularity of social media platforms has led to the weaponisation of information on an unprecedented scale. New technology has made the manipulation and fabrication of content simple, and social networks dramatically amplify falsehoods – be they from states, politicians, corporate entities or others – that are then shared by susceptible members of the public.<sup>71</sup> Sophisticated disinformation is often persuasive because it looks credible.

However, unlike incitement, terrorism advocacy or child sexual abuse material, this has been more complex to regulate as it is not necessarily illegal content, particularly in a democratic context where political speech is recognised as deserving of strong free speech protections.<sup>72</sup> The complexity is exacerbated by the cross-border nature of social media platforms, with the potential for disinformation arising from both domestic and from foreign sources. Given time and resource constraints, as well as a lack of digital literacy skills in the country, voters may not dig deeper into false stories in order to verify the information.

Various countries have sought to impose regulatory measures aimed at the dissemination of false information.<sup>73</sup> It is concerning, however, that the regulatory measures being proposed or implemented in many countries tend towards criminalising the dissemination of false information. This gives rise to serious concern, as there is always the risk that criminalising speech will have a chilling effect on the right to freedom of expression.

#### THE NETWORK ENFORCEMENT LAW IN GERMANY

Accessible [here](#).

Germany has enacted the *Netzwerkdurchsetzungsgesetz*, or Network Enforcement Law, which came into force in October 2017, with a transition period until 1 January 2018. In terms of the law, social media platforms are required to implement procedures that allow users to report unlawful content, which is defined as anything that violates Germany's Criminal Code. This includes disinformation. If social media platforms systematically fail to establish and enforce such reporting complaint management systems, they can be fined with penalties of up to €50 million based on the law. Social networks also have to publish a report every six months detailing how many complaints they received and how they dealt with them.

<sup>70</sup> The proposals include the following: a code of practice on disinformation; an independent European network of fact-checkers; a secure European online platform on disinformation; enhancing media literacy; resilience of elections; voluntary online identification systems; support for quality and diversified information; coordinated strategic communication policy. See: European Commission, 'Tackling online disinformation: Commission proposes EU-wide Code of Practice', (26 April 2018) (accessible [here](#)).

<sup>71</sup> UNESCO, above n 63 at p 15.

<sup>72</sup> The Guardian, 'Global crackdown on fake news raises censorship concerns', (24 April 2018) (accessible [here](#)).

<sup>73</sup> Poynter, 'A guide to anti-misinformation actions around the world' (24 July 2018) (accessible [here](#)).

As noted in the Joint Declaration, the right to freedom of expression is not limited to the protection of correct statements, and includes protection for information and ideas that may shock, offend and disturb. Any regulatory measure that would impose restrictions on the dissemination of false information would need to be balanced against the right to freedom of expression contained in section 16 of the Constitution, and would need to comply with the provisions of section 36 of the Constitution in order for it to be a justifiable limitation.

### Dealing with disinformation online in the upcoming elections

#### ELECTORAL LAWS REGARDING FALSE INFORMATION

##### Section 89(2) of the Electoral Act: Intentional false statements:

“(2) No person may publish any false information with the intention of –

- (a) disrupting or preventing an election;
- (b) creating hostility or fear in order to influence the conduct or outcome of an election; or
- (c) influencing the outcome or conduct of an election.”

##### Section 9(1)(b) of the Electoral Code of Conduct: Prohibited conduct:

“No registered party or candidate may –

...

- (b) publish false or defamatory allegations in connection with an election in respect of –
  - (i) a party, its candidates, representatives or members; or
  - (ii) a candidate or that candidate’s representatives”.

Although South Africa does not have a comprehensive law dealing with disinformation, section 89(2) of the Electoral Act contains an express prohibition against the publication of false statements with the intention of causing one of the three listed harms: disrupting or preventing an election; creating hostility or fear in order to influence the conduct or outcome of an election; or influencing the conduct or outcome of an election. A person convicted of an offence in terms of section 89(2) can be sentenced to a fine or imprisonment for up to ten years.

In an effort to give effect to this provision, MMA has been working with the IEC and other stakeholders, including SANEF, to establish an online portal and complaints mechanism for members of the public to lodge complaints regarding disinformation online that falls within the scope of section 89(2) of the Electoral Act. As part of this process, it is intended that a committee will be established to lend support to the IEC during the election period, by considering the complaints received and making recommendations to the IEC on the proposed way forward. The IEC will then receive the recommendations and be responsible for making a final determination on the outcome of the complaint and the proposed recourse.

The 2019 General Election is the first time that such an initiative is being run. The role and functions of this committee has been narrowly circumscribed in accordance with section 89(2) of the Electoral Act, and does not create any new offences or online regulation. For the purposes the media, any complaint received in respect of content published by a member of the media that falls within the jurisdiction of the Press Council, ICASA or the BCCSA will be forwarded directly to the appropriate regulatory body for consideration.

The Electoral Code of Conduct is also of relevance. Section 4(1)(a) states that every registered party and candidate must, among other things, publicly state that everyone has the right to freely express their political beliefs and opinions, to challenge and debate the political beliefs and opinions of others, and publish and distribute election and campaign materials. Section 4(1)(b) of the Code requires every registered party and candidate to “publicly condemn any action that may undermine the free and fair conduct of elections”.

