Joint submission by Amnesty International South Africa,
Campaign for Free Expression, Committee to Protect Journalists, Media Monitoring Africa,
and the South African National Editors' Forum

for the 41st Session of the Universal Periodic Review Working Group, November 2022
South Africa

31 March 2022

Amnesty International South Africa: Amnesty International is a global movement campaigning for human rights. Executive Director, Shenilla Mohamed, +27 11 283 6000, shenilla.mohamed@amnesty.org.za

Campaign for Free Expression (CFE): CFE is a non-profit organisation dedicated to protecting and expanding the right to free expression for all. Director, Anton Harber, anton@harber.co.za

Committee to Protect Journalists (CPJ): CPJ is an independent, non-profit organisation that promotes press freedom worldwide. Africa Program Coordinator, Angela Quintal, +1 212-300 9004. aquintal@cpj.org

Media Monitoring Africa (MMA): MMA is a South African non-profit media advocacy and research organisation. Director, William Bird, +27 11 788 1278, williamb@mma.org.za

South African National Editors' Forum (Sanef): Sanef is a non-profit members advocacy forum for editors and senior journalists. Executive Director, Reggy Moalusi, +27 10 001 8971, reggy@sanef.org.za

Executive summary

1. As organisations promoting freedom of expression, this submission focuses on South Africa's compliance with international human rights obligations related to freedom of opinion and expression and on progress made since the last review in 2017.

2. In particular, the concerns raised in this submission relate to:

    - Physical attacks and harassment of journalists
    - Online attacks on journalists
    - Surveillance of journalists
    - Editorial interference at the public broadcaster
    - "False news"
    - Cybercrimes Act
    - Prevention and Combating of Hate Crimes and Hate Speech Bill
    - Threats to whistleblowers
    - Review of the Protection of State Information Bill
    - Amendments to the Films and Publications Act
    - Children and the media

Human rights instruments referred to in this submission

3. The Constitution of the Republic of South Africa, 1996 contains an extensive and progressive Bill of Rights, and enshrines the right to freedom of opinion and expression, including press freedom.[1] The Constitutional Court has described it as "a sine qua non for every person's right to realise her or his full potential as a human being". It is therefore both a fundamental right in itself, as well as a crucial enabling right necessary to realise other rights. It is not an unqualified right, and may be limited by the need to protect other rights, including the rights to dignity and privacy.[2] However, according to Section 36 (1) of the Constitution, these limitations need to be "reasonable and justifiable in an open and democratic society", and taking into account: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose". These limitations are important when considering changes both enacted and proposed to legislation impacting on freedom of expression in South Africa.

4. In 2019, the Declaration of Principles of Freedom of Expression and Access to Information in Africa (hereafter the "Declaration") was revised by the Special Rapporteur of the Africa Commission on Human and Peoples' Rights. The Declaration reaffirms "the fundamental importance of freedom of expression and access to information as individual human rights, as cornerstones of democracy and as means of ensuring respect for other human rights"[3]. It emphasises the "key role of the media and other means of communication in ensuring full respect for freedom of expression, promoting the free flow of information and ideas, assisting individuals in making informed decisions and facilitating and strengthening democracy".[4] The Declaration stresses the following general principles relevant to this submission: The importance of the rights to freedom of expression and access to information; non-interference with freedom of opinion; non-discrimination; protection of the rights to freedom of expression and access to information online; and protection of human rights defenders and others. Its Principle 20 (2) specifically stresses that States "shall take measures to prevent attacks on journalists and other media practitioners, including

murder, extra-judicial killing, torture and other forms of ill-treatment, arbitrary arrest and detention, enforced disappearance, kidnapping, intimidation, threats and unlawful surveillance undertaken by State and non-State actors".

Implementation of recommendations from previous review

5. Our commentary on the recommendations supported from the previous UPR cycle are contained in the matrix of relevant recommendations in Appendix 1. The two recommendations that were supported for Theme: D43 on Freedom of opinion and expression can be considered 'partially achieved'. However, several other recommendations that are relevant to a free media and were supported are contained in Theme: B31 Equality & non-discrimination, Theme: D31 Liberty and security – general, and Theme: D51 Administration of justice & fair trial. These should be considered either 'partially achieved' or 'not implemented'.

Update on situation for freedom of expression since the last review

General observations

6. While several areas of concern are raised in this submission, threats to freedom of expression in South Africa are being experienced on several fronts at once: a) in-person attacks on journalists by police, political parties, and the public; b) through online hate speech, harassment, and doxxing amongst online threats targeting journalists; d) through the surveillance of journalists by state intelligence; d) through overly punitive legislation that targets journalists or limits their ability to report; and e) through the ongoing vulnerability of senior journalists at the public broadcaster. All of these are limiting the right to free expression in the country and have the potential to limit the right of the public to access information in the public interest. These issues need to be properly and simultaneously addressed by the state in order to prevent a weakening of free expression in the country.

Specific issues of concern

Physical attacks and harassment of journalists

7. There have been at least 59 separate incidents over the past five years where journalists working in the field have been assaulted, or verbally and physically harassed, preventing them from doing their work.

