6 South Africa

1 INTRODUCTION

The Republic of South Africa officially institutionalised a system of racial segregation known as apartheid in 1948, although racial segregation had always been a feature of colonial rule. The country's first democratic election was held in 1994 following the passage of the Interim Constitution, 1993, which was a negotiated constitution. In 1996 the first democratically elected Parliament, acting as the Constitutional Assembly, enacted the final Constitution. Both the Interim and final constitutions protected basic civil rights, such as freedom of expression, but the final Constitution is particularly noteworthy because it provides for independent regulation of the broadcasting sector.

A feature of the apartheid era was extensive state regulation and censorship of the media. The only broadcast media that was freely available in the country was the South African Broadcasting Corporation (SABC), which provided both radio and television services. The SABC was a state broadcaster, which was subject to government control and manipulation. The only other broadcast service that was allowed in South Africa was a subscription television service – M-Net – which was specifically prohibited from broadcasting news. Some radio and television services did, however, broadcast from the so-called independent states, particularly from Bophuthatswana and the Ciskei, but their reach was limited.

The apartheid era also saw the imposition of severe restrictions on the reporting of news and current affairs by the print media. This was particularly relevant during states of emergency, such as those which were in place during much of the 1980s.

The advent of democracy after 1994 brought about significant improvements in the media environment in South Africa. The broadcast media sector bourgeoned as commercial and community sound and television broadcast media were licensed by the independent regulator. The SABC was transformed into a public, as opposed to a state, broadcaster. In the print media sector, black economic empowerment imperatives have broadened print media ownership, and there are a number of independent daily and weekly newspapers.

South Africa has recently seen a number of potential threats to the media. The public broadcaster has been in crisis for some years and signs indicate a possible shift back to the era of state – as opposed to public – broadcaster. The ruling party has also been discussing the need for a statutory media appeals tribunal ostensibly to protect the public against poor journalism.

There has also been huge protest against the Protection of State Information Bill. In this book, bills are generally not discussed and the chapters deal with the law as it stands. However, given the importance of South Africa as a leader in democratic media law on the continent, the Protection of State Information Bill will be a critical test of South Africa's commitment to democratic media law.

It is important to note that certain of the bill's provisions are excellent and it does repeal an important apartheid-era security law. However, there are a number of extremely problematic aspects to the bill, which, if enacted into law, will send very worrying signals about South Africa's commitment to media freedom. In particular, the bill provides, in effect, that South Africa's Promotion of Access to Information Act will not apply to information classified under the bill. In addition, there are tough prison sentences for the publication of classified information and there is no public interest override allowing for such publication in the public interest.

These provisions are being hotly contested by opposition parties and civil society in South Africa, including by the trade union federation, which is one of the ruling party's key allies. At the time of writing, the second house of Parliament, the National Council of Provinces (NCOP), had received over 300 written submissions, almost all of which are critical of the bill. The NCOP is due to hold oral hearings on the bill shortly.

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

- Media and the constitution

- Media-related legislation
- Media-related regulations
- Media self-regulation
- Media-related common law based on decided cases

The aim of this chapter is to equip the reader with an understanding of the main laws governing the media in South Africa. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in South Africa, to better enable the media to fulfil its role of providing the public with relevant news and information, 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
- ❑ What is meant by constitutional supremacy
- ❑ How a limitations clause operates
- ❑ Which constitutional provisions protect the media
- ❑ Which constitutional provisions might require caution from the media or might conflict with media interests
- ❑ What key institutions relevant to the media are established under the South African Constitution
- ❑ How rights are enforced under the Constitution
- ❑ What is meant by the 'three branches of government' and 'separation of powers'
- ❑ Whether there are any clear weaknesses in the South African 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 South African Constitution sets out the foundational rules of the South African state. These are the rules upon which the entire country operates. The Constitution contains the underlying principles, values and laws of the Republic of South Africa. A key constitutional provision in this regard is section 1, which states:

> The Republic of South Africa is one sovereign, democratic state founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
> (b) Non-racialism and non-sexism;
> (c) Supremacy of the constitution and the rule of law;
> (d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

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 South African Constitution makes provision for constitutional supremacy. Section 2 specifically states: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

2.3 Definition of a limitations clause

It is clear that 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. Clearly, governments require the ability to limit rights in order to serve important societal interests; however, owing to the supremacy of the constitution this can only be done in accordance with the constitution.

The Constitution of South Africa makes provision for three types of legal limitations on the exercise and protection of rights contained in Chapter 2, 'Bill of Rights'.

2.3.1 Internal limitations

There are limitations that are right specific and contain limitations or qualifications

to the particular right that is dealt with in a particular section of the Bill of Rights. As discussed later, the right to freedom of expression contains such an internal limitations clause.

2.3.2 Constitutional limitations

Section 36(2) of the Constitution makes it clear that a law may limit any right entrenched in the Bill of Rights if this is allowed in terms of any provision of the Constitution. See, for example, section 37 of the Constitution, which deals with states of emergency. Section 37(4) specifically allows for emergency legislation to provide for derogations from the Bill of Rights in certain circumstances. These circumstances include where the derogation is strictly required by the emergency, and that certain rights cannot be derogated from, namely, the rights to dignity and life.

2.3.3 General limitations

The last type of limitation is a general limitations provision. General limitations provisions apply to the provisions of a bill of rights or other statement setting out the fundamental rights. These types of clauses allow a government to pass laws limiting rights, generally provided this is done in accordance with the constitution. One can find the general limitations clause applicable to the South African Bill of Rights in section 36 of the South African Constitution, headed 'Limitations of rights'. Section 36(1) provides that the rights in the Bill of Rights may be limited only:

- In terms of a law of general application. This means that the law may not single out particular individuals and deny them their rights

- To the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
  - The nature of the right
  - The importance of the purpose of the limitation
  - The nature and extent of the limitation
  - The relation between the limitation and its purpose
  - Less restrictive means to achieve the purpose

These factors are important because they show that the limitation of a right has to be narrowly tailored and that its purpose must be interrogated by a court when deciding whether or not the limitation of the right is constitutionally sound.

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 actually not very effective.

2.4 Constitutional provisions that protect the media

The South African Constitution contains a number of important provisions in Chapter 2, 'Bill of Rights', that directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are, however, provisions elsewhere in the Constitution that assist the media as it goes about its work of reporting on issues in the public interest, and we include these in this section too.

2.4.1 Rights that protect the media

FREEDOM OF EXPRESSION

The most important provision that protects the media is section 16(1), part of the section headed 'Freedom of expression', which states:

> Everyone has the right to freedom of expression, which includes –
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas;
> (c) freedom of artistic creativity; and
> (d) academic freedom and freedom of scientific research.

This provision needs some detailed explanation.

- This freedom applies to 'everyone' and not just to certain people, such as citizens.

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

- Section 16(1)(a) 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'. Thus, the section distinguishes between the 'press' – with its connotations of the news media – and 'other media', which could include fashion, sports, gardening or business publications or television channels, thereby protecting all media.

- Section 16(2)(b) specifically enshrines the freedom 'to receive or impart information and ideas'. This right of everyone's to receive information is a fundamental aspect of freedom of expression and this subsection enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas that traditionally have limited access to the media.

RIGHT OF ACCESS TO INFORMATION

Another critically important provision that protects the media is section 32, which enshrines the right of access to information. Section 32(1) provides that everyone has the right of access to:

> (a) any information held by the state; and
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.

This right requires some explanation.

Section 32 essentially provides for two types of rights of access to information:

- The first is a general right of access to any information held by the state. There are no prerequisites for this right; everyone has the right to any information held by the state.

- The second right is, paradoxically, both broader and narrower. It is broader because it grants everyone the right to information 'held by any other person' – other than the state, that is. Essentially, this grants everyone the right to information held by all private persons, whether individuals or institutions. However, this right is more narrowly tailored as one has the right to information held by non-state persons only where access to the information is 'required for the exercise or protection of any rights'. Thus one needs to demonstrate that the information is required in order to protect or exercise a right.

The right of access to information is vital in the information age in which we live. When states wield enormous power, particularly with regard to the distribution of resources, the right of access to information is one of the most important rights in ensuring transparency and holding government accountable. If one considers that the

media plays an enormous role in ensuring transparency and government accountability through providing the public with information, having this right of *access* to information is critical to enable the media to perform its functions properly.

Importantly, section 32(2) provides that national legislation must be enacted to give effect to the right of access to information. This has been done through the Promotion of Access to Information Act, 2000, which is dealt with in more detail in the legislation section below.

RIGHT TO JUST ADMINISTRATIVE ACTION

Another important provision that protects the media is section 33, 'Just administrative action'. Section 33(1) provides that everyone 'has the right to administrative action that is lawful, reasonable and procedurally fair', and section 33(2) provides that everyone 'whose rights have been adversely affected by administrative action has the right to be given written reasons'.

This right requires explanation. The reason why this provision is important for journalists and the media is that it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements. It also entitles journalists and the media to written reasons when administrative action results in their rights being adversely affected.

An administrative body is not necessarily a state body; indeed, these bodies are often private or quasi-private institutions. These constitutional requirements would therefore apply to non-state bodies too.

Many decisions taken by bodies are 'administrative' in nature, and this requirement of administrative justice is a powerful one that prevents or corrects unfair and unreasonable conduct on the part of administrative officials. Furthermore, having a constitutional right to written reasons is a powerful tool in ensuring rational and reasonable behaviour on the part of administrative bodies, and aids in ensuring transparency and, ultimately, accountability.

Importantly, section 33(3) provides that national legislation must be enacted to give effect to the right to just administrative action. This has been done in the Promotion of Administrative Justice Act, 2000.

PRIVACY

A fourth protection is contained in section 14, 'Privacy'. Section 14 specifies that

everyone has the right to privacy, which includes the right not to have their person, home or property searched, their possessions seized or the privacy of their communications infringed upon. This protection of communications (including letters, emails, telefaxes and telephone conversations) is an important right for working journalists.

FREEDOM OF RELIGION, BELIEF AND OPINION

A fifth protection is contained in section 15(1), which guarantees everyone the right to freedom of, among other things, 'thought, belief and opinion'. Freedom of opinion is important for the media as it protects commentary on public issues of importance.

FREEDOM OF ASSOCIATION

A sixth protection is provided for in section 18, which grants everyone the right to freedom of association, thereby guaranteeing the rights of the press to form press associations, but also to form media houses and operations.

FREEDOM OF TRADE, OCCUPATION AND PROFESSION

Section 22 guarantees everyone the right to choose their profession freely; however, this right is subject to the internal limitation that the practise of a profession, such as journalism, may be regulated by law.

This is not a dangerous internal limitation – it merely allows for appropriate regulation to protect the public, such as ensuring against malpractice by members of the medical profession, or unethical behaviour by lawyers.

2.4.2 Other constitutional provisions that assist the media

It is important to note that there are provisions in the South African Constitution, apart from the Bill of Rights provisions, that are important and assist the media in performing its functions.

PROVISIONS REGARDING THE FUNCTIONING OF PARLIAMENT

A number of provisions in the Constitution regarding the functioning of Parliament are important for the media, including the following:

- Sections 58 and 71, which specifically protect freedom of speech in the National Assembly or the NCOP of the president, Cabinet members, deputy minister and

members of the National Assembly and delegates to the NCOP. They cannot be arrested, charged or sued either civilly or criminally in respect of speeches made or documents produced in the National Assembly or NCOP.

- Sections 59(1) and 72(1), which provide that the National Assembly and NCOP are required to conduct their business in an open manner and must hold their sittings as well as committee sittings in public, although reasonable measures may be taken to refuse entry to any person.

- Importantly, sections 59(2) and 72(1) specifically provide that the National Assembly and NCOP may not exclude the media from a sitting of a committee, unless it is reasonable and justifiable to do so in an open and democratic society.

These provisions assist the media in two key ways. First, they ensure that the media has a great deal of access to the workings of Parliament by being physically able to be in Parliament. Second, they protect parliamentarians by allowing members of Parliament (MPs) to speak freely in front of the media without facing arrest or charges for what they say.

PROVISIONS REGARDING PUBLIC ADMINISTRATION

Section 195 is headed 'Basic values and principles governing public administration'. Section 195(1) provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, and includes a number of principles. Some of these have particular importance for the media, namely:

> (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making;
> (f) Public administration must be accountable; and
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

There can be little doubt that the media plays a crucial role in educating the population, enabling citizens to participate meaningfully in a democracy. These provisions could therefore be interpreted as requiring media-friendly policies on the part of the state.

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. It is important for journalists to understand which provisions in the Constitution can be used against the media. There are a number of these.

2.5.1 Right to human dignity

The right to human dignity is provided for in section 10, which states that 'everyone has inherent dignity and the right to have their dignity respected and protected'. Dignity is a right that is often raised in defamation cases because defamation, by definition, undermines the dignity of the person being defamed. This right is often set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.5.2 Right to privacy

Similarly, the right to privacy (discussed in some detail above) is often raised in litigation involving the media, with the subjects of press attention asserting their rights not to be photographed, written about or followed in public, etc. The media has to be careful in this regard. The media should be aware that there are always 'boundaries' in respect of privacy that need to be respected and which are dependent on the particular circumstances, including whether or not the person is a public figure or holds public office, and the nature of the issue being dealt with by the media.

