



# Proactive Disclosure of Information and Elections in South Africa

An assessment of South Africa's compliance with the ***Guidelines on Access to Information and Elections in Africa***, issued by the African Commission on Human and Peoples' Rights

DEMOCRACY      INDEPENDENCE      ELECTIONS  
CITIZENS      MEDIA      CREDIBILITY      RIGHTS  
GOVERNANCE      VOTE      TRANSPARENCY  
INFORMATION      FREEDOM      BALLOT



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REPORT COMMISSIONED AND COMPILED BY  
THE CENTRE FOR HUMAN RIGHTS (CHR)  
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THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION (SAHRC)

HUMAN SCIENCES RESEARCH COUNCIL (HSRC)

THE ELECTORAL INSTITUTE FOR SUSTAINABLE DEMOCRACY IN AFRICA (EISA)

THE FREEDOM OF EXPRESSION INSTITUTE (FXI)

SEPTEMBER 2020







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## GLOSSARY OF ABBREVIATIONS

**ACHPR** – African Commission on Human and Peoples’ Rights (African Commission)

**AGA** – African Governance Architecture

**ATI** – access to information

**AU** – African Union

**BCCSA** – *Broadcasting Complaints Commission of South Africa*

**CCC** – ICASA Complaints and Compliance Committee

**ECA** – Electoral Commission Act (1996)

**EISA** – Electoral Institute for Sustainable Democracy in Africa

**EMB** – election management body

**ICASA** – Independent Communications Authority of South Africa

**IEC** – Independent Electoral Commission of South Africa (the Commission)

**NA** – *National Assembly of the Parliament of South Africa*

**OPP** – Office of the Public Protector

**PAIA** – Promotion of Access to Information Act (2000)

**PP** – Public Protector

**PPFA** – Political Party Funding Act (2018)

**PSC** – Public Service Commission

**SAHRC** – South African Human Rights Commission

**African Charter** – African Charter on Human and Peoples’ Rights (1981)

**Declaration** – Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019)

**Guidelines** – Guidelines on Access to Information and Elections in Africa (ACHPR, 2017)

**Model Law** – Model Law on Access to Information for Africa (ACHPR, 2013)

**Special Rapporteur** – Special Rapporteur on Freedom of Expression and Access to Information in Africa, appointed by the ACHPR

## PREFACE

It is with pleasure that I welcome the first study on compliance with the African Commission on Human and Peoples' Rights' Guidelines on Access to Information and Elections in Africa, by a state party to the African Charter. This report, which was prepared by South African partners, evaluates how key stakeholders in the electoral process in South Africa fared in terms of proactive disclosure of information before, during and after the national and provincial elections, held on 8 May 2019.

When the African Commission adopted the Guidelines in November 2017, it was a landmark development and a clear acknowledgement of the importance of the right of access to information – particularly the obligation of state parties to the African Charter to ensure that all stakeholders involved in electoral processes adhere to their obligations to proactively disclose all critical information, as clearly outlined by the Commission in the Guidelines.

States are required to comply with the standards outlined in these Guidelines to ensure transparency of the entire electoral process. State parties to the Charter are further encouraged to use these requirements as minimum standards to ensure that all information related to electoral processes are proactively disclosed to enhance both the transparency and integrity of the electoral processes, whilst also strengthening the foundations of democratic practice across the continent, as exemplified by the AU's adoption of the African Charter on Democracy, Elections and Governance (ACDEG).

The right of access to information is guaranteed by article 9 of the African Charter and acknowledged in a number of extant treaties of the African Union, including the African Charter on Democracy, Elections and Governance, the African Charter on the Values and Principles of Public Service and Administration, the African Union Convention on Preventing and Combating Corruption, the African Youth Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa.

It is further elaborated in several soft law instruments that the African Commission has adopted in support of article 9 of the African Charter, such as the Model Law on Access to Information for Africa, adopted in Banjul, The Gambia, on 23 February 2013, and the Declaration of Principles on Freedom of Expression and Access to Information in Africa that was adopted in Banjul, The Gambia on 5 November 2019.

Access to information is both a stand-alone right and an enabling right for the realisation of various other rights enshrined in the African Charter, such as the rights to health and education, guaranteed under articles 16 and 17 respectively; and, in the context of elections and electoral processes, the right of access to information is an enabler to the right to political participation, guaranteed by article 13 of the Charter.

When fully implemented by state parties to the African Charter, the Guidelines are expected to promote transparency and integrity of elections and electoral processes on the continent, thus transforming the electoral landscape in Africa because access to information is not only central to democratic processes, but is indeed also a guarantor of free, fair, credible and transparent elections.