8. The attacks have come from four main sources: the South African Police Services (SAPS); political parties or groups and their supporters; communities where reporting occurs; and crime. The attacks restrict the ability of journalists to perform their tasks properly, and therefore have direct consequences for freedom of the media and freedom of expression in South Africa.

9. With respect to the actions of the SAPS, our concerns are not new, and we refer to recommendations 139.111 and 139.108 on reducing excessive force by police officers supported in the previous cycle (and which should be considered 'not implemented'), and recommendations 139.110 and 139.109 noted in the previous cycle.

10. A detailed list of incidents reported between 2017 and March 2022 are contained in Appendix 2. As it shows, over the past five years, 22 incidents have involved the SAPS, 11 have involved political parties or groups and their supporters, 15 have involved members of the public, and 11 incidents of crime have been reported, many of these involving more than one journalist. It is likely that the number of incidents is higher, and that many go unreported. Of particular concern is the 2019 murder of Free State journalist Thamsanqa Junior Bonase.[5] The case has been presented in court[6] and police are awaiting a decision on the inquest. It remains unconfirmed whether or not his murder was related to his work.

11. We are concerned that the attacks speak to an underlying lack of understanding and acceptance of the importance of a free media and the extent to which they are the result of deliberate attempts by politicians,[7] including cabinet ministers,[8] to undermine the media over the reporting period. This is evident in the actions of the SAPS in a number of incidents, the assaults by political groups at events, and the assaults and harassments by communities where journalists were reporting.

12. As the reported incidents suggest, 2020 in particular saw an increase in the number of incidents involving the SAPS, only some of which can be attributed to the nationwide lockdown due to the Covid-19 pandemic.

13. In most incidents, police officers showed scant regard for media freedoms and rights, and act in contravention of their own Standing Orders. [9] In some, they operated without evident court orders preventing journalists from covering events,[10] and in the worst cases committed criminal acts by intimidating and assaulting journalists.[11] Attacks have included severely beating up journalists, manhandling both male and female journalists, and firing at journalists with rubber bullets. In a number of incidents police officers attempted to delete their footage.

14. In the previous review, South Africa supported a recommendation on combating crime.[12] However, since then, journalists have also been consistently targeted by criminals, who typically rob them of their high-value equipment. In a number of incidents, journalists were threatened at gunpoint and assaulted.

Online attacks on journalists

15. We are concerned about the ongoing and serious online intimidation and harassment of journalists, including through trolling and baiting, doxxing and automated attacks from Twitterbots. Since the last reporting period, journalists have been subjected to hate speech, death threats, threats of physical harm, and public attacks by politicians and public figures. Several examples that illustrate this trend in online attacks are included in Appendix 3.

16. Of specific concern to the coalition is that:

    a) The targeting of journalists or the media in general by politicians often leads to further online harassment and intimidation by their political supporters.

b) Threats against female journalists are frequently gendered and include misogynistic attacks on person, death threats, and threats of rape.[13] Although journalists were not specifically identified in the recommendations, these gendered attacks on female journalists speak to numerous recommendations supported in the previous review cycle on Theme: F13 Violence against women. The coalition would also like to draw attention to Principle 20 (6) of the Declaration on the safety of journalists which notes that "States shall take specific measures to ensure the safety of female journalists and media practitioners by addressing gender specific safety concerns, including sexual and gender-based violence, intimidation and harassment."[14]

17. While the South African National Editors' Forum (Sanef) among others in the coalition have consistently pointed to the prevalence of online harassment and abuse of journalists and its deleterious implications for media freedoms in South Africa, most cases of the online harassment of journalists in South Africa go unreported, and are now accepted as "part of the job".[15] Yet by being harmful to the dignity of journalists and their rights to safety, including in the workplace, these threats undermine media freedoms and can have a chilling effect on a journalist's willingness to perform his or her duties in as robust a way as is required, sometimes leading to self-censorship.

18. Of further concern to the coalition is that journalists subject to these attacks cannot find easy recourse to justice. For example, in October 2019, Sanef lost its Equality Court application to interdict EFF leader Julius Malema. The application was lodged together with five journalists[16] who said they had been intimidated and harassed both in person and online by EFF supporters following several statements made against the media by Malema. However, the court found that journalists did not qualify for special protection under the Promotion of Equality and Prevention of Unfair Discrimination Act.[17]

Surveillance of journalists

19. In the previous review, South Africa supported a recommendation[18] to continue its efforts to ensure the right to access to information and freedom of expression by adopting regulations in accordance with the Constitution and its international commitments.