2.5.3 Internal limitation to the right to freedom of expression

It is important to note that the right to freedom of expression is one of the few rights in the Bill of Rights that is subject to an internal limitation. Section 16(1) sets out the content of the right to freedom of expression, and section 16(2) provides that the right to freedom of expression does not extend to three types of expression, namely: propaganda for war; incitement to imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

It is important to understand the nature of the provisions of section 16(2). There is a misconception that the Constitution outlaws or makes illegal this kind of expression. This is not correct: what the Constitution does say is that these three types of expression do not fall within the right to freedom of expression. In other words, they are simply not constitutionally protected.

The effect of this is that government may prohibit this kind of expression without needing to meet any of the requirements contained in the general limitations clause: because there is no right to make these three types of expression, there is no need to

justify limitations on them. The danger in this, of course, is that the government is free to be heavy handed and to legislate in a disproportionate manner when regulating such expression.

2.5.4 States of emergency provisions

It is also critically important to note the provisions of section 37 in the Bill of Rights, which deal with states of emergency. A state of emergency may be declared in legislation for a period of 21 days (although this can be extended for up to three months at a time) by the National Assembly 'only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and the declaration is necessary to restore peace and order'. Importantly, section 37 specifically allows for emergency legislation to provide for the derogation of rights laid down in the Bill of Rights (including all of the rights that are important to the media, such as the right to freedom of expression, privacy, access to information, administrative justice, etc.), where this is strictly required by the emergency.

2.6 Key institutions relevant to the media established under the South African Constitution

A number of important institutions in relation to the media are established under the South African Constitution. These include the judiciary, the Judicial Service Commission (JSC), the Public Protector, the Human Rights Commission and the independent authority to regulate broadcasting.

2.6.1 The judiciary

In terms of section 165(1) of the South African Constitution, judicial authority of the republic vests in the courts. These are: the Constitutional Court, the apex court in respect of constitutional matters; the Supreme Court of Appeal, the apex court in respect of non-constitutional matters; the high courts; the magistrates' courts; and any other court established in terms of an act of Parliament.

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 a society. The media needs the judiciary because of the courts' ability to protect the former from unlawful action by the state and from unfair damages claims by litigants.

Section 165(2) specifically provides that the courts 'are independent and subject only to the Constitution and to the law, which they must apply impartially and without fear, favour or prejudice'. Judges are appointed by the state president, acting on the recommendation of the JSC and after consultation with the chief justice and leaders of all political parties represented in Parliament. Judges are removed by the president, who must act on a finding by the JSC that the particular judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct. In addition, a resolution must be passed by two-thirds in the National Assembly calling for the judge to be removed.

2.6.2 The Judicial Service Commission

The JSC is a constitutional body established to participate in the appointment and removal of judges. Many would query why the JSC is relevant to the media. The answer is because of the JSC's critical role in the judiciary, the proper functioning and independence of which are essential for democracy. In terms of section 178, the JSC comprises: the chief justice; the president of the Supreme Court of Appeal; one judge president designated by all the judges president; two practising advocates nominated by the profession and two practising attorneys nominated by the profession, all of whom are appointed by the president; one law teacher designated by the universities; six members of the National Assembly, three of whom represent opposition parties; four permanent delegates to the NCOP; and four persons designated by the state president after consultation with the leaders of all political parties represented in the National Assembly. Also, when considering matters relating to a specific high court, both the judge president and the premier of that province is part of the JSC.

Unfortunately, it appears that the JSC is becoming increasingly politicised and its credibility among a number of legal practitioners, including some members of the judiciary, has been dented. An example is the furore surrounding the JSC's effective dismissal of a complaint of judicial misconduct laid by the Constitutional Court against Cape Judge President Hlophe.

2.6.3 The Public Protector

The Public Protector's Office is an important office for the media because it, too, is aimed at holding public power accountable. The Public Protector is established in terms of section 182 of the Constitution. It is part of Chapter 9 of the Constitution, 'State institutions supporting constitutional democracy'. The main power of the Public Protector is to investigate (and, if necessary, act upon) any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper, or to result in any impropriety or prejudice.

The Public Protector is governed by the Public Protector Act, Act 23 of 1994. In terms of section 1A(2) of this act, read with section 193 of the Constitution, the Public Protector is appointed by the president on the recommendation of the National Assembly. Note that the Public Protector can be removed only on the grounds of misconduct, incapacity or incompetence, in terms of section 194 of the Constitution.

2.6.4 The Human Rights Commission

The Human Rights Commission is an important organisation in respect of the media. It is also a 'Chapter 9' body – that is, a state institution supporting constitutional democracy. In terms of section 184 of the Constitution, the Human Rights Commission's brief is to promote respect for human rights, as well as to promote the protection, development and attainment of human rights, including monitoring and assessing the observance of human rights in South Africa.

The Human Rights Commission is governed by the Human Rights Commission Act, 1994. Members of the Human Rights Commission are appointed by the president upon recommendation of the National Assembly. As with the Public Protector, the commissioners can be removed only on the grounds of misconduct, incapacity or incompetence, in terms of section 194 of the Constitution.

2.6.5 The independent authority to regulate broadcasting

Section 192 of the Constitution is critically important for the broadcast media. It requires that national legislation be passed to establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society. It is also a Chapter 9 body.

The independent broadcasting authority required by section 192 of the Constitution has been established in terms of the Independent Communications Authority of South Africa Act, 2000. It is called the Independent Communications Authority of South Africa (Icasa), and is dealt with in more detail elsewhere in this chapter.

Section 192 clearly articulates constitutional values for the broadcasting sector, namely, that broadcasting is to be regulated in the public interest and that a diversity of views within the broadcasting sector is important.

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.

Section 7(2) of the Constitution requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. Section 8(1) of the Constitution makes it clear that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. Furthermore, section 8(2) makes it clear that the Bill of Rights also binds a natural (an individual) or juristic person (such as a company) if a particular right is applicable in the circumstances.

While rights are generally enforceable through the courts, the Constitution itself also envisages the right of people, including the media, to approach a body such as the Public Protector or the Human Rights Commission to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected under the Constitution is through the provisions of the Constitution that entrench Chapter 2, the Bill of Rights. Section 74(2) of the Constitution requires that a constitutional amendment to Chapter 2 be passed by two-thirds of the members of the National Assembly and by six of the nine provinces in the NCOP, thereby providing significant protection for the Bill of Rights provisions.

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', yet working journalists may not have a clear idea what these terms mean.

2.8.1 Branches of government

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

THE EXECUTIVE

In terms of section 85(1) of the Constitution, executive power in South Africa vests in the president. Executive power is exercised by the president, together with Cabinet, in terms of section 85(2) of the Constitution. In terms of section 91(1) of the Constitution, the Cabinet comprises the president, a deputy president and ministers appointed by the president – all but two of which must be selected from the members of the National Assembly.

Section 85 sets out a number of functions of the president acting together with members of the Cabinet. These include:

- Implementing national legislation
- Developing and implementing national policy
- Coordinating functions of state departments and administrations
- Preparing and initiating legislation
- Performing any other executive function in terms of the Constitution or legislation

Essentially, it can be said that the role of the executive is to administer or enforce laws, make governmental policy and propose new laws.

THE LEGISLATURE

In terms of section 43(a) of the Constitution, legislative power in South Africa vests in Parliament. In terms of section 42(1) of the Constitution, Parliament consists of the National Assembly and the NCOP. In terms of section 44, this legislative authority has the power to amend the Constitution and to pass and amend legislation. The National Assembly also fulfils other important functions, including, in terms of section 55(2), holding the executive accountable for its operations. It does this through playing an oversight role in terms of the workings of the executive branch of government.

In terms of section 46, the National Assembly is made up of between 350 and 400 people, elected in terms of a common voters' role and in accordance with national legislation. In terms of section 60, the NCOP comprises nine delegations of 10 people – one delegation from each of country's nine provinces.

THE JUDICIARY

As described above, judicial power vests in the courts. The role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law.

2.8.2 Separation of powers

It is important in a functioning democracy to divide governmental power between different organs of the state in order 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 is to separate the functions of the three branches of government – the executive, the legislature and the judiciary – so that no single branch is able to operate alone, assume complete state control and amass centralised power. While

each branch performs a number of 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 a number of weaknesses in the South African Constitution. If these provisions were strengthened, there would be specific benefits for the South African media.

2.9.1 Remove internal constitutional limitation

The internal limitation contained in section 16(2) of the Constitution and applicable to the right to freedom of expression ought to be repealed. These provisions are unnecessary because the provisions of the general limitations clause give government the powers it needs to limit fundamental rights reasonably. Consequently, the legislature already has the power to pass legislation limiting hate speech and other kinds of expression, which is the subject of the internal qualifier found in section 16(2).

2.9.2 Bolster independence of the broadcasting regulator

It is disappointing that the Constitution does not provide the independent broadcasting regulator, established in terms of section 192, the same degree of institutional protection against political and other interference that is provided to all other Chapter 9 (state institutions supporting constitutional democracy) bodies. The broad provisions that protect the independence of Chapter 9 bodies generally should be amended such that they specifically apply to the broadcasting regulator, as well as to all the other Chapter 9 bodies. These provisions are:

- Section 181 – Establishment and governing principles
- Section 193 – Appointments
- Section 194 – Removal from office

2.9.3 Constitutional protection for the public broadcaster

It has become clear that the public broadcaster, the SABC, is increasingly threatened by political interference. Most South Africans access news and current affairs information from the SABC. The Constitution should therefore specifically protect its independence and ensure that it operates in the public interest.

This is important in order to guarantee impartiality and to be sure that the South African public is exposed to a variety of views. Chapter 9 of the Constitution ought to be amended specifically to include the SABC as a state institution supporting constitutional democracy.

3 THE MEDIA AND LEGISLATION

In this section you will learn:

- ❑ What legislation is and how it comes into being
- ❑ Key legislative provisions governing the publication of print media
- ❑ Key legislative provisions governing the broadcasting media in general
- ❑ Key legislative provisions governing the public broadcasting sector
- ❑ Key legislative provisions governing broadcasting signal distribution
- ❑ Generally applicable statutes that threaten a journalist's duty to protect sources
- ❑ Generally applicable statutes that prohibit the publication of certain kinds of information
- ❑ Generally applicable statutes that prohibit the interception of communication
- ❑ Generally applicable statutes that specifically assist the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by parliament, which is the legislative authority. As discussed, legislative authority in South Africa vests in Parliament, which, in terms of the Constitution, is made up of the National Assembly and the NCOP. Consequently, both houses of Parliament are involved in passing legislation.

Detailed rules in sections 73–82 of the Constitution set out the law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution, there are four kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- Legislation that amends the Constitution – the procedures and/or applicable rules are set out in section 74 of the Constitution

- Legislation that does not deal with provincial-related issues – the procedures and/or applicable rules are set out in section 75 of the Constitution

- Legislation that deals with provincial issues – the procedures and/or applicable rules are set out in sections 76 and 78 of the Constitution

- Legislation that deals with taxation issues – the procedures and/or applicable rules are set out in section 77 of the Constitution

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 in accordance with the various applicable procedures required for different types of bills as set out above, it is sent to the president. Once it is signed by the president (signifying his assent to the bill) it becomes an act (in terms of section 81 of the Constitution). An act must be published promptly, and takes effect or comes into force when it is published or on a date specified in the act itself (in terms of section 81 of the Constitution).

Besides the checks upon legislation that are built in to the system of having both houses of Parliament consider and vote upon a bill, the Constitution provides for other mechanisms of reviewing a bill passed by Parliament before it becomes an act:

- *Presidential review:* If the president has reservations about the constitutionality of any bill passed by Parliament, he or she may refer it back to the National Assembly for reconsideration, in terms of section 79 of the Constitution. Note that the NCOP must also participate in such reconsideration if the president is concerned about a procedural matter involving the NCOP, or if the bill is one which amends the Constitution or deals with provincial matters. After the reconsideration, the president must either accept the bill – that is, sign it such that it becomes an act – or the president must refer the bill to the Constitutional Court for a ruling on its constitutionality. If the Constitutional Court rules that the bill is constitutional, section 79(5) requires the president to assent to and sign the bill.

