



Namibia

1 Introduction

The Republic of Namibia is a large country with a small population of just over 2.5 million people, and approximately 55% of the population lives in an urban environment.¹ The territory, previously known as South West Africa, was administered by South Africa from the end of World War I and gained independence in 1990. Since independence, Namibia has been a constitutional democracy with the South West African People's Organization (Swapo) as the ruling party. The current media environment in Namibia, particularly in respect of broadcasting, is very different compared to the pre-independence regime. There are, for example, several broadcasters, and the public has access to a wider range of news, information and viewpoints than was previously the case. In both 2019 and 2020, Namibia ranked first among African countries on the World Press Freedom Index.²

Namibia is a country of contradictions. Although Namibia claims 53% of the population has access to electricity, it varies considerably across the country with 35% of people in rural areas and approximately 72% of the urban population having access to electricity.³ Internet access is available to roughly 53% of the population, with just over 27% having a Facebook account.⁴ It is probable that urban vs rural internet penetration rates will be similarly unequal. Namibia has not yet completed the Digital Terrestrial Television (DTT) conversion, having failed to meet their self-imposed 2016 analogue switch-off deadline.⁵ However, DTT rollout has reached roughly 70% completion.⁶ The last census relating to radio access in Namibia was performed in 2007 and, at that time, approximately 75% of households in Namibia had access to a radio.⁷

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in Namibia. The chapter is divided into five sections:

- ▶ Media and the constitution
- ▶ Media-related legislation
- ▶ Media-related regulations
- ▶ Media self-regulation
- ▶ Media-related case law

The aim of this chapter is to equip the reader with an understanding of the main laws governing the media in Namibia. Critical weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Namibia, to enable the media to fulfil its role of providing the public with relevant news and information better, and to serve as a vehicle for government-citizen debate and discussion.

2 The media and the constitution

In this section, you will learn:

- ▷ the definition of a constitution
- ▷ definition of constitutional supremacy
- ▷ definition of a limitations clause
- ▷ constitutional provisions that protect the media
- ▷ constitutional provisions that might require caution from the media or might conflict with media interests
- ▷ key institutions relevant to the media are established under the Namibian Constitution
- ▷ enforcing rights under the constitution
- ▷ the ‘three branches of government’ and ‘separation of powers’
- ▷ weaknesses in the Namibian Constitution that ought to be strengthened to protect the media

2.1 Definition of a constitution

A constitution is a set of rules that are foundational to the country, institution or organisation to which they relate. For example, you can have a constitution for a soccer club or a professional association, such as a press council. Constitutions such as these set out the rules by which members of the organisation agree to operate. Constitutions can also govern much larger entities, indeed, entire nations.

The Namibian Constitution sets out the foundational rules of the Namibian state. These are the rules upon which the entire country operates. The constitution contains the underlying principles and values of the Republic of Namibia. An important constitutional provision in this regard is article 1(1), which states: ‘The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.’

2.2 Definition of constitutional supremacy

Constitutional supremacy means that the constitution takes precedence over all other law in a particular country, for example, legislation or case law. It is important to ensure that a constitution has legal supremacy; if a government passed a law that violated the constitution (was not in accordance with or conflicted with a constitutional provision) such law could be challenged in a court of law and could be overturned on the ground that it is unconstitutional. The Namibian Constitution makes provision for constitutional supremacy. Article 1(6) specifically states: 'This Constitution shall be the Supreme Law of Namibia.'

2.3 Definition of a limitations clause

Rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech or false, defamatory statements made with reckless disregard for the truth. Governments require the ability to limit rights to serve important societal interests; however, owing to the supremacy of the constitution, this can only be done in accordance with the constitution.

The Namibian Constitution makes provision for two types of legal limitations on the exercise and protection of rights and freedoms contained in Chapter 3 of the Namibian Constitution, headed Fundamental Human Rights and Freedoms.

2.3.1 Internal limitations

Internal limitations clauses occur within an article of the constitution. They deal specifically and only with the limitation of the particular right or freedom that is dealt with in that article. As discussed more fully later in this chapter, both the right to privacy and the right to freedom of expression contain such internal limitations clauses. In other words, the article which contains the right also sets out the parameters or limitations allowable in respect of that right.

2.3.2 Constitutional limitations

General limitations provisions apply to the provisions of a Bill of Rights or other statement setting out fundamental rights. These types of clauses allow a government to pass laws limiting rights, provided this is done in accordance with the constitution.

A general limitations clause applicable to rights can be found in article 22 of the Namibian Constitution, Limitations upon Fundamental Rights and Freedoms. This allows the Namibian government to pass laws limiting fundamental rights and freedoms. Article 22 sets out the requirements for this to be done lawfully. These requirements are that such a law must:

- ▶ be generally applicable — that is, the law may not single out particular individuals and deny them their rights

- ▶ not negate the essential content of the right. This is a difficult legal concept. It means that the limitation cannot do away with the entire right; its essence must remain intact. For example, the death penalty negates the essential content of the right to life — there is nothing left of the right
- ▶ specify the ascertainable extent of the limitation — that is, the law must clearly set out what the limitation is and how far it reaches
- ▶ specify the articles in the constitution that give authority for the limitation.

It is not always clear why it is necessary to have internal limitations clauses if there is a general limitations clause as well. Often, internal limitations clauses offer insight into rights which appear to be substantive but which are not very effective.

2.4 Constitutional provisions that protect the media

The Namibian Constitution contains several important articles in Chapter 3, Fundamental Human Rights and Freedoms. These articles directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are several articles in other chapters of the Namibian Constitution which can be used by the media to ensure effective reporting on government activities.

2.4.1 Freedom of expression

The most important provision that protects the media is article 21(1)(a), which is part of the article headed Fundamental Freedoms. It states: 'All persons shall have the right to freedom of speech and expression, which shall include freedom of the press and other media.' This provision warrants some discussion.

This freedom applies to 'all persons'. This is important as certain rights apply only to particular groups of people, such as citizens (in respect of voting rights, for example) or children (in respect of children's rights). Freedom of expression is, therefore, a fundamental right enjoyed by everyone in Namibia, including foreigners.

The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many examples of this, including physical expressions, such as mime or dance, photography or art.

The article specifies that the right to freedom of expression includes 'freedom of the press and other media'. This is very important for two reasons:

- ▶ it makes it clear that this right can apply to corporate entities such as media houses, newspapers or broadcasters, as well as to individuals
- ▶ it makes it clear that the right extends to both the press and other media. The article distinguishes between the press (with its connotations of the news media) and other media. Thus other media could include, for example, fashion, sports, gardening or social media. Note that all technology platforms are also protected, print media, broadcasting and the internet.

2.4.2 Administrative justice

Another important provision that protects the media is article 18, Administrative Justice, which states:

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

This right also requires further explanation:

An administrative body is not necessarily a state body; they are often private or quasi-private institutions, such as a press council operated by private newspapers or an independent broadcasting regulator. This constitutional requirement would therefore apply to these non-state bodies too.

This provision is important for journalists and the media because it protects them (as it does all people) from administrative officials who act unfairly (for example, maliciously or in a biased manner) and unreasonably (which means there is no rational justification for the action) and who otherwise do not comply with legal requirements. The provision gives them the right to approach a court to review administrative decisions.

2.4.3 Privacy

A third protection is contained in article 13, Privacy. Article 13(1) specifies, among other things, that:

no person shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with the law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others.

The provisions of article 13 are problematic and do not afford the media a great deal of protection. This is because the supposed protections are rather weak. The article contains an internal limitation clause, namely, that the constitutional right to privacy can be limited by law in certain circumstances. Unfortunately, these are widely cast. In particular, it is a pity that terms such as 'national security', 'public safety', and so on are employed as they can be used to deny the media the right to report on sensitive issues. The effect of this is that the constitutional right to privacy is watered down. This article probably does not provide substantial privacy protection to the media and journalists.

2.4.4 Emergency provisions

Important protection for the media is contained in the constitutional articles dealing with states of emergency and derogations of fundamental rights. Chapter 4 contains only one article, article 26, Public Emergency, State of National Defence and Martial Law.

Article 26 contains several provisions which allow the president to:

- ▶ declare a state of emergency in all or part of Namibia, during times of national disaster, state of public defence or national emergency which threaten the life of the nation or the constitutional order
- ▶ make regulations during a state of emergency, including the right to suspend the operation of any rule of the common law, statute or any fundamental right or freedom protected under the constitution.

However, article 26 is subject to article 24 of the constitution, Derogation. Importantly, article 24(3) specifically prohibits the derogation of several rights, such as the right to freedom of speech and expression, which includes the freedom of the press and other media contained in article 21(1)(a).

The constitution therefore specifically does not allow for the freedom of the press and the right to freedom of expression to be interfered with or limited by presidential powers during a declared state of emergency. This is a significant strength of the Namibian Constitution, but one that is rare on the continent.

2.4.5 Public access to sittings of the National Assembly

Article 61 of the Namibian Constitution requires that, as a general rule, all meetings of the National Assembly must be open to the public. The press and other media would therefore have open access to the proceedings of the National Assembly.

Disappointingly, there are exceptions, as provided in article 61(2); however, the public can be excluded only on the adoption of a motion to this effect supported by at least 66% of the members of the National Assembly.

2.4.6 State policy principles encourage public debate

Another provision in the Namibian Constitution which may be used to support the media and the work of journalists is article 95(k). This article falls within Chapter 11 of the constitution, Principles of State Policy, and provides that:

The state shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at... encouragement of the mass of the population through education and other activities and through their organisations to influence Government Policy by debating its decisions.

The media undoubtedly plays a crucial role in educating the population to participate meaningfully in a democracy. This article could therefore be used to

encourage the growth of a culture of openness and transparency on the part of the government. It could be interpreted as requiring media-friendly policies on the part of the state to meet the informational needs of the population.

However, it is important to note that, in terms of article 101 of the constitution, the principles of state policy, including the one set out above, are not legally enforceable by themselves. They are only there to guide government action and can be used by the courts when interpreting laws based on them. Thus, while one cannot directly sue the state for failure to comply with article 95(k), it is useful in interpreting other laws.

2.5 Constitutional provisions that might require caution from the media or might conflict with media interests

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions from the media. Journalists need to understand which provisions in the Namibian Constitution can be used against the media. There are several of these.

2.5.1 Internal limitations on freedom of expression

Perhaps the most important and troubling constitutional provision which could be used against the media is the internal limitation provision (see discussion on limitations clauses above) contained in article 21(2). This limitation, unfortunately, deprives the fundamental freedoms contained in article 21(1) (including freedom of speech and expression, which extends to freedom of the press and other media) of much of their force.

Article 21(2) provides that the freedoms contained in article 21(1) must be exercised subject to the law of Namibia. This is a troubling provision because it essentially provides that an ordinary law, such as a statute, can limit the fundamental freedoms. This goes against the notion of constitutional supremacy (discussed above) and undermines the whole point of enshrining rights in a constitution.

However, article 21(2) does require that such a limiting law must impose 'reasonable restrictions', which are 'necessary in a democratic society' and which are 'required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or concerning contempt of court, defamation or incitement to an offence'.

The reference to defamation is particularly noteworthy. The Namibian Constitution envisages laws limiting freedom of expression to protect against defamation (see case law on defamation below).

2.5.2 Dignity

The requirement of respect for human dignity set out in articles 8, and 8(1) specifically provides that the 'dignity of all persons shall be inviolable'. Dignity is a right

that is often raised in defamation cases because defamation usually undermines the dignity of the person being defamed. This right is frequently set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.5.3 Privacy

Similarly, the right to privacy (discussed in some detail above) is often raised in litigation involving the media. People who find themselves the object of media attention sometimes assert their privacy rights when arguing that they should not be photographed, written about or followed in public.

The media does have to be careful in this regard and should be aware that there are boundaries that need to be respected. It is impossible to state with certainty what these boundaries are as they are context-specific and depend on the circumstances of each case. However, a public figure has less of a right to personal privacy concerning matters relevant to his or her public life. For example, a church minister will have less of a right to privacy concerning his or her private life if it is led in a manner that is inconsistent with his or her church teachings.

2.6 Key institutions relevant to the media established under the Namibian Constitution

Four important institutions concerning the media are established under the Namibian Constitution, the judiciary, the Judicial Services Commission (JSC), the Ombudsman and the Anti-Corruption Commission.

2.6.1 The judiciary

In terms of article 78(1), the judiciary is the Namibian courts, that is the Supreme Court, High Court and lower courts of Namibia.