Section 9 sets out the prohibited conduct in terms of the Code of Conduct. Of particular relevance, section 9(1)(b) of the Code of Conduct provides that no registered party or candidate may publish false or defamatory allegations in connection with an election in respect of a party, its candidates, representatives or members, or a candidate or that candidate’s representatives. Section 9 should be read with section 3(b) of the Code, which would require all registered parties and candidates to instruct such persons to comply with this provision as well.

### Standard of care by the media

Various codes of conduct – including the Press Code, the ICASA Code and the BCCSA Code – place requirements on members of the media to report news truthfully, accurately and fairly. Different media organisations will likely put in place different measures to achieve this, in order to ensure that reasonable steps are taken to meet these requirements. However, it is inevitable that there will be instances in which members of the media will make mistakes. Members of the media should at all times conduct themselves in a manner that is reasonable and compliant with the ethical standards expected of the profession.

#### NATIONAL MEDIA LIMITED AND OTHERS V BOGOSHI

[1998] ZASCA 94

In *National Media Limited and Others v Bogoshi*, in the context developing the reasonableness defence available to a media institution for publishing a false and defamatory statement, the Supreme Court of Appeal held that:

“In my judgment we must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.

In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion ... and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper.”

Although the judgment pre-dates the current debates regarding the dissemination of false information online, the guidance provided nevertheless is of relevance, particularly in respect of the factors that ought to be considered when determining whether the publication of false information was justifiable.

It must also be remembered that denigrating certain legitimate news reports as ‘fake news’ has been used as a political tool to stifle criticism. In other parts of the continent, members of the media are still seeking to challenge the criminal offence of publishing false information, which has historically been used as a intimidation tactic to silence journalists.<sup>74</sup> As noted in the preamble to the Joint Declaration, mentioned above, public authorities claim that the media is lying and has a hidden political agenda, in an effort to undermine public trust and confidence in journalism. This in turn may mislead the public by blurring the lines between disinformation and media products containing independently verifiable facts.

However, this of course does not absolve the media of responsibility. As noted by UNESCO, “it is a time for news media to tack more closely to professional standards and ethics, to eschew the publishing of unchecked information, and to take a distance from information which may interest some of the public but which is not in the public interest.”<sup>75</sup> It notes further that all news institutions and journalists – whatever their political leanings – should avoid inadvertently and uncritically spreading disinformation and misinformation.<sup>76</sup> Furthermore, journalists cannot leave it to fact-checking organisations alone to do the journalistic work of verifying questionable claims that are presented by sources. In this regard, journalism also needs to proactively detect and uncover new cases and forms of disinformation.<sup>77</sup>

### The importance of counter-narratives

#### DIFFERENT FORMS OF FALSE CONTENT

Source: UNESCO, ‘Journalism, ‘fake news’ and disinformation’: Handbook for journalism education and training’, (2018) (accessible [here](#)).

- **False connection**, in which headlines, visuals or captions do not support the content (commonly referred to as ‘clickbait’).
- **Misleading content**, in which there is a misleading use of information to frame issues or individuals in certain ways, such as by cropping photographs, or choosing quotes or statistics selectively.
- **False context**, in which genuine information is re-circulated outside of its original context.
- **Imposter content**, in which journalists have their by-lines used alongside articles they did not write, organisations’ logos used in videos or images they did not create.
- **Manipulated content**, in which genuine content is manipulated to deceive, such as an image being manipulated to impute an improper relationship between two people.
- **Fabricated content**, which includes completely fabricated ‘news’ websites or fabricated images. Referred to as ‘information disorder’, journalists need to separately examine the elements of information disorder – the agent, the messages and the interpreter – as well as the different phases of information disorder – creation, production and distribution.

<sup>74</sup> See, for example, the judgment of the Community Court of Justice of the Economic Community of West African States in *Federation of African Journalists and Others v The Republic of the Gambia*, Judgment No. ECW/CCJ/JUD/04/18 (13 March 2018), in which it held that the false news provision contained in the Criminal Code did not conform with the international law standards on freedom of expression contained in article 9 of the African Charter and article 19 of the International Covenant on Civil and Political Rights.

<sup>75</sup> UNESCO, above n 63 at p 11.

<sup>76</sup> Id. at p 11.

<sup>77</sup> Id. at pp 11-12.

This should, however, be distinguished from legitimate forms of speech – such as artistic expression, satire or parody, or protected comment – that would be protected under the right to freedom of expression.

In respect of information disorder in the context of the digital transformation of newsrooms and storytelling, UNESCO notes that the impacts include, for instance, reporters being increasingly required to sub-edit and publish their own content without appropriate review; social-first publishing, in which reporters post stories to their individual social media accounts to meet audience demand of real-time news; and digital-first deadlines that do not allow for sufficient time.<sup>78</sup> This has the potential to lead to a number of negative consequence.<sup>79</sup>

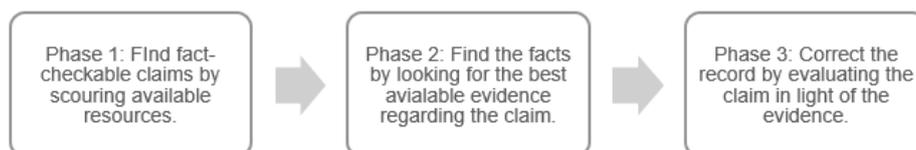
The publication of counter-narratives that provide corrections to false information and highlight the work being done by fact-checking organisations is one of the key roles that the media can play in addressing this challenge. In essence, instead of killing a false story, this approach causes a story to be surrounded with related articles to provide the reader with more context and alternative views.<sup>80</sup> This invites easier access to alternative perspectives and information, including articles by third-party fact-checkers. While this approach raises questions about algorithmic transparency on social media platforms, it is an approach that some platforms have already begun to implement through suggested content appearing alongside a particular post.