- *Review by the National Assembly:* It is interesting that the Constitution, in section 80, provides for a procedure to test the constitutionality of a recently enacted act of Parliament by members of the National Assembly. In terms of section 80, members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an act of Parliament is unconstitutional, provided that:
    - At least one-third of the members of the National Assembly support

the application. The reason for this requirement is to prevent small minority parties (less than a third of the MPs) from being able to disrupt the democratic process by unnecessarily challenging laws through allegations of unconstitutionality

- The act of Parliament was assented to and signed by the president within the previous 30 days. The reason for this requirement is to try to discourage Parliament from causing legal chaos by challenging its own legislation after the legislation has long been settled

3.2 Statutes governing the print media

Since the advent of democracy, South Africa's print media has enjoyed a level of media freedom that is unprecedented in its history. Indeed, South Africa's print media environment is undoubtedly the most free, robust and critical on the continent. There are very few limitations on the ability to operate as a print media publication. Most of the laws setting down specific obligations upon the print media are clearly reasonable and justifiable and do not impinge in any way on the public's right to know.

3.2.1 Imprint Act, Act 43 of 1993

There are certain key requirements laid down by the Imprint Act in respect of printed matter, the definition of which would clearly include a newspaper, newspaper poster, magazine or periodical:

- Section 2 requires printers of publications intended for public sale or distribution to put their full name and full address in one of the official languages on any such publication. Note that it is possible for a registered abbreviation to be used, in terms of section 3.

- Section 4 provides that no person may distribute any publication that is printed outside of the country unless the name of the country of origin is affixed to the publication.

- In terms of section 7, failure to comply with sections 2, 3 or 4 is an offence and, upon conviction, a person would be liable to a fine or imprisonment not exceeding one year.

3.2.2 Legal Deposit Act, Act 54 of 1997

The aim of the Legal Deposit Act is to preserve South Africa's documentary heritage.

Section 2, read with sections 3 and 4, requires a publisher, at its cost, to supply up to five copies of each published document (which clearly includes newspapers, magazines and periodicals) to a prescribed place of legal deposit (these are large libraries based in the major cities), and to provide the State Library with prescribed information regarding that document within 14 days of publication.

3.3 Statutes governing the broadcast media generally

3.3.1 Statutes regulating broadcasting generally

Broadcasting in South Africa is regulated in terms of a number of different pieces of legislation:

- *Broadcasting Act, Act 4 of 1999*. The Broadcasting Act has been amended a number of times and, apart from a few sections which are still generally applicable to all broadcasters, it is essentially an act that regulates the public broadcaster, the SABC, as is dealt with in more detail below.

- *Independent Communications Authority of South Africa Act, Act 13 of 2000*. This act establishes and empowers Icasa, which is the authority that regulates electronic communications, broadcasting and postal services in South Africa.

- *Electronic Communications Act (ECA), Act 36 of 2005*. The ECA provides for a number of specific powers and functions of Icasa in relation to the entire electronic communications and broadcasting sectors in South Africa. Chapter 9 of the ECA, 'Broadcasting services', regulates the broadcasting industry in South Africa.

- *Media Development and Diversity Agency (MDDA) Act, Act 14 of 2002*. The MDDA Act creates the Media Development and Diversity Agency as a juristic person, whose main object is to promote development and diversity in the media throughout the country, in terms of section 3 of the MDDA Act. The MDDA's main source of funding is through financial contributions made by broadcasters. This funding is used for a range of projects, including providing financial support to community media and small commercial media. Note that this is not limited to broadcast media.

3.3.2 Establishment of Icasa and the MDDA

The Icasa Act provides in section 3 that Icasa is established and that it operates through a council. The MDDA Act provides in section 2 that the MDDA is established and that it operates through a board.

3.3.3 Main functions of Icasa and the MDDA

ICASA

In terms of section 2 of the Icasa Act, Icasa is established to regulate electronic communications, postal matters and, importantly, in terms of section 2(a), 'to regulate broadcasting in the public interest to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution'.

Section 4(1)(a) of the Icasa Act requires Icasa to exercise the powers and perform the duties conferred or imposed upon it by the Icasa Act, but also by other relevant statutes, including the Broadcasting Act, the Postal Services Act and the Electronic Communications Act. Consequently, Icasa's mandate derives from a number of different statutes.

If one looks at all the broadcasting-related statutes (the Icasa Act, the Broadcasting Act and the ECA), it is clear that Icasa's main functions with regard to broadcasting include: licensing of various broadcasting services; spectrum management and licensing; regulation of ownership and control of broadcasting services; and content regulation. These are dealt with in more detail below.

THE MDDA

The MDDA Act, at section 3, provides that the MDDA's main objective is to promote development and diversity in the South African media and for that purpose, among other things, to:

- Encourage media ownership by historically disadvantaged communities
- Encourage the channelling of resources to the community media and small commercial media sectors.

3.3.4 Appointment of Icasa councillors and MDDA board members

ICASA

In terms of section 5 of the Icasa Act, the Icasa Council is made up of nine people: the chairperson and eight other councillors. They are all appointed by the minister of communications on the advice of the National Assembly.

Section 5(1) requires that the appointment process include a public nominations process, be transparent and open, and include the publication of a shortlist of candidates.

The process set out in section 5 requires the National Assembly to come up with a shortlist of suitable candidates of one-and-a-half times the number of councillors to be appointed, and the minister must make his or her choice of councillors from that list.

Section 5(3) of the Icasa Act sets out criteria for appointment. Importantly, these include a commitment to 'fairness, freedom of expression, openness and accountability' as well as technical competencies. Section 6(1) of the Icasa Act sets out grounds for disqualification of Icasa councillors, and these include being foreign, public servants, holding political office, conflicts of interest and prior convictions.

THE MDDA

In terms of section 4 of the MDDA Act, the MDDA board is made up of nine members, all of whom are appointed by the president. However, of the nine members:

- Six are appointed on the recommendation of the National Assembly. Section 4(1)(b) of the MDDA Act requires that the appointment process must include a public nominations process, be transparent and open, and include the publication of a shortlist of candidates

- Three are appointed by the president without the intervention of the National Assembly 'taking into account section 15', in terms of section 4(1)(c) of the MDDA Act. Section 15 deals with the funding of the MDDA and is a pointed reference to the fact that the majority of funding for the MDDA currently derives from voluntary contributions made by the media. Indeed, section 4(1)(c) specifies that one of the three purely presidential appointees must be from the commercial print media and another from the commercial broadcast media

Section 4(4) read with section 4(5) of the MDDA Act sets out criteria for appointment. These include a commitment to 'fairness, freedom of expression, openness and accountability' as well as technical competencies. Section 5 of the MDDA Act sets out grounds for disqualification of MDDA board members, and these include being foreign, holding elective office, holding political party office and prior convictions.

3.3.5 Funding for Icasa and the MDDA

ICASA

In terms of section 15 of the Icasa Act, Icasa is funded from money appropriated by Parliament. In other words, funding for Icasa must be provided for in the national

budget. Section 15(1A) also allows Icasa to be funded from other sources, as may be agreed between the minister of communications and the minister of finance, and as approved by Cabinet.

It is important to note that Icasa is not permitted to keep any licence/regulatory fees paid to it by the broadcasting, electronic communications or postal industries, and section 15(3) requires Icasa to pay such fees and other revenue into the National Revenue Fund within 30 days of receipt.

THE MDDA

In terms of section 15 of the MDDA Act, the funds of the MDDA consist of: money appropriated by Parliament that is specifically set aside in the national budget for that purpose; money received in terms of voluntary agreements with any organisation (note that this includes a number of print and broadcast media entities); domestic and foreign grants, investment interest and moneys lawfully obtained from any other source.

3.3.6 Making broadcasting regulations

The ECA, at section 4, sets out a regulation-making process and procedure for Icasa. Icasa is given wide powers to make regulations. When Icasa intends making a regulation it must give the public at least 30 days' notice of its intention, and a draft regulation must be published for public notice and comment. Importantly, section 4(5) of the ECA requires Icasa to notify the minister of communications in writing of its intention to make a regulation and the subject matter of the regulation. Section 4(6) allows for Icasa to conduct public hearings in regard to proposed regulations.

3.3.7 The licensing regime for broadcasters in South Africa

CATEGORIES OF BROADCASTING SERVICES

Section 5(1) of the Broadcasting Act provides that there are three categories of broadcasting services:

- *Public:* These are the radio and television services provided by the public broadcaster, the SABC.

- *Community:* These are both radio and television services provided by non-profit entities in the interests of a community – either a geographic community or a community of interest, such as a religious broadcaster or a student radio station.

- *Commercial:* These are both radio and television services provided on a commercial basis. Note that commercial broadcasters operate on a free-to-air basis (in which case their revenue is derived from advertising alone) or on a subscription basis (in which case their revenue is derived from subscription income and advertising).

TYPES OF BROADCASTING LICENCES

In terms of section 5 of the ECA, Icasa is empowered to grant licences for the different categories of broadcasting services. There are two types of broadcasting licences available:

- *Individual licences:* For commercial and public broadcasting services of national or regional scope. In terms of section 5(9) of the ECA, an individual licence may be granted for a period not exceeding 20 years and may be renewed.

- *Class licences:* For community broadcasting services or for low-power services, such as radio stations used by drive-in cinema operators. In terms of section 19(1) of the ECA, a class licence must have a term of validity not exceeding 10 years. Class licences may be renewed.

FREQUENCY SPECTRUM LICENSING

Section 31(1) of the ECA provides that, as a general rule, any person who transmits a signal by radio must have a radio frequency spectrum licence granted by Icasa. As broadcasters in South Africa make use of radio frequencies to transmit their broadcasting signals, all broadcasters are required to have a frequency spectrum licence.

In terms of section 31(2) of the ECA, a radio frequency spectrum licence is required in addition to the broadcasting licences set out above.

3.3.8 Responsibilities of broadcasters in South Africa

ADHERENCE TO LICENCE CONDITIONS

Section 4(3)(d) of the Icasa Act specifically empowers Icasa to develop and enforce licence conditions. In terms of section 8(1) of the ECA, Icasa must pass regulations setting out standard terms and conditions for individual and class licences and, in terms of section 8(3) of the ECA, may prescribe additional terms applicable to any individual or class licence.

ADHERENCE TO CONTENT REQUIREMENTS OR RESTRICTIONS

Although all broadcasters enjoy the constitutional right to freedom of expression, this right is not absolute and broadcasters are, in fact, subject to a range of content regulation in relation to what they may or may not broadcast. These regulations include the following.

Adherence to a broadcasting code of conduct
In terms of section 54 of the ECA, Icasa must prescribe a code of conduct for broadcasting services. Broadcasters must comply either with the Icasa code or with the code of a self-regulatory body of which the broadcaster is a member, provided that Icasa has approved the code of that self-regulatory body. Almost all broadcasters (public, commercial or community) are members of the National Association of Broadcasters (NAB).

The NAB has established a self-regulatory mechanism in respect of broadcasting content, namely the Broadcasting Complaints Commission of South Africa (BCCSA), which has its own Icasa-approved codes of conduct for both free-to-air and subscription broadcasters. Most broadcasters are therefore governed by and adhere to the BCCSA's codes, which are very similar to Icasa's code.

The codes are dealt with in more detail in the regulations and self-regulation sections below.

Adherence to an advertising code
In terms of section 55 of the ECA, all broadcasting service licensees must adhere to the Code of Advertising Practice of the Advertising Standards Authority of South Africa. However, breaches of the Code of Advertising Practice by broadcasters are dealt with by Icasa, acting through its Complaints and Compliance Committee. The code is dealt with in more detail in the self-regulation section below.

Adherence to local content quotas
Section 61 of the ECA deals with the preservation of South African programming, and empowers Icasa to make regulations and licence conditions on:

- Local television content quotas for television broadcasting services
- Independent television production quotas for television broadcasting services
- South African music quotas for sound broadcasting services

The requirements of the local content regulations are set out in more detail in the regulations section below.

National sporting events
Section 60(1) of the ECA prohibits subscription broadcasting services from acquiring exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest by Icasa, after consultation with the ministers of communications and sports. The requirements of the sports broadcasting regulations are set out in more detail in the regulations section below.

Political broadcasting restrictions
Section 56 of the ECA prohibits the broadcasting of all party election broadcasts and political advertising except during an election period. During each specific election period, Icasa develops a new set of regulations for party election broadcasts, in accordance with the following requirements of section 57 of the ECA:

- Party election broadcasts cannot be broadcast within the 48-hour period prior to an election.

- No commercial or community broadcaster is obliged to carry party election broadcasts, although the public broadcaster is so obliged.

- Icasa is to determine the duration and scheduling of party election broadcasts, having regard to the principle that all parties are to be treated equitably. Note that equitable treatment does not mean that all parties are required to be given equal time for party election broadcasts.

Political advertising is governed by section 58 of the ECA, which provides that:

- Political advertisements cannot be broadcast within the 48-hour period prior to an election

- No broadcaster (public, commercial or community) is obliged to carry political advertising, but if it chooses to do so it must afford all political parties an equal opportunity

- Broadcasters may not discriminate against or give preference to any political party in respect of political advertising

Section 59 of the ECA requires generally equitable treatment of political parties by broadcasters during an election period:

- All parties must be treated equitably and there must be reasonable opportunities for the discussion of conflicting views.

- There must be adherence to the principle of the right of reply.