The judiciary is an important institution for the media because the two rely on each other to support and strengthen democratic practices in a country. The judiciary needs the media to inform the public about its judgments and its role as one of the branches of government, and the media is essential for building public trust and respect for the judiciary, which is the foundation of the rule of law in society. The media needs the judiciary because of the courts' ability to protect the former from unlawful action by the state and unfair damages claims by litigants.

Article 78(2) specifically provides that the courts are independent and subject only to the constitution and the law. Judges are appointed and removed by the president, acting on the recommendation of the JSC. Article 78(7) assigns supervisory authority over the judiciary to the Chief Justice.

2.6.2 The Judicial Services Commission (JSC)

The JSC is a constitutional body established to participate in the appointment and removal of judges and of the Ombudsman. Many would query why the JSC is

relevant to the media. The answer is because of the critical role of the JSC in the judiciary and the Ombudsman, the proper functioning and independence of which are essential for democracy.

In terms of article 85, the JSC is made up of the Chief Justice, the Deputy Chief Justice, the Attorney-General and two members of the legal profession nominated by professional bodies. The provisions regarding the JSC are adequate as it is apparent that legal practitioners, as opposed to politicians, serve on the JSC. This is important to protect the independence of the JSC, which, in turn, is necessary to protect the independence of the judiciary.

2.6.3 The Ombudsman

In terms of article 89 of the Namibian Constitution, the Ombudsman is a constitutional office with the same level of independence as the members of the judiciary. The Ombudsman's functions are set out in article 91 and include investigating complaints regarding violations of fundamental rights. The Ombudsman can, therefore, play an important role in, for example, protecting the media from unlawful action by the state.

The Ombudsman is appointed and removed by the president, acting on the recommendation of the JSC. Specific legislation has been passed governing the office and functions of the Ombudsman in the Ombudsman Act, Act 7 of 1990.

2.6.4 The Anti-Corruption Commission

In terms of article 94A(2) of the Namibian Constitution, the Anti-Corruption Commission (ACC) is established as an 'independent and impartial body'. Article 94A(1) provides that the powers and functions of the ACC in combatting corruption are to be set out in legislation. Such legislation pre-dates the reference to the ACC in the constitution as the ACC was established in terms of the Namibia Anti-Corruption Commission Act, Act 8 of 2003 (the NACCA).

According to section 2(3) of the NACCA Act, the ACC is an agency in the public service as contemplated in the Public Service Act, Act 13 of 1995. The appointment and removal process for ACC commissioners is that they are appointed by the prime minister on the recommendation of the Public Service Commission, in terms of section 18(1) of the Public Service Act.

Interestingly, the constitution was amended to provide for the ACC, which indicates a desire to give the ACC additional protections beyond those provided for in legislation. For example, abolishing the ACC would require a constitutional amendment as opposed to the repeal of the NACCA Act, for example.

The essential role of the ACC is to investigate allegations of corruption or initiate investigations in terms of section 3(a) of the NACCA Act. The ACC is significant because it, as does the media, contributes to transparency and lawful action on the part of the state.

2.7 Enforcing rights under the constitution

A right is only as effective as its enforcement. All too often rights are enshrined in documents such as a constitution or a Bill of Rights, and yet remain empty of substance because they cannot be enforced properly. There are several ways in which the Namibian Constitution addresses the issue and tries to ensure that rights are effective.

Article 5, Protection of Fundamental Rights and Freedoms require all of the fundamental rights and freedoms enshrined in Chapter 3 to be 'respected and upheld by the Executive, the Legislature and the Judiciary' as well as by 'all natural and legal persons in Namibia', where the rights apply to them and 'shall be enforceable by the Courts.' This means that:

- ▶ all three branches of government (see below) must uphold these fundamental rights and freedoms
- ▶ individuals and companies also have a duty to uphold rights and freedoms where applicable
- ▶ a person whose rights or freedoms have been violated can approach the courts for relief.

However, it is obvious that the constitution itself also envisages the right of people, including the media, to approach a body, such as the Ombudsman or the courts, to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected under the constitution is by the provisions of the constitution that entrench the chapter on fundamental human rights and freedoms. If it were easy for the National Assembly to do away with the constitutional protection of rights and freedoms, then, in an overall sense, the enforcement of the rights would be weak. The rights and freedoms would be subject to the constant potential threat of the rights simply being done away with. Article 131 of the constitution, Entrenchment of Fundamental Rights and Freedoms, addresses this concern.

This article flatly disallows the amendment or repeal of any of the provisions of Chapter 3 (which contains the fundamental human rights and freedoms) if the repeal or amendment 'diminishes or detracts from the fundamental human rights and freedoms' contained and defined in that chapter. Importantly, the article also provides that any purported amendment or repeal which violates this rule will be invalid and have no effect.

2.8 The three branches of government and separation of powers

All too often, politicians, commentators and journalists use political terms such as branches of government and separation of powers, but working journalists may not have a clear idea what these terms mean.

2.8.1 Branches of government

It is generally recognised that government power is exercised by three branches of government, namely the executive, the legislature and the judiciary.

The executive

In Namibia, executive power is vested in the president and the Cabinet, in terms of article 27(2). In terms of article 35, the Cabinet is made up of the president, the vice-president, the prime minister, the deputy prime ministers and the ministers appointed from members of the National Assembly. The article has removed the wording that refers to the appointments being made by the president, but it seems clear that this was inadvertent and that Cabinet members do serve at the pleasure of the president.

Article 40 sets out several functions of the Cabinet, including the following:

- ▶ in terms of article 40(a) 'to direct, coordinate and supervise the activities of Ministries and Government departments, including parastatal enterprises'
- ▶ in terms of article 40(b) 'to initiate Bills for submission to the National Assembly'.

The executive is responsible for developing government policy, which is to inform the development of such bills. The role of the executive is to administer or enforce laws, make governmental policy and propose new laws.

The legislature

The principal legislative authority in Namibia is the National Assembly, in terms of article 44. The vast majority of members of the National Assembly are elected by general, direct and secret ballot, in terms of article 46(1)(a). In terms of article 63(1), the National Assembly has the power to make and repeal laws. Note that in terms of article 75 of the Namibian Constitution, the National Council plays a role in reviewing legislation passed by the National Assembly.

The legislature also fulfils other important functions, including, in terms of article 63(2)(f), holding the executive accountable for its operations, that is playing an oversight role in terms of the workings of the executive branch of government.

Under article 146(2), which deals with constitutional definitions, parliament is defined as being the National Assembly acting subject to review by the National Council when this is required by the constitution.

The judiciary

The judicial power, as discussed above, is vested in the courts. The main role of the judiciary is to interpret the law and to adjudicate legal disputes following the law. The judiciary has no powers of enforcement.

2.8.2 Separation of powers

In a functioning democracy, it is important to divide government power between different organs of the state to guard against the centralisation of power, which may lead to abuses of power. This is known as the separation of powers doctrine. The aim, as the Namibian Constitution has done, is to separate the functions of the three branches of government, the executive, the legislature and the judiciary, so that no single branch can operate alone, assume complete state control and amass centralised power. While each branch performs several different functions, each also plays a watchdog role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution.

2.9 Weaknesses in the constitution that ought to be strengthened to protect the media

There are several weaknesses in the Namibian Constitution. If these provisions were strengthened, there would be specific benefits for the Namibian media.

2.9.1 Remove internal limitations on fundamental rights and freedoms

The internal limitations applicable to fundamental rights, such as the rights to freedom of expression and privacy, ought to be repealed because they weaken the rights. In any event, the general limitations clause renders the internal limitations unnecessary as the government has all the power it needs to limit fundamental rights reasonably under the general limitations clause.

2.9.2 Recognise the right to information

It is disappointing that the Namibian Constitution does not recognise the right to receive information and ideas explicitly, and does not guarantee the public a right of access to information held by the state.

We live in an information age, and access to information is probably the single biggest factor in empowering people to make appropriate decisions about their lives, including political decisions. The media is the way that most people obtain access to news and information, and having a right of access to information would enable the media to play its public information role.

2.9.3 Provide for an independent communications regulator and public broadcaster

It is disappointing that the constitution does not provide specific protections for the independence of the broadcasting or converged communications regulator or of the public broadcaster. These institutions are critical to the functioning of broadcasting as a whole in Namibia.

The constitution should specifically protect their independence and ensure that

they operate in the public interest to guarantee impartiality and ensure that the Namibian public is exposed to a variety of views.

3 The media and legislation

In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing the operations of print media
- ▷ legislation governing the state newspaper
- ▷ legislation governing films
- ▷ legislation governing the broadcasting media generally
- ▷ legislation governing the state broadcasting sector and the state news agency
- ▷ legislation governing broadcasting signal distribution
- ▷ legislation governing the internet
- ▷ legislation that threatens a journalist's duty to protect sources
- ▷ legislation that prohibits the publication of certain kinds of information
- ▷ legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation and how it comes into being

Legislation is a body of law consisting of acts properly passed by the legislative authority. Legislative authority in Namibia is vested primarily in the National Assembly, with legislation also being referred to the National Council on certain

occasions, in terms of the constitution. Legislation or statutes are therefore acts of the National Assembly made into law.

Article 75 of the constitution provides that all bills approved by the National Assembly must be referred to the National Council by the Speaker; the National Council must then submit a report with its recommendations to the Speaker. Should the National Council confirm a bill in its report, the Speaker must then refer the bill to the president who must approve the bill in accordance with article 56 of the constitution. After that it becomes law when published in the Government Gazette. The president may withhold consent to a bill in accordance with article 64 if he or she has concerns regarding its constitutionality and informs the Speaker of the National Assembly and the Attorney-General. The Attorney General refers the bill to court for a ruling on its constitutionality. From here, there are two different processes:

- ▶ If the court finds that the bill is constitutional, then the president must assent if it was passed by a two-thirds vote in the National Assembly in terms of article 56(2) of the constitution.
- ▶ The president can continue to withhold consent if it was passed by a vote with less than two-thirds support in the National Assembly in terms of article 56 (4) of the constitution in which case, the bill is returned for review, and if the National Assembly declines to amend or withdraw the bill, the president may continue to withhold consent in which case the bill will lapse.
- ▶ If the court finds that the bill is not constitutional, then the president is not required to assent to the bill, and it lapses.

Chapter 19 of the Namibian Constitution deals with amendments of the constitution. Article 131 of the constitution provides that no amendments can be made to Chapter 3 of the constitution in so far as it repeals, amends, diminishes or detracts from the fundamental rights and freedoms defined in the chapter.

Article 132 of the constitution sets out the requirements that must be met to repeal or amend other aspects of the constitution. These include that two-thirds of both the National Assembly and the National Council must be in favour of the amendment. Should a bill proposing an amendment or repeal of the constitution fail to secure a two-thirds majority in either the National Assembly or National Council, the president may make the bill proposing the repeal or amendment the subject of a national referendum by proclamation. Should the referendum gain two-thirds of the votes cast, the bill shall be deemed to have met the requirements of the constitution and the president shall assent to the bill, and the bill must be published as an act in the Gazette.

It is important to note that the effect of section 132 is that the president has a mechanism to appeal directly to the voters on constitutional issues even in the face of objections by the legislature.

3.1.2 The difference between a bill and an act

A bill is a draft law that is debated and usually amended by parliament during the law-making process. If a bill is passed by parliament (that is, by the National Assembly and the National Council), it becomes an act once it is signed by the president (signifying his assent to the bill) and published in the Government Gazette, in terms of article 56 of the Namibian Constitution.

3.1.3 Why do some pieces of old South African legislation continue to be law in Namibia?

Article 140(1) of the constitution specifically provides that, subject to the constitution, all laws which were in force in Namibia immediately before the date of independence shall remain in force until repealed or amended by an act of parliament or until declared unconstitutional by a competent court. This provision maintains a peaceful transition to a constitutional legal regime by ensuring the existing laws continue to apply until properly dealt with in terms of the constitution, whether by parliament or by a court.

3.2 Legislation governing the operations of print media

The print media in Namibia is regulated under the Newspaper and Imprint Registration Act, Act 63 of 1971 (RSA) (Newspaper Act). Unfortunately, some of the provisions of legislation place restrictions on the ability to operate as a print media publication in Namibia.

In terms of section 2 of the Newspaper Act, no person is entitled to publish a newspaper intended for public dissemination unless the newspaper has been registered.

3.2.1 Requirements associated with registration

In terms of section 4 of the Newspaper Act, registration certificates are issued by the Minister of the Interior (note that it seems the Minister of Home Affairs now performs this function). However, the application for registration must be made in accordance with the prescribed form and on payment of the prescribed fee, to the Secretary for the Interior, in terms of section 3. The only basis for refusing to register a newspaper is set out in section 4, and this is if the name of the newspaper too closely resembles the name of another registered newspaper and could be deceiving.