The Guidelines provide guidance to election management bodies; authorities responsible for appointing election management bodies; political parties and candidates; law enforcement agencies; election observers and monitors; media and internet regulatory bodies; media and online media platform providers; and civil society organisations in relation to the information they are expected to proactively disclose throughout the electoral cycle.



Electoral transparency through information disclosure enhances public confidence in the electoral process. Thus, it is imperative for states to ensure that measures are adopted to enable public access to all relevant information and indeed nurture a culture of electoral transparency, through ensuring that all stakeholders in the electoral process abide by their obligation to proactively disclose information to the public at all times throughout the entire electoral process.

Section 32(1) of the South African Constitution guarantees the right of access to information. To give effect to this right, the country enacted the Promotion of Access to Information Act (PAIA) of 2000, the first country on the continent to do so.

So far at least 24 African countries have adopted access to information laws.

I would like to commend South Africa for all the measures that were taken to enable the free flow of ideas and information so that citizens could have access to the requisite election-related information – for example, by ensuring continuous internet access during the electoral period. Internet shutdowns are incompatible with international human rights norms and standards, but have become prevalent in Africa. According to the authorities in the states where they have become prevalent, their actions are justified on considerations of maintaining public order and protecting national security. However, it must be stated that internet shutdowns violate the right to freedom of expression and access to information and so such actions are contrary to the provisions of article 9(1) of the African Charter. It must be emphasized that access to the internet enables the public to exercise their right to freedom of expression and access information.

I would also like to commend the Independent Electoral Commission (IEC) and Media Monitoring Africa for taking steps to curb the spread of disinformation during elections through the Real411.org initiative. This is a digital platform that enabled the public to report digital disinformation, hate speech, incitement to violence and harassment of journalists. Disinformation is a threat to elections and democracy and is now a global challenge.

As the mandate of overseeing the implementation and promotion of the Promotion of Access to Information Act (PAIA) is transitioning from the South African Human Rights Commission to the recently constituted Information Regulator, I would like to implore the government of South Africa to commit adequate resources to the Information Regulator, to enable it to effectively carry out its mandate and spearhead the reforms to PAIA recommended in this report.

I would also like to commend the ongoing processes regarding disclosure of funding information by political parties.

Proactive disclosure of information is at the heart of the promotion and protection of the right of access to information enshrined in article 9(1) of the Charter, which South Africa, like the other 54 of the 55 member states of the AU, has ratified. Although PAIA has elaborate provisions on implementing the right of access to information, it does not provide for adequate proactive disclosure as defined in the ACHPR Model Law on Access to Information for Africa. As stated in the recommendations of this report, amendments to PAIA will be required to make it fit for purpose in the digital age and improve on the provisions for proactive disclosure of information, aimed at fostering a culture of information disclosure by public and relevant private bodies without citizens having to struggle to obtain information to exercise their rights.

Furthermore, as information and communications technologies (ICTs) are essential to enabling access to information, I would like to urge the South African government to take steps to ensure that universal access to the internet becomes a reality in this country, in compliance with Principle 37 of the Declaration of Principles on Freedom of Expression and Access to Information in Africa.

I would like to congratulate and extend my gratitude to the Centre for Human Rights and its partners for conducting this research project, the first of its kind after the Guidelines were adopted by the African Commission. It is important work which will assist South Africa as well as other states in their use of the Guidelines.

It is my sincere hope that this kind of research will be replicated in other countries to promote the culture of access to information in the context of elections, with particular emphasis on proactive disclosure of information by all stakeholders involved in the electoral cycle.

As was rightly stated back in 2005 by Mr Abid Hussain, the then United Nations Special Rapporteur on Freedom of Opinion and Expression, in his report to the United Nations Commission on Human Rights:

*“Freedom would be bereft of all effectiveness, if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.”*

Information is essential to democracy, and democratic elections are impossible without accurate and credible information being made available to the public, proactively.

### **Lawrence Murugu Mute**

**Former Special Rapporteur on Freedom of Expression and Access to Information in Africa & Former Vice Chairperson, African Commission on Human and Peoples’ Rights**

September 2020

## BACKGROUND TO THE REPORT

The African Commission on Human and Peoples' Rights is the African Union's longest-serving and most active human rights body. It is mandated to promote and protect all rights and obligations enshrined in the **African Charter on Human and Peoples' Rights** (hereinafter referred to as the African Charter) and other AU human rights treaties.

Article 9(1) of the African Charter provides for both the right to freedom of expression and the right to 'receive information.' This second component of article 9(1) has been interpreted to encompass the full gamut of the right of access to information (ATI).