KEEPING RECORDS OF PROGRAMMES BROADCAST

Section 53 of the ECA requires all broadcasters to keep a recording of every programme broadcast for a period of 60 days from the date of broadcast, and to produce a script or transcript of a programme after the broadcast thereof. Importantly, section 53(2) specifically provides that Icasa is not authorised to view programmes prior to their being broadcast.

ADHERENCE TO OWNERSHIP AND CONTROL REQUIREMENTS

Regulating ownership and control of broadcasting licences is an important part of Icasa's regulatory work. Ensuring diversity of ownership is an important part of guaranteeing that there is genuine diversity of views expressed over the airwaves. Icasa has five important areas of supervision in this regard:

No party political broadcasters
Section 52 of the ECA prohibits any broadcasting licence to be given to any party, movement, organisation or like body which is of a party political nature.

Limitations on foreign ownership and control of commercial broadcasting services
Section 64 of the ECA prohibits:

- A foreign person from controlling a commercial broadcasting licensee
- A foreign person from having a financial interest or voting interest exceeding 20% in a commercial broadcasting licensee
- Foreigners from constituting more than 20% of directors of a commercial broadcasting licensee

Limitations on the number of commercial broadcasting services a single entity can control
Section 65 of the ECA sets limits on the number and type of commercial broadcasting services a single entity can control. In summary, the limitations are as follows:

- No person can control more than one commercial television service. Note that acting in terms of section 92(3) of the ECA, Icasa has recommended that this provision not apply to subscription broadcasters, thus allowing a single entity to control more than one subscription television broadcasting service.

- No person may control more than two FM sound broadcasting services or more than one in the same coverage area.

- No person may control more than two AM sound broadcasting services or more than one in the same coverage area.

However, Icasa may grant exemptions from all of these requirements on good cause shown.

Limitation on cross-media control of commercial broadcasting services
Section 66 of the ECA sets limits on cross-media control. Cross-media ownership and control is an issue where a single entity owns or controls both print and broadcast media. In summary, section 66 prohibits:

- An entity from controlling a newspaper, a sound broadcasting service and a television broadcasting service

- An entity which controls a newspaper from also controlling a sound or television broadcasting service if the:
  - Newspaper has an ABC (Audit Bureau of Circulations – a print media industry body responsible for accurately calculating circulation and readership figures) circulation that is equal to 20% of the entire newspaper readership in the area
  - Circulation area of the newspaper substantially overlaps (by 50% or more) with the broadcast coverage area of the sound or television broadcasting service

Ownership and control of individual licences by persons from historically disadvantaged groups
There are no set requirements for ownership and control of licences by persons from historically disadvantaged groups. Section 9(2)(b) of the ECA does, however, specify that Icasa must set out the percentage of equity ownership required to be held by persons from historically disadvantaged groups whenever it issues an invitation to apply for an individual licence. Importantly, section 9(2)(b) stipulates that such percentage cannot be less than 30%.

3.3.9 Is Icasa an independent regulator?

Icasa has a huge advantage over many other broadcasting regulators in the South African region, namely, that its independence is constitutionally mandated in terms of section 192 of the South African Constitution (see constitutional section above).

Furthermore, the Icasa Act contains specific statements about Icasa's independence. Section 3(3) of the Icasa Act states that Icasa 'is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice'. Section 3(4) of the Icasa Act states specifically that Icasa 'must function without any political or commercial interference'.

Besides these important statements, Icasa does have substantive independence in relation to its main regulatory functions, particularly with respect to broadcasting:

- *Licensing:* Icasa is entitled to issue invitations to apply for individual broadcasting licences and to license such broadcasters on its own without any role being played by the executive. It is likewise entitled to issue class broadcasting licences on its own. In both cases Icasa makes licence conditions without any role being played by the executive (see sections 5 and 9 of the ECA).

- *Regulation making:* While Icasa is required to inform the minister of proposed regulations, the minister's consent to such regulations is not required (see section 4 of the ECA).

- *Ministerial policy directions:* While the minister is entitled to make policy directions on any matter of national policy applicable to the information and communication technology sector, he or she may not do so if this will affect licensing – see section (3)(3) of the ECA. Furthermore, Icasa is only required to 'consider' such ministerial policy directions and is not required to act in accordance with them – see section 3(4) of the ECA.

However, there are certain regulatory functions that Icasa is not entirely free to regulate.

- *Frequency spectrum management:* Importantly, the ECA at section 34(2) provides for ministerial approval of the National Radio Frequency Spectrum Band Plan, which is to be developed by Icasa. The ECA is silent on what would occur if the minister did not approve the band plan, but it is clear that Icasa may proceed to publish the final band plan in the Government Gazette only once such approval has been obtained – see section 34(12) of the ECA.

In relation to appointments, already mentioned above, Icasa's councillors are appointed by the minister upon the recommendation of the National Assembly. It is important that the National Assembly is involved because this is a representative body comprising members of various political parties. However, concerns have been raised about the fact that the minister makes the final appointments.

In the 2007 report of the Ad Hoc Committee on the Review of Chapter 9 and associated institutions, the committee recommended to Parliament that changes be made in this regard. The committee recommended that Icasa councillors be appointed by the president, rather than the minister, on the recommendation of the National Assembly. To date, however, the recommendations of the committee have not been implemented by Parliament.

In relation to performance management, section 6A of the Icasa Act was introduced in 2006 to provide for a performance management system to monitor and evaluate the performance of Icasa council members. The performance management system is established by the minister in consultation with the National Assembly, in terms of section 6A(1) of the Icasa Act. In the 2007 report of the Ad Hoc Committee on the review of Chapter 9 and associated institutions, the committee recommended to Parliament that changes be made in this regard. The committee bluntly recommended that the performance management system be revised to remove the role of the minister. To date, however, the recommendations of the committee have not been implemented by Parliament.

3.3.10 Amending the legislation to strengthen the broadcast media generally

There are two broad problems with the current and proposed legislative framework for the regulation of broadcasting generally:

- *Provisions regulating ownership diversity:* The ECA should be amended to ensure that a workable definition of 'control' of a broadcasting service is clearly provided for. This will ensure that ownership limitations which are critical for maintaining viewpoint diversity (e.g, foreign ownership restrictions and limitations on the number of broadcasting services a single entity can own) can be enforced effectively.

- *Provisions that undermine the constitutionally required independence of Icasa:*
  - The Icasa Act ought to be amended to provide that the:
    - President is the member of the executive who is the formal authority responsible for Icasa council appointments and not the minister. This is because ministerial appointments lack credibility from an independence point of view
    - National Assembly is responsible for developing and ensuring compliance with a performance management system in respect of Icasa councillors and not the minister.
  - The ECA ought to be amended to make it clear that Icasa is able to develop the national radio frequency band plan on its own, and this should not require the prior consent of the minister.

3.4 Statutes that regulate the public broadcasting sector

3.4.1 Introduction

The SABC is South Africa's public broadcaster. It has three free-to-air television services as well as Channel Africa, which is broadcast on a satellite platform. The SABC has 18 radio stations, some of which are regional and some national. In recent times, the SABC has been in severe crisis. In 2009:

- Its board of directors was dismissed by Parliament and an interim board was appointed to run the affairs of the SABC
- Most of its senior managers were suspended pending investigation into financial and other irregularities
- The SABC's debts ballooned to nearly R2 billion, requiring a government bail-out involving the Department of Finance

The main statute governing the affairs of the SABC is the Broadcasting Act, Act 4 of 1999, although there are also relevant provisions in the ECA.

3.4.2 Establishment of the SABC

The SABC was converted from a statutory body into a public company incorporated in terms of the Companies Act, 1973, and having a share capital in terms of section 8A(1) and (2) of the Broadcasting Act. In terms of section 8A(3), the state is the sole shareholder of the SABC. The Broadcasting Act provides, at section 9, that the SABC consists of two separate operating divisions: a public service division and a commercial service division.

3.4.3 The SABC's mandate

The SABC's exact mandate is very unclear. Chapter IV of the Broadcasting Act is headed 'Public broadcasting service and charter of the corporation', but it contains a number of provisions that have nothing to do with the public broadcasting mandate. Indeed, the Broadcasting Act has been criticised for some time because the actual public mandate appears to consist of provisions found in a number of different sections of the Broadcasting Act, and it is difficult to say with any legal certainty precisely what the public mandate is.

It appears that the public mandate of the SABC is currently contained in a number of disparate provisions of the Broadcasting Act and the ECA, and includes:

- Taking into account the needs of language, cultural and religious groups as well as constituent regions and local communities, and the need for educational programming – section 2(u) of the ECA

- Developing South African expression by providing in official languages a range of programming that: reflects South African attitudes, opinions and values; displays South African talent in education and entertainment programmes; offers a plurality of views and a variety of news, information and analysis from a South African point of view and advances the national and public interest – section 6(4) of the Broadcasting Act

- Providing radio and television programming that informs, educates and entertains – section 8(d) of the Broadcasting Act

- Being responsive to audience needs, including the needs of the deaf and the blind – section 8(e) of the Broadcasting Act

- Providing a public service that: makes services available in all official languages; reflects both the unity and diverse cultural and multilingual nature of South Africa; strives to be of high quality; provides significant news and public affairs programming; includes significant amounts of educational programming; enriches South Africa's cultural heritage; commissions programming from within the corporation and from the independent production sector; and includes national sports programming as well as developmental and minority sports – section 10(1) of the Broadcasting Act

- Providing a commercial service that: is subject to the same policy and regulatory structures as outlined for commercial services; complies with the values of the public programming service; commissions from the independent production sector; subsidises the public service; and is operated efficiently – section 11(1) of the Broadcasting Act

3.4.4 Appointment of the SABC Board

The SABC is controlled by a board of 12 non-executive members and three executive members (the group chief executive officer, the chief operations officer and the chief financial officer), in terms of section 12 of the Broadcasting Act.

The non-executive members are appointed by the president on the advice of the National Assembly, in terms of section 13(1) of the Broadcasting Act. Furthermore, section 13(2) of the Broadcasting Act requires that the appointment process must

include a public nominations process, be transparent and open, and include the publication of a short-list of candidates.

Unfortunately, the Broadcasting Act is silent on who appoints the executive members of the board, the minister or the non-executive members of the board. This gap in the law has led to a great deal of conflict and litigation, and it appears from court papers (although this was contested) that the minister has played a decisive role in appointing the executive members of the board.

Section 13(4) of the Broadcasting Act sets out the criteria for board appointments. These include a commitment to 'fairness, freedom of expression, openness and accountability' as well as technical competencies. Section 16(1) of the Broadcasting Act sets out grounds for disqualification of board members, and these include being foreign and having conflicts of interest or prior convictions.

The appointment process of the SABC Board has come under intense public scrutiny over the past few years. It was widely publicised that the ruling party had intervened in the parliamentary process to ensure that certain individuals were recommended for board appointment when they had not made the short-list. Furthermore, the presidential appointments were made days after the then-president had lost the party leadership. The board was seen to be out of step with the new political alignment within the ruling party. This, coupled with the financial crisis that developed at the SABC, and open conflicts between the board and management, led to widespread calls for changes to the board and mass resignations of board members. Parliament quickly pushed through an amendment act, which resulted in a number of key changes to the Broadcasting Act. These changes include the introduction of section 15A of the Broadcasting Act, which allows for Parliament to:

- Recommend the dissolution of the entire board if it has failed to discharge its fiduciary duties or adhere to the charter

- Recommend the appointment of an interim board to replace a dissolved board. This interim board consists of the three executive board members and five non-executive board members appointed by the president on the advice of the National Assembly. Note that there are no requirements in respect of public nominations or transparency, or the development of a short-list vis-à-vis recommendations for interim board members.

3.4.5 Funding for the SABC

The Broadcasting Act does not contain a single clear statement on how the SABC is

funded. The SABC is required to keep separate accounts for its public services and public commercial services divisions, in terms of section 9 of the Broadcasting Act. Its public services division is entitled to draw revenue from a range of sources, including advertising and sponsorships, grants and donations, licence fees and state grants, in terms of section 10(2) of the Broadcasting Act.

Unfortunately, the Broadcasting Act is silent on the sources of revenue for the public commercial services division, although section 11(1)(d) does make it clear that it is to subsidise the public services division.

Section 27 of the Broadcasting Act provides for a television licence fee, to be determined by the minister. Television licence fees account for approximately 16% of the SABC's total revenues and direct government funding accounts for approximately 2%. The rest of the SABC's income is largely dependent on advertising and sponsorship.

3.4.6 SABC: Public or state broadcaster?

There is doubt as to whether the SABC is currently a genuinely public, as opposed to a state, broadcaster. From a legal point of view, the role of the minister is particularly problematic in relation to his or her development of company articles and memoranda of association, as well as the appointment of executive management, leading to fears of ruling party 'deployment'.

In recent years, scandals such as the black-listing saga and the cancellation of a political satire series already commissioned by the SABC have raised questions about the SABC's commitment to its own editorial independence. There has been disquiet about instances of alleged ruling party interference in the parliamentary process concerning board appointments.