Section 5 of the Newspaper Act requires changes to the registration information to be notified to the secretary.

Section 6 of the Newspaper Act provides that a copy of the first edition of the newspaper must be forwarded to the secretary. Also, if the minister makes a written request for any issue, this must be sent to the minister.

In terms of section 7, the name and address of where the newspaper is published

and the name and addresses of the proprietor, printer and publisher must be published in every issue of a registered newspaper.

In terms of section 8, the editor of a registered newspaper must be a resident.

3.2.2 Penalties for non-compliance with the registration and associated requirements

Section 11 of the Newspaper Act makes it an offence not to comply with a provision of this act, and the penalty is a fine or imprisonment or both.

3.2.3 Amending the legislation to strengthen the media generally

While ordinarily registration requirements are not seen as being in accordance with the right to freedom of expression, these are not problematic because there are very limited grounds for a refusal to register a newspaper other than the similarity of name or title.

3.3 Legislation governing the state newspaper

3.3.1 Establishment of the state-sponsored newspaper

The New Era Publication Corporation is established as a publication corporation in terms of section 2 of the New Era Publication Corporation Act, Act 1 of 1992. It publishes the New Era newspaper.

3.3.2 Main functions

In terms of section 3 of the New Era Publication Corporation Act, New Era's main function is to provide an objective and factual information service by compiling, publishing and distributing the New Era newspaper in English as well as in different indigenous languages. Section 3(b) sets out the reporting objectives of the newspaper. These are community-related issues (particularly in rural areas), issues of national interest and government-related matters.

3.3.3 Board appointments

The affairs of the New Era are managed by a board of directors of between seven and 12 members, all of whom are appointed by the relevant line minister.

3.3.4 Funding

While New Era is entitled to be funded from, among other sources, money received from the sales and advertising in of the paper, it is clear from section 11(1)(a) that the New Era Publication Corporation Act envisages that the major source of funding is from the national budget, paid over to it by parliament. Importantly, the newspaper is exempt from paying income tax and transfer duty, in terms of section 15 of the act.

3.3.5 Is the newspaper independent?

New Era was never intended to be an independent newspaper. It was established overtly as a government newspaper, with a mandate which includes reporting on the government. Its board is entirely appointed by the minister and, while its main aim is to provide an objective and factual information service, there is no reference in the legislation to operating in the public interest.

3.3.6 Weaknesses in the statute that should be amended to strengthen the media generally

There is undoubtedly a need to communicate with the public, and having an effective communications strategy is a key priority for all governments. But should a government be establishing and funding its own newspaper?

The problem with state-sponsored newspapers is that it is difficult to ensure genuinely objective news reporting on government if the medium is an extension of government. Furthermore, given that it has special benefits, including government funding and tax exemptions, a government newspaper such as the New Era does not compete on a level playing field with other print media. An imbalance or unfair advantage for government media is, therefore, created to the detriment of other media.

If the government wanted to ensure the development of community-focused media, it could encourage this by, for example, funding community media initiatives or establishing a genuine public broadcasting service.

3.4 Legislation governing films

The Namibia Film Commission Act, Act 6 of 2000 (Film Act) provides for the establishment of the Namibia Film Commission to regulate activities relating to film production, and the development and promotion of the film industry in Namibia.

3.4.1 Establishment of the Namibia Film Commission (NFC)

Section 2 of the Film Act establishes the NFC.

3.4.2 The objects of the NFC

Section 3 provides that the objects of the NFC are to:

- ▶ support, encourage and promote the development of film production, the film industry and film marketing in Namibia
- ▶ promote Namibia as a location for film production on the international market
- ▶ attract film producers to carry out film productions in Namibia
- ▶ encourage film producers to employ or make use of Namibian personnel and facilities for film production

- ▶ establish relationships with any local or international person, which may contribute to the development and promotion of the film industry in Namibia.

3.4.3 Powers duties and functions of the NFC

Subject to the provisions of the Film Act, the NFC is empowered under section 4 of the Film Act to administer the Film and Video Development Fund (FVD Fund) established in Part II of the Film Act (discussed below) and to authorise the production of films by foreigners in accordance with section 20 of the Film Act. Section 20 prohibits non-Namibian nationals from producing a film (defined as including television series and interactive media) without authorisation by the NFC. Note that the definition of film is so wide that it could include, for example, a video taken by a foreign tourist on holiday. This is unworkable, and it seems clear that the Film Act was intended to regulate only commercial film productions. Note that the definition of film specifically excludes reports on the news or current affairs.

3.4.4 Composition of the NFC

Section 5 of the Film Act provides that the NFC must comprise five members who are appointed by the minister responsible for broadcasting services, these include:

- ▶ one person who is a staff member of the ministry responsible for the administration of broadcasting services
- ▶ one person nominated by the Minister of Home Affairs
- ▶ one person nominated by the Minister of Environment and Tourism
- ▶ two people nominated by a body recognised by the minister as representing film producers.

One-third of the people appointed to be members of the NFC must be female.

A person may be disqualified from being appointed to the NFC if he or she:

- ▶ is not a citizen or permanent resident in Namibia
- ▶ is a member of parliament or local or regional authority
- ▶ has been convicted of an offence in any country and sentenced to a term of imprisonment without the option of a fine
- ▶ is an unrehabilitated insolvent.

3.4.5 The Film and Video Development Fund (FVD Fund)

Section 14 of the Film Act establishes the FVD Fund and provides that it will be credited with:

- ▶ sums of money appropriated by parliament

- ▶ sums of money accrued from the fund from any other source, including donations or grants made for the benefit of the fund
- ▶ prescribed fees received by the NFC for granting, renewing or transferring any authorisation in terms of the Film Act
- ▶ any amounts of money received in respect of the repayment of a loan granted from the FVD Fund
- ▶ interest derived from investments made by the FVD Fund.

All money available in the FVD Fund must be utilised to:

- ▶ establish a film industry in Namibia
- ▶ financially assist Namibian film producers
- ▶ develop and distribute Namibian film, video and television production projects.

3.4.6 Making regulations relating to film

Section 28 of the Film Act empowers the minister responsible for broadcasting, in consultation with the NFC, to make regulations relating to:

- ▶ the terms and conditions subject to which authorisations may be issued, renewed or transferred
- ▶ the fees payable for the application, issue, transfer or renewal of an authorisation
- ▶ the administration of the FVD Fund
- ▶ achieving the aims of the Film Act.

3.4.7 Enforcement of the Film Act

In terms of section 31 of the Film Act, any person who contravenes or fails to comply with:

- ▶ section 10 of the Film Act, which provides a person who comes into any secret knowledge during the exercise of his or her duties is required to preserve the secrecy of that knowledge except in so far as any such communication is made in the ordinary course of the exercise of the performance of his or her duties under the act or any other law, or is required by order of a competent court or is effected with prior permission in writing of the NFC or person concerned
- ▶ section 24(1) of the Film Act, which provides that any person required to hold an authorisation must when asked by a person authorised to request it, present that authorisation for inspection;
- ▶ section 20(1) of the Film Act, which provides that no person who is not a Namibian citizen, a company registered in Namibia, or a lawfully admitted

permanent resident in Namibia shall carry out any film production in Namibia, except with the written authorisation of the NFC granted on an application made to it by the secretary in such form and manner as the NFC may determine;

- ▶ section 22(1) of the Film Act, which provides a holder of an authorisation may transfer that authority to another person without the written approval of the NFC upon application made in writing and upon payment of a subscribed fee;

commits an offence, the penalty for which, on conviction, is a fine, imprisonment or both.

3.5 Legislation governing the broadcasting media generally

3.5.1 Statutes that regulate broadcasting

Broadcasting in Namibia is regulated in terms of the Communications Act, Act 8 of 2009 which came into force in 2011.

3.5.2 Establishment of the Communications Regulatory Authority of Namibia (CRAN)

Section 4 of the Communications Act establishes the Communications Regulatory Authority of Namibia (CRAN).

3.5.3 Composition of Members of CRAN

In terms of section 8 of the Communications Act, CRAN is managed by a board of five members unless a different number is determined in accordance with section 14(1)(a) of the State-Owned Enterprises Governance Act, Act 2 of 2006 (SOE Governance Act), which limits the number of board members to between five and seven members. The Board consists of a Chairperson, Vice-Chairperson, and other members who, in accordance with section 9 of the Communications Act, must represent a cross-section of the population of Namibia, taking into account gender qualifications, expertise and experience in the fields of information and communication policy and technology, radio services, law, economics, business practice and finance.

CRAN Board members are appointed in terms of the SOE Governance Act and for terms also determined by the SOE Governance Act, failing which determination, a term is three years, subject to reappointment in accordance with section 11 of the Communications Act. In terms of section 15(5) of the SOE Governance Act, the minister responsible for communications appoints the members of CRAN on the recommendation of the minister responsible for public enterprises.

A person may be disqualified from becoming or remaining a member of the board in terms of section 10 of the Communications Act if he or she:

- ▶ is not a citizen or permanent resident of Namibia

- ▶ is not resident in Namibia
- ▶ is a member of parliament, a regional council, or local authority
- ▶ manages, is employed by, or has any financial interest in any provider of tele-communications services or any business having a financial interest in any product or industry that is or may be regulated by CRAN
- ▶ has been convicted of an offence, other than a political offence committed before the date of independence of Namibia, in any country and sentenced to imprisonment without the option of a fine
- ▶ has any financial or other interest likely to prejudicially affect the performance of his or her duties as a member of the board
- ▶ has been declared mentally ill under any law relating to mental health
- ▶ is an unrehabilitated insolvent.

A member of the board vacates his or her office in terms of section 12 of the Communications Act if he or she:

- ▶ resigns by giving not less than one month's notice to the minister responsible for communications
- ▶ has been absent from three consecutive meetings of the board without leave of the board
- ▶ has become subject to any disqualification referred to in section 10
- ▶ the minister has given the member notice of intent to dismiss the member from office and provided the member with the opportunity to be heard.

The minister may remove any member from office if he or she is satisfied that the member:

- ▶ is either physically or mentally incapable of acting as a member of the board
- ▶ is guilty of conduct which renders him or her unable or unfit to discharge the functions of the office of a member of the board efficiently
- ▶ has taken part in a discussion of, or has voted in connection with, any matter in which he or she has an interest
- ▶ is guilty of conduct prejudicial to the objectives of CRAN.

Section 13 of the Communications Act provides that the minister must appoint the Chairperson and Vice-Chairperson of the Board.

In terms of section 20 of the Communications Act, the Board must appoint a suitably qualified person as the Chief Executive Officer of CRAN in accordance with section 22(3) of the SOE Governance Act. The person selected to be CEO of CRAN

may not be selected if he or she is disqualified from being a member of the board in terms of section 10 of the Communications Act.

3.5.4 Funding for CRAN

Section 22(1) of the Communications Act outlines how CRAN is funded. Funding methods include:

- ▶ an initial amount appropriated by parliament
- ▶ fees received concerning the granting, renewal or transfer of any licence or authorisation in terms of the Communications Act or any other law
- ▶ fees received concerning the regulation and control of the radio frequency spectrum
- ▶ fees and levies prescribed under the Communications Act or any other law for the benefit of CRAN
- ▶ revenue received for services provided in the course of its activities
- ▶ fines and other monetary sanctions imposed by CRAN in accordance with the provisions of the Communications Act or any other law
- ▶ interest derived from investments
- ▶ monies accrued to CRAN from any other source, including donations or grants made for the benefit of CRAN.

3.5.5 Main functions of CRAN

Section 5 of the Communications Act provides that the object of CRAN is 'to regulate the communications industry [defined to mean electronic communication and the postal service] in Namibia in accordance with the provisions of the Communications Act'.

3.5.6 Requirements for a broadcasting licence

Section 83(1) of the Communications Act prohibits any person from broadcasting or operating a broadcasting service without a broadcasting licence required under the Communications Act.

In terms of section 83(2) of the Communications Act, a broadcasting licence is also required for any broadcast transmitted from outside Namibia if such broadcast is intended to be received by persons who subscribe to receive that service. Any person in question who promotes such a service in Namibia or who receives payment as consideration for access to such service is deemed to be operating the service in question, in terms of section 83(3).

Section 114(1) of the Communications Act makes it an offence to provide a broadcasting service without a licence, the penalty for which is a fine or imprisonment.

Section 114(2) of the Communications Act makes it an offence to provide a broadcasting service outside the scope of a licensee's licence, the penalty for which is a fine or imprisonment.