Consideration should be had to how this can be made relatable to the audience to whom the false information was targeted, and can be readily accessed. The effect of misinformation can be very strong, and requires engagement and participation from audiences to be persuaded. A 2017 study on misinformation recommends the following approaches for debunking misinformation:<sup>81</sup>

- **Reduce arguments that support misinformation:** News accounts about misinformation should not inadvertently repeat or belabour detailed thoughts in support of the misinformation.
- **Engage audiences in scrutiny and counterarguing of information:** A state of healthy scepticism should be promoted. When trying to correct misinformation, it is beneficial to have the audience involved in generating counterarguments.
- **Introduce new information as part of the debunking message:** People are less likely to accept debunking when the initial message is just labelled as wrong rather than countered with new evidence.

### Fact-checking and other measures

Fact-checking of information has been key to countering disinformation. In general, fact-checking comprises three phases:<sup>82</sup>



<sup>78</sup> Id. at p 61.

<sup>79</sup> Id. at pp 64-65.

<sup>80</sup> A. Alemanno, 'Editorial: How to counter fake news? A taxonomy to anti-fake news approaches' in *European Journal of Risk Regulation* 9 (2018) at p 4 (accessible [here](#)).

<sup>81</sup> Annenberg Public Policy Center of the University of Pennsylvania, 'Debunking study suggests ways to counter misinformation and correct 'fake news'', (12 September 2017) (accessible [here](#)).

<sup>82</sup> UNESCO, above n 63 at p 89.

There are various online tools that can be used to assess the credibility of a particular online news resource. Media Monitoring Africa (MMA), for example, has developed KnowNews, a browser extension for Google Chrome and Firefox that can be downloaded to help identify the credibility of a news website. The KnowNews database is a collection of news publishers, and once installed the KnowNews icon provides a colour-coded guide to how trustworthy a website is considered. The extensions can be downloaded here: <https://newstools.co.za/page/knownews>. People can also verify the existence of a news entity by going to <https://openanddisclose.org.za/>.

MMA has also built an app, RoveR, that enables users to fulfil three core functions: (i) upgrade their skills on spotting real versus false news by going through a few learning modules; (ii) testing their skills on spotting real versus false news through quizzes; and (iii) preventing sharing of false news by allowing users to check the credibility of the website from which it is obtained. RoveR can be downloaded from the Google Play Store or from here: <https://rover.directory/>.

Africa Check – a non-partisan organisation that works towards accuracy and honesty in public debate and the media in Africa – explains their approach to fact-checking in the following eight steps:<sup>83</sup>

STEP TO BE TAKEN	HOW IT WORKS
<b>Step 1: Select the claim to check</b>	At Africa Check, the editors sift through the suggestions sent in by readers and raised by the team, based on criteria set out on the website: is the topic important, was the claim framed as a statement of fact or opinion, does the claim matter, and is it a speaker we have focused on before?
<b>Step 2: Establish exactly what was said</b>	Once the topic is selected, it is necessary to establish exactly what was said. The precise wording is needed. Consider the following questions: What exactly did they say? Was it as reported? And what was the context in which it was said?
<b>Step 3: Ask for their evidence</b>	Having established the claim, try to contact the speaker or their office, and ask what evidence they have for their claim.
<b>Step 4: Check archives and other sources</b>	Check through archives and other publicly available sources, both for evidence that supports and that contradicts the claim. It is advisable to cast the net as widely as possible.
<b>Step 5: Discuss the evidence with experts</b>	Having secured the evidence, this should be discussed with specialist experts where necessary to help understand the data. According to Africa Check, they only discuss with experts willing to go on the record, and do not use anonymous sources.
<b>Step 6: Write up the report, setting out the evidence step-by-step and providing links</b>	The next step is to write up the report, setting out the following: (i) the claim that was made and the context in which it was delivered and reported; (ii) the evidence that supports the claim; (iii) any contrary evidence; and (iv) a balanced conclusion. For all evidence, a link or source should be provided.

<sup>83</sup> Africa Check, 'How we work', (undated) accessible here: <https://africacheck.org/about-us/how-we-work/>.

<b>Step 7: Have a colleague review the report and findings</b>	To ensure that the report itself is accurate, a colleague should be asked to review the report, and independently assess the findings, before it is finalised.
<b>Step 8: Publish and monitor feedback</b>	Finally, the report is published and feedback is monitored. If or when a reader identifies an error, the report is updated openly.

In February 2019, the Fact-Checkers Legal Support Initiative was launched to connect fact-checkers with pro bono lawyers, to help pay legal fees for fact-checkers under threat in order for them to continue to do their work. As noted on the website, in recent year non-partisan fact-checking has emerged as a vital tool to address the spread of misinformation; however, the individuals and organisations who check facts are being targeted with online harassment, physical threats and legal application. For more information about this initiative, please visit: <https://factcheckerlegalsupport.org/>.