The African Commission established the **Special Rapporteur on Freedom of Expression** on 7 December 2004<sup>1</sup> with Commissioner Andrew Rangayi Chigovera serving as the first Special Rapporteur. At the end of his term in office<sup>2</sup>, his successor, Advocate Faith Pansy Tlakula was appointed as Special Rapporteur on Freedom of Expression in Africa, on 5 December 2005<sup>3</sup>.

On assuming office, Commissioner Tlakula made a case that the African Commission should align her mandate as Special Rapporteur on Freedom of Expression with the full gamut of the provisions of article 9(1) of the African Charter, which includes the right of access to information as a standalone right.

Her request to expand the mandate of the Special Rapporteur to deal with the right of access to information (ATI) as a fully-fledged right and not as a sub-set of the right to freedom of expression was finally approved by the Commission at its 42<sup>nd</sup> Ordinary Session held in Congo Brazzaville from 15<sup>th</sup> to 28<sup>th</sup> November 2007.<sup>4</sup> The expanded mandate became known as "**the Special Rapporteur on Freedom of Expression and Access to Information in Africa,**" (Special Rapporteur) with revised terms of reference that clearly reflected the ATI dimension of the mandate.

From then on, both rights enshrined in article 9(1) of the African Charter and further elaborated upon by the Commission in its 2002 **Declaration of Principles on Freedom of Expression in Africa**<sup>5</sup>, fully engaged the attention of the Special Rapporteur in equal measure, all over the continent. The Commission has since reviewed and updated the 2002 declaration to bring it in line with evolving standards and practices as well as developments in the online sphere, and subsequently issued a revised **Declaration of Principles on Freedom of Expression and Access to Information in Africa** (the Declaration) in November 2019.

Premised on the need to support state parties to the African Charter to adopt progressive, all-encompassing ATI laws, the Commission developed a **Model Law on Access to Information for**

1 African Commission on Human and Peoples' Rights (African Commission) 'Resolution 71(XXXVI) 2004: Resolution on the mandate and appointment of a Special Rapporteur on Freedom of Expression in Africa' 7 December 2004 36th Ordinary Session Dakar, Senegal.

2 The term of the Special Rapporteur on Freedom of Expression in Africa came to an end on 21 November 2005. See African Commission 'Resolution 84(XXXVIII) 2005: Resolution on the Appointment of a Special Rapporteur on Freedom of expression in Africa' 5 December 2005 38th Ordinary Session Banjul, The Gambia.

3 African Commission Res 84(XXXVIII) 2005 (n 2 above).

4 African Commission 'Resolution 122(XXXII) 2007: Resolution on the expansion of the mandate and reappointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa' 28 November 2007 42nd Ordinary Session Brazzaville, Republic of Congo.

5 The Declaration was developed pursuant to Resolution 54(XXIX) 01 on the Freedom of Expression – see African Commission 'Resolution 54(XXIX) 2001: Resolution on freedom of expression' 7 May 2001 29th Ordinary Session Tripoli, Libya. Resolution 54(XXIX) 01 allowed the Commission to elaborate on the nature, content and extent of the right to freedom of expression provided for in article 9 of the African Charter. The Declaration was subsequently adopted through Resolution 62(XXXII) – see African Commission 'Resolution 62(XXXII) 2002: Resolution on the adoption of the Declaration of principles on freedom of expression in Africa' 23 October 2002 32rd Ordinary Session Banjul, The Gambia.

**Africa**<sup>6</sup> (Model Law) that it adopted in February 2013. Following its adoption by the Commission, the Special Rapporteur engaged the leadership of several AU member states to use it as a guide in advancing the enactment and implementation of progressive ATI laws in their respective countries.

Furthermore, the African Commission, recognising the value of ATI as a leveraged right that could be deployed in aid of the effective realisation of various other rights enshrined in the African Charter, began a process in 2015<sup>7</sup> of developing a set of guidelines aimed at sensitising state parties to the Charter to implement their ATI obligations during electoral processes. However, considering the critical importance of free, fair and credible elections in strengthening democracy in Africa, the Special Rapporteur chose as her departure point for these guidelines, the need for member states to implement the principle of proactive disclosure of all critical information by stakeholders involved in the entire electoral process.

Following a multi-stakeholder consultation process to develop these guidelines, in 2017, under the auspices of Adv Tlakula's successor, Commissioner Lawrence Murugu Mute<sup>8</sup>, the African Commission adopted the **Guidelines on Access to Information and Elections in Africa** (Guidelines).