20. We welcome the ruling by the Constitutional Court declaring the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002[19] (or RICA) unconstitutional. However, we are concerned that reports of state surveillance by the Crime Intelligence division of the SAPS persist, with the latest incidents reported as recently as March 2021.[20]

21. RICA, which allows for the surveillance of the media, was challenged in the High Court in 2019 on grounds of its unconstitutionality by the amaBhungane Centre for Investigative Journalism, and Sam Sole, an investigative journalist working at the centre. In its judgment, which upheld a previous High Court ruling, the Constitutional Court said the Act "fails to provide adequate safeguards to protect the right to privacy, as buttressed by the rights of access to courts, freedom of expression and the media, and legal privilege" and that "the confidentiality of journalists' sources is protected by the rights to freedom of expression and the media."[21] The court also said inter alia that so-called "bulk interception" is not authorised by law.[22] The court suspended its declaration of invalidity for two years to allow Parliament time to develop remedial legislation.[23]

22. Proving state surveillance of journalists is difficult given that by its very nature it is covert and designed to be kept secret from the persons surveilled. However, in their application to the court amaBhungane and Sole listed eight cases of proven or suspected surveillance of journalists by the state or linked to the state since 2011. These are listed in Appendix 4 and are considered by journalists to be the "tip of the iceberg".[24]

23. Any state surveillance legislation should comply with the principles of legality, legitimacy, necessity and proportionality and align with the Declaration's Principle 20.2 that "States shall take measures to prevent…unlawful surveillance undertaken by State and non-State actors", and Principle 25.3 that surveillance may only be "ordered by an impartial and independent court and [should be] subject to appropriate safeguards". Furthermore, we would like to draw the government's attention to the safeguards contained in Principle 41 on Privacy and communication surveillance including the requirements that states provide "*proactive* [our emphasis] transparency on the nature and scope of its use" and that surveillance is subject to "effective monitoring and regular review by an independent oversight mechanism".

Editorial interference at the public broadcaster

24. In the previous review, South Africa supported a recommendation to ensure that journalists, especially those working at the public broadcaster, can work without fear of reprisals for expressing critical opinions, including when reporting on issues sensitive to the government.[25]

25. Despite assurances from the public broadcaster[26] that it is committed to its editorial independence from political or commercial suasion, not enough has been done to practically ensure this independence, and that mechanisms for transparency to reassure the public of its unbiased coverage of news are not sufficiently in place. This includes board interference in editorial decision-making ostensibly to secure preferential coverage for the ruling-party.

26. Despite several house-cleaning exercises over the past five years, including a revision to the public broadcaster's editorial code[27] (which is considered a benchmark for editorial independence at the public broadcaster and is supported by the industry and media watchdogs) and reassurances from the broadcaster of its commitment to editorial integrity and independence, allegations continue to surface of undue political influence in editorial decision-making.[28]

27. Since the last reporting period, there have been several parliamentary and independent processes aimed at securing the editorial independence of the SABC, as well as further allegations of editorial malpractice at the broadcaster. A summary of these processes and allegations are included in Appendix 5.

28. We would like to emphasise Principles 13 (1) on public service media in the Declaration, that "States shall establish public service media governed by a transparently constituted and diverse board adequately protected against undue interference of a political, commercial or other nature", and Principle 13 (3), that "The editorial independence of public service media shall be guaranteed".

"False news"

29. In 2020, during the first year of the Covid-19 pandemic, regulations were issued in relation to the Disaster Management Act of 2002.[29] Section 14 (2) of the regulations made it an offense to publish any statement "with the intention to deceive any other person" about Covid-19, or any measure taken by the government to address Covid-19.

30. We are concerned that attempts to criminalise the spread of "false news"[30] will largely be ineffective, can be misused, and will have a chilling effect on media freedoms.

31. Research has suggested that such legislation is often vague in scope and terminology, and is implemented in a partisan way, frequently to silence government critics, including during election periods. [31]

32. With respect to the regulations issued in 2020 criminalising the publication of any statement made "with the intention to deceive", particularly in relation to criticism of government actions on the pandemic, we note the vagueness of the clause allowing for broad interpretation of intention leaves the regulations open to misuse.

33. As suggested in the recent (2021) Inquiry into Media Ethics and Credibility initiated by the Sanef, and echoed elsewhere, leaving "false news" unaddressed can damage public trust in journalism, and result in a loss in media credibility.[32] However, criminalising the spread of information over educating the public and encouraging fact-checking and other mechanisms to increase the public's access to trustworthy, objective and reliable data is likely to lead to serious infringements of media freedoms, including the misuse of this legislation by partisan authorities, censorship and self-censorship, and, as has been pointed out, could delay access to critical information that is in the public interest.[33]

Cybercrimes Act

34. In 2020 the Cybercrimes Act 19[34] was passed. Amongst other things, it criminalises the "disclosure of data messages which are harmful" in order to "protect complainants from [the] harmful effects of malicious communications".

35. The Act is a problematic and potentially malicious piece of legislation in several respects. These include the lack of any public interest override for communications that are intentionally published in the public interest, the interests of justice or that are already in the public domain, particularly by members of the media who may seek to report on these communications.[35] There is also a lack of an appropriate internet governance policy in South Africa to ensure effective and coherent responses to cybercrimes in line with good governance practices.[36]

Prevention and Combating of Hate Crimes and Hate Speech Bill

36. In the previous review, South Africa supported several recommendations on the Prevention and Combating of Hate Crimes and Hate Speech Bill (2018),[37] including 139.59 on the commitment to engage stakeholders[38] and recommendation 139.51 which calls for the state to ensure that the provisions in the Bill "cannot be used to restrict the rights to freedom of expression".[39]

37. We welcome the invitation in October 2021 for public comments on the Bill, which we consider flawed in several respects.[40]