3.5.7 Broadcasting licence categories in Namibia

In terms of section 84 of the Communications Act, CRAN is empowered to prescribe the categories of broadcasting licences. It should be noted that, when determining the different categories of broadcasting licences, the following distinguishing characteristics must be taken into account by CRAN when making licence category regulations:

- ▶ the method of distribution used
- ▶ whether scarce resources such as portions of the radio spectrum are used by the service
- ▶ the extent to which the licensee has editorial control over the contents of channels or programmes forming part of the services concerned and whether the provider concerned is a provider contemplated in section 83(2)
- ▶ whether the services concerned are community, commercial or public broadcasting services.

It is clear that the Communications Act envisages the standard three-tier broadcasting sector of public, commercial and community broadcasting services in accordance with best practice.

3.5.8 Licensing regime for broadcasters in Namibia

CRAN is authorised under section 85(1) of the Communications Act, to issue a broadcasting licence in the appropriate category and may determine any prescribed fees for those licences.

In terms of section 85(2), the persons to whom CRAN may issue a broadcasting licence include Namibian citizens and juristic person of which at least 51% of the shareholding is beneficially owned by Namibian citizens and which is not controlled by persons who are not Namibian citizens, and has its principal place of business or registered office in Namibia.

In an important departure from the essential regulatory regime provided for in the Communications Act, section 85(3) empowers the minister responsible for communications to authorise the issuing of a broadcasting licence to a juristic person other than those mentioned in section 85(2). This undermines the ability of CRAN to regulate the communications sector as a whole.

In terms of section 85(4) of the Communications Act, every application for a broadcasting licence must be made in the prescribed form and in accordance with the prescribed requirements.

Sections 85(6) and (7) of the Communications Act require a public notice and comment procedure in respect of applications for a broadcasting licence, which encourages transparency in the licensing process. CRAN is required to take any opposition into account when considering the application.

Section 85(8) of the Communications Act provides that, when considering an application for the issue of a broadcasting licence, CRAN must take into account:

- ▶ the character of the applicant, or if the applicant is a body corporate, the character of its directors
- ▶ the adequacy of the expertise, experience and financial resources available to the applicant
- ▶ the desirability or otherwise of allowing any person or association of persons to have control of or a substantial interest in:
 - ▶ more than one broadcasting service
 - ▶ more than one radio station and one television station and one registered newspaper with a common coverage and distribution area or significantly overlapping coverage and distribution areas
- ▶ whether or not the applicant is likely to comply with such technical broadcasting standards as CRAN may prescribe
- ▶ whether or not the conditions of a broadcasting license will unjustly benefit one licensee above another
- ▶ the allocation of spectrum resources in such a manner as to ensure the widest possible diversity of programming and the optimal utilisation of such resources provided that the priority may be given to broadcasters transmitting the maximum number of hours per day
- ▶ the reservation of radio frequency spectrum for future use
- ▶ the desirability of giving priority to community-based broadcasts.

Section 85(9) of the Communications Act requires CRAN to give notice in the Government Gazette when it grants a licence application.

It should be noted that section 85(10) of the Communications Act provides that, in accordance with article 18 of the Namibian Constitution, the decision of CRAN to grant or refuse an application for the issue of a broadcasting licence is final.

Section 86 of the Communications Act provides that CRAN may impose such conditions on broadcasting licenses as are appropriate for the category of the broadcasting license issued to the licensee concerned. The conditions may include:

- ▶ the frequencies that may be used and the power limitations of transmitters used in connection with the broadcasting service, as well as the transmitter location

- ▶ the broadcasting of reports, announcements, news, or other information which is required to be broadcast in the public interest.

Section 86(3) provides that CRAN may, in respect of any particular licence, amend any of the conditions, or add additional conditions, to a broadcasting licence:

- ▶ if CRAN believes that it is in the interest of orderly spectrum management
- ▶ to give effect to any international treaty concerning broadcasting to which Namibia is a party
- ▶ at the request of the licensee.

The licensee must be provided with the opportunity to make representation to CRAN relating to any amendment that CRAN chooses to impose on a licensee, in cases where the licensee has not requested the amendment.

Any decision made by CRAN is subject to article 18 of the Namibian Constitution.

Section 87 of the Communication Act provides that, broadcasting licences are issued for the following terms:

- ▶ radio broadcasting licences — five years
- ▶ television broadcasting — ten years
- ▶ any other broadcasting licence — for a period determined by CRAN.

CRAN may renew a licence for a further period in accordance with the above. An Application for the renewal of a licence must be made not earlier than six months and not later than 60 days before the expiry of the existing licence.

When considering an application for renewal of a broadcasting licence, CRAN may require any new additional information it deems necessary to make a finding concerning the renewal. CRAN must renew a licence unless, in its opinion, the licensee has contravened the Communications Act or a condition of the licence or the renewal of the licence will not be in accordance with the object of the Communications Act. If CRAN is unable to come to a decision pending the renewal of a licence by the expiration of the previous licence period, the licence continues pending the decision by CRAN.

A broadcasting licence will be considered to have lapsed after the expiry of a period which may be prescribed if no broadcasts are made under that licence.

Section 88 of the Communications Act provides that, should any prescribed fees not be paid by the licensee on the date that such fees are due, and remain unpaid after the expiry of seven days after the written notice by CRAN to the licensee, CRAN may declare the licence to be forfeited.

Section 91 of the Communications Act provides that every licensee must submit to CRAN statements audited by a person registered as an accountant and auditor in

terms of the Public Accountants' and Auditors' Act within 60 days after the end of the licensee's financial year.

3.5.9 Broadcasting Code

Section 89(1) of the Communications Act provides that CRAN must develop a Broadcasting Code that must be followed by broadcasting licensees. Section 89(2) provides that the broadcasting code may:

- ▶ prescribe duties relating to the coverage of news and current affairs to ensure that the news coverage by broadcasters is fair, objective and impartial
- ▶ prescribe such duties as may be required to comply with generally accepted journalistic ethics
- ▶ regulate the broadcasts of any matter having the purpose of promoting the interests of any political party (whether it is in the form of a paid advertisement or otherwise)
- ▶ prescribe special duties for broadcasters while campaigns are being conducted for elections or referendums as will promote democracy and the fair conducting of such elections or referendums
- ▶ regulate the broadcasting of matters of a sexual or violent nature containing offensive or strong language or that is offensive or degrading to any portion of the Namibian public or prohibit such broadcasts under prescribed circumstances or during prescribed times or prescribe other conditions relating to such broadcasts or, subject to the Namibian Constitution, prohibit the broadcast of a prescribed class of such matter under the prescribed circumstances
- ▶ prescribe the duty to broadcast a prescribed class of public announcements free of charge
- ▶ prescribe the circumstances under which corrections or counter-versions must be broadcast when factually incorrect or defamatory or injurious material or matter whose broadcast is prohibited by the code, has been broadcast
- ▶ require the broadcast of prescribed types of content produced in Namibia
- ▶ prescribe the amount and nature of advertisements that may be broadcast and prohibit the broadcast of advertisements that are degrading or offensive
- ▶ prescribe any duty that will improve the quality of the service provided by broadcasters.

Section 89(3) provides that, when the Broadcasting Code is prescribed, CRAN must:

- ▶ ensure that the duties imposed on a specific category of broadcasting service are appropriate for the services in question

- ▶ ensure that duties are not imposed that will make some class of service uneconomical or impractical
- ▶ ensure that community broadcasting is promoted
- ▶ impose duties that will, as far as practical, promote Namibian creativity.

In terms of section 89(4), if CRAN believes that a licensee belongs to an organisation that enforces the compliance of its members with broadcasting standards that comply with the requirements of the Broadcasting Code, it may with the concurrence of the minister responsible for communications, decide that the licensee concerned does not require regulation by a broadcasting code. It should be noted that section 89 (5) provides that if CRAN determines that a large percentage of licensees already follow their own Broadcasting Code, and it meets the requirements of the Broadcasting Code developed by CRAN, CRAN may, with the concurrence of the minister responsible for communications decide that the making of a Broadcasting Code is no longer worthwhile due to the small number of licensees that will be subject to the broadcasting code. Section 89(6) provides that CRAN may still, following a rule-making procedure, prescribe in respect of all, or a specified class of licensees, any matter which may be prescribed in the Broadcasting Code.

Section 89(4) is an important provision because it envisages self-regulation of broadcasting content. This follows the South African model.

3.5.10 Making broadcasting regulations

Broadcasting regulations (as with all regulations made in terms of the Communications Act) are made by the CRAN.

3.5.11 Is the CRAN an independent regulator?

Despite section 2 of the Communications Act which refers to an 'independent regulatory authority', CRAN does not meet the requirements of an independent regulator, which can be seen from several factors:

- ▶ The minister responsible for communications appoints the Board after recommendations have been made by the public service commission, so there is no involvement by the public or by a multi-party body such a parliament.
- ▶ Nowhere does the Communications Act specify to whom CRAN is accountable. Concerning an independent broadcasting regulator, such accountability statements are common, and the governing legislation of many regulators will state that the regulator is accountable to the public (via parliament) and acts in the public interest.
- ▶ The minister may authorise the issuing of a broadcasting licence even in cases where the applicant does not meet the requirements set out in the Communications Act. This undermines the authority of CRAN.

3.5.12 Amending the legislation to strengthen the media generally

There are several weaknesses in the Communications Act which ought to be strengthened in the interests of a free and independent media, and of the public more generally:

- ▶ The concept of regulating ‘in the public interest’ needs to be strengthened in the act, and the direct involvement of the executive branch of government, namely the minister, in the appointment and affairs of CRAN and the licensing process needs to be diminished. This is in line with international best practice standards.
- ▶ The public ought to be involved in making CRAN member nominations.
- ▶ There ought to be a public interview process for short-listed candidates.
- ▶ Parliament (as a multi-party body) ought to make binding recommendations on CRAN appointments to the minister.
- ▶ The activities of the Namibian Broadcasting Corporation (NBC) should fall under the jurisdiction of CRAN, to ensure that the NBC is regulated in the public interest (this issue is dealt with in more detail below, Key legislative provisions governing the state news agency and the state broadcaster).

3.6 The Namibian Press Agency (Nampa)

Establishment of Nampa

The Namibia Press Agency (Nampa) is established in terms of section 2(1) of the Namibia Press Agency Act, Act 3 of 1992.

Nampa’s main mandate

Following the passage of the Namibia Press Agency Amendment Act (2004), Nampa’s mandate is two-fold, to operate a news agency service and an information technology service for the production, collection and dissemination of media, information and information technology products and services. To achieve its mandate, Nampa is given a wide range of powers, listed in section 5 of the act. These include establishing facilities for collecting and distributing news and information, publishing any literary matter, and entering into any agreement to supply news and information to Nampa.

Appointment of the Nampa board

Nampa is controlled and governed by a board, comprising three to five members, all of whom are appointed by the minister of information and broadcasting. If the minister is responsible for appointing the board, the board cannot be said to be independent of the executive.

Funding for Nampa

Nampa is funded by a range of sources, including donations and from contracts for services rendered by it. In terms of section 12 of the Namibia Press Agency Act, Nampa is funded primarily by money appropriated by parliament, that is specifically allocated to it in the national budget.

Given that Nampa is essentially government-funded and controlled, it appears that Nampa operates as a government communication and information service.

3.7 The Namibian Broadcasting Corporation (NBC)

Establishment of the NBC

The Namibian Broadcasting Corporation (NBC) is established as a corporation under section 2 of the Namibian Broadcasting Act, Act 9 of 1991.

3.7.1 The NBC's mandate

The NBC's mandate is set out in section 3 of the Namibian Broadcasting Act. Its mandate is to:

- ▶ provide a broadcasting service to inform and entertain the public
- ▶ contribute to the education and unity of the nation and peace in Namibia
- ▶ provide and disseminate information relevant to the socio-economic development of Namibia
- ▶ promote the use and understanding of English.

3.7.2 Appointment of the NBC board

The NBC is controlled by a board comprising between six and 11 members, who are appointed by the minister responsible for broadcasting services, in terms of section 6(1) of the Namibian Broadcasting Act.

While it is often the case that there is a minister for communications, sometimes the interior, home affairs or information minister is tasked with regulating broadcasting.

The wording of the section makes it clear that whoever is responsible for regulating broadcasting appoints the NBC board. If the minister is responsible for appointing the board, the board cannot be said to be independent of the executive.