Verification processes of source and visual content are also an important consideration when dealing with spread of false information. Verification tools can be used to establish where a source has posted from, but it is also possible to manually triangulate a source by analysing their social media history to check for clues that could indicate the feasibility of them being in a particular place at a particular time.<sup>84</sup> Examining the history of their interactions with other users and checking linked content within posts also assists in the manual verification process and can help eliminate information shared by bots.<sup>85</sup>

#### CHECKLIST OF VERIFYING VISUAL CONTENT

Source: UNESCO, 'Journalism, 'fake news' and disinformation': Handbook for journalism education and training', (2018) at pp 105-106 (accessible [here](#)).

While it might not be possible to ascertain with full certainty the provenance of visual content, there are several indicators that can be uncovered through a verification process that asks:

- Is the content original, or has it been 'scraped' from previous reporting and re-appropriated misleadingly?
- Has the content been digitally manipulated in some way?
- Can we confirm the time and place of the photograph or video capture, using available metadata?
- Can we confirm the time and place of the photograph or video capture, using visual clues in the content?

In order to assess these indicators, it is also useful to understand the different types of false or misleading visual content that commonly arise.<sup>86</sup> This includes, for instance, wrong time/wrong place content that re-shares old visuals with new claims about what they show; manipulated content that has been digitally manipulated using editing software; or staged content that creates or shares original content with the intention of misleading.<sup>87</sup>

<sup>84</sup> UNESCO, above n 63 at p 105.

<sup>85</sup> Id. at p 105.

<sup>86</sup> Id. at pp 105-106.

<sup>87</sup> Id. at pp 105-106.

It should be emphasised that in many instances, there will not be one single indicator that reveals whether the image or content is false information. Rather, the relevant conclusion is reached on a balance of all the information that is available. It is also important to remember that not all false information is intended to mislead or be malicious; this can sometimes arise from a genuine error of fact or judgment.

While the tools and resources available to assist with fact-checking and verification processes are invaluable, journalists should also remember that there will be times when one's instinct – in conjunction with discussions with editors and the broader news team – will play a key determining factor in assessing particular content.

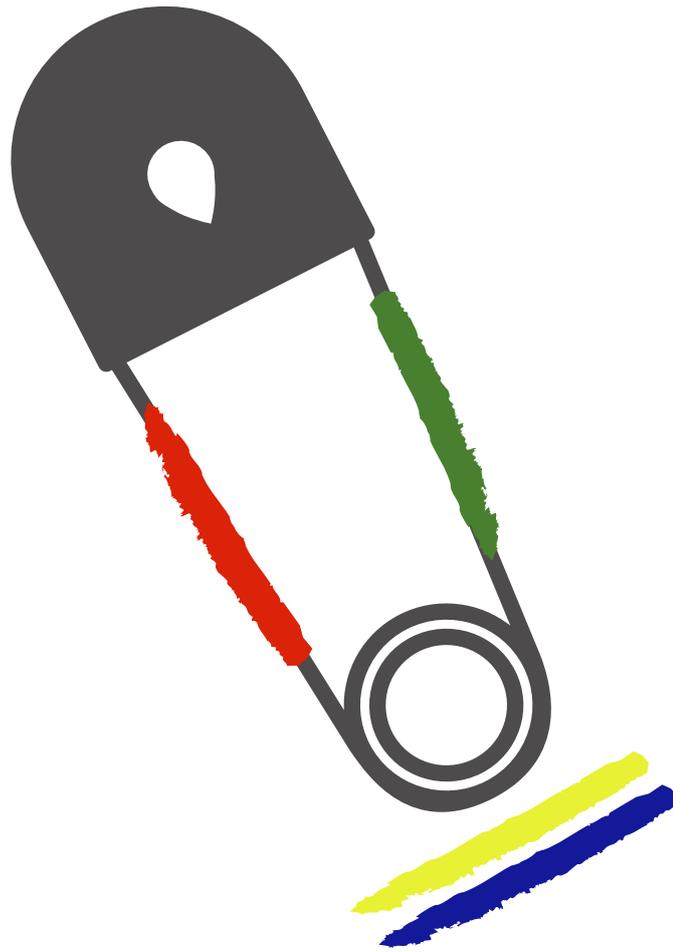
### TOOLS AND TIPS FOR VERIFICATION

- **Intel Techniques**, that undertakes Facebook account analysis and enables a journalist to find out more about a source by analysing their Facebook account (accessible here: <https://inteltechniques.com/osint/facebook.html>).
- **Google Reverse Image Search**, that enables to check if the image database contains an earlier version of that image, in order to ascertain whether the image is being recycled to support a new claim or event (accessible here: <https://support.google.com/websearch/answer/1325808?hl=en>).
- **YouTube Data Viewer**, that can detect video thumbnails for YouTube videos and facilitate a reverse image search on those thumbnails to check if earlier versions of the video have been uploaded (accessible here: [https://firstdraftnews.org/curriculum\\_resource/youtube-data-viewer/](https://firstdraftnews.org/curriculum_resource/youtube-data-viewer/)).
- **Geolocation**, which is the process of determining where the video or image was captured. This can be obtained from metadata or by cross-referencing visual characteristics and landmarks from the content with satellite imagery, street-view imagery and content available from other sources.
- **Weather corroboration**, which relies on historical weather data to check if the weather observable in visual content is corroborated by the historic record.
- **Shadow analysis**, which examines the internal consistency of any shadows, such as where one would expect them to be and whether the visible shadows are consistent with the light sources.
- **Image forensics**, which seeks to detect inconsistencies in image metadata that suggest manipulation.