38. While it is important to address hate speech in public communications by groups in power, or people or institutions of authority, including the media, it is necessary for the Bill to strike an appropriate balance between freedom of expression and the protection of human dignity. In particular, the criminalisation of hate speech is disproportionate given that civil limitations on hate speech are already contained in the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000,[41] (the criminalisation of hate speech effectively makes such criminalisation a "first resort" in contradiction to the Declaration).[42]

39. The Bill is also disproportionate and will limit freedom of expression given a disjunctive approach adopted by the proposed legislation between, where the objective test determines the subjective intention. Moreover, the Bill is disproportionate and in contradiction to the Declaration in that it limits the right to privacy by criminalising hate speech in private conversation. Lastly, what constitutes "harm" is vague, and it is unclear how it would be proved in most circumstances.

40. Although the need to address hate speech in a culturally diverse country like South Africa is important, given multiple factors such as its apartheid past, its high level of migrancy from other African states, history of gender-related violence, and the targeting of sexual minorities, it is not clear that hate speech can be effectively legislated against without implementing broader interventions to eradicate discrimination and foster greater equality in a way that can meaningfully promote understanding, mutual respect between cultures and peoples of different identities, and a narrowing or dissolution of the causes of identity-based hate of others.

41. In 2019, the UN Special Rapporteur on the right to freedom of opinion and expression released a report on states' efforts to regulate online hate speech. The Special Rapporteur noted the risks of states using disproportionate means and excessive criminalisation of speech and urged states to find the least restrictive means to regulate freedom of expression. The Special Rapporteur also highlighted that: "[s]ome States have taken steps to address illegal hate speech through other creative and seemingly proportionate means"[43] and emphasised that fostering "tolerance and intercommunity respect [and] education and intercultural dialogue"[44] should precede criminalisation. We note that such mechanisms of engagement are in line with several recommendations supported by South Africa during the last review.[45]

42. We would further like to draw attention to Principle 23 (2 and 3) of the Declaration on "Prohibited Speech", which states the following principles governing hate speech:

> 2. States shall criminalise prohibited speech *as a last resort* [our emphasis] and only for the most severe cases. In determining the threshold of severity that may warrant criminal sanctions, States shall take into account the:
>
> a. prevailing social and political context;
> b. status of the speaker in relation to the audience;
> c. existence of a clear intent to incite;
> d. content and form of the speech;
> e. extent of the speech, including its public nature, size of audience

and means of dissemination;
f. real likelihood and imminence of harm.

3. States shall not prohibit speech that merely lacks civility or which offends or disturbs.[46]

Threats to whistleblowers

43. In 2017 amendments[47] to the Protected Disclosures Act 26 of 2000[48] were passed, extending the application of the Act as well as the protections offered to those who under an obligation of confidentiality disclose wrongdoing. However, we are still concerned about the lack of proper safety afforded to whistleblowers as required by Article 32 (2) of the United Nations Convention Against Corruption. The protection of whistleblowers is fundamental to the operations of a free media. While South Africa has a robust legal system protecting whistleblowers not limited to the Protected Disclosures Act, gaps in the legislative framework, and the practical workings of these mechanisms, were exposed after the murder of Babita Deokaran, the chief director of financial accounting at the Gauteng Department of Health in Gauteng. Deokaran had exposed corruption in the procurement of Covid-19 personal protective equipment.

44. In January 2022 a former business strategy advisor, Athol Williams, who had testified before the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, said he was in danger after his disclosures and was forced to flee the country. He claimed he had asked for state protection but had not received any.[49]

45. This has led to calls to strengthen the Protected Disclosures Act, including with respect to the protection of the identities of whistleblowers, the confidentiality of information flow, expanding the list of people whom whistleblowers can disclose information to, and to bring legislation in line with Article 32 (2) of the Convention Against Corruption which requires that all signatory states establish procedures for the physical protection of whistleblowers.

46. Furthermore, while the Auditor-General and the Public Protector are key institutions that whistleblowers are expected to disclose information to, and are seen as central to realising the purpose of the Act, this places a duty on the state to ensure that these positions are properly funded, and are not compromised through political favours or bias, particularly in the context of the country's history of state capture and ongoing battle against corruption, which inadvertently nullifies the purpose of these reporting mechanisms and further imperils whistleblowers.

Review of the Protection of State Information Bill

47. In the previous review, South Africa merely noted recommendations to revise the Protection of State Information Bill (2010), including the need to remove "any limitations on freedom of expression, including the unwarranted persecution of whistle-blowers".[50]

48. The coalition welcomes the stated intention by President Rampahosa in 2020 to review the Protection of State Information Bill (2010) [51] in order to align it better with the Constitution. While we acknowledge the importance of the Bill that will replace the egregious apartheid-era Public Information Act of 1982, we see this as an opportunity to align the Bill with international norms, and the principles of proportionality and necessity, and would like to

draw attention to Principle 21.2 of the Declaration which states: "Privacy and secrecy laws shall not inhibit the dissemination of information of public interest."