3.7.3 Funding for the NBC

The Namibian Broadcasting Act is vague about how the NBC is funded. There appear to be three different sources of funding:

- ▶ In terms of section 16(3), the NBC is entitled to collect and keep television licence fees, which are paid by the public. Note that it is the minister responsible for broadcasting services, not the NBC, who determines what the actual television licence fee is to be.
- ▶ Section 20(1)(a) refers to 'monies appropriated by law for the benefit of the Corporation'. Therefore it seems that parliament would set aside an amount of money for the NBC in the national budget.
- ▶ However, section 20(1)(a) also refers to 'all other monies received by the Corporation', and this is a reference to advertising revenue.

The NBC, therefore, seems to have a mixed model of funding, including television licence fees, government funding and commercial revenue from advertising.

3.7.4 NBC: public or state broadcaster?

Unfortunately, it appears that the NBC does not meet certain basic standards for public broadcasting. It is evident that the NBC is not sufficiently independent from government and in particular, is not sufficiently independent from the minister responsible for broadcasting. This can be seen in several important areas.

The minister appoints the entire board. While section 6(2) of the act specifies some objective (and good) criteria for the board as a whole, including knowledge or experience in the administration or management of public affairs and the political, socio-economic and communication field, the minister has sole discretion over board appointments.

The minister also plays a role in several of the NBC's functions, as is seen from the provisions of section 4 of the act, some of which require the minister's permission before the NBC can engage in certain activities, including erecting foreign broadcasting installations and entering into programming supply agreements.

Nowhere does the act specify that the NBC is editorially independent and free to express its views.

Nowhere does the act specify to whom the board is accountable. Such accountability statements are common in a public broadcaster, and the governing legislation of many public broadcasters will state that the corporation is accountable to the public and acts in the public interest.

Weaknesses in the NBC statute that should be amended to strengthen the media generally

Two important weaknesses ought to be addressed, the concept of broadcasting 'in the public interest' needs to be strengthened in the act, and the direct involvement of the executive in the NBC diminished. In line with international best practice standards:

- ▶ the public ought to be involved in making board nominations

- ▶ there ought to be a public interview process for short-listed candidates
- ▶ parliament (which is a multi-party body) ought to make recommendations on board appointments to the president and not to a minister
- ▶ the NBC's mandate ought to be expanded to develop measurable goals for broadcasting in the public interest.

3.8 Legislation governing broadcasting signal distribution

3.8.1 Regulation of Radio Spectrum

Section 99 of the Communications Act empowers CRAN to control, plan, administer, manage and license the Radio Spectrum in Namibia. In doing so, CRAN must comply with the standards and requirements of the International Telecommunication Union and its Radio Regulations as agreed to or adopted by Namibia. CRAN must honour current and future commitments of Namibia in terms of international agreements and standards in respect of radio communications and telecommunication matters.

Radio frequency plan

Section 100 of the Communications Act provides that CRAN may prescribe a frequency band plan in respect of any part of the radio frequency spectrum. A frequency band plan must:

- ▶ define how the radio spectrum must be used
- ▶ ensure that the radio frequency spectrum is utilised and managed in an orderly, efficient and effective manner
- ▶ reduce congestion in the use of frequencies and protect frequency users from any interference or other inability to make use of the frequencies assigned to them
- ▶ avoid obstacles to the introduction of new technologies and telecommunication services
- ▶ provide opportunities for the introduction of the widest range of telecommunication services and the maximum number of users thereof as is practically feasible.

In developing a band plan, CRAN must have a public notice and comment procedure to ensure the views of interested parties are taken into account.

Spectrum licences, certificates and authorities

Section 101(1) of the Communications Act prohibits any person from:

- ▶ transmitting any signal by radio waves;

- ▶ using radio apparatus to receive signals transmitted by radio waves;
- ▶ instructing, permitting or failing to prohibit any person in his or her employ or under his or her control from transmitting or using radio apparatus to receive signals transmitted by radio waves,

except in accordance with a licence or authorisation issued by CRAN.

Section 101(6) provides that a spectrum licence is required in addition to any broadcasting where the broadcasting service entails the use of radio waves. In terms of section 101(7), an application for a broadcasting licence must be accompanied by an application for the necessary spectrum required to render the service concerned.

3.9 Legislation governing the internet

No legislative provisions regulate the internet except for section 103 of the Communications Act which establishes the .na Domain Name Association (Name Association) as a juristic person with the object of obtaining all rights necessary for administering the .na namespace. The Name Association will come into being on a date to be determined by the minister responsible for communications. This has yet to happen, and so the Name Association is not yet operational, and the .na domain name is being administered by the Namibian Network Information Centre.

Note that section 112 provides that CRAN, with the approval of the minister responsible for communications, may make regulations relating to the management of domain names in Namibia which are to be implemented by the Name Association.

3.10 Legislation that undermines a journalist's duty to protect his or her sources

A journalist's sources are the lifeblood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often be prepared to provide critical information only if they are confident that their identities will remain confidential and will be respected and protected by a journalist. This is particularly true of so-called whistleblowers, inside sources that can provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that, without such protection, information that the public needs to know would not be given to journalists.

3.10.1 Criminal Procedure Act, Act 51 of 1977

The Criminal Procedure Act (CPA), Act 51 of 1977, which was an old South African statute, is still applicable in Namibia. However, it has been revised and amended many times by the Namibian Parliament.

Section 205 of the CPA essentially empowers a presiding officer to call any person who is likely to give material or relevant information as to any alleged offence to come before him or her and to be examined by the public prosecutor, at the request of a public prosecutor. Thus, if a public prosecutor suspects that a journalist knows something about a crime, such journalist might be ordered, in terms of section 205 of the CPA, to reveal his or her sources of information relating to that crime.

3.10.2 Security Commission Act, Act 18 of 2001

The Security Commission Act, Act 18 of 2001, is an act to regulate the affairs of the National Security Commission, established in terms of article 114 of the Namibian Constitution. According to the constitution, the role of the National Security Commission is primarily to advise the president on the appointment of the chief of the defence force, the inspector-general of police and the commissioner of prisons. However, the Security Commission Act, at section 5, sets out several other functions, including advising the president on states of emergency and defence and internal security issues and advising the minister on whether or not a person constitutes a threat to Namibia and ought to be labelled a prohibited immigrant.

Section 5(6) of the Security Commission Act empowers the commission to conduct an enquiry into any matter relating to its functions and, at such enquiry, the Commission is empowered, in terms of section 5(6)(a), to require any person who, in its opinion, can provide information relevant to the enquiry to appear before the Commission and to give evidence.

Thus, if the Commission suspects that a journalist knows something of relevance to an enquiry being held by it, such journalist might be ordered in terms of section 5(6)(a) of the Security Commission Act to reveal his or her sources of information.

3.10.3 Prevention of Organised Crime Act, Act 29 of 2004

In terms of section 87(1) of the Prevention of Organised Crime Act, an authorised member of the police may request any person employed in, or associated with, an agency, office, ministry or statutory body to furnish him or her with all information which may be required for any investigation. If a person requested for information by an authorised person fails to provide the information requested, the Prosecutor-General may request a judge, divisional magistrate or any other magistrate, for an order compelling the person to appear before the judge or magistrate for examination by the Prosecutor-General, in terms of section 87(2).

Journalists should be aware of this as it could be used to force a journalist working for the state broadcaster, state newspaper or the state news agency to reveal his or her sources.

It is important to note, however, that whether requiring a journalist to reveal a source is an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each case. It is therefore extremely

difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the Constitution.

3.11 Legislation that prohibits the publication of certain kinds of information

Several statutes contain provisions which, looked at closely, undermine the public's right to receive and the media's right to publish information. These statutes are targeted and prohibit the publication of certain kinds of information, including:

- ▶ prohibition on the publication of a minor's identity in legal proceedings
- ▶ prohibition on the publication of certain information relating to criminal proceedings
- ▶ prohibition on the publication of identities involved in protection order proceedings
- ▶ prohibition on the publication of information relating to defence, security and prisons
- ▶ prohibition on the publication of obscene photographic matter
- ▶ prohibition on the publication of advertising on roadsides
- ▶ prohibition on the disclosure of Bank of Namibia information
- ▶ prohibition on the publication of racist publications.

It is often difficult for journalists to find out how laws that would seem to have no direct relevance to the media can affect their work. Important provisions of such laws are therefore set out below.

3.11.1 Prohibition on the publication of a minor's identity in legal proceedings

General Law Amendment Ordinance 22 of 1958

The General Law Amendment Ordinance is an old South West African ordinance enacted by the Legislative Assembly for the Territory of South West Africa (as it was then), which is still in force in Namibia.

Section 1(1) of the ordinance prohibits the publication of the name, address, school, place of employment or any other information likely to reveal the identity of any person who is under 18 years and who is a party to any civil proceedings or is a witness in any legal proceedings, unless the judge or magistrate in question has agreed, in writing after consultation with the person's parent or guardian. A violation of section 1(1) is an offence, and the penalty is a fine, imprisonment or both.

Criminal Procedure Act, Act 51 of 1977

The Criminal Procedure Act (CPA) is a piece of South African legislation that is still in force in Namibia, although it has been amended by the Namibian Parliament several times.

Section 154(3) of the CPA prohibits the publication of the identity of an accused person or a witness in criminal proceedings if that accused person or witness is under 18 years unless the court rules that such publication would be just and equitable. In terms of section 154(5), such publication is an offence with a penalty of a fine, imprisonment or both.

3.11.2 Prohibition on the publication of certain information relating to criminal proceedings

The Criminal Procedure Act, Act 51 of 1977, at section 154, read with section 153, sets out circumstances in which a court may direct that no information relating to certain criminal proceedings may be published. These circumstances include:

- ▶ in the interests of the security of the state or of good order, public morals or the administration of justice
- ▶ in extortion proceedings
- ▶ where the identity of the complainant in the case of a sexual offence might be revealed, unless the judge authorises such publication as being just and equitable, or where the complainant is 18 or older and consents to the publication
- ▶ the publication of the identity of a complainant concerning a charge involving extortion or sexual offences from the commission of the offence until the accused has pleaded to the charge.

In terms of section 154(5) of the CPA, any such publication is an offence with a penalty of a fine, imprisonment or both.

Importantly, section 154(6) of the CPA specifically states that, to the extent that such prohibitions upon publication authorise interference with a person's freedom to publish, this is done in terms of article 21(2) of the Namibian Constitution. This clause was dealt with in greater detail at the beginning of the chapter; it is the so-called internal limitation to, among others, the right to freedom of expression.

3.11.3 Prohibition on the publication of identities involved in protection order proceedings

Section 30 of the Combating Domestic Violence Act, Act 4 of 2003, makes it an offence to publish any information concerning protection order proceedings that might reveal the identity of an applicant, complainant, or any child, or any other person involved in such protection order proceedings unless the court has authorised publication in the public interest. The penalty is a fine, imprisonment or both.

3.11.4 Prohibition on the publication of information relating to defence, security and prisons

Defence Act, Act 1 of 2002

Section 54(1) of the Defence Act prohibits any person from publishing (including in a newspaper or on radio or television) any information likely to endanger national security or the safety of any member of the defence force, except where the minister responsible for national defence has authorised the publication thereof or furnished the information.

Furthermore, section 54(2) of the Defence Act makes the owner, printer, publisher or editor of the publication in which the prohibited information was published guilty of an offence too.

Section 55 of the Defence Act also makes it an offence to take photographs or make a sketch of any military camp, installation or other premises which are under military control, or to have any means for taking photographs while on military property.

Section 63 sets out the penalties in respect of all of the offences set out above. The penalties are a fine, imprisonment or both.

Protection of Information Act, Act 84 of 1982

The Protection of Information Act is a piece of old South African legislation that has been amended by the Namibian Parliament. Section 4 of the act sets out several provisions relating to the disclosure of security-related information. It essentially makes it an offence to publish a range of security-related information, such as official codes or passwords, or confidential information that has been entrusted to a person by the government. The penalty for such disclosure is a fine, imprisonment or both.

Correctional Services Act, Act 9 of 2012, The Correctional Services Act, is a Namibian statute regulating prison matters. Section 82 of the Correctional Services Act makes it an offence for anyone to, without the written permission of the Commissioner-General:

- ▶ take a photograph or make a film, video, sketch or drawing of a correctional facility
- ▶ or cause to be published a photograph, film, video, sketch or drawing of a correctional facility Take a photograph or make a film, video, sketch or drawing of a prisoner or group of prisoners, whether inside or outside of correctional facility
- ▶ publish or cause to be published a photograph, film, video, sketch or drawing of an offender or offenders, whether inside or outside of a correctional facility. It is also an offence to publish false information concerning an offender's

behaviour or experience in a correctional facility, knowing the same to be false or without taking reasonable steps to verify such information.