3.4.7 Amending the legislation to strengthen the public broadcaster

The government has recognised that the current crises involving the SABC are at least partly a result of legislative weaknesses, and it is clear that the Broadcasting Act is going to be substantially amended, if not entirely repealed, at some point in the future.

There are currently three main weaknesses in the existing Broadcasting Act, namely:

- The SABC's public mandate is not set out in a single, clear, coherent statement. Consequently, the board and senior management struggle to define their roles properly and the public have little idea about what they should expect from the

public broadcaster. This makes it extremely difficult to hold the SABC accountable for meeting its public mandate.

- There is a significant legal gap in the Broadcasting Act in that it does not set out clearly who is responsible for the appointment of the SABC's executive management. This has led to alleged ministerial interference and open conflict between the board and executive management.

- The SABC has a range of programming obligations, including in all 11 official languages, yet its funding model appears to be unsustainable. The SABC is overwhelmingly dependent on commercial sources of funding, and there is insufficient public funding of the broadcaster.

3.5 Statutes governing broadcasting signal distribution

Broadcasting signal distribution is the technical process of ensuring that the content-carrying signal of a broadcaster is distributed such that it can be heard and/or viewed by its intended audience. Two statutes are of particular relevance here, namely the ECA and the Sentech Act, Act 63 of 1996.

3.5.1 Licences required by broadcasting signal distribution providers

The ECA makes it clear that broadcasting signal distribution is a form of electronic communications network service (ECNS), which is defined in section 1 as:

> a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise:
> (a) for that person's own use for the provision of ... [a] broadcasting service;
> (b) to another person for that other's use in the provision of a ... broadcasting service; or
> (c) for resale to a ... broadcasting service ... .

Consequently, all broadcasting signal distributors must have an ECNS licence to provide ECNS.

As is the case with broadcasting licences, there are two types of ECNS licences: individual and class licences. In terms of section 5(3) of the ECA, an ECNS of provincial and national scope operated for commercial purposes and an ECNS having a public entity hold more than 25% of its share capital must hold individual licences. In terms of section 5(5) of the ECA, an ECNS of district municipality or local municipal scope operated for commercial purposes is required to hold only a class licence.

3.5.2 The regulatory framework for an ECNS

The ECA, at sections 62 and 63, sets out the regulatory framework for ECNSs that provide broadcasting signal distribution.

The main obligations upon an ECNS licensee that provides signal distribution are to prioritise South African broadcasting channels (section 62(1)(a)) and to ensure that it provides signal distribution only to licensed broadcasters (section 62(2)(b)).

3.5.3 Types of broadcasting signal distribution ECNSs

It is important to note that the ECA distinguishes between types of signal distribution ECNSs, although it is not clear on this point. The lack of clarity is because the provisions of the ECA on this issue were not fully carried over from the previously applicable, and now repealed, Independent Broadcasting Authority (IBA) Act, 1993.

The ECA clearly specifies two types of signal distribution ECNSs, but there is also a third:

- Section 62(3) of the ECA refers to a 'common carrier' ECNS, which is defined as an ECNS provider 'who is obliged to provide signal distribution for broadcasting services on a non-discriminatory and non-exclusive basis'. Sentech is the only common carrier ECNS.

- In section 63(1) of the ECA, reference is made to self-provisioning of broadcasting signal distribution. This means that a broadcaster is entitled to distribute its own signal provided it has an ECNS licence to do so. There are a number of community broadcasting services that have a class ECNS licence to provide their own signal distribution services.

- There is, in practice, a third kind of ECNS signal distribution service that is neither a self-provider nor a common carrier, and that is a commercial signal distributor, which can choose whether or not to provide signal distribution services to a broadcasting licensee. An example of this kind of ECNS licensee is Orbicom, the company that distributes the M-Net and MultiChoice subscription broadcasting services signals.

3.5.4 Legal provisions governing Sentech

Sentech Limited is the only 'common carrier' signal distributor in South Africa. It is a public company established in terms of the Sentech Act, with the state as the sole

shareholder (section 6(1)). The minister of communications exercises the rights of the state in respect of the state's shares in Sentech (section 6(3)). Clearly, this includes appointing the board. Consequently, the executive effectively controls the activities of Sentech.

The Sentech Act provides, at section 5, that the main object and business of Sentech is to provide electronic communications services and ECNSs in accordance with the ECA.

3.6 Statutes that undermine a journalist's duty to protect his or her sources

A journalist's sources are the life blood 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 whistleblowers – inside sources who are able to 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.

3.6.1 Criminal Procedure Act, Act 51 of 1977

Section 205 of the Criminal Procedure Act (CPA) 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 the director of public prosecutions or any public prosecutor so authorised by the director. 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/her sources of information relating to that crime.

3.6.2 National Prosecuting Authority Act, Act 32 of 1998

Section 28, read with sections 1 and 7(1), empowers an investigating director within the National Prosecuting Authority to conduct investigations into specific offences, as set out in a proclamation by the president. These are known as 'specified offences'. Section 28(6) specifically empowers any investigating director who is looking into such specified offences to summon any person who is believed to be able to furnish any information on the subject of the investigation for questioning, or to require such person to produce any book, document or object. Refusing to appear before the

investigating director or refusing to provide the book, document or object is an offence.

It is, however, important to note that whether or not requiring a journalist to reveal a source is in fact an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each case, particularly whether or not the information is available from any other source. 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.

3.7 Statutes that prohibit the publication of certain kinds of information

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

- Identities of minors in court proceedings
- Certain kinds of information regarding legal proceedings
- Information regarding defence, security, prisons and the administration of justice
- Obscene materials
- Racism
- Election-related information
- State procurement
- Financial intelligence information
- Certain advertising restrictions

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

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

CRIMINAL PROCEDURE ACT, ACT 51 OF 1977

Section 154(3) of the CPA prohibits the publication of the identity of an accused person or of a witness in criminal proceedings if that accused person or witness is under 18 years of age, 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 or imprisonment of not more than five years, or both.

CHILD JUSTICE ACT, ACT 75 OF 2008

Section 45 specifically makes the provisions of section 154 of the Criminal Procedure Act (set out immediately above) applicable to minors in preliminary inquiries (in other words, before criminal proceedings even start).

CHILDREN'S ACT, ACT 38 OF 2005

Section 74 of the Children's Act prohibits the publication 'in any manner' of any information relating to the proceedings of a children's court (a court specifically established under the act), which may reveal the name or identify of a child who is a party or witness to a proceeding, without the permission of the court.

Anyone contravening section 74 commits an offence in terms of section 305(1)(b) of the Children's Act and is liable to a fine, a period of imprisonment, or both, in terms of section 306(6) of the Children's Act.

3.7.2 Prohibition on the publication of certain information relating to legal proceedings

CRIMINAL PROCEDURE ACT, ACT 51 1977

The CPA, 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
- To protect the identity of witnesses in criminal proceedings
- To protect the identity of minors in criminal proceedings
- To protect the identity of a complainant in relation to a charge involving extortion or sexual offences

In terms of section 154(5) of the CPA, any such publication is an offence with a penalty of a fine or imprisonment of not more than one year, or both.

Importantly, section 154(6) of the CPA specifically allows the court to award civil compensation for such publication. In other words, to require damages to be paid to the person whose identity is revealed.

DIVORCE ACT, ACT 70 OF 1979 AND MEDIATION IN CERTAIN DIVORCE MATTERS ACT, ACT 24 OF 1987

Section 12(1) of the Divorce Act makes it an offence to 'publish for the information of the public' any particulars of a divorce action or any information which comes to light in the course of a divorce action other than: the names of the parties to a divorce action; or the judgment or order of the court. A person found guilty of such an offence is liable to a fine not exceeding R1,000 or to imprisonment not exceeding one year, or both, in terms of section 12(4).

The provisions of section 12(1) of the Divorce Act (set out immediately above) also apply to any enquiry instituted by the Family Advocate in terms of the Mediation in Certain Divorce Matters Act and in terms of section 12(3) of the Divorce Act.

3.7.3 Prohibition on the publication of state security–related information and the administration of justice

DEFENCE ACT, ACT 42 OF 2002

Section 104(7) of the Defence Act makes it an offence to, without authority, disclose or publish any information (whether in the print or electronic media, verbally or by gesture) that has been classified in terms of the Defence Act. Any person found guilty of such an offence is liable to a fine or imprisonment not exceeding five years. Importantly, this provision is subject to the Promotion of Access to Information Act, Act 2 of 2000. However, as there are exceptions to the requirement of granting access to information based on national defence and security grounds in that act, this may not be particularly helpful.

It is also important for journalists to be aware of the provisions of section 104(19)(1), which makes it an offence to even gain access to classified information from specific classified facilities, installations or instruments of the Department of Defence. Any person found guilty of such an offence is liable to a fine or imprisonment not exceeding 25 years.

PROTECTION OF INFORMATION ACT, ACT 84 OF 1982

The Protection of Information Act, at section 4, sets out a number of provisions relating to the disclosure of security-related information and 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 not exceeding R10,000 or imprisonment for a period not exceeding 10 years, or both.

NATIONAL KEY POINTS ACT, ACT 102 OF 1980

Section 2 of the National Key Points Act allows the minister of defence, whenever he or she thinks it necessary for the safety of South Africa or in the public interest, to declare any place a national key point. In terms of section 10(2) of the National Key Points Act, any person who provides any information relating to security measures in relation to a national key point or to any incident that took place at such national key point without being legally obliged or entitled to do so, or without the authority of the minister of defence, is guilty of an offence. Upon conviction for such an offence, the person would be liable to a fine not exceeding R10,000, or to imprisonment for a period not exceeding three years, or both.

CORRECTIONAL SERVICES ACT, ACT 111 OF 1998

The Correctional Services Act contains restrictions upon the publication of issues relating to prisons. Section 123(1) prohibits the publication of any account of prison life or of conditions that may identify a specific prisoner, unless the prisoner concerned has granted permission for such publication.

Section 123(2) requires permission from the commissioner of correctional services to publish any account of an offence for which a prisoner or person who is subject to community corrections is serving a sentence, unless the information is part of the official court record.

A person who contravenes these provisions is guilty of an offence and may be liable to a fine or imprisonment for up to two years, or both.

SOUTH AFRICAN POLICE SERVICE ACT, ACT 68 OF 1995

In terms of section 69(2) of the Police Service Act, any person who, without the permission of the national or provincial police commissioner, publishes a photograph or sketch of a person who is in police custody and:

- Who is suspected of having committed an offence and a decision on prosecution is pending
- The commencement of criminal proceedings at which he or she is an accused is pending
- Who is a witness in criminal proceedings, pending the commencement of his or her testimony in those proceedings,

commits an offence, and upon conviction is liable to a fine or imprisonment for a period not exceeding 12 months.

NATIONAL PROSECUTING AUTHORITY ACT, ACT 32 OF 1998

Section 41(6) read with section 28(1) makes it an offence to disclose the record of any investigation into any specified offence as gazetted by the president without the permission of the national director of public prosecutions.

Upon conviction, a person would be liable to a fine, imprisonment for a period not exceeding 15 years, or both.

3.7.4 Prohibition on the publication of obscene materials

The Films and Publications Act, Act 65 of 1996 is a post-constitutional piece of legislation that is the main mechanism for regulating obscene materials in South Africa. It has undergone significant amendment as a result of the Films and Publications Amendment Act, Act 3 of 2009, which came into effect on 14 March 2010.

MATERIALS NOT REGULATED UNDER THE FILMS AND PUBLICATIONS ACT

The Films and Publications Act appears to regulate a wide range of materials, including films, most publications, games, and certain services provided over the internet or on mobile telephones.

While it seems that the Films and Publications Act has an enormous impact on, and relevance to, the media, this is not necessarily the case because it has two important exceptions to its application:

- *Newspapers:* Section 16(1) of the Films and Publications Act specifically exempts all newspapers published by a member recognised by the Press Ombudsman, which subscribes and adheres to a code of conduct enforced by that body.

- *Broadcasters:* Section 18(6) of the Films and Publications Act exempts broadcasters regulated by Icasa from the obligation of applying for classifications for films broadcast or from being subject to film classifications made in terms of the act, except in respect of a film that is subject to an XX or X18 classification, or which has been refused classification by the Film and Publication Board.

In dealing with the Films and Publications Act, we generally focus only on those provisions affecting publications and films.

BODIES ESTABLISHED UNDER THE ACT, APPOINTMENT OF MEMBERS AND FUNCTIONS

The Films and Publications Act establishes three key bodies:

- *The Film and Publication Board:* In terms of section 9A:
  - The board consists of the chief executive officer and such number of officers at determined by the council
  - The functions of the board are to:
    - Appoint classification committees to classify films or publications submitted by the board
    - Determine applications for exemptions in respect of any film or publication
    - Determine applications for registration as a distributor or exhibitor of films or publications

- *The Film and Publication Council:*
  - In terms of section 4, the council consists of a chairperson and deputy chairperson appointed by the minister responsible for the administration of the Films and Publications Act (which is currently the minister of home affairs) and such other members, not exceeding seven, as the minister may appoint, having regard to the need to ensure representivity of the South African community of relevant stakeholders, as well as the chief executive officer appointed by the council in consultation with the minister.
  - In terms of section 6, the minister is to consult with Cabinet before making such appointments.
  - In terms of section 4A, the council issues directives of general application, including classification guidelines, and reviews the functioning of the board.