49. In particular, we would like to emphasise the critical importance of including a public interest defence to the sharing of protected information, which is currently absent from the Bill. Without this defence, the ability of journalists to investigate and report is severely crippled.[52] The Bill also allows for a 15- to 25-year jail term for any journalist found to have classified documents in their possession, which violates the right to freedom of expression and is likely to have a negative impact on the free flow of information in the public interest.

Amendments to the Films and Publications Act

50. In 2019, amendments to the Films and Publications Act, 1996[53] were passed. Among other things, the Films and Publications Amendment Act 11 of 2019[54] regulates the online distribution of films and games, extend compliance obligations of the Act to distributors, provide for the classification of publications, films and games, including the role of independent industry classification bodies. Our objections to the Act include the prior-classification and permission of content that is required and the vague definitions of "harms".[55]

51. While members of the Press Council are exempt from pre-publication and classification, the Film and Publications Board (FPB) is nevertheless significantly and disproportionately empowered through the amendments. As has been stated: "The amendments effectively empower the FPB to make decisions as to what is and is not allowed speech under the South African Constitution, which is an issue that the courts struggle to deal with. The FPB will not be appropriately equipped to make such decisions and this provision effectively amounts to online censorship. As such, this may be the subject of constitutional challenge in due course."[56]

Children and the media

52. In 2019, the Constitutional Court ruled on Section 154(3) of the Criminal Procedure Act, forcing the state to redraft the section with respect to the protection of children in the media.[57] The challenge with Section 154(3) is that it impacted negatively both on media rights and freedom of expression, as well as children's rights to dignity and privacy. We consider this a significant development that will enable a proper balancing of rights in the legislation, and welcome the fact that Section 154(3) will be redrafted by the National Council of Provinces.[58] However, we encourage the state to ensure that the spirit of the Constitutional Court ruling is adhered to, and that a proper balancing of rights is achieved in the redrafting.

Recommendations to the Republic of South Africa by the coalition

Physical attacks and harassment of journalists [59]

53. Ensure the Public Prosecutor promptly finalises its independent and impartial investigation into the murder of Thamsanqa Junior Bonase and brings all those responsible to justice in a fair trial.

54. Enforce Standing Order (General) 156 which sets out how police officers should treat journalists and details limitations in this regard, including with respect to preventing journalists from photographing or making visual recordings of incidents. In collaboration with, a relevant media organisation such as Sanef, allocate significantly more resources to the SAPS for training on the content of Standing Order 156.

55. Launch a public awareness campaign on the importance of a free media to the advancement of human rights, particularly at the grassroots and community levels.

56. Consider the vulnerability of journalists to crime as a special case with specific needs when developing crime-fighting strategies in communities. The specific vulnerabilities in this regard need to be understood in consultation with journalists and relevant media organisations such as Sanef.

Surveillance of journalists

57. Ensure the changes to the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 (2002) are in line with both the Constitution, South Africa's international obligations, and accepted human rights best practice, including that the principles of transparency and oversight by an independent body of lawful state surveillance is given due consideration.

58. Open up any proposed changes to the legislation for public input and deliberation, including consultation with journalists and media organisations.

Editorial interference at the public broadcaster

59. Ensure that the SABC fully implements its 2020 editorial policies to guarantee its full independence.

60. Implement these policies in a transparent way that reassures the public of the editorial independence of the broadcaster.

"False news"

61. Recognise the nuanced ecology of causes of the circulation of "false news", and repeal any law that criminalises disinformation and misinformation.

62. Adopt a multistakeholder approach to responses to "false news", such as those adopted by the Independent Electoral Commission and Media Monitoring Africa in the lead up to elections.[60]

63. Step up efforts to disseminate reliable, objective, trustworthy and evidence-based information, which is crucial to counter false and misleading information and build trust among the population.

64. Support Media and Information Literacy (MIL) training initiatives, including fact-checking services, and systematise MIL training in the country's education system.

65. Commit to public transparency in government-decisions making in all spheres of activity.[61]

66. Build the capacity of officials to work with data and report on data properly, and properly fund data capacity development in South Africa generally.

Cybercrimes Act

67. Amend the Cybercrimes Act to include a public interest defence to protect journalists and other media workers.

Prevention and Combating of Hate Crimes and Hate Speech Bill

68. Ensure that unnecessary and disproportionate limits to freedom of expression are removed from the Bill in the current review process.

69. Explore and implement broader interventions to foster equality and non-discrimination, including mechanisms of dialogue and discussion, as alternative ways to progressively educate the public on the harms of hate speech and to foster national unity.

Threats to whistleblowers

70. Review the Protected Disclosures Act to strengthen the protection of whistleblowers, including with respect to reporting mechanisms for whistleblowers.

71. Establish transparent oversight mechanisms to ensure that this protection is properly received, and that the public is reassured that this protection is received.

72. Allocate resources for the protection of whistleblowers and ensure that these are clearly accounted for in line with the Public Finances Management Act.

73. Adequately fund the Auditor-General and the Public Protector to ensure they have the capacity to properly fulfil their duties in respecting and protecting whistleblowers.

Review of the Protection of State Information Bill

74. Include a public interest defence for the sharing of protected information in the Bill.

75. Make specific the definition of "classified documents" in order to limit its misuse.

76. Ensure that journalists are not punished solely for being in possession of protected information and bring relevant laws in line with international standards.