3.11.5 Prohibition on the publication of obscene photographic matter

The Indecent or Obscene Photographic Matter Act, Act 37 of 1967, is an old South African statute that makes it an offence to possess indecent or obscene photographic matter. The penalty is a fine, imprisonment or both.

It is important to note that this act might not survive a constitutional challenge as many of its definitions are outdated and too broad. The act has been repealed in South Africa.

3.11.6 Prohibition on the publication of advertising on roadsides

The Advertising on Roads and Ribbon Development Ordinance, 30 of 1960, is an ordinance that was passed by the Legislative Assembly for the Territory of South West Africa and which remains in force. Its provisions are probably of more interest to media owners than to media practitioners, but it is important to note that this act allows for local government to regulate certain forms of advertising, such as billboards, on roadsides.

3.11.7 Prohibition on the disclosure of Bank of Namibia information

The Financial Intelligence Act, Act 3 of 2007, is designed to prevent money laundering activities. Section 35 deals with the protection of confidential information and prohibits any person from disclosing 'confidential information' obtained from the Bank of Namibia, with very few exceptions.

Note that the term 'confidential information' is undefined, making it difficult to know what falls within the ambit of that term. The penalty for such disclosure is a fine, imprisonment or both.

3.11.8 Prohibition on the publication of racist publications

The Racial Discrimination Prohibition Act, Act 2 of 1991, as amended, is a post-independence piece of legislation aimed at overcoming the legacy of Apartheid in Namibia by outlawing a raft of racist practices. Certain of its provisions directly affect the media.

In terms of section 10 of the act, no one can publish an advertisement that indicates an intention to discriminate concerning public amenities, provision of goods and services, selling or letting immovable property (houses, flats, and so on), educational institutions, medical institutions, employment and the formation of associations and religious services.

In terms of section 11 of the act, no one can publish an article which intends to:

- ▶ threaten or insult any person or group on racial grounds

- ▶ incite hatred between different racial groups
- ▶ disseminate ideas based on racial superiority.

It is important to note that the original wording of section 11 was much broader, but this was held to be an unconstitutional violation of the freedom of expression provisions in the Namibian Constitution in *S v Smith NO and Others* 1996 NR 367 (HC). The section was consequently amended to its current wording. The penalty for violating sections 10 or 11 is a fine, imprisonment or both.

Section 15, in the parts relevant to the media, provides that where the person convicted of an offence under the act also holds a licence, such as a broadcasting licence, the court may enforce additional penalties, including a declaration that imposes conditions upon, suspends or even cancels such a licence.

In terms of section 16, in deciding in respect of an offence, a court may make a compensatory damages award in favour of the person who originally complained about the conduct. Thus, a media outlet might find itself liable for these damages.

3.12 Legislation that specifically assists the media in performing its functions

Namibia passed the Whistleblower Protection Act, Act 10 of 2017 to make provision for both private and public sector employees to disclose information regarding unlawful or irregular conduct by their employers, or other employees, and to be protected concerning such disclosures.

Section 6(1) read with section 7 of the Whistleblower Protection Act establishes the Whistleblower Protection Office (WPO) as an independent office to investigate, consider and take the appropriate action regarding whistleblower disclosures.

Part 3 of the Whistleblower Protection Act establishes the Whistleblower Protection Advisory Committee (WPAC) to advise both the minister responsible for justice on matters relating to whistleblower protection in Namibia and the WPO on the exercise of its powers and performance of its functions.

Section 3 of the Whistleblower Protection Act provides that disclosures may be made to authorised persons, including:

- ▶ the commissioner or a staff member of the WPO
- ▶ an employee's supervisor or another senior member of the employer who has been designated by that employer to receive disclosures
- ▶ an ethics and integrity officer who is appointed by the minister responsible for justice
- ▶ a person, institution or entity declared by the minister responsible for justice to be an authorised person

- ▶ to the Ombudsman of Namibia where the disclosure relates to the WPO itself.

In terms of section 36 of the Whistleblower Protection Act, a person may make a public disclosure (for example to the media) in circumstances where there is insufficient time to make the disclosure to an authorised person, and the whistleblower has reasonable grounds to believe that the subject matter of the disclosure is an act or omission that constitutes:

- ▶ a serious offence under any law of Namibia
- ▶ imminent risk of substantial and specific danger to the life, health and safety of persons, or the environment.

Before making a disclosure public, the person who receives the disclosure must take all reasonable steps to ensure that the information received is true and find out the identity of the person making the disclosure.

It should be noted that the public disclosure of any information that is prohibited or restricted by any law in Namibia in the interest of national security, national defence, the prevention and detection of crime, the administration of justice or the sovereignty and integrity of Namibia is not protected under the Whistleblower Protection Act.

Section 47 of the Whistleblower Protection Act, protects whistleblowers from liability in civil or criminal proceedings or disciplinary action for disclosures made under this act unless the whistleblower knew the information was false and the disclosure is determined to have been in bad faith. Further, section 78(3) empowers the Minister of Justice to make any contravention of a provision of the Whistleblower Protection Act an offence carrying a penalty of a fine or imprisonment or both.

4 Regulations affecting the broadcast media

In this section, you will learn:

- ▷ definition of regulations
- ▷ regulations governing broadcasting licences
- ▷ regulations governing broadcasting quality
- ▷ regulations governing broadcasting content

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules that are made in terms of a statute, in this case, the Communications Act (discussed earlier in this chapter). Rules are a way for ministers or organisations, such as CRAN, to make regulations governing an industry or sector, without having to proceed to parliament.

The empowering statute will entitle the relevant minister or a body such as CRAN to make regulations on particular matters within the scope of the functions and powers of that minister or organisation.

4.2 Regulations governing broadcasting licences

4.2.1 Broadcasting licence categories

The Board of CRAN has passed regulations setting out Broadcasting and Telecommunications Service Licence Categories in General Notice 124, published in the Government Gazette No 4714 dated 18 May 2011 (Licence Categories Regulations), which have been subsequently amended. Section 4 of the Licence Categories Regulations distinguishes between the following categories of licensed services:

- ▶ a commercial broadcasting service: defined as a broadcasting service operating for profit
- ▶ a community broadcasting service: defined as a service that serves a particular community and is wholly owned by a non-profit association registered in terms of section 21 of the Companies Act, Act 28 of 2004, or which operates under a non-profit constitution
- ▶ public broadcasting service: defined as a broadcasting service provided by the Namibian Broadcasting Corporation.

4.2.2 Licence procedures

CRAN has passed regulations for the procedures to be followed by applicants wishing to apply for a broadcasting licence. The Regulations regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences (General Notice 272, published in the Government Gazette 4785 dated 29 August 2011) (Licensing Procedures Regulations).

Annexure A of the Licensing Procedures Regulations is the application form for a broadcasting licence.

The Licensing Procedures Regulations also contain provisions regarding applying for radio frequency spectrum as well as provisions relating to the transfer, amendment renewal and withdrawal (which includes a surrender of a licence) of broadcasting and spectrum licences.

Key features of the form include providing information regarding foreign share-

holding and a statement about the nature of the broadcasting service the applicant intends to provide.

Section 11 of the Licensing Procedures Regulations provides that notice of applications made in terms of the Licensing Procedures Regulations must be published by CRAN, and it must invite written representations thereon.

After considering any application made in terms of these regulations and any written and oral submissions, CRAN will either approve or deny the application and issue the appropriate licence, transfer, amendment renewal or withdrawal.

Section 11 of the Licensing Procedures Regulations provides that all decisions made in terms of the regulations will be communicated to the applicants and other relevant parties in writing, together with reasons, and must be published in the Government Gazette.

4.2.3 Licence conditions

Licence conditions for broadcasting licences are regulated in terms of the Communications Act by regulations passed by CRAN. CRAN has passed the Regulations regarding Licence Conditions for Broadcasting Service Licences (Notice 309 published in Government Gazette No 5037 on 13 September 2012) Licence Conditions Regulations.

These licence conditions regulations apply to all broadcasting licences except the Namibian Broadcasting Corporation (NBC). Section 4 of the licence condition regulations provide that all licences issued with a broadcasting licence in accordance with Annexure A, are duly authorised to provide broadcasting services. The licence condition regulations entitle licence broadcasters to provide their own signal distribution, provided the licensees obtain a spectrum user licence and set out the licence terms, five years for a radio licence and ten years for a television licence. Licensees are required to renew their licences before the expiry of the licence.

If a licensee fails to commence providing a broadcasting service within six months from the date of issue of the licence, the licence will automatically expire.

4.3 Key regulations governing broadcasting quality

Broadcasting quality in Namibia is governed by the Regulations Prescribing Quality of Service Standards applicable to Service Licences, published in Notice 152, Government Gazette No 5713, dated 21 April 2015 (the Quality Regulations).

Section 4 of the Quality Regulations provides that licensees must maintain quality of service standards in accordance with the requirements contained in Appendix A of the Quality Regulations which deal with service quality, billing, customer service and network quality.

Section 8 of the Quality Regulations makes it an offence for any licensee to fail to maintain the minimum quality of service standards set out in these regulations or

to submit the reports required to be submitted by section 5 of these regulations. Where a licensee contravenes one or more of these regulations or the quality of service standards, CRAN is empowered to take several actions, including requiring a licensee to implement a remedial plan, ordering a licensee to compensate consumers for a poorer quality of service or imposing penalties.

4.4 Key regulations governing broadcasting content

Although CRAN published draft regulations containing a code of conduct concerning broadcasting content, these were never finalised, and so there are no regulations governing broadcasting content at this time. It appears that, in practice, Namibian broadcasters self-regulate content issues in terms of a self-regulatory code which is dealt with in the next section.

5 Media self-regulation

Self-regulation of the media, including print, broadcast and certain online media, is done by the Media Ombudsman together with the Editor's Forum of Namibia and is intended to be in keeping with international best practice principles on media self-regulation. A self-regulatory code of ethics and conduct in Namibia has been introduced by the Editor's Forum of Namibia (EFN) to regulate the media environment better and is enforced by the Media Ombudsman.

5.1 The self-regulatory code of ethics and conduct

The EFN Code of Ethics and Conduct for Namibian Print, Broadcast and Online Media (the Code) is set out in four parts which are summarised below:

5.1.1 Media-generated content and activities applicable to all print, broadcast and online media

Gathering and reporting of news

- ▶ The media shall take care to report news truthfully, accurately and fairly.
- ▶ News shall be presented in context and a balanced manner, without any intentional or negligent departure from the facts whether by distortion, exaggeration or misrepresentation, material omissions, or summarisation.
- ▶ Only what may reasonably be true, having regard to the sources of the news, may be presented as fact, and such facts shall be published fairly with reasonable regard to context and importance. Where a report is not based on facts or is founded on opinion, allegation, rumour or supposition, it shall be presented in such manner as to indicate this clearly.

- ▶ News should be obtained legally, honestly and fairly, unless the public interest dictates otherwise.
- ▶ The gathering of personal information for the purpose of journalistic expression must only be used for this purpose.
- ▶ Media representatives shall identify themselves as such unless public interest or their safety dictates otherwise.
- ▶ Where there is reason to doubt the accuracy of a report or a source and it is practicable to verify the accuracy thereof, it shall be verified. Where it has not been practicable to verify the accuracy of a report, this shall be stated in such report.
- ▶ The media shall seek the views of the subject of critical reportage in advance of publication. This need not be done where the institution has reasonable grounds for believing that by doing so it would be prevented from reporting, where evidence might be destroyed or sources intimidated or because it would be impractical to do so in the circumstances of the publication. Reasonable time should be afforded the subject for a response. If the media are unable to obtain such comment, this shall be reported.
- ▶ Where a news item is published on the basis of limited information, this shall be stated as such, and the reports should be supplemented once new information becomes available.
- ▶ The media shall make amends for presenting information or comment that is found to be inaccurate by communicating promptly and with appropriate prominence to attract attention, a retraction, correction or explanation.
- ▶ An online article that has been amended for factual accuracy should indicate as such. In the event of an apology or retraction, the original article may remain, but the publisher must prominently indicate that it has led to an apology or retraction and should link to both the apology or retraction and the original article.
- ▶ No person shall be entitled to have an article removed which falls short of being defamatory but is alleged by such person to be embarrassing.
- ▶ Journalists shall not plagiarise.

Independence and conflicts of interest

- ▶ The media shall not allow commercial, political, personal or other non-professional considerations to influence or slant reporting. Conflicts of interest must be avoided, as well as arrangements or practices that could lead audiences to doubt the media's independence and professionalism.
- ▶ The media shall not accept bribes, gifts or any other benefits where this is intended or likely to influence coverage.