These Guidelines are directed at electoral role players and stakeholders involved in the entire electoral process – during the planning, preparation and actual conduct of elections, as well as post-elections. The Guidelines stipulate the minimum standards for proactive disclosure of information applicable to each category of stakeholders involved in the elections value chain: the authority responsible for appointing an election management body; the electoral management body; political parties and candidates; law enforcement agencies; election monitoring and observation groups; media and online media platform providers; media regulatory bodies; and civil society organisations.

The Guidelines also specifically requires that member states adopt legislative, administrative, judicial and other measures to give effect to the Guidelines.

## ASSESSMENT OF THE SOUTH AFRICAN ELECTIONS

The South African national and provincial elections held on 8 May 2019 presented an opportunity to, for the first time since the adoption of the Guidelines, assess the extent of adherence by electoral stakeholders to their proactive disclosure obligations in the context of an actual election on the continent; and to launch a pilot study to draw lessons from such an assessment process. As a result, the University of Pretoria's Centre for Human Rights (CHR) initiated this research project, with the support of the Special Rapporteur<sup>9</sup>, which was executed with assistance from the South African Human Rights Commission (SAHRC), the Democracy, Governance & Service Delivery research programme at the Human Sciences Research Council (HSRC), the Electoral Institute for Sustainable Democracy in Africa (EISA) and the Freedom of Expression Institute (FXI).

6 African Commission 'Resolution 167(XLVIII)2010: Resolution on securing the effective realization of access to information in Africa' 24 November 2010 48th Ordinary Session Banjul, The Gambia, which authorized the Special Rapporteur to lead this ATI Model Law initiative.

7 African Commission 'Resolution 307 (EXT.OS/XVIII) 2015: Resolution on the Development of Guidelines on Access to Information and Elections in Africa' 7 August 2015 18th Extraordinary Session Nairobi, Kenya (authorizing the Special Rapporteur to lead the process of developing the Guidelines on ATI and Elections in Africa).

8 Appointed by the Commission via Resolution 377 (LXI), 2017. See African Commission 'Resolution 377 (LXI) 2017: Resolution on the appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa' 15 November 2017 61st Ordinary Session Banjul, The Gambia.

9 The research project was executed during Commissioner Lawrence Mute's term as Special Rapporteur. His successor, Commissioner Jamesina King, was confirmed as Special Rapporteur during the ACHPR's 66<sup>th</sup> Ordinary Session in July/August 2020.

Overall, the objective of the report was to:

- assess the extent of compliance with the Guidelines by the eight stakeholder categories in the run-up to, during and after the South African elections; and to identify the reasons for compliance/non-compliance, as the case may be
- contribute to discussions in South Africa about the need for proactive disclosure of information in future elections
- raise awareness of the Guidelines in South Africa, but also more widely within the Southern African sub-region and the rest of Africa
- identify and consider possible improvements and eventual amendments of the Guidelines
- contribute to resources of best practice on the implementation of the Guidelines, for use in future elections on the African continent

The methodology for this collaborative research project on access to information and elections in South Africa was developed by the CHR in consultation with former Special Rapporteur Lawrence Mute and the participating research institutions.

The assessment took the form of a desk review of the available documentary materials; and interviews with key stakeholders done by researchers from the participating institutions. The text of the Guidelines for each of the electoral stakeholders was used as a framework for each section of the assessment.

For each stakeholder, the researchers endeavoured to include:

- the relevant laws (including the Constitution of the Republic of South Africa of 1996, as amended; the Electoral Act 73 of 1998, as amended; the Promotion of Access to Information Act 2 of 2000, as amended; the Electoral Commission Act 51 of 1996, as amended; the Independent Communications Authority of South Africa Act 13 of 2000; and the Political Party Funding Act 6 of 2018)
- the institutional framework that supports the laws identified (the various institutions established under the relevant legislation such as the Independent Electoral Commission)
- the extent of proactive disclosure by each specific stakeholder (using the clauses in the Guidelines as a checklist)
- an overall assessment of proactive disclosure by the specific stakeholder, highlighting areas in which the expectations of the Guidelines were either met, not met or exceeded; other best practices; major gaps and challenges; and recommendations

## LIMITATIONS OF THE STUDY

Information for this assessment was accessed and gathered via interviews and desk research at different times over the period from April to November 2019, before and after the elections. Interviews with officials from the Independent Electoral Commission in July 2019 were supplemented with information from the IEC's 2019 National and Provincial Elections Report<sup>10</sup> when it became available during the course of 2020; and some updates to reflect recent developments were made during

10 Independent Electoral Commission of South Africa (IEC) '2019 National And Provincial Elections Report' (2019) [http://www.elections.org.za/content/Documents/Election-reports/National-and-Provincial-Elections/2019-National-and-Provincial-Elections-Report-\(PDF\)/](http://www.elections.org.za/content/Documents/Election-reports/National-and-Provincial-Elections/2019-National-and-Provincial-Elections-Report-(PDF)/) (accessed 28 July 2020).



the editing process in 2020. It is however possible that information which became available after interactions with key officials of relevant information holders/providers, or after the information was sourced, may not be reflected in this report.