## Suggested resources

- A. Alemanno, 'Editorial: How to counter fake news? A taxonomy to anti-fake news approaches' in *European Journal of Risk Regulation* 9 (2018) (accessible [here](#)).
- C. Silverman, 'Verification handbook: The ultimate guideline on digital age sourcing for emergency coverage', (undated) (accessible [here](#)).
- Data & Society, 'Reading metadata' in *Data craft: The manipulation of social media metadata*, (undated) (accessible [here](#)).
- European Commission, 'A multi-dimensional approach to disinformation: Report of the independent High Level Group on fake news and online disinformation', (2018) (accessible [here](#)).
- European Parliament, 'Societal costs of 'fake news' in the Digital Single Market' (2019) (accessible [here](#)).
- S. Rajaratnam School of International Studies and Centre of Excellence for National Security, 'Policy report: Countering fake news: A survey of recent global initiatives' (March 2018) (accessible [here](#)).
- UNESCO, 'Journalism, 'fake news' and disinformation': Handbook for journalism education and training', (2018) (accessible [here](#)).





 SAFETY OF  
JOURNALISTS  
ON- AND OFFLINE

## MODULE IV | SAFETY OF JOURNALISTS ON- AND OFFLINE

### COMMITTEE FOR THE PROTECTION OF JOURNALISTS: SAFETY KIT FOR JOURNALISTS COVERING THE SOUTH AFRICAN ELECTION

The Committee for the Protection of Journalists (CPJ) has published a dedicated safety kit for journalists, specifically geared towards the upcoming General Elections in South Africa. The toolkit draws on the experiences and best practices from other countries, and contains practical advice for journalists to protect themselves, both on- and offline. CPJ's safety kit is accessible [here](#).

#### Overview of this module

- The types of threats, harassment and attacks faced by the media – including gender-specific – and the obligations on the state and media organisations.
- The importance of the protection of sources, as recognised under our domestic case law.
- Practical guidance for journalists to protect themselves online, including on social media.
- Practical guidance for journalists on where they can seek assistance and recourse in the event of threats, harassment or attacks.

#### Attacks on journalists

As noted in the ACHPR Resolution on the Safety of Journalists and Media Practitioners in Africa (2011), freedom of expression, press freedom and access to information can only be enjoyed when journalists and media practitioners are free from intimidation, pressure and coercion. However, journalists continue to be subjected to threats and harassment, both on- and offline, in the execution of their work. Threats and attacks against the media do not only jeopardise that person's right to freedom of expression, but also the rights of the public to receive and access information freely.



Source: ARTICLE 19, 'Acting on UN Human Rights Council Resolution 33/2 on the Safety of Journalists', accessible [here](#).

Although it is clear that what is required in the face of attacks on journalists is swift and firm justice, the reality is that many perpetrators commit criminal acts of violence against journalists and other members of the media with impunity.<sup>88</sup> Impunity perpetuates a cycle of violence against journalists. It raises serious concern that when attacks against journalists go unpunished, this sends a public signal that the state and public authorities do not truly value the important role that the media plays in that country. As noted in the UN Plan of Action on the Safety of Journalists and the Issue of Impunity (UN Plan of Action), promoting the safety of journalists must not be constrained to after-the-fact action; instead, it requires prevention mechanisms and actions to address the root causes of attacks against journalists and impunity.

### IMPLEMENTING THE HUMAN RIGHTS COUNCIL RESOLUTION ON THE SAFETY OF JOURNALISTS

Source: ARTICLE 19, 'Acting on UN Human Rights Council Resolution 33/2 on the Safety of Journalists' (2017) at p 10 (accessible [here](#)).

In 2016, the UN Human Rights Council adopted a landmark resolution on the safety of journalists. In it, states committed to prevent, protect and prosecute in order to end impunity for violence against journalists. ARTICLE19, a leading human rights organisation focused on the right of expression, contends that this commitment requires states to take the following measures:

- **Duty to prevent:** States are required to create and maintain an enabling environment for journalists; ensure national laws do not interfere with journalists' independence; release arbitrarily arrested or detained journalists; not spy on journalists or intercept their communications; allow encryption and anonymity; protect journalists' confidential sources; train key stakeholders (including judges, law enforcement, military, journalists and civil society) on the states' international legal obligations and commitments on the safety of journalists.
- **Duty to protect:** States are required to publicly, unequivocally and systematically condemn violence and attacks; establish early warning systems and rapid response mechanisms; regularly monitor and report on attacks against journalists; protect journalists covering protests and elections; protect media outlets against attacks and forced closure; protect journalists in armed conflict as civilians; recognise the role of media organisations in advancing safety.
- **Duty to prosecute:** States are required to adopt strategies to combat impunity; investigate; prosecute; ensure victims of crimes against journalists and their families have access to appropriate remedies; reinvigorate their efforts to effectively implement the international human rights framework on the safety of journalists.

In addition to the duties on states, the International Declaration on the Protection of Journalists further notes that media organisations themselves can play a role in implementing measures for the benefit of their journalists. This could include, for instance, general safety training for all journalists; the development and implementation of procedures and tools aimed at ensuring the physical, psychological and digital safety and security of journalists; training for journalists on their rights and duties under national and international law; promoting public support for journalism and journalists; and building solidarity amongst journalists.