- ▶ The media shall indicate clearly when an outside organisation has contributed to the cost of newsgathering.
- ▶ Editorial material shall be kept distinct from advertising and sponsored content.

Privacy, dignity and reputation

- ▶ The media shall exercise care and consideration in matters involving the private lives and concerns of individuals. The right to privacy may be overridden by public interest.
- ▶ In the protection of privacy, dignity and reputation, special weight must be afforded to cultural customs concerning the privacy and dignity of people who are bereaved and their respect for those who have passed away, as well as concerning children, the aged and the physically and mentally disabled.
- ▶ The media shall exercise care and consideration in matters involving dignity and reputation. The dignity or reputation of an individual should only be overridden if it is in the public interest and the following circumstances:
 - ▶ the reportage amounts to fair comment based on facts that are adequately referred to and that are true or substantially true
 - ▶ the facts reported are true or substantially true
 - ▶ the reportage amounts to a fair and accurate report of court proceedings, parliamentary proceedings or the proceedings of any quasi-judicial tribunal or forum
 - ▶ it was reasonable for the information to be communicated because it was prepared in accordance with accepted principles of journalistic conduct and the public interest
 - ▶ the article was, or formed part of, an accurate and impartial account of a dispute to which the complainant was a party.
- ▶ Rape survivors and survivors of sexual or gender-based violence shall not be identified without the consent of the victim or, in the case of children, without the consent of their legal guardians (or a similarly responsible adult) and the child (taking into consideration the evolving capacity of the child), and public interest is evident, and it is in the best interest of the child.
- ▶ The HIV/Aids status of people shall not be disclosed without their consent. In the case of children, the HIV/Aids status of the child shall not be disclosed without the consent of the child (taking into consideration the evolving capacity of the child) together with the consent of their legal guardian or a similarly responsible adult, provided that such disclosure is in the public interest and is in the best interests of the child.

News and current affairs during elections and referenda

- ▶ News coverage of elections and referenda shall be left to the discretion of the media concerned.
- ▶ Proper balance and fairness shall be applied to all current affairs programmes that deal with elections and referenda.

Balance and impartiality during elections and referenda

- ▶ The media must afford reasonable opportunities for the discussion of conflicting views and must treat all political parties equitably.
- ▶ The media must ensure that they are balanced and impartial in their election reporting and that no political party or candidate shall be discriminated against in editorial coverage or the granting of access to coverage.
- ▶ In the event of any criticism against a political party being levelled in a particular medium:
 - ▶ without that party having been allowed to respond immediately
 - ▶ without the view of that political party having been reflected therein, the medium concerned must afford that political party a reasonable opportunity to respond to the criticism.

Protection of personal information

- ▶ The media shall take reasonable steps to ensure that the personal information under their control is protected from misuse or loss and to prevent unauthorised access to such information.
- ▶ The media shall ensure that the personal information they gather is accurate, reasonably complete and up to date.
- ▶ Where a person requests a correction to be made to his or her personal information under the control of a member, the media must take reasonable steps to verify the accuracy of the information and, if necessary, amend the information.
- ▶ Some personal information, such as addresses, may enable others to intrude on the privacy and safety of individuals who are the subject of news coverage. The media shall only disclose sufficient personal information to identify the persons being reported in the news to minimise these risks.
- ▶ Where it is reasonably suspected that an unauthorised person may have obtained access to personal information held by a member, the media must inform the affected person(s) and take reasonable steps to mitigate any prejudicial effects.

Violent, discriminatory or hate speech

- ▶ The media must not publish material which, judged within context, amounts to:
 - ▶ propaganda for war
 - ▶ incitement of imminent violence
 - ▶ the advocacy of hatred that is based on race, ethnicity, religion or gender
 - ▶ constitutes incitement to cause harm.
- ▶ The above does not apply to material which, judged within context, amounts to a:
 - ▶ *bona fide* scientific, documentary, dramatic, artistic or religious material
 - ▶ discussion, argument or opinion on a matter pertaining to religion, belief or conscience
 - ▶ *bona fide* discussion, argument or opinion on a matter of public interest.
- ▶ Except where it is strictly relevant to the matter reported and is in the public interest to do so, the media shall avoid discriminatory or denigratory references to people's sex, race, colour, sexual orientation, ethnic origin, religion, creed or social or economic status, age, or mental or physical disability.

Opinion

The media are justified in airing their own views on controversial topics, provided that they treat their constituencies fairly by:

- ▶ making fact and opinion clearly distinguishable
- ▶ not misrepresenting or suppressing relevant facts
- ▶ not distorting the facts.

Protected comment

- ▶ The media shall be entitled to comment upon or criticise any actions or events of public interest.
- ▶ Comment or criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, as long as it:
 - ▶ expresses an honestly-held opinion
 - ▶ is without malice
 - ▶ is on a matter of public interest
 - ▶ has taken fair account of all material facts that are substantially true
 - ▶ is presented in such a manner that it appears clearly to be a comment.

Children

Article 15 of the Namibian Constitution protects children's rights. The media also recognises that special protective measures in respect of children are needed and shall, therefore:

- ▶ exercise exceptional care and consideration when reporting on children. If there is any chance that coverage might cause harm of any kind to a child, he or she shall not be interviewed, photographed or identified without the consent of a legal guardian or of a similarly responsible adult and the child (taking into consideration the evolving capacity of the child), and unless a public interest is evident
- ▶ not publish child pornography
- ▶ not identify children who have been victims of abuse, exploitation, or who have been charged with or convicted of a crime, without the consent of their legal guardians (or a similarly responsible adult) and the child (taking into consideration the evolving capacity of the child), unless a public interest is evident and it is in the best interests of the child.

Violence and graphic content

- ▶ Due care and responsibility shall be exercised by the media concerning the presentation of brutality, gratuitous violence and suffering.
- ▶ Material, judged in context, should not sanction, promote or glamourise violence or unlawful conduct, or discrimination based on sex, race, colour, ethnic origin, religion, creed or social or economic status.
- ▶ Content which depicts violent crime or other violence or explicit sexual conduct should be avoided unless the public interest dictates otherwise, in which case prominent indication and warning must be displayed indicating that such content is graphic and inappropriate for certain audiences such as children.
- ▶ The media must not publish material which, judged in context:
 - ▶ contains violence which does not play an integral role in developing the plot character or theme of the material as a whole
 - ▶ sanctions, promotes or glamourises violence or unlawful conduct, particularly if based on race, national or ethnic origin, colour, religion, gender, sex and sexual orientation, age, or mental or physical disability.
- ▶ The above does not apply to material which, judged in context, amounts to:
 - ▶ *bona fide* scientific, documentary, dramatic, artistic or religious material
 - ▶ a discussion, argument or opinion on a matter pertaining to religion, belief or conscience
 - ▶ *bona fide* discussion, argument or opinion on a matter of public interest.

Headlines, posters, pictures and captions

- ▶ Headlines and captions to pictures or broadcasting content shall give a reasonable reflection of the contents of the report or picture in question.
- ▶ Posters shall not mislead the public and shall give a reasonable reflection of the contents of the reports in question.
- ▶ Pictures, video or audio content shall not misrepresent or mislead nor be manipulated to do so.

Confidential and anonymous sources

The media shall:

- ▶ protect confidential sources of information; the protection of sources is a basic principle in a democratic and free society
- ▶ avoid the use of anonymous sources unless there is no other way to deal with a story and care should be taken to corroborate the information
- ▶ not publish information that constitutes a breach of confidence, unless the public interest dictates otherwise.

Payment for information

The media shall avoid paying informants to induce them to give information, particularly when they are criminals, except where the material concerned ought to be published in the public interest and the payment is necessary for this to be done.

Competitions and audience participation

- ▶ Where audiences are invited on air to react to a programme or competition, the media must make known the full cost of a telephone call or SMS.
- ▶ The media must specify the proportion of the cost of the call or SMS, as the case may be, which is intended for any specified charitable cause.
- ▶ The media must ensure that audiences who are encouraged to compete in any competition are made aware of the rules of the competition on air. Such rules must include the closing date and how the winner is to be determined.

5.1.2 Broadcasting content and activities applicable to broadcast media only

Children

- ▶ Broadcasting service licensees must not broadcast material which is harmful or disturbing to children at times when a large number of children are likely to be part of the audience.

- ▶ Broadcasting service licensees must exercise particular caution, as provided below, in the depiction of violence in children's programming.
- ▶ In children's programming portrayed by real-life characters, violence may, whether physical, verbal or emotional, only be portrayed when it is essential to the development of a character and plot.
- ▶ Animated programming for children, while accepted as a stylised form of story-telling which may contain non-realistic violence, must not have violence as its central theme, and must not incite dangerous imitation.
- ▶ Programming for children must deal with reasonable care themes that could threaten their sense of security when portraying, for example, domestic conflict, death, crime or the use of drugs or alcohol.
- ▶ Programming for children must deal with reasonable care themes which could influence children to imitate acts which they see on screen or hear about, such as the use of plastic bags as toys, the use of matches or the use of a dangerous household object as toys.
- ▶ Programming for children must not contain realistic scenes of violence which create the impression that violence is the preferred or only method to resolve a conflict between individuals.
- ▶ Programming for children must not contain realistic scenes of violence which minimise or gloss over the effect of violent acts. Any realistic depiction of violence must portray, in human terms, the consequences of that violence for both its victims and perpetrators.
- ▶ Programming for children must not contain frightening or otherwise excessive special effects not required by the storyline.
- ▶ Offensive language, including profanity and other religiously sensitive material, must not be broadcast in programmes specially designed for children.
- ▶ No excessively or grossly offensive language should be used outside the watershed period on television or at times when a large number of children are likely to be part of the audience on television or radio.

Watershed period

- ▶ Programming on television which contains scenes of explicit violence, sexual conduct, nudity, grossly offensive language or all of these, intended for adult audiences must not be broadcast before the watershed period.
- ▶ Promotional material and music videos which contain any or all of the following, scenes of explicit violence, explicit threats of violence, sexual conduct, fondling or touching of breasts, genitalia, the anus or all three, nudity, offensive language intended for adult audiences must not be broadcast before the watershed period.

- ▶ Some programmes broadcast outside the watershed period may not be suitable for very young children. Licensees must provide sufficient information, in terms of regular scheduling patterns or audience advisories, to assist parents and *de facto* legal guardians in making appropriate viewing choices.
- ▶ Television broadcasting service licensees may, with the advance of the watershed period, progressively broadcast more adult material.
- ▶ Broadcast service licensees must be particularly sensitive to the likelihood that programmes which commence during the watershed period and which run beyond it may be viewed by children.

Sexual conduct

- ▶ Broadcasting service licensees must not broadcast material which, judged in context, contains a scene or scenes, simulated or real, of sexual conduct.
- ▶ The above shall not apply to *bona fide* scientific, documentary, dramatic or artistic material which, judged in context, is of such a nature, provided that it is broadcast with due audience advisories after the watershed period.

Audience advisories

- ▶ To assist audiences in choosing programmes, television broadcasting service licensees must provide advisory assistance which, when applicable, must include guidelines as to age, where such broadcasts contain any or all of the following, violence, sex, nudity, offensive language.
- ▶ The advisory must be visible on the screen for a minimum of 30 seconds at the commencement of the programme and a minimum of 30 seconds after each advertisement or other break.
- ▶ Where the frequency of the said subject matters, or any one or some of them, is high, a continuous advisory will be necessary, whether it is broadcast before or after the watershed.
- ▶ The following visual advisory age system must be used: 10, 13, 16 and 18.
- ▶ The following symbols must be used in accordance with the relevant content: V (violence), L (language), N (nudity), S (sex), PG (Parental Guidance).
- ▶ An audio advisory before the commencement of the programme must also accompany the broadcast of a film with an age restriction of 18.

News broadcasts

- ▶ Broadcasting service licensees must advise viewers in advance of scenes or reporting of extraordinary violence, or graphic reporting on delicate subject matter such as sexual assault or court action related to sexual crimes, particularly during afternoon or early evening newscasts and updates.

- ▶ Broadcasting service licensees must not include explicit or graphic language related to news of destruction, accidents or sexual violence which could disturb children or sensitive audiences, except where it is in the public interest to include such material.

Controversial issues of public importance

- ▶ In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster must make reasonable efforts to present opposing points of view fairly, either in the same or subsequent programme forming part of the same series of programmes presented within a reasonable time after the original broadcast and substantially within the same time slot.
- ▶ A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given the right to reply to such criticism on the same programme. If this is impractical, reasonable opportunity to respond to the programme should be provided where appropriate, for example in a right-to-reply programme or a pre-arranged discussion programme with the prior consent of the person concerned.