It should be noted that the sections in this report dealing with the various stakeholders vary in terms of scope, approach and the level of detail, based on the availability of information on different stakeholders, capacity and resources of the participating research organisations and the specifics of the requirements for each stakeholder as stipulated in the relevant section of the Guidelines.

## OUTLINE OF THE REPORT

Section one provides an introduction on the right of access to information and elections in the context of South Africa. Section two gives some background on the South African national and provincial elections in 2019 and the stakeholders listed in the Guidelines. Section three reviews the proactive disclosure of information for each of the electoral stakeholders, measured against the expectations in the Guidelines. Section four deals with recommendations and the implementation of the Guidelines.

## RESEARCH TEAM

The research work was commissioned by Prof Frans Viljoen from the Centre for Human Rights, University of Pretoria; with research coordinator and contributor Hlengiwe Dube and contributors Marystella Simiyu and Tomiwa Ilori, also from the CHR; Olufunto Akinduro, at the time working for the Electoral Institute for Sustainable Democracy in Africa; Michael Cosser and Gary Pienaar from the Human Sciences Research Council; Samkelo Mokhine from the Freedom of Expression Institute; and Chantal Kisoona from the South African Human Rights Commission. Consolidation of the research contributions and editing were done by independent media and elections consultant Izak Minnaar, with additional contributions and peer review by Maxwell Kadiri from the Open Society Justice Initiative.



SECTION 1

ACCESS TO INFORMATION AND ELECTIONS IN SOUTH AFRICA

The African Commission on Human and Peoples' Rights is a body mandated by the African Union to promote and protect the rights and obligations enshrined in the African Charter on Human and Peoples' Rights and other AU human rights treaties.

Among the rights protected in the African Charter is the right of access to information. Article 9(1) of the African Charter, which provides for both the right to freedom of expression and the right to 'receive information', has been interpreted to fully encompass the right of access to information.

The African Commission established the Special Rapporteur on Freedom of Expression on 7 December 2004, and later, on 28 November 2007, the Commission extended the mandate of this special mechanism to include Access to Information. Consequently the mandate became known as the Special Rapporteur on Freedom of Expression and Access to Information in Africa, and was given the primary responsibility to oversee the effective implementation by all state parties to the African Charter, of both rights enshrined in article 9(1) of the Charter.

Article 13 of the African Charter provides to everyone the right to 'participate freely in the government' of their country through their 'freely chosen representatives'. Promoting the right of access to information is essential for political participation and promoting democracy. At the core of democracy is informed consent, which requires the disclosure of information held by a range of public institutions and relevant private entities. This was affirmed by the Indian Supreme Court in the case of *S.P. Gupta v. Union of India*, a case involving government's refusal to release intra-agency correspondence regarding the transfer and dismissal of judges. The Court affirmed the existence of the public's right to information, even in the absence of express constitutional or statutory provision.<sup>11</sup>

In the context of elections, access to information empowers the electorate to be well informed about political processes with due regard to their best interest; to elect political office holders; to participate in decision-making processes in the implementation of laws and policies, and to hold public officials accountable for their acts or omissions in the execution of their duties. With access to accurate, credible and reliable information about a broad range of electoral issues prior to, during and after elections, citizens have the potential to meaningfully exercise their right to vote in the manner envisaged by article 13 of the African Charter.

To this effect, the African Commission, under the auspices of the Special Rapporteur, adopted the Model Law on Access to Information for Africa in February 2013 and subsequently adopted a soft law instrument dealing with elections and access to information, the Guidelines on Access to Information and Elections in Africa, in November 2017.

11 The Court stated ([1982] AIR (SC) 149, at 232): "[W]here a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government. ... The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State."

# ACHPR GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA: GENERAL PRINCIPLES

## THE RIGHT OF ACCESS TO INFORMATION

2. The right to information is guaranteed in accordance with the following principles:
  - (a) Every person has the right to access information of public bodies and relevant private bodies expeditiously and inexpensively.
  - (b) Every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively.
  - (c) Any policy or practice creating a right of access to information shall be interpreted and applied on the basis of a duty to disclose. Non-disclosure shall be permitted only in exceptionally justifiable circumstances.
  - (d) No one shall be subject to any sanction for releasing information in good faith

## PROACTIVE DISCLOSURE

3. The presumption is that all information held by relevant electoral stakeholders is subject to full disclosure. Accordingly, relevant electoral stakeholders are obliged to publish key information of public interest about their structure, functions, powers, decision making processes, decisions, revenue and expenditure in relation to the electoral process.