<sup>88</sup> UNESCO, 'Legal standards on freedom of expression: Toolkit for the judiciary in Africa', (2018) at p 119 (accessible [here](#)).

## Addressing gender-specific threats against women journalists

Gender-specific threats against women journalists should be interpreted to include all threats and attacks that are bias-motivated and are disproportionately experienced by women journalists, including sexual and gender-based threats such as rape and sexual assault.<sup>89</sup> Reactions to women journalists are often more hostile, and certain threats are often particular to women journalists online, such as stalking.<sup>90</sup>

Structural discrimination can also limit women journalists' access to prevention and protection measures, both from the state and from employers, as well as access to justice.<sup>91</sup> As has been noted, these factors "lead to a higher incidence of self-censorship amongst women journalists, the under-reporting of threats, and the denial of effective prevention, protection and prosecution, further contributing to a climate of impunity for gender-specific threats."<sup>92</sup>

It is imperative that any strategy considered in respect of the safety of journalists – whether by the state or within a media organisation – appropriately considers the gender dynamic of the forms of threat and harassment, as well as the frequency with which it occurs.

### The protection of sources

#### **BOSASA OPERATIONS (PTY) LTD V BASSON AND ANOTHER [2012] ZAGPJHC 71 (26 April 2012) at paras 38 and 55.**

The right to source protection has been confirmed by the High Court of South Africa in *Bosasa Operations (Pty) Ltd v Basson and Another*, in which the court refused to order the journalist to reveal the identity of his source. Of relevance, the court stated as follows:

"[I]t is apparent that journalists, subject to certain limitations, are not expected to reveal the identity of their sources. If indeed freedom of the press is fundamental and *sine qua non* for democracy, it is essential that in carrying out this public duty for the public good, the identity of their sources should not be revealed, particularly, when the information so revealed, would not have been publicly known. This essential and critical role of the media, which is more pronounced in our nascent democracy, founded on openness, where corruption has become cancerous, needs to be fostered rather than denuded.

...

In the circumstances of this matter I find that the plaintiff has failed to prove that its right to a fair trial has been infringed. On the contrary, to order the defendants to reveal their sources would infringe their freedom of the press. Had it not been the defendants' sources, the public's right to know whether the plaintiff won the tender fairly would never have been known. The public would be poorer for it. The public interest will, in my view, be served by not revealing the identity of the defendants' sources at this stage. The defendants have a valid objection to revealing their sources."

Section 11 of the Press Code provides that the media must protect confidential sources of information and not publish information that constitutes a breach of confidence, unless the public interest dictates otherwise.

<sup>89</sup> ARTICLE 19, 'Acting on UN Human Rights Council Resolution 33/2 on the Safety of Journalists' (2017) at p 10 (accessible [here](#)).

<sup>90</sup> *Id.* at p 10.

<sup>91</sup> *Id.* at p 11.

<sup>92</sup> *Id.* at p 11.

## Digital security

### *(i) Tips to improve your digital security*

There are a number of resources online that will assist with the necessary tips and tools for improving digital security. A useful, regularly updated resource is Tactical Technology Collective & Front Line Defenders, 'Security in a box: Digital security tools and tactics', accessible here: <https://securityinabox.org/en/>. This resource contains various guides covering digital security basics and identifying relevant tools, including on topics such as protecting your device from malware and phishing attacks; protecting your information from physical threats; using your smartphone as securely as possible; and protecting the sensitive files on your computer.

#### DIGITAL SECURITY CHECKLIST

- Have you backed up your devices (on hardware and/or the cloud)?
- Have you removed sensitive data from the device?
- Have you logged out of your accounts, apps and browsers?
- Have you put a PIN lock or password on all devices?
- Have you encrypted your devices?
- Have you set up your devices to remote wipe?
- Have you saved the relevant content from your messaging applications?

### *(ii) Tips to improve your social media security*

Social media platforms give rise to various online attacks, including against journalists. This poses particular complications as it is not always possible to identify the person responsible. Journalists covering elections are increasingly likely to be targeted online through smear campaigns which aim to discredit them and their work. Attackers can be real people, but they can also be malicious computer bots: accounts that are run by computers rather than humans, and that mimic human behaviour on social media accounts as a way to spread misinformation or propaganda that support their cause.

While it is not always easy to identify a bot, it is sometimes from the profile created – such as when it was created, whether it contains personal information or a photograph, a low number of followers with a high number of likes or retweets, or whether the name of the account and the handle match – to assess whether it is a human or a bot. Journalists may want to mute or block bots attacking them online, and should also report any malicious accounts to the social media companies.

CPJ notes further that, in the event of an attack, journalists should try not to engage with the trolls as this can make the situation worse. Journalists should report any abusive or threatening behaviour to the social media company, and document any comments or images that are of concern. It is also advisable to be vigilant for signs of hacking of your accounts, and ensure that there are adequate digital security measures to guard against this.