Elections and referenda

During any election or referendum period, as defined in applicable electoral legislation from time to time, all broadcasters are to comply with the requirements prescribed by CRAN. The EFN does not have jurisdiction in these matters, and complaints must be directed to CRAN.

5.1.3 User-generated content applicable to online media only

Guiding principles

- ▶ This chapter applies where a complaint is brought against an online media member in respect of comments and content posted by users on all online platforms it controls and on which it distributes content.
- ▶ The media are not obliged to moderate all user-generated content in advance.
- ▶ All members should have a policy in place governing moderation, removal of user-generated content or user profiles, or both, posted on the platforms (UGC Policy) which must be consistent with the of the Namibian Constitution.
- ▶ Members may remove any user-generated comment, content or user profile in accordance with their UGC Policy. A member's UGC policy should be publicly available and:
 - ▶ set out the authorisation process, if any, which users who wish to post comments must follow, as well as setting out any terms and conditions and any indemnity clauses during such registration process
 - ▶ set out the content which shall be prohibited

- ▶ explain how the public may inform the member of prohibited content.
- ▶ Members should where practical, place a notice on the platforms to discourage the posting of prohibited content.
- ▶ The public should be informed that UGC is posted directly by users and does not necessarily reflect the views of the member.
- ▶ Users shall be encouraged to report content which they believe violates the provisions of the member's UGC Policy.
- ▶ Online forums directed at children and the young should be monitored particularly carefully.

Prohibited content

- ▶ Material constitutes prohibited content if it is expressly prohibited in a member's UGC policy.
- ▶ In addition to, and notwithstanding anything to the contrary contained in a member's UGC policy, prohibited content for this Code consists of the following:
 - ▶ propaganda for war
 - ▶ incitement to imminent violence
 - ▶ advocacy of hatred that is based on race, ethnicity, gender or religion that constitutes incitement to cause harm.

Defences in relation to user generated content

- ▶ It is a defence, concerning any complaint brought against the media regarding UGC, for the member to show that it did not itself author or edit the content complained of.
- ▶ This defence will not apply in the following circumstances:
 - ▶ the complainant sent a written notice to the member concerning the content concerned
 - ▶ the member failed to remove the content in accordance with the above.
- ▶ The written notice mentioned above must:
 - ▶ be sent via email or letter to the particular address stipulated by the member
 - ▶ identify the content concerned and, in particular, specify where on the website the statement was posted
 - ▶ explain why the content concerned is prohibited, either in terms of a member's UGC Policy or the above.

- ▶ On receipt of a written notice complaining about UGC the member must:
 - ▶ remove the relevant UGC from the platform as soon as operationally possible and notify the complainant that it has done so
 - ▶ decide not to remove the UGC and notify the complainant of this decision.
- ▶ Where a member has decided not to remove the UGC:
 - ▶ the complainant may complain to the EFN enforcement structures
 - ▶ it will be treated as if the UGC had been posted by the member itself, and the member will be liable for such content if it is shown to be prohibited in terms of the above.

5.1.4 Enforcement procedures concerning the code of ethics

- ▶ The code contains detailed provisions regarding enforcement and, essentially, complaints are considered by the media ombudsman or a media complaints committee appointed by the EFN. If a party to a complaint is unhappy about a ruling of the media ombudsman or media complaints committee, it may appeal the ruling to the media appeals committee, also established by the EFN.
- ▶ The media ombudsman, the media complaints committee or the media appeals committee may uphold or dismiss a complaint or appeal, as the case may be.
- ▶ The media ombudsman, the media complaints committee or the media appeals committee, as the case may be, may make any one or more of the following sanction orders against the publication, radio or television station or online publication in question:
 - ▶ caution or reprimand a respondent
 - ▶ direct that a correction, retraction or explanation and, where appropriate, an apology, the findings of the media complaints committee and or the media appeals committee, or both as the case may be, be published or broadcast by the respondent in such manner as may be determined by the media complaints committee or the media appeals committee
 - ▶ order that a complainant's reply to a published or broadcast article, comment or letter be published, whether in print or online or broadcast by the respondent
 - ▶ make any supplementary or ancillary orders or issue directives that are considered necessary for carrying into effect the orders or directives made in terms of this clause and, more particularly, issue directives as to the publication of the findings of the media complaints committee or the media appeals committee, as the case may be
 - ▶ a fine may be imposed for a second or subsequent violation of the code. Fines collected in this manner shall be utilised solely to promote the code by means of publicity campaigns and training.

In the reasons for the decision, sanction or both, the media ombudsman, the media complaints committee or the media appeals committee is entitled to criticise the conduct of the complainant, respondent or both, concerning the complaint, where such criticism is warranted in the view of the media ombudsman, the media complaints committee or the media appeals committee.

6 Case law and the media

In this section, you will learn:

- ▷ Common law
- ▷ Defamation, the defences to an action for defamation, and remedies for defamation
- ▷ Contempt of court
- ▷ Interpretation of national security laws

6.1 Definition of common law

The common law is judge-made. It is made up of judgments handed down in cases adjudicating on disputes brought by people, whether natural (individuals) or juristic (for example, companies or government departments). In common law legal systems such as Namibia's, judges are bound by the decisions of higher courts and also by the rules of precedent, which require rules laid down by the court in previous cases to be followed unless they were wrongly decided. Legal rules and principles are therefore decided on an incremental, case-by-case basis.

In this section, we focus on two areas of common law of particular relevance to the media, defamation and contempt of court.

6.2 Defamation

6.2.1 Definition of defamation

Defamation is part of the common law of Namibia, and reliance is placed on several leading South African cases. Defamation is the unlawful publication of a statement about a person which lowers his or her standing in the mind of an ordinary, reasonable and sensible person. It is important to note that the media can be liable for defamation even if it is merely reporting on a defamatory statement made by someone (see *Smit v Windhoek Observer (Pty) Ltd and Another* 1991 NR 327 (HC)).

The Namibian courts have held that the common law of defamation is not *per se* inconsistent with the constitution. This is because of the importance of upholding the right to dignity, which includes the right of a person not to be unlawfully defamed (see *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC)).

Once it is proved that a defamatory statement has been published, two legal presumptions arise. Firstly, that the publication was unlawful; this is an objective test which determines the lawfulness of a harmful act based on considerations of fairness, morality, policy and by the court's perception of the legal convictions of the community. Secondly, the person publishing the same had the intention to defame. The person looking to defend against a claim of defamation must then raise a defence against the claim.

6.2.2 Defences to an action for defamation

There are several defences to a claim based on defamation. We shall focus on two of the most common of these, truth in the public interest and that the defamation occurred at a privileged occasion. See, for example, *Marais v Hauliyondjaba* 1993 NR 171 (HC) and *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC).

Truth in the public interest: This is where an action for damages is defended by stating that the defamatory statement was true and, further, that it is in the public interest to publicise the information. It is important to note that 'public interest' does not mean what is interesting to the public, but rather what contributes to the greater public good. It is therefore often the case that it will be in the public interest to publish true, albeit defamatory, material about public representatives. This is because of the importance of the public having accurate information to engage in democratic practices such as voting.

Privileged occasions: These are when the law recognises that certain situations require statements to be made freely, even if the statements are defamatory. For example:

- ▶ In the discharge of a legal, social or moral duty to a person having a reciprocal duty or interest to receive the statement. For example, when a teacher reports suspected child abuse to a social worker.
- ▶ In the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive such information, and the statement was relevant to the matter under discussion on that occasion. For example, a manager giving an assessment of the work performance of an employee to a management committee

6.2.3 Remedies for defamation

There are two main remedies in respect of defamation in the absence of a defence: an action for damages; or a prior restraint.

Action for damages: This is where a person who has been defamed sues for monetary compensation. This takes place after the publication has occurred, and

damages (money) are paid to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The quantum of damages (in other words, the amount to be paid in compensation) will depend on several factors, including whether or not an apology or retraction was published, and also the standing or position of the person being defamed in society (see, *Smit v Windhoek Observer (Pty) Ltd and Another* 1991 NR 327 (HC)).

It is important to note that the Namibian courts have ordered that exemplary damages (this is where a high amount is ordered to be paid to make an example of the defamer) be awarded in circumstances where defamatory material was published and continued to be published about a person after the institution of legal proceedings and without an apology, and also without defending the defamation action (see, *Afrika v Metzler and Another* 1994 NR 323 (HC)).

Prior restraint: This is where the alleged defamatory material is prevented from being published in the first place. Where a person is aware that defamatory material is going to be published, he or she may be able to go to court to, for example, obtain an interdict prohibiting the publication, thereby preventing the defamation from occurring. Prior restraints are dangerous because they deny the public (such as readers of a publication or audiences of a broadcaster) the right to receive the information that would have been publicised had it not been for the interdict. Prior restraints are a last resort mechanism, and the legal systems of countries which protect the right to freedom of expression usually prefer to allow publication and to deal with the matter by damages claims, in other words, using 'after publication' remedies. The Namibian High Court has refused to grant an interdict preventing the broadcast of material in circumstances where the producer has taken reasonable steps to ascertain the truth of the allegations to be broadcast (see, *Muheto and Others v Namibian Broadcasting Corporation* 2000 NR 178 (HC)).

6.3 Contempt of court

In general terms, the common law crime of contempt of court is made up of two distinct types of contempt, namely: the *sub judice* rule and the rule against scandalising the court.

6.3.1 The *sub judice* rule

The *sub judice* rule guards against people trying to influence the outcome of court proceedings while legal proceedings are underway. It is, therefore, illegal to report on judicial proceedings in such a way as to pre-empt the outcome of the proceedings.

6.3.2 Scandalising the court

The rule against scandalising the court is there to protect the institution of the judiciary. It acts to prevent the public undermining of the dignity of the courts. This issue has been addressed by the Namibian courts and by the judiciary in *S v Heita and Another* 1992 NR 403 (HC). The court discussed contempt of court as follows: 'Contempt of Court is a common law crime. This crime is necessary to protect the

independence of the court and the independence, dignity and effectiveness of the courts and their judicial officers.’

The court also quoted extensively from a public statement by the Minister of Justice on contempt of court in which the minister contrasted criticism with contempt, quoting former Judge President Strydom:

An honest and temperate expression of a dissenting opinion regarding, for example, the perennial topic of inequality of sentences will not constitute contempt of Court ... However it is one thing to exercise one’s right to make fair comment, it is quite another to scandalise or intimidate a Judge by calling him or her names ... We ... say yes to fair comment but definitely no to undue political and other pressures on members of the judiciary.

6.4 Interpreting national security laws

In *Director-General of the Namibian Central Intelligence Service and Another v Haufiku, Mathias and Another* [2019] NASC 7, the Supreme Court considered an appeal by the Namibian Central Intelligence Service against a ruling of the High Court refusing to grant it an interdict against an online and print newspaper for publishing a story which would place the intelligence services in an unfavourable light. In dismissing the appeal with costs, the Supreme Court held that the submission that ‘publication of information relating to the [intelligence service] must, without exception, be suppressed even if doing so would expose a crime, cannot be sustained’. The Intelligence Services had based its argument on the provisions of the Protection of Information Act, dealt with in section 3 above.

Notes

- 1 <https://www.worldometers.info/world-population/namibia-population/> [Last accessed on 22 June 2020].
- 2 <https://rsf.org/en/ranking/2020> and <https://rsf.org/en/ranking/2019> [Last accessed 16 October 2020]
- 3 [https://tradingeconomics.com/namibia/access-to-electricity-percent-of-population-wb-data.html#:~:text=Access%20to%20electricity%20\(%25%20of%20population\)%20in%20Namibia%20was%20reported,compiled%20from%20officially%20recognized%20sources.](https://tradingeconomics.com/namibia/access-to-electricity-percent-of-population-wb-data.html#:~:text=Access%20to%20electricity%20(%25%20of%20population)%20in%20Namibia%20was%20reported,compiled%20from%20officially%20recognized%20sources.) [Last Accessed on 22 June 2020].
- 4 <https://www.internetworldstats.com/africa.htm#ls> [Last accessed on 22 June 2020]
- 5 <https://www.itu.int/net4/ITU-D/CDS/DSO2019/CountryDetails.asp?Country=71> [Last accessed on 22 June 2020].
- 6 <https://www.news24.com/fin24/tech/news/namibia-beats-sa-to-digital-terrestrial-tv-20150202> [Last accessed on 22 June 2020].
- 7 <https://tradingeconomics.com/namibia/households-with-a-radio-percent-wb-data.html> [Last accessed on 22 June 2020].