- *The Film and Publication Review Board:*
  - In terms of sections 5 and 6, the review board consists of a chairperson and eight other members appointed by the minister after consultation with Cabinet.
  - In terms of section 20, the role of the review board is to hear appeals in respect of classification-related decisions taken by the board.

CLASSIFICATION OF PUBLICATIONS

There are two mechanisms for classifying publications:

- *Request mechanism:* Any person may request that a publication (other than an exempted newspaper) be classified.

- *Prior classification:* Publications (other than an exempted newspaper) that are required to undergo pre-distribution classification are, in terms of section 16(2):
  - Publications that contain certain kinds of sexual conduct, namely, sexual conduct which is disrespectful, degrading or constitutes incitement to cause harm
  - Publications that constitute propaganda for war, incitement of violence and advocacy of hatred based on group characteristics, which constitute incitement to cause harm. Note that these particular provisions appear to have been tailored to meet the requirements of unprotected expression, as laid down in section 16(2) (the internal limitation to the right to freedom of expression) of the Bill of Rights.

Section 16(4) contains the following types of publication classifications/rulings by the Film and Publication Board's Classification Committee:

- *Refused classification:* Those publications involving child pornography or constituting propaganda for war, incitement of violence or the advocacy of hatred based on group characteristics, which constitute incitement to cause harm. While there are no exemptions in respect of child pornography, there are exceptions for the other types of publications set out above, provided the publication is a bona fide documentary or is a publication of scientific, literary or artistic merit, or is on a matter of public interest. In a legal gap, the act is silent as to what classifications such exempted materials will be subject to, if any.

- *XX classification:* This generally relates to publications containing explicit and degrading adult sexual conduct or extreme violence. Note that bona fide documentaries or publications of scientific, literary or artistic merit, or which are on a matter of public interest will be entitled to an X18 classification or other condition, ensuring that children do not have access to the publication. Certain of the provisions relating to the XX classification might well be found to be unconstitutional as they are overbroad and vague, and would impinge too heavily on the right to freedom of expression. For example, the act provides at section 16(4)(b)(iii) that publications which reflect conduct or an act which encourages 'harmful behaviour' are also to be subject to an XX classification.

- *X18 classification:* This relates to explicit adult sexual conduct that is not degrading and does not contain extreme violence. Note that bona fide documentaries or

publications of scientific, literary or artistic merit, or which are on a matter of public interest will not be classified as X18, but instead will be subject to other conditions, ensuring that children do not have access to the publication.

- Publications that do not fall within the above categories may still be subject to conditions, ensuring that children do not have access to them.

With regard to any publication that contains child pornography, the matter will be handed over to the police for investigation and prosecution. Notice must be given in the Government Gazette of all publications that have been classified as refused classification, XX or X18.

HOW ARE FILMS CLASSIFIED?

Section 18(1) of the act provides that any person who intends to exhibit or distribute any film (other than broadcasters, as discussed above) must submit the film for classification.

Section 18(3) contains the following types of film classifications by the Film and Publication Board's Classification Committee:

- *Refused classification:* Those films involving child pornography or constituting propaganda for war, incitement of violence, or the advocacy of hatred based on group characteristics, which constitute incitement to cause harm. While there are no exceptions to this classification in respect of child pornography, there are exceptions for the other types of films set out above, provided the film is a bona fide documentary or is a publication of scientific, dramatic or artistic merit, or is on a matter of public interest. In a legal gap, the act is silent as to what classifications these kinds of excepted films or games will be subject to, if any.

- *XX classification:* This generally relates to films containing explicit and degrading adult sexual conduct or extreme violence. Note that bona fide documentaries or films of scientific, dramatic or artistic merit will be entitled to an X18 classification or other condition, ensuring that children do not have access to the publication. Certain of the provisions relating to the XX classification might well be found to be unconstitutional as they are overbroad and vague, and would impinge too heavily on the right to freedom of expression. For example, the act provides at section 18(3)(b)(iii) that films which reflect conduct or an act which encourages 'harmful behaviour' are also to be subject to an XX classification.

- *X18 classification:* This relates to explicit adult sexual conduct. Note that bona

fide documentaries or films or games of scientific, dramatic or artistic merit will not be classified X18 but instead will be subject to other conditions, such as age restrictions, ensuring that children do not have access to them.

- Films that do not fall within the above categories may still be subject to conditions, ensuring that children do not have access to them.

With regard to any film that contains child pornography, the matter will be handed over to the police for investigation and prosecution. Notice must be given in the Government Gazette of all films that have been classified as refused classification, XX or X18.

PROVISIONS APPLICABLE TO INTERNET SERVICE PROVIDERS OR MOBILE TELEPHONE PROVIDERS

Section 24C contains a number of obligations applicable to persons providing child-oriented contact service or content service, including internet chat-rooms, via mobile cellular telephones or the internet. These are not set out in detail, but they relate to:

- Displaying safety messages
- Moderating services to ensure that offences are not being committed against children through the use thereof
- Mechanisms for children to report suspicious behaviour
- Reporting obligations to the police

PENALTIES FOR CONTRAVENING THE PROVISIONS OF THE LEGISLATION

The offences and enforcement provisions in the Films and Publications Act are found in sections 24A–30B of the act. The following offences carry various penalties ranging from the imposition of a fine, to imprisonment or both:

- Distributing: XX classified publications, films and games; X18 publications, films or games (unless the distributor is a licensed adult premises); publications, games or films not in accordance with conditions of distribution; unclassified films or games; films or games without being a registered distributor.
- Possessing child pornography.
- Advertising, including in newspapers, films and games without indicating the

classification, age restriction or other consumer advice, or showing a trailer of a film with a more restrictive classification.

- Knowingly distributing a film, game or publication classified as X18 or which contains explicit sexual conduct, unless it is a bona fide documentary or is of scientific, literary or artistic merit, or is on a matter of public interest, to a person who is under the age of 18.

- Failing to report suspected child pornography offences to the South African Police Service.

- Facilitating financial transactions relating to child pornography.

- Failing to register with the board as an internet service provider.

- Failing as an internet service provider to take all reasonable steps to: prevent access to child pornography; report the presence of child pornography to the South African Police Service and to provide particulars thereof; preserve evidence of child pornography; secure child-oriented services (such as contact and child-targeted content services), including providing safety messages, reporting mechanisms and filter information.

3.7.5 Prohibition on the publication of racist expression

The Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000 (the Equality Act) is a piece of legislation that is required to have been passed in terms of the right to equality provisions in the Bill of Rights. Most of the Equality Act's provisions relate to unfair discrimination provisions. However, a number of provisions also relate to 'hate speech' and directly prohibit the publication of certain types of expression:

- Section 10 of the Equality Act prohibits the publication, propagation, advocacy or communication of words based on one or more of the prohibited grounds (these are defined in section 1 as being race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, or indeed any other ground that undermines human dignity and causes or perpetuates systemic disadvantage), which could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or incite harm, or promote or propagate hatred.

- Section 12(1) of the Equality Act prohibits the dissemination or broadcast of any

information, or the publication or display of any advertisement or notice that could reasonably be understood as demonstrating a clear intention to unfairly discriminate (on the prohibited grounds set out immediately above) against any person.

Both sections 10 and 12(1) are subject to the exceptions contained in section 12(2), namely:

- Bona fide engagement in artistic creativity, academic or scientific enquiry
- Publication of any information, advertisement or notice in accordance with section 16 of the Constitution.
- Fair and accurate reporting in the public interest

The provisions of the Equality Act are enforced by specialised equality courts established in terms of the act. Such courts can impose damages awards, including in respect of impairment of dignity, pain and suffering, or emotional and psychological suffering (section 21(2)(d)). Also, in respect of hate speech, the matter may in addition be sent to the director of public prosecutions for the institution of criminal proceedings under the common law or other legislation (section 10).

Note that a particular weakness of the Equality Act is that its hate speech provisions are not tailored to match the type of hate speech referred to in 16(2)(c) of the Constitution. This means that the prohibitions contained in sections 10 and 12(1) of the Equality Act extend far beyond the unprotected hate speech provided for in section 16(2)(c) of the Constitution.

This is a problem because certain of the speech or expression prohibited under the Equality Act is actually protected expression under the Constitution. It would have been far better if the hate speech prohibitions in the Equality Act matched the wording of the constitutionally unprotected hate speech provisions found in section 16(2)(c) of the Constitution.

3.7.6 Prohibition on the publication of election-related information

Section 109 of the Electoral Act, Act 73 of 1998, specifically prohibits exit polls from being printed or published or otherwise distributed during the prescribed hours for an election – that is, while voting is actually taking place. Note that this prohibition applies in addition to the broadcasting-related election coverage provisions set out above in the sections relating to broadcasting legislation specifically.

3.7.7 Prohibition on the publication of state procurement–related information

The National Supplies Procurement Act, Act 89 of 1970, is an old apartheid-era statute. Sections 2 and 3(1) of the act are extremely broad, all-encompassing provisions, which give the minister of trade and industry vast powers to bypass tender and procurement board procedures, and to insist on delivery of goods or services if the minister 'deems it necessary or expedient for the security of the Republic'.

Furthermore, section 8A prohibits the disclosure of any information relating to any such goods or service without the permission of the minister of trade and industry or a controller acting in accordance with the minister's directions.

Much more generally, section 8B also empowers the minister of trade and industry to issue a notice in the Government Gazette prohibiting the disclosure of any information in relation to any goods or service. Any contravention of the above provisions is an offence and, upon conviction, the penalty is a fine, imprisonment or both. A number of the provisions of the National Supplies Procurement Act are unlikely to withstand constitutional scrutiny.

3.7.8 Prohibition on the disclosure of Financial Intelligence Centre information

Section 41 of the Financial Intelligence Centre Act, Act 38 of 2001, makes it an offence to disclose confidential information held by or obtained from the Financial Intelligence Centre (established in terms of the act to counter money laundering activities) without the permission of the centre.

Section 60 of the Financial Intelligence Centre Act makes it an offence to disclose any information that is likely to prejudice an investigation being conducted by the Financial Intelligence Centre.

3.7.9 Prohibition on roadside advertising

The provisions of the Advertising on Roads and Ribbon Development Act, Act 21 of 1940, are probably of more interest to media owners than media practitioners, but it is important to note that this act allows for local government to regulate certain forms of advertising on roadsides, such as billboards.

3.8 Legislation prohibiting the interception of communication

The legality of monitoring, recording and intercepting communications by the media has been heard in South Africa's court cases. This issue is governed by the Regulation

of Interception of Communications and Provision of Communication-related Information Act, Act 70 of 2002.

Section 2 of the Interception Act prohibits the intentional interception of a communication in the course of its transmission. For the purposes of the Interception Act, 'interception' is defined in section 1 as acquiring the content of any communication so as to make it available to a person other than the sender and recipient of the communication. Interception includes monitoring or recording the content, viewing the content or diverting it away from its intended destination.

There are certain important exceptions to the general prohibition in section 2, which journalists need to be aware of. Section 4 specifically allows a person to intercept (note the definition of this includes recording the content thereof) communication if he or she is a party to the communication (unless the purpose of the interception is to commit an offence). In this regard it is important to note that a party to communication means a person:

- Actually participating in the communication
- In whose immediate presence the communication occurs and is audible to the person concerned, whether or not the communication is specifically directed to him or her
- In relation to indirect communication (making use of a telecommunications system such as a telephone or email), any person who is in the immediate presence of the sender or recipient of the indirect communication

The effect of these exemptions is that if, for example, a journalist is in the office of a news source and the source is party to a conversation that takes place over a speaker phone in his/her office, the journalist may record the conversation and make use of the contents thereof without this being an offence under the Interception Act, even though the other party to the conversation is not aware of the journalist's presence and has not consented to the recording or to the publication or broadcasting thereof.

3.9 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation which specifically promotes the accountability and transparency of public and private institutions. Such statutes, while not specifically designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest. South Africa has passed three important pieces of legislation of this kind.

3.9.1 Promotion of Access to Information Act, Act 2 of 2000

The Promotion of Access to Information Act (PAIA) was passed in accordance with the requirements of section 32 of the Constitution, in order to facilitate and give effect to the right of access to information provision in the Bill of Rights.

Section 3 of PAIA stipulates that the act extends to records of both:

- Public bodies – note that this includes:
  - Government departments (national, provincial or local)
  - Functionaries and institutions exercising public powers, such as parastatals or statutory bodies such as Icasa or the SABC

- Private bodies – that is, individuals or juristic persons such as a company

Section 11 of PAIA provides that any person requesting information from a public body must be given access to the records of such body, provided:

- The requester has complied with the relevant procedural requirements

- Access to the record is not refused on a ground of refusal recognised by PAIA

Importantly, section 11(3) specifically provides that the *reason* for requesting information from a public body is irrelevant to a consideration of whether or not there is a right of access to the information requested.