The Films and Publications Act

77. Revisit the amendments to the Act to bring them practically and meaningfully in line with its obligation to protect freedom of expression and the necessary role of the media in society.

Children and the media

78. Ensure the balance struck by the Constitutional Court between children's rights to dignity and privacy and the right to freedom of expression is followed through in the re-drafting of the Criminal Procedure Act.

[1] Section 16(1) of the Constitution of the Republic of South Africa No. 108 of 1996. https://www.gov.za/sites/default/files/images/a108-96.pdf

[2] Constitutional Court judgment. S v Mamabolo 2001(3) SA 409 (C). https://collections.concourt.org.za/handle/20.500.12144/2112

[3] African Commission on Human and Peoples' Rights (2019) *Declaration of the Principles on Freedom of Expression and Access to Information in Africa*. Adopted at 65th Ordinary Session, 21 October to 10 November 2019. p7 https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf

[4] Ibid. p8

[5] Committee to Protect Journalists (May 22, 2019) "Thamsanqa Junior Bonase Killed". https://cpj.org/data/people/thamsanqa-junior-bonase/

[6] On December 28, 2021.

[7] South African National Editors' Forum (December 19, 2018) Statement. "Sanef Approaches Equality Court over Malema Remarks". https://sanef.org.za/sanef-approaches-equality-court-over-malema-remarks/

[8] South African National Editors' Forum (November 13, 2018) Statement. "Sanef Meets Mboweni over "War" Tweets". https://sanef.org.za/sanef-meets-mboweni-over-war-tweets/

[9] For an overview of Standing Order (General) 156 Media Communication in the South African Police Service Communication and Liaison Services, see South African National Editors' Forum (August 12, 2019). Statement. "Rules SAPS must follow when dealing with journalists". https://sanef.org.za/rules-saps-must-follow-when-dealing-with-journalists/

[10] South African National Editors' Forum (April 8, 2020) Statement. "Sanef Condemns Barring of Journalists from Cape Courts and Metro Police Harassment". https://sanef.org.za/sanef-condemns-barring-of-journalists-from-cape-courts-and-metro-police-harassment/

[11] South African National Editors' Forum (May 16, 2020) Statement. "Sanef Deeply Disturbed by the Physical Abuse and Incarceration of a Journalist". https://sanef.org.za/sanef-deeply-disturbed-by-the-physical-abuse-and-incarceration-of-a-journalist/

[12] A/HRC/36/16/Add.1, Recommendation 139.107 (Angola)

[13] Amnesty International (2021) *Twitter Scorecard: Tracking Twitter's progress in addressing violence and abuse against women online in South Africa.* https://amnesty.org.za/research/south-africa-new-report-finds-twitter-continues-to-fall-short-on-protecting-women-online/

[14] African Commission on Human and Peoples' Rights (2019) *Declaration of the Principles on Freedom of Expression and Access to Information in Africa*. Adopted at 65th Ordinary Session, 21 October to 10 November 2019. p17. https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf

[15] Quintal. A (July 1, 2019) "Discredited, threatened, attacked: challenges of covering South Africa's election in the digital age". Committee to Protect Journalists. https://cpj.org/2019/07/south-africa-election-journalists-online-harassment-threats-doxx/, In particular the author writes: "Some of the journalists with whom I met sought to play down the threats. They insisted they were not 'cry-babies'. South African journalists, for example, were not being jailed or killed for their work. Their colleagues had it far worse elsewhere in Africa, they said. Younger journalists, in particular, dismissed the uptick in harassment and intimidation as 'normal'."

[16] Ranjeni Munusamy, Adriaan Basson (News24), Pauli van Wyk (Daily Maverick), Barry Bateman (Eyewitness News) and Max du Preez (Vrye Weekblad).

[17] Equality Court (October 24, 2019) Judgment. Case No 90405/18. https://mediamonitoringafrica.org/wp-content/uploads/2019/10/SKM_654e19102411230.pdf

[18] A/HRC/36/16/Add.1, recommendation 139.118 (Poland)

[19] Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002. https//gov.za/documents/regulation-interception-communications-and-provision-communication-related-information--13

[20] South African National Editors' Forum (March 8, 2021) Statement. "Sanef concerned about the allegedly illegal surveillance and interception of News24 journalist by the Crime Intelligence (CI) division". https://sanef.org.za/sanef-concerned-about-allegedly-illegal-surveillance-and-interception-of-news24-journalist-by-the-crime-intelligence-ci-division/; and South African National Editors' Forum (March 20, 2021) "Hands off journalists Sanef tells crime intelligence division". https://sanef.org.za/hands-off-journalists-sanef-

tells-crime-intelligence-division/

[21] Constitutional Court of South Africa (February 4, 2021). Post judgment media summary. "Amabhungane Centre for Investigative Journalism NPC and another V Minister of Justice and Correctional Services and others; Minister of Police V Amabhungane Centre for Investigative Journalism NPC and others. CCT278/19 & CCT279/19" https://www.concourt.org.za/index.php/judgement/383-amabhungane-centre-for-investigative-journalism-npc-and-another-v-minister-of-justice-and-correctional-services-and-others-minister-of-police-v-amabhungane-centre-for-investigative-journalism-npc-and-others-cct278-19-cct279-19