## DUTY TO CREATE, KEEP, ORGANISE AND MAINTAIN INFORMATION

4. All relevant electoral stakeholders are obliged to create, keep, organise, maintain and manage information about the electoral process in machine-readable formats and in a manner that facilitates the right of access to information. This requires that electoral stakeholders keep and record information for a reasonable period of time on electoral cycle activities, and arrange this information in a manner that allows prompt and easy identification and also safeguards the integrity of its content.

## PROCEDURE FOR ACCESSING INFORMATION

5. The process for accessing information held by relevant electoral stakeholders shall be simple, quick and affordable. In accessing information, no fees, other than the actual cost of reproduction, shall be charged. The cost of reproduction shall however be waived where the requester is indigent.
6. Any refusal of information by relevant electoral stakeholders shall be well reasoned and premised on existing regional and international standards and best practices on access to information. The refusal shall also be provided timeously, in writing and be subject to an internal appeal process which shall be expeditious and inexpensive. The right of further appeal against the outcome of an internal appeal process shall lie to an independent body and the Courts.

## EXEMPTIONS

7. The right to access information held by relevant electoral stakeholders may only be limited by narrowly defined exemptions, which shall be provided by law and shall comply strictly with regional and international standards and good practices on access to information.
8. Information may only be legitimately withheld as an exemption if its release would:
  - (a) Result in the unreasonable disclosure of the personal information of a third party;
  - (b) Cause substantial prejudice to a legitimate commercial or financial interest of relevant election stakeholders or other third party;
  - (c) Endanger the life, health and safety of an individual;

- (d) Cause substantial prejudice to the national security and defence of the State;
- (e) Cause substantial prejudice to international relations where the information relates to information required to be held in confidence under international law, the position of the State with respect to international negotiations, and diplomatic or official correspondence with States or international organisations and diplomatic or consular missions respectively;
- (f) Cause substantial prejudice to the economic interests of the State in terms of its ability to determine currency or exchange rates, interest rates or taxes;
- (g) Cause prejudice to law enforcement, in particular, the prevention and detection of crime, apprehension or prosecution of offenders, the administration of justice or the assessment or collection of tax or duty;
- (h) Result in the disclosure of confidential communication between medical practitioner and patient, lawyer and client, journalist and sources, or is otherwise privileged from disclosure in legal proceedings; or
- (i) Jeopardise the integrity of a professional examination or recruitment process.

#### PUBLIC INTEREST OVERRIDE

8. Information can only be legitimately withheld by relevant election stakeholders where the harm to the interest protected under the relevant exemption clearly outweighs the public interest in disclosure of the information.

#### SEVERANCE

9. Where a portion of a document containing requested information is exempted from disclosure, the exempted portion shall be severed or redacted and access granted to the remainder of the document that is not exempted from disclosure.

#### WHISTLEBLOWING PROTECTION

10. Persons who, in good faith and in the public interest, disclose information about wrongdoing in the electoral process by a relevant electoral stakeholder or its employees, shall be protected from administrative, social, legal and employment-related sanctions or other sanctions of a similar nature.

The Guidelines complement the Model Law in the context of elections by providing guidance and direction to states on the categories of information in the electoral process that must, at the minimum, be proactively disclosed by all stakeholders involved in it, at one point or the other.

The adoption of the Guidelines is evidence that there is general acceptance of the importance of proactive disclosure of information in both the preparation and actual conduct of elections. Consequently, the Guidelines represent a concerted effort by Africa's premier human rights institution to express in concrete terms the critical importance of the role that proactive disclosure of information plays in enhancing prospects of free, fair, transparent and credible elections in Africa, taking into consideration the peculiarities of the electoral processes in many African states.

Recent experiences across the continent have clearly revealed the dangers associated with a lack of information in electoral processes in many parts of Africa, owing to the failure of critical stakeholders involved in one way or another, to proactively disclose information prior to, during and after the actual conduct of elections.<sup>12</sup> This failure is also seen in the risks posed to peace, security and stability of states.

12 For instance, via network disruptions. See Collaboration on International ICT Policy for East and Southern Africa (CIPESA) 'State of Internet Freedom in Africa 2019: Mapping Trends in Government Internet Controls, 1999–2019' (September 2019) 25–28 [https://cipesa.org/?wpfb\\_dl=307](https://cipesa.org/?wpfb_dl=307) (accessed 29 July 2020).