Section 50 of PAIA provides that any person requesting information from a private body must be given access to the records of such body, provided:

- The record is required for the exercise or protection of any rights
- The requester has complied with the relevant procedural requirements
- Access to the record is not refused on a ground of refusal recognised by the act

Section 33 of PAIA makes it clear that there are grounds for refusing access which are mandatory (access *must* be denied), and grounds for refusing access which are discretionary (access *can* be denied).

- *Mandatory grounds for refusing access to information applicable to both public and private bodies:*
  - Protection of privacy of a third party who is a natural person, where the access would result in unreasonable disclosure of personal

information about an individual – sections 34 (public bodies) and 63 (private bodies)
    - Protection of commercial information of third parties – sections 36 (public bodies) and 64 (private bodies)
    - Protection of confidential information of third parties – sections 37 (public bodies) and 65 (private bodies)
    - Protection of the safety of individuals and property – sections 38 (public bodies) and 66 (private bodies)
    - Protection of legally privileged information – sections 40 (public bodies) and 67 (private bodies)
    - Protection of research information of third parties and of public or private bodies – sections 43 (public bodies) and 69 (private bodies)

- *Mandatory grounds for refusing access to information applicable to public bodies only:*
    - Protection of certain records of the South African Revenue Service – section 35
    - Protection of police dockets and law enforcement and legal proceedings – section 39

- *Discretionary grounds for refusing access to information applicable to public bodies only:*
    - Protection of defence, security and international relations – section 41
    - Economic interests and financial welfare of South Africa – section 42
    - Operations of public bodies with respect to pre-decision policy formulation and deliberative processes – section 44
    - Manifestly frivolous or vexatious requests – section 45

- *Discretionary grounds for refusing access to information applicable to private bodies only:*
    - Commercial activities of private bodies – section 68

Note that there are no discretionary grounds for refusing access that are applicable to both public and private bodies.

Two similar and important provisions in PAIA are sections 46 (in relation to public bodies) and 70 (in relation to private bodies), which require even mandatory grounds of refusal to be overridden when the public demands this, and where the record would reveal evidence of a substantial contravention of the law, or would reveal any imminent and serious public safety or environmental risk.

In terms of section 90, any person who, while trying to deny a right of access, destroys, damages, alters, conceals or falsifies a record, commits an offence. Upon conviction, the person is liable to a fine or imprisonment for a period not exceeding two years.

PAIA is critically important for the media. If used properly, particularly in respect of ongoing investigative journalism, it can provide access to extremely valuable information. Much of what the public knows about South Africa's notorious arms deal has come to light as a result of access to information held by public bodies, particularly documents obtained from the Auditor General's Office under PAIA.

3.9.2 Protected Disclosures Act, Act 26 of 2000

The Protected Disclosures Act (PDA) makes provision for procedures for both private and public sector employees to disclose information regarding unlawful or irregular conduct by their employers, or indeed other employees, and to be protected in relation to such disclosures.

Section 3 is at the heart of the PDA. It provides that no employee (whether of a public body or private person or body) may be subjected to any occupational detriment for having made a protected disclosure.

- Occupational detriment includes, among other things, any disciplinary action – being dismissed, suspended, demoted, intimidated, transferred unwillingly, or refused promotion or appointment – section 1.

- A protected disclosure is a disclosure made to a legal advisor, employer, Cabinet member or member of a provincial executive council, public protector, auditor general or, in exceptionally serious cases, any other person – sections 1, 8 and 9.

- Section 1 defines a disclosure as the disclosure of information regarding the conduct of an employer or another employee, which shows or tends to show that:
  - A criminal offence has been committed or is likely to be committed
  - A legal obligation has not been complied with
  - A miscarriage of justice is happening
  - The health and safety of an individual is endangered
  - The environment is being damaged
  - Unfair discrimination
  - Any of the above is being concealed

The effect of the PDA is that in serious cases it will be competent for an employee to make a protected disclosure to the media itself, if bodies that are supposed to address

such issues (such as the Public Protector) have failed to act in the past. This legislation assists the media in working with whistleblowers within both government and the private sector to make public information regarding corruption and other illegal or damaging conduct.

3.9.3 Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, Act 4 of 2004

The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act (Powers Act) confirms and, indeed, adds to the privileges and immunities that are given to Parliament and provincial legislatures by the Constitution. As the preamble to the Powers Act provides, furthering privileges and immunities is essential 'in order to protect the authority, independence and dignity of the legislatures and their members'.

- Section 6 of the Powers Act extends the constitutional privilege of free speech to the president, members of the National Assembly and delegates to the NCOP, as well as to joint sittings of the National Assembly and the NCOP.

- Section 18 of the Powers Act is critical for the press because it provides that no person (including, of course, the media) is liable to civil or criminal proceedings in respect of the publication of any report, paper or minutes that have been submitted to Parliament, including committees thereof. However, section 19 prohibits the wilful publication of documents that have been prohibited in Parliament or which falsely purport to have been published under the authority of Parliament or to be a verbatim account of proceedings.

- Section 21 allows for the broadcasting of parliamentary proceedings only with the permission of the authority of the body (for example, a committee chair) concerned. Once such authority is granted, no person is liable to civil or criminal proceedings in respect of such broadcast.

- All of the above provisions apply equally to provincial legislatures (section 28).

4 REGULATIONS AFFECTING THE BROADCAST MEDIA

In this section you will learn:

- ❑ What regulations are
- ❑ Key regulations governing broadcasting content
- ❑ Other key aspects of broadcast-related regulations

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules made in terms of a statute. Regulations are a legal mechanism for allowing ministers or organisations such as Icasa to make legally binding rules governing an industry or sector, without needing Parliament to pass a specific statute thereon.

The statute will empower the minister or a body such as Icasa to make regulations on particular matters within the scope of the functions and powers of that minister or body.

4.2 Key regulations governing broadcasting content

4.2.1 Regulation setting out the Code of Conduct for Broadcasters

The Code of Conduct for Broadcasters – Notice 958 published in Government Gazette 32381 dated 6 July 2009, applies to all broadcasters except those governed by an Icasa-approved code of conduct enforced by a self-regulatory body (see section below on self-regulatory codes).

The Code of Conduct for Broadcasters:

- Prohibits the broadcasting of:
  - Unnecessary or explicit extreme violence or explicit infliction of domestic violence
  - Propaganda for war
  - Incitement of imminent violence
  - Advocacy of hate speech based on race, ethnicity, religion or gender and which constitutes incitement to cause harm
  - Certain kinds of sexual conduct: child pornography, bestiality, sexual conduct which advocates hatred based on gender that constitutes incitement to cause harm; explicit sexual conduct

  Note that there are exceptions for bona fide scientific, documentary, dramatic, artistic or religious broadcasts, or which amounts to a discussion, argument or opinion pertaining to religion, belief or conscience, or on a matter of public interest. There are also exceptions for material broadcast during the watershed period (between 9 pm and 5 am for free-to-air broadcasters, and between 8 pm and 5 am for subscription broadcasters), with relevant warnings.

- Requires particular care when children are likely to be part of the audience. There

are specific requirements for children's programming, including in respect of: the portrayal of violence, safety matters and issues which could threaten a sense of security such as death, domestic conflict, the use of drugs or alcohol, etc.; and the use of offensive language

- Provides that programming which contains scenes of explicit violence, sexual conduct or nudity, or offensive language may be broadcast only during the watershed period

- Specifies that television broadcasting licensees must provide advisory assistance, including age guidelines, where broadcasts contain violence, sex, nudity or offensive language

- Requires that news be truthful, accurate and fair without intentional or negligent departure from the facts:
  - Where a report is based on opinion, rumours or allegations, this must be clearly presented
  - Where there is reason to doubt the correctness of a report, verification should take place
  - When a broadcast report is known to have been incorrect, this must be rectified quickly and fairly
  - The identity of rape victims and other victims of sexual violence must not be divulged without their consent
  - There must be warnings for reports involving graphic violence or sexual assault

- Requires that comment be honest, clearly presented and based on facts

- Requires that when presenting programming in which controversial issues of public importance are discussed, reasonable efforts must be made to present opposing views and to ensure a right of reply

- Requires that broadcasters exercise exceptional care in matters involving the privacy, dignity and reputation of individuals (particularly in respect of people who are bereaved and in regard to children, the aged and the disabled), subject to a legitimate public interest

- Requires, when audiences are invited to react to a programme or competition, that broadcasters broadcast:
  - The full cost of the telephone call or SMS, and must specify what percentage thereof is intended for a charitable cause, if any

- The rules of any competition, including the closing date and the manner in which the winner is determined

4.2.2 Subscription broadcasters' obligation to carry SABC channels

The Regulations on the Extent to which Subscription Broadcasting Services Must Carry the Television Programmes Provided by the Public Broadcasting Service Licensee – Notice 1271 published in Government Gazette 31500 dated 10 October 2008, oblige certain subscription television broadcasters to carry SABC television channels.

The obligations are as follows:

- Only subscription broadcasters providing 30 or more television channels are obliged to carry SABC channels.

- Every 20th channel above the minimum threshold of 30 channels must be a public broadcasting service channel. This means that channels 30, 50, 70, 90 etc. will be public channels.

- The channels provided by the public services division (as opposed to the public commercial services division) of the SABC must be prioritised for carriage.

Failure to comply with the must-carry regulations carries a fine not exceeding R1 million.

4.2.3 Local content regulations

The Local Content Regulations – Notice 153 published in Government Gazette 28453 dated 31 January 2006 and Notice 154 published in Government Gazette 28454 dated 31 January 2006, set out South African programming and independent television production requirements for both radio and television licensees in all three categories: public, commercial and community.

Local content requirements are important because they ensure that South African television content (including independently produced content) and music is produced and broadcast, when it is often cheaper and easier to import poor quality foreign content. It is also important to note that the Local Content Regulations represent a floor and not a ceiling in respect of local content; the local content requirements may well be higher for specific broadcasters depending on their licence conditions. The regulations are, in places, extremely technical. Below is a summary of the basic local content requirements.

TELEVISION

Nature of television service	Local television content to be broadcast as a percentage of programming	Percentage of local content to be independently produced
Public services	Overall total and prime time percentage required: 55%, and of this: • 35% of drama • 80% of current affairs • 50% of documentary • 50% of informal knowledge building • 60% of educational programming • 55% of children's programming	40%
Commercial and public commercial services	35% of programming broadcast during the South African performance period (5 am to 11 pm daily) and of this: • 20% of drama • 50% of current affairs • 30% of documentary • 30% of informal knowledge building • 25% of children's programming	40%
Community services	55%	40%
Terrestrial or cable subscription services	10% of programming (including 2% being South African drama) or to spend a specified sum of money as determined by Icasa on programming that has South African television content	40%
Satellite subscription services	At least 10% of the channel acquisition budget is spent on channels with South African television content. Note that channels carried under the 'must-carry' regulations do not count towards meeting local content requirements	40%

RADIO

Applicable to all radio stations which, between the hours of 5 am and 11 pm, devote more than 15% of broadcast time to music.

Nature of the radio/sound service	South African music requirement as a percentage of total music broadcast
Public sound services	40%
Commercial and public commercial sound services	25%
Community sound services	40%
Subscription sound services	10% of the bouquet is to consist of channels made up of South African music content.

4.2.4 Sports broadcasting rights regulations

The Sports Broadcasting Rights Regulations – Notice 1044 published in Government Gazette 27728 dated 28 June 2005, contain a list of specified national sporting events that are required to be broadcast live, delayed live or delayed by a free-to-air television broadcaster. The regulations are, however, silent on the fact that the rights to broadcast such events are to be acquired from the rights holders (often subscription broadcasting licensees) at commercial rates. Although these Sports Broadcasting Regulations were supposed to have been reviewed in 2009, this process has yet to be finalised.

4.3 Other key broadcasting-related regulations

Icasa has passed dozens of regulations governing different non-content aspects of broadcasting, signal distribution and radio frequency spectrum management, including in respect of licence fees, administrative procedures and record keeping. The regulation that has particular significance for the development of broadcasting generally is set out below.

4.3.1 People with disabilities

Icasa has prescribed Regulations on a Code on People with Disabilities – Notice 1613 published in Government Gazette 30441 dated 7 November 2007. The Disability Code requires all broadcasters to report annually on their progress in implementing the following:

- All broadcasting licensees must ensure that their services are available and accessible to people with disabilities, including through:
  - The use of sign language and sub-titles
  - Programme support such as fact sheets
  - Websites that offer a range of formats, such as audiotape
  - The use of spoken languages, where materials such as weather forecasts or economic indicators are shown on screen

- Broadcasting licensees must have surveys and contact with disability organisations regarding their services.