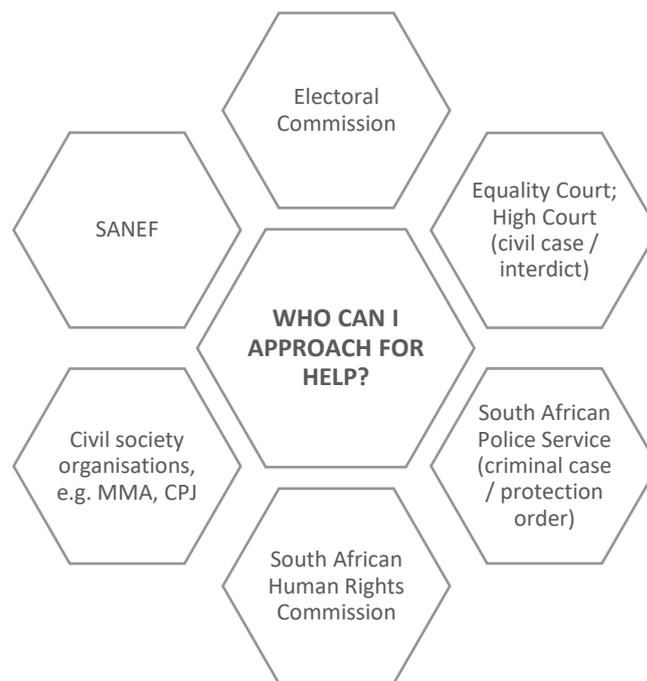
In light of the prevalence of online harassment, and the serious personal and professional impact that this can have on the journalist in question, media outlets are encouraged to work with their journalists to put in place a plan of action in case trolling becomes serious. Journalists should also be provided with the necessary support and training to protect themselves from such attacks, and to deal with such attacks in the unfortunate event that they may arise.

### SOCIAL MEDIA CHECKLIST

- Do you have long and strong passwords for your accounts?
- Do you have a unique password for each account? (Tip: Consider using a password manager.)
- Have you tuned on two-factor authentication for all accounts?
- Have you reviewed the privacy settings for each account to make sure any personal data is removed?
- Have you removed any photos or images that could be manipulated and used as a way to discredit you?
- Have you spoken with family and friends about removing photographs of you from their profiles or locking down their accounts?
- Have you considered getting your account verified by the social media company to identify your account from fake accounts set up in your name?
- Are you monitoring your accounts for signs of increased trolling activity or for indications that a digital threat could become a physical one?

### Assistance and recourse for journalists under threat during the upcoming elections

An attack against a member – whether physical or verbal, whether online or offline – is a serious concern, and requires swift and effective action to deal with it accordingly. There are a number of different options available to journalists to seek assistance and recourse for any threats or attacks made against them.



As a point of departure, we note that **SANEF** will be documenting threats and violence against journalists through an online resource via the SANEF website. This data will be collated and used in order to work towards developing strategies and approaches to protect the safety journalists, there may be appropriate circumstances in which SANEF will intervene. In addition, various organisations may be able to provide support and advice to journalists, including CPJ and MMA.

### INITIATIVES BY MMA AND SANEF

SANEF and MMA are working on developing online tools to document attacks against journalists and assist where possible. As mentioned above SANEF has developed a dedicated resource for this purpose, accessible here: <http://sanef.org.za/elections-2019/#reporting>.

While we cannot undertake to assist in every incident, we can seek to provide the following assistance:

- Once evidence is submitted from a journalist, we will, where possible, investigate and leverage relationships with the social media platforms to help expose and or sanction those responsible for carrying out the threats. MMA will also use existing tools, to help identify potential networks.
- The IEC will, where possible, be notified of the incident, so they may, if necessary, ask the relevant authorities to also investigate. If, for example, hate speech is also evident, it may be reported to the South African Human Rights Commission, or if gender-based it may also be submitted, to the Commission on Gender Equality.

While we cannot guarantee that the perpetrators will be identified, it is hoped that by offering the option to report it will allow MMA and SANEF not only to capture and record the incidents, but will also help raise public awareness of the importance of journalism.

In addition to following the approach above, the **IEC** may also be approached directly with any matter that falls within its jurisdiction as a contravention of the electoral law framework. For example, as noted above, section 8 of the Electoral Code of Conduct requires candidates to respect the role of the media during elections, including by not preventing members of the media from accessing public political meetings, marches, demonstrations and rallies. It further provides that every party and candidate must take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters. In the event that a registered party or candidate does not adhere to these provisions, this should be brought to the attention of the Commission as a breach of the Electoral Code of Conduct.

A complaint may also be lodged with the **South African Human Rights Commission** in accordance with the Complaints Handling Procedures (1 January 2018). The South African Human Rights Commission is competent to investigate any alleged violation of human rights, either on its own initiative or on receipt of a complaint, and has a wide discretion to decide whether to investigate a complaint or not. Another Chapter 9 institution, the **Commission for Gender Equality**, may also be approached in appropriate circumstances with a gender-based claim falling within its mandate.

The **Equality Court** can also be approached for recourse for harassment. In this regard, section 11 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) states that “[n]o person may subject any person to harassment”, subject to the definition of harassment contained in section 1 of the Equality Act.<sup>93</sup> Notably, the South African Human Rights Commission is permitted to institute legal proceedings under the Equality Act in its own name or on behalf of a person or group of persons.<sup>94</sup> An affected person is therefore in a position to choose whether to bring a case

<sup>93</sup> Harassment is defined in section 1 of the Equality Act as unwanted conduct which is persistent or serious and 40 demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences, and which is related to sex, gender or sexual orientation, or to a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.

<sup>94</sup> Section 20(1)(f) of the Equality Act.

of harassment in their own name or ask the South African Human Rights Commission to act on their behalf.