Access to information is a foundational requirement for the practice of democratic governance, and the importance of access to information in the electoral process and for democratic governance cannot be overemphasised.

Free, fair, transparent and credible elections remain a significant demand of citizens of African states and as such, ensuring its realisation needs to be a foundational requirement of the democratic processes in all African countries. The electoral processes, when properly conducted, ought to convey the will of the people. However, given the lived reality in many African countries, electoral processes often do not reflect the wishes of the people. Although some democratic gains have been made in recent elections, a number of factors, such as corruption, fraud and failure to proactively disclose critical election-related information, remain an Achilles' heel in African elections.

In the Guidelines, the African Commission calls on state parties to the African Charter to adopt legislative, administrative, judicial and other measures<sup>13</sup> to give effect to their obligation to ensure proactive disclosure of information in electoral processes by key stakeholders involved in all aspects of their electoral processes.

Generally, the access to information regime in Africa is gradually improving. Several countries have constitutional provisions that guarantee, in one form or the other, the right of access to information. South Africa was the pioneer in adopting access to information legislation in Africa, with its enactment in 2000 of the Promotion of Access to Information Act (PAIA). To date, 24 states have adopted access to information laws in Africa.

The international and regional legal framework recognizes and protects the right to access information in an array of international instruments and soft laws.<sup>14</sup> The protection afforded to political rights recognizes that in democracies, the free and informed exercise of political rights is heavily reliant on and related to other rights such as the right to participation, freedom of expression and opinion, media freedom and the right of access to information.

Access to information, in this sense, is more than a right in itself, because it is also a critical enabling right.<sup>15</sup> This is evinced by its recordal in normative instruments, both within the region and in sub-regional agreements.<sup>16</sup>

13 The African Commission on Human and Peoples' Rights *Guidelines on access to information and elections in Africa* (2017) clause 3.

14 Universal Declaration of Human Rights 1948; International Covenant on Civil and Political Rights 1966 arts 19, 21 and 22; European Covenant and its Protocol for the Protection of Human Rights and Fundamental Freedoms; Declaration of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference for Security and Cooperation in Europe 1990; American Convention on Human Rights 1969; the African Charter on Human and Peoples Rights 1981; African Charter on Democracy, Elections and Governance 2007 art 17.

15 Other rights such as freedom and security of the person, freedom of expression and privacy; all of which are protected in the South African Bill of Rights.

16 State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the African Union's Declaration on the Principles Governing Democratic Elections in Africa 2002; SADC Principles and Guidelines Governing Democratic Elections 2004; African Union Guidelines for Elections Observation and Monitoring Missions 2002; African Charter on the Values and Principles of Public Service and Administration 2011; African Convention on Preventing and Combatting Corruption 1999; African Charter on Statistics; African Youth Charter; African Charter on Democracy, Elections and Governance 2007; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003; African Union Convention on Cyber Security and Personal Data Protection 2014. A number of soft law standards have also been adopted in the region by the African Commission such as the Model Law on Access to Information for Africa 2013; and the Guidelines on Access to Information and Elections in Africa 2017. Also see Economic Community of West African States (ECOWAS) Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol of the ECOWAS Treaty on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, December 2001; Regulation MSC/REG.1/01/08 on the ECOWAS Conflict Prevention Framework 2008; Treaty of the Economic Community of West African States 1993.

More recently, the ACHPR mandated<sup>17</sup> the revision and expansion of its 2002 Declaration of Principles on Freedom of Expression, to specifically include very robust principles on access to information in line with the provisions of the Model Law on Access to Information for Africa, as well as other forward-looking provisions relating to freedom of expression and access to information online, especially since online rights will increasingly have an important bearing on future elections. The ACHPR adopted the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa in November 2019.

In line with the key outcomes sought by the African Union in the achievement of Agenda 2063<sup>18</sup> for Africa, member states will work toward ensuring that democratic values and culture as enshrined in the African Governance Architecture (AGA)<sup>19</sup> are entrenched; and that at least seven out of ten persons in every member state will perceive elections to be free, fair and credible; and democratic institutions, processes and leaders as accountable. These outcomes are driven by goals which are important for purposes of securing economic transformation in the region, and ending poverty. The right of access to information will play a vital role in securing such perceptions and in supporting the AGA. Access to information will also take centre stage as state parties plan and implement necessary cyber infrastructure in the region in terms of the Agenda 2063 goals. This step is likely to see massive data flows, together with increased access and interaction with data. A commitment to fully open government data through proactive disclosure practices will in this context result in enhanced access to information which is known to improve public participation, transparency, accountability and therefore ultimately advance the achievement of the Agenda 2063 goals.