[22] Bulk interception is massive surveillance and data retention occurs. See CPJ's interview with Sole: Quintal, A (February 10, 2021) "South African journalist Sam Sole on landmark court victory: '2008 surveillance was the tip of the iceberg'". Committee to Protect Journalists. https://cpj.org/2021/02/south-african-journalist-sam-sole-on-landmark-court-victory-2008-surveillance-was-the-tip-of-the-iceberg/

[23] Constitutional Court of South Africa (February 4, 2021). Post judgment media summary. "Amabhungane Centre for Investigative Journalism NPC and another V Minister of Justice and Correctional Services and others; Minister of Police V Amabhungane Centre for Investigative Journalism NPC and others. CCT278/19 & CCT279/19" https://www.concourt.org.za/index.php/judgement/383-amabhungane-centre-for-investigative-journalism-npc-and-another-v-minister-of-justice-and-correctional-services-and-others-minister-of-police-v-amabhungane-centre-for-investigative-journalism-npc-and-others-cct278-19-cct279-19

[24] Quintal, A (February 10, 2021) "South African journalist Sam Sole on landmark court victory: '2008 surveillance was the tip of the iceberg'". Committee to Protect Journalists. https://cpj.org/2021/02/south-african-journalist-sam-sole-on-landmark-court-victory-2008-surveillance-was-the-tip-of-the-iceberg/

[25] A/HRC/36/16/Add.1, recommendation 139.121, (Sweden)

[26] The SABC has 19 radio stations and six television channels, and its programming reaches well over the majority of the South African population. Its television channels alone broadcast to nearly 30 million adults in a typical month. It broadcasts in several of the country's official languages.

[27] South African Broadcasting Corporation (2020) *SABC Editorial Policies 2020*. https://web.sabc.co.za/digital/stage/editorialpolicies/SABC_Editorial_Policies_2020.pdf

[28] South African National Editors' Forum (January 29, 2022) Statement. "Phathiswa Magopeni's unfortunate dismissal by the SABC". https://sanef.org.za/phathiswa-magopenis-unfortunate-dismissal-by-the-sabc/

[29] Department of Co-operative Governance and Traditional Affairs (April 25, 2020) Regulations issued in terms of Section 27(2) of the Disaster Management Act, 2002. https://www.gov.za/sites/default/files/gcis_document/202004/43258rg11098gon480s.pdf

[30] By "false news" we refer to both disinformation and misinformation. We use this term because it is appearing in numerous policy documents throughout the world, although we consider it a problematic term in that it may be used to conceal the necessary distinction between disinformation and misinformation.

[31] Cunliffe-Jones, P et al. (2021) *Misinformation Policy in Sub-Saharan Africa: From Laws and Regulations to Media Literacy*. University of Westminster Press. https://doi.org/10.16997/book53

[32] In the South African context, false news is the result of, amongst others, the deliberate construction of false narratives, or alleged payment of journalists to write false stories (disinformation, and in the context of state capture); the apparently deliberate publishing of false news by media companies in the service of personal or corporate vendettas (disinformation); the unverified publishing of content through editorial lapses (misinformation); and the poor analysis of data shared by authorities (misinformation).

[33] Committee to Protect Journalists (March 19, 2020) "South Africa enacts regulations criminalizing 'disinformation' on coronavirus outbreak". https://cpj.org/2020/03/south-africa-enacts-regulations-criminalizing-disi/

[34] Cybercrimes Act 19 of 2020. https://www.gov.za/sites/default/files/gcis_document/202106/44651gon324.pdf

[35] Journalists or human rights defenders who publish content that falls within the scope of "malicious communications", but which may be in the public interest or in the interests of justice may still be criminally liable in terms of the Act.

[36] Furthermore, a socio-economic impact assessment was not made public for stakeholders to comment on before the Act can be signed into law. According to the Socio-Economic Impact Assessment System Guidelines, published by the Department of Planning, Monitoring and Evaluation, the compilation and publication of a socio-economic impact assessment is a mandatory requirement that must be fulfilled prior to the finalisation of any new or amended legislation. That it has not been provided is of profound concern given that it is a

Cabinet Directive.

[37] Prevention and Combating of Hate Crimes and Hate Speech Bill (2018). https://www.gov.za/documents/prevention-and-combating-hate-crimes-and-hate-speech-bill-b9-2018-13-apr-2018-0000

[38] A/HRC/36/16/Add.1, recommendation 139.59 (United States of America)

[39] A/HRC/36/16/Add.1, recommendation 139.51 (Estonia)

[40] Media Monitoring Africa (October 1, 2021) Submission. *Prevention and Combating of Hate Crimes and Hate Speech Bill [B9 – 2018]* https://mediamonitoringafrica.org/wp-content/uploads/2022/01/Media-Monitoring-Africa-Submissions-Prevention-and-Combating-of-Hate-Crimes-and-Hate-Speech-Bill-.pdf

[41] Promotion of Equality and Prevention of Unfair Discrimination Act of 2000. https://www.gov.za/documents/promotion-equality-and-prevention-unfair-discrimination-act

[42] Section 4(1)(a) of the Hate Speech Bill criminalises hate speech which "could reasonably be construed to demonstrate a clear intention to (i) be harmful or to incite harm; or (ii) promote or propagate hatred" regardless of the form of communication, or the number of people communicated with (private communications is also covered by the draft). Hate speech is also limited to a list of statuses and identities: "age; albinism; birth; colour; culture; disability; ethnic or social origin; gender or gender identity; HIV status; language; nationality, migrant or refugee status; race; religion; sex, which includes intersex; or sexual orientation".