A claim for **civil damages** may also be brought for other forms of harm suffered, such as in respect of a civil claim for defamation brought by a journalist against a person who has maliciously spread false information about him or her. There are various legal practitioners in South Africa who can be approached for assistance, and the Legal Practice Council can be approached for a full list of registered legal practitioners in the country. In the event that a journalist or media organisation cannot afford to pay for legal fees, there are also public interest organisations that may assist, as well as other legal practitioners who may be willing to assist on a *pro bono* basis. The Media Legal Defence Initiative may also be approached for possible assistance, as its mandate is to provide legal help for journalists, bloggers and independent media around the world.<sup>95</sup>

An **interdict** is an important tool that can be relied on to stop certain conduct from persisting. An interdict – whether temporary or final – is an order of court, and is therefore binding on the person or entity that it is granted against, subject to it being discharged. There are four requirements that must be met for an interim interdict: (i) the applicant must have a clear *prima facie* legal right; (ii) the applicant must have a well-grounded basis for believing it will suffer irreparable harm if the interdict is not granted; (iii) the balance of convenience must favour the applicant; and (iv) there is no alternative remedy available to the applicant.

Once an interim interdict is granted, a court date will be allocated on which the parties wanting to oppose the relief can argue against why the interim interdict should not be made final. If no one appears on the return date, the interim interdict is made final; if it is opposed, the matter may be postponed and argued fully at a later date. While the case is ongoing, the interim interdict typically remains in force.

#### **SOUTH AFRICAN NATIONAL EDITORS FORUM AND OTHERS V BLACK LAND FIRST AND ANOTHER**

[2017] ZAGPJHC 179 (7 July 2017) at para 29.

In *South African National Editors Forum and Others v Black Land First and Another*, the High Court of South Africa granted an interdict in favour of the media broadly, prohibiting the respondent from: “engaging in any of the following acts directed towards the applicants: Intimidation; Harassment; Assaults; Threats; Coming to their homes; or acting in any manner that would constitute an infringement of their personal liberty”, and from “making any threatening or intimidating gestures on social media ... that references any violence, harm and threat”. The court subsequently held the respondent in contempt of court for continuing to engage in certain activities, including the harassment of members of the media, following the interdict having been granted.

A **protection order** may also be obtained in terms of the Protection from Harassment Act 17 of 2011. The provisions regarding an application for a protection order are set out in terms of section 2 thereof. As set out in section 3(2), the court must issue an interim protection order against the respondent – notwithstanding that the respondent has not been given notice of the proceedings – if it is satisfied that there is *prima facie* evidence of the following: (i) the respondent is engaging or has engaged in harassment; (ii) harm is being suffered by the complainant or a related person as a result of that conduct if a protection order is not issued immediately; and (iii) the protection accorded by the interim protection order is likely not to be achieved if prior notice of the application is given to the respondent. Once an

<sup>95</sup> Accessible here: <https://www.mediadefence.org/>.

interim protection order has been issued, this must be served on the respondent by the clerk of the court, sheriff or peace officer identified by the court.<sup>96</sup> Section 9 of the Protection from Harassment Act sets out the provisions for the final granting of a protection order.

#### SECTION 4 OF THE PROTECTION FROM HARASSMENT ACT

Of particular relevance to online harassment, section 4 provides that if a court is satisfied that a protection order must be issued as a result of harassment that has taken place over electronic communications or e-mail, and the identity of the respondent is not known, the court may issue a direction to an electronic communications service provider directing that it furnish the court with the following information on affidavit:

- The electronic communications identity number from where the harassing electronic communications or electronic mail originated.
- The name, surname, identity number and address of the respondent to whom the electronic communications identity number has been assigned.
- Any information which indicates that electronic communications or electronic mail were or were not sent from the electronic communications identity number of the respondent to the electronic communications identity number of the complainant.
- Any other information that is available to an electronic communications service provider that may be of assistance to the court to identify the respondent or the electronic communications service provider which provides a service to the respondent.

Lastly, it must be emphasised that in the event that a member of the media is facing any form of threat or violence, this must be reported to the South African Police Services as a matter of urgency, as the appropriate authority tasked with handling criminal matters. This can be done in conjunction with certain of the other options set out above, as appropriate. All members of the media are encouraged to prioritise their safety and the safety of those around them, out in place necessary measures for protection, and seek appropriate assistance from colleagues, friends and family, and the designated bodies that can assist.

#### Suggested resources

- ARTICLE 19, 'Acting on UN Human Rights Council Resolution 33/2 on the Safety of Journalists' (2017) (accessible [here](#)).
- CPJ, 'Safety kit for journalists covering the South African election,' (2019) (accessible [here](#)).
- International Declaration on the Protection of Journalists (accessible [here](#)).
- Tactical Technology Collective & Front Line Defenders, 'Security in a box: Digital security tools and tactics', accessible here: <https://securityinabox.org/en/>.
- UN Plan of Action on the Safety of Journalists and the Issue of Impunity (accessible [here](#)).
- UNESCO, 'Director-General report on the safety of journalists and the danger of impunity', (2018) (accessible [here](#)).
- UNESCO, 'Legal standards on freedom of expression: Toolkit for the judiciary in Africa', (2018) (accessible [here](#)).



<sup>96</sup> Section 3(3) of the Protection from Harassment Act.

A PARTNERSHIP BETWEEN:



ELECTORAL COMMISSION OF SOUTH AFRICA  
ENSURING FREE AND FAIR ELECTIONS



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