- Broadcasting licensees must ensure that their programming does not stereotype disabled people or disability, and must involve disabled people as part of studio audiences and in-programming story lines.

5 MEDIA SELF-REGULATION

There are three important self-regulatory codes that affect the media in South Africa:

- The Code of Advertising Practice governs advertising and is put out by the Advertising Standards Authority.

- The Broadcasting Complaints Commission of South Africa's (BCCSA) Codes of Conduct for Broadcasters – one for free-to-air broadcasters and one for subscription broadcasters.

- The South African Press Code, which is put out by the Press Council of South Africa and enforced by the Press Ombudsman and the South African Press Appeals Panel.

5.1 The Code of Advertising Practice

The essence of the Code of Advertising Practice is that advertising should be legal, decent, honest and truthful, and have a sense of responsibility to the consumer. Some key topics that the code addresses are the following:

- No advertising that is harmful to children or that exploits children or portrays them in a sexually provocative manner.

- No harming of animals in advertisements.

- No advertising may be discriminatory, unless this is reasonable in an open and democratic society based on dignity, equality and freedom.
- Educational advertising must not mislead as to the qualification to be obtained.
- No fear tactics may be used.
- Advertisers of financial products must take special care to ensure comprehensive communication of commitments.
- Any product that has a cost payable above postage costs cannot be advertised as 'free'.
- Furniture advertisements must specifically state additional items that are shown but which are not part of the price.
- Guarantees must be available in printed form.
- Advertisements must be honest.
- Advertisements for instructional courses must not make exaggerated claims regarding employment opportunities.
- No encouragement of criminal activity.
- No misleading claims.
- No claims of miracle healing.
- Money-back undertakings may be made only if a full refund of the purchase price is available.
- No advertisements if the goods are not available.
- No offensive advertising.
- Living persons must consent to being part of an advertisement.
- No advertising which jeopardises safety.
- Advertisers must have acceptable proof of factual claims made.

- There are fairly detailed provisions regarding the advertising of self-employment opportunities.

- No encouragement of violence.

5.2 The BCCSA Code of Conduct for Free-to-Air Broadcasters

The BCCSA Code for Free-to-Air Broadcasters is very similar to the Icasa Code of Conduct set out under the regulations section above.

The BCCSA Code of Conduct for Free-to-Air Broadcasters:

- Prohibits the broadcasting of:
  - Unnecessary violence, particularly in respect of violence against women
  - Propaganda for war
  - Incitement of imminent violence
  - Advocacy of hate speech based on race, ethnicity, religion or gender, and which constitutes incitement to cause harm
  - Certain kinds of sexual conduct: child pornography, bestiality, sexual conduct which advocates hatred based on gender, and which constitutes incitement to cause harm; explicit sexual conduct

  Note that there are exceptions for bona fide scientific, documentary, dramatic, artistic or religious broadcasts, or which amounts to a discussion, argument or opinion pertaining to religion, belief or conscience, or on a matter of public interest. And there are also exceptions for material broadcast during the watershed period (between 9 pm and 5 am for free-to-air broadcasters, and 8 pm and 5 am for subscription broadcasters) with relevant warnings.

- Requires particular care when children are likely to be part of the audience. There are specific requirements for children's programming, including in respect of: the portrayal of violence; safety matters; issues which could threaten a sense of security, such as death, domestic conflict, the use of drugs or alcohol; and the use of offensive language

- Provides that programming which contains scenes of explicit violence, sexual conduct or offensive language may be broadcast only during the watershed period (between 9 pm and 5 am)

- Specifies that television broadcasting licensees must provide advisory assistance,

including age guidelines, where broadcasts contain violence, sex, nudity or offensive language

- Requires that news be truthful, accurate and fair without intentional or negligent departures from the facts.
  In this regard:
  - Where a report is based on opinion, rumour or allegation, this must be clearly presented
  - Where there is reason to doubt the correctness of a report, verification should take place
  - When a broadcast report is known to have been incorrect, this must be rectified quickly and fairly
  - The identity of rape victims and other victims of sexual violence must not be divulged without consent
  - There must be warnings for reports involving graphic violence or sexual assault

- Requires that comment be honest and clearly presented as comment, and must be based on facts

- Requires that when presenting programming in which controversial issues of public importance are discussed, reasonable effort must be made to present opposing views and to ensure a right of reply

- Requires that broadcasters exercise exceptional care in matters involving the privacy and dignity of individuals, subject to a legitimate public interest

- Requires that no payment be made to a criminal for information about a crime, unless there are compelling societal interests in doing so

5.3 The BCCSA Code of Conduct for Subscription Broadcasters

The BCCSA Code of Conduct for Subscription Broadcasters is virtually identical to the Code of Conduct for Free-to-Air Broadcasters set out above. There are, however, some small differences:

- There are no special provisions regarding children and children's programming, undoubtedly due to the parental control mechanisms which are to be in place.

- Subscription broadcasters are under an obligation to, where practicable, implement parental control mechanisms to enable a subscriber to block a

programme based on its classification and to provide its subscribers with a parental control guide and a call centre facility.

- The watershed period is an hour longer and is from 8 pm to 5 am.

5.4 The South African Press Code

The South African Press Code states as part of its preamble that the 'primary purpose of gathering and distributing news and opinion is to serve society by informing citizens and enabling them to make informed judgments on the issues of the time'.

Below are some key topics that the code addresses:

- Reporting of news
  - Truthful, accurate and fair
  - Contextual and balanced with no departure from the facts
  - Only what is reasonably true may be presented as fact
  - Opinions, allegations and rumours to be clearly indicated as such
  - Verification of accuracy if possible
  - Seek the views of the subject of critical reporting where possible
  - Publish retractions and apologies for inaccuracies promptly
  - Reports and visual images involving obscenity to be presented with sensitivity to the prevailing moral climate, and in this regard:
    - No visual presentation of sexual conduct unless this is in the public interest
    - No child pornography
  - Identities of victims of sexual violence not to be published without consent
  - No publication of news obtained by dishonest or unfair means
  - Respect privacy, unless there is an overriding public interest

- Discrimination and hate speech
  - Press to avoid discriminatory or denigratory references
  - Press should not refer to a person's race, colour, ethnicity, gender, sexual orientation or physical or mental illness in a prejudicial or pejorative context, except where strictly relevant to the story
  - Press must not publish material amounting to hate speech

- Advocacy – a publication may strongly advocate its own views provided it:
  - Distinguishes between fact and opinion
  - Does not misrepresent facts

- Comment
  - Comment must be made fairly and honestly
  - Comment must clearly appear as commentary and must be based on facts
  - Honest expression of opinion

- Headlines, posters, pictures and captions:
  - To be reasonably reflective of the contents of the report or picture in question
  - Posters and pictures not to be misleading

- Protect confidential sources of information

- No payment for feature articles to persons engaged in crime or notorious behaviour, except in the public interest

- Due responsibility to be exercised on the presentation of brutality, violence and atrocities

6 COMMON LAW AND THE MEDIA

In this section you will learn about:

- ❑ Common law
- ❑ Defamation
- ❑ Contempt of court
- ❑ Court rulings on the issue of allowing the broadcast of important legal proceedings

6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating upon disputes brought by people, whether natural (individuals) or juristic (for example, companies).

In common law legal systems such as South Africa'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 clearly wrongly decided. Legal rules and principles are therefore decided on an incremental, case-by-case basis.

This section focuses on three areas of common law of particular relevance to the media, namely: defamation; contempt of court; and the broadcasting of legal proceedings.

6.2 Defamation

6.2.1 Definition of defamation

Defamation is part of the common law of South Africa. It 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. An action for defamation 'seeks to protect one of the personal rights to which every person is entitled, that is, the right to a good name, unimpaired reputation and esteem by others'.[1] Once it is proved that a defamatory statement has been published, two legal presumptions arise:

- 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.
- That the person publishing 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, namely:[2]

- Truth in the public interest
- Absolute privilege – for example, a member of the National Assembly speaking in Parliament
- Statements made in the discharge of a duty – for example, the duty to provide information in connection with the investigation of a crime, enquiries as to the creditworthiness of a person, etc.
- Statements made in judicial or quasi-judicial proceedings
- Reporting on proceedings of a court, Parliament or of certain public bodies
- Fair comment upon true facts and which are matters of public interest
- Self-defence (to defend one's character, reputation or conduct)
- Consent

The most relevant here is the defence of truth in the public interest. Truth in the public interest is where an action for damages is defended by asserting that the defamatory statement was true and, furthermore, 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. Therefore, it may be in the public interest to publish true, albeit defamatory, material about public representatives. This is due to the importance of the public having accurate information to be able to engage in democratic practices, such as voting, effectively.

Prior to South Africa's transition to democracy and a new constitutional order, the media (publishers, printers, editors, newspaper owners, broadcasting companies) were strictly liable for the publication of defamatory material. This meant that in the absence of one of the recognised defences set out above (for example, truth in the public interest), the media was not entitled to raise a lack of intention or absence of negligence argument. In other words, the courts were not required to find fault on the part of the media in the publication of a defamatory statement.[3] In the ground-breaking case of *National Media Ltd and Others v Bogoshi* [1998] 4 All SA 347 (A), the Appellate Division (as it was then called) overruled its earlier *Pakendorf* decision as being clearly wrong and adopted the approach taken in England, Australia and the Netherlands.

The new legal principle is stated at pages 361–362 of the *Bogoshi* judgment:

> [t]he publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time. In considering the reasonableness of the publication, account must obviously be taken of the nature, extent and tone of the allegations. We know that greater latitude is usually allowed in respect of political discussion ... and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper.

The effect of the *Bogoshi* judgment is to make it possible for the media to escape

liability for the publication of false defamatory statements if the media acted reasonably in the publication of the false statements. As is stated in the judgment, key factors in determining whether the media's conduct is reasonable will include:

- Nature and tone of the allegations
- Nature of the information on which the allegations were based, for example, if the information is related to an important political issue or not
- Reliability of the source of the allegations
- Steps taken to verify the allegations
- The general standard of care adopted by the media in the particular circumstances

6.2.3 Remedies for defamation

There are three main remedies in respect of defamation in the absence of a defence:

- *The publication of a retraction and an apology by the media organisation concerned:* Where it has published a false defamatory statement, a newspaper or broadcaster often will publish a retraction of a story or allegation in a story, together with an apology. Whether or not this satisfies the person who has been defamed will depend on a number of factors, including: the seriousness of the defamation; how quickly the retraction and apology is published; and the prominence given to the retraction and apology (this is a combination of the size of the retraction, but also its positioning in the paper).

- *An action for damages:* This is where a person who has been defamed sues for monetary compensation. This takes place after the publication has occurred. Damages (money) are paid to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The amount to be paid in compensation will depend on a number of factors, including whether or not an apology or retraction was published, as well as the standing or position in society of the person being defamed.

- *An action for 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 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 seen as being a last resort mechanism. The legal systems of countries that protect the right to freedom of expression usually prefer to allow publication and to deal with the matter through damages claims – in other words, using 'after publication' remedies.

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 under way: 'It is contempt of court to publish information or comment regarding a case which is pending and which may tend to prejudice the outcome of the case'.[4]

6.3.2 Scandalising the court

The reason why scandalising the court is criminalised is to protect the institution of the judiciary. The point is to prevent the public from undermining the dignity of the courts. In *S v Mamabolo (Etv, Business Day and the Freedom of Expression Institute Intervening)* 2001 (5) BCLR 449 (CC), the Constitutional Court held at paragraph 19 that:

> [b]ecause of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One of the protective devices is to deter disparaging remarks calculated to bring the judicial process into disrepute.

The court held that the test is 'that the offending conduct, viewed contextually, really was likely to damage the administration of justice' [at paragraph 50].

6.4 Broadcasting court proceedings

South Africa is not the only country in Africa that has allowed the broadcasting of legal proceedings, but it undoubtedly has the most developed case law on the subject.

Given the importance of the broadcast media in ensuring that news and information, particularly with regard to legal and governmental matters, is disseminated to the public, the issue of broadcasting court proceedings is extremely important. In *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (2) BCLR 167 (CC), the Constitutional Court held that the overriding concern was not the right of the broadcaster concerned, '[w]hat is at stake is the right of the public to be informed and educated' [at paragraph 27]. '[I]t concerns the right of South Africans to know and understand the manner in which one of the three arms of government functions, namely, the judiciary' [at paragraph 29].

However, in relation to the broadcasting of criminal proceedings, the court agreed with the Supreme Court of Appeal that this clearly has to be weighed against the right of an accused person to justice. In particular, the Constitutional Court supported the test which had been formulated by the Supreme Court of Appeal, namely that 'broadcasting should not be permitted unless the court was satisfied that it would not inhibit justice' [at paragraph 45].

NOTES

1 See FDJ Brand, 'Defamation', *LAWSA*, 2nd ed., Volume 7, para 232 citing *Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 23D-I.
2 Ibid, paras 245ff.
3 See *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A).
4 See generally, *LAWSA*, 2nd ed., Volume 6, para 199.