[43] Kaye, D. (2019, 9 October) *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*. United Nations General Assembly. p15. par. 36. A/74/486 - E - A/74/486 - Desktop (undocs.org

[44] Ibid. p9. par. 18

[45] A/HRC/36/16/Add.1, recommendations 139.60-61 (Canada, Hungary) and 139.85 (Guatemala)

[46] African Commission on Human and Peoples' Rights (2019) *Declaration of the Principles on Freedom of Expression and Access to Information in Africa*. Adopted at 65th Ordinary Session, 21 October to 10 November 2019. p18 https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf

[47] Protected Disclosures Amendment Act 5 of 2017. https://www.gov.za/sites/default/files/gcis_document/201708/410162-8-2017act5of2017protecteddisclosuresamendacta.pdf

[48] Protected Disclosures Act 26 of 2000. https://www.gov.za/documents/protected-disclosures-act. The Constitution, the Labour Relations Act, Companies Act, the South African Competition Commission, and the Prevention and Combating of Corrupt Activities Act also all form part of the legislative framework supporting whistleblowing.

[49] News24.com (January 8, 2022) "Whistleblower Athol Williams: 'I'm in danger and I don't know where it will come from'". https://www.news24.com/news24/southafrica/news/whistleblower-athol-williams-im-in-danger-and-i-dont-know-where-it-will-come-from-20220108

[50] A/HRC/36/16/Add.1, recommendations 139.119-120 (Sweden, Switzerland)

[51] Protection of State Information Bill (2010). https://www.gov.za/documents/protection-state-information-bill-3

[52] South African National Editors' Forum (June 11, 2020) Statement. "Sanef welcomes the President's decision to review the 'Secrecy Bill'" https://sanef.org.za/sanef-welcomes-the-presidents-decision-to-review-the-secrecy-bill/

[53] Films and Publications Act, 1996. https://www.gov.za/documents/films-and-publications-act

[54] Films and Publications Amendment Act 11 of 2019. https://www.gov.za/documents/films-and-publications-amendment-act-11-2019-3-oct-2019-0000

[55] Media Monitoring Africa (2020) *Submission to the draft Films and Publications Amendment Regulations, 2020*. https://mediamonitoringafrica.org/wp-content/uploads/2020/08/200817-MMA-Submission-on-the-Films-and-Publications-Amendment-Regulations.pdf

[56] Ongeso, J.P. and Dyer L. (March 3, 2022) "South Africa: Films and Publications Amendment Act comes into operation". Bowmans. https://www.bowmanslaw.com/insights/technology-media-and-telecommunications/south-africa-films-and-publications-amendment-act-comes-into-operation/

[57] Constitutional Court of South Africa. *Centre for Child Law and Others v Media 24 Limited and Others (CCT261/18) [2019] ZACC 46; 2020 (3) BCLR 245 (CC); 2020 (1) SACR 469 (CC); 2020 (4) SA 319 (CC) (4 December 2019)* http://www.saflii.org/za/cases/ZACC/2019/46.html

[58] National Council of Provinces, Security and Justice (November 10, 2021). Briefing. "Criminal Procedure Amendment Bill: briefing by Ministry of Justice; Removal of Magistrate from office" https://pmg.org.za/committee-meeting/33760/

[59] We would like to draw attention to Principles 20.1 and 20.2 of the Declaration on the safety of journalists: **"**1. States shall guarantee the safety of journalists and other media practitioners." and "2. States shall take measures to prevent attacks on journalists and other media practitioners, including murder, extra-judicial killing, torture and other forms of ill-treatment, arbitrary arrest and detention, enforced disappearance, kidnapping, intimidation, threats and unlawful surveillance undertaken by State and non-State actors."

[60] Real 411. Website. https://real411.org.za/election

[61] As a recent example, In 2020 questions were raised whether the NCCC, set up to co-ordinate the government's Covid-19 response, was ignoring advice from the Ministerial Advisory Committee on covid-19 (MAC) – a group of biomedical and public health experts that had been formed to advise the NCCC. This was after Professor Glenda Gray, a prominent MAC member and president of the South African Medical Research Council, openly criticised government regulations for being irrational and unscientific. These tensions were compounded by the government's poor communications on the scientific basis of its decisions for what often appeared to be ad hoc regulations on a range of issues. It was only in late August, following pressure from the media and civil society, that the department of health made its MAC advisories public. The reluctance to share the advisories arguably contributed to the spread of disinformation on the pandemic.