In South Africa, the Electoral Act, 73 of 1998 and the Electoral Commission Act, 51 of 1996 are foundational election-related legislation. Both statutes are national laws and are supported by a number of regulations and provincial legislation. The Electoral Commission Act is of significance to this report in that it provides the electoral management body (the Independent Electoral Commission - IEC) with the remit to manage any election and promote conditions conducive to free and fair elections.<sup>20</sup> In addition, the IEC must promote voter education and cooperation with and between governments and administrations to achieve the objective of conducting free and fair elections.<sup>21</sup>

Furthermore, the right of access to information, together with political rights, receive constitutional protection.<sup>22</sup> The right to access information is a 'stand-alone' right in the Constitution and is not entrenched in the form of a coupling with the right to freedom of expression.

17 African Commission 'Resolution 350 (EXT.OS/XX) 2016: Resolution to Revise the Declaration of Principles on Freedom of Expression in Africa' 18 June 2016 20th Extraordinary Session Banjul, The Gambia.

18 African Union 'Agenda 2063' [au.int/ar/node/34999](http://au.int/ar/node/34999) (accessed 29 July 2020).

19 African Governance Architecture 'Why AGA' [aga-platform.org/about](http://aga-platform.org/about) (accessed 29 July 2020).

20 Electoral Commission Act sec 5(1)(c).

21 Electoral Commission Act sec 5(1)(k)-(l).

22 Sec 32 of the Constitution reads as follows:

Access to information

1. 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.
2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

Sec 19 of the Constitution reads:

Political rights

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

According to the Constitution, 'everyone has the right of access to any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights'.<sup>23</sup> As provided under section 32(2), South Africa enacted the Promotion of Access to Information Act of 2000 to give effect to the right of access to information guaranteed in article 32(1). PAIA is applicable to public and private bodies.

It heralded a departure from misinformation and secrecy which characterised South Africa's information environment during colonial rule and apartheid. This legacy of secrecy allowed for gross and ongoing violation of human rights as well as corrupt activities to continue undetected. PAIA therefore seeks to strengthen effective access to information with a view to, amongst other things, promote understanding, participation, scrutiny, accountability, freedom of expression and transparency.

The drafters of the Constitution further recognised the value of transparency in promoting participatory democracy through entrenching a set of basic principles, also referred to as the Batho Pele (the people first) principles, in the public service.<sup>24</sup> These principles seek to create open, effective governance and requires the public service to provide timely, accessible and accurate information to the public.

PAIA prescribes that a public body must, upon request, disclose information upon fulfilment of the requirements stipulated in the law. The same procedure applies to private bodies, but the information requested must be 'for the exercise or the protection of a right'.<sup>25</sup> The grounds for refusal of information requests, premised on the range of exemptions provided under PAIA, include national security, unreasonable disclosure of personal information about a third party, or trade secrets of the body or a third party or information provided in confidence.

However, in terms of the public interest override, viz-a-viz the range of exemptions provided for in PAIA, the grounds for refusal (exemptions), may be disregarded in circumstances where there is evidence of extensive breach of the law or threat to the environment or public safety. Thus, if the public interest in disclosing the information evidently outweighs the harm envisaged in the ground of refusal, then the information will be released.

As the primary statute governing the right to access information, two notable schemes in PAIA are evident in the context of elections. One of these is the entrenchment of a right to access identified records automatically or without the need for a formal request for information to both public and private bodies,<sup>26</sup> and the other are the permissible exemptions which allow for a refusal of part or all of a record.<sup>27</sup>

PAIA is aligned with the African Charter on Democracy, Elections and Governance, in its recognition that the interpretative presumption in respect of access to information should favour disclosure. Exemptions from disclosure should therefore be interpreted restrictively. The duty of proactive disclosure of identified records, often interpreted as publicly available information (proactive disclosure) is specifically recorded in PAIA, albeit very limited compared to the Model Law requirements. The presumptions favouring release of information may be seen in provisions

23 Constitution of the Republic of South Africa, Act 108 of 1996 sec 32.

24 Section 195 of the Constitution; South Africa's Department of Public Service and Administration 'The Batho Pele Vision: A better life for all South Africans by putting people first' 20 July 2014 <http://www.dpsa.gov.za/documents/Abridged%20BP%20programme%20July2014.pdf> (accessed 29 July 2020).

25 D Milo & P Stein 'Guide: Getting to grips with South Africa's Promotion of Access to Information Act (PAIA)' <https://africacheck.org/factsheets/getting-to-grips-with-the-promotion-of-access-to-information-act-paia/> (accessed 6 April 2019).

26 Promotion of Access to Information Act secs 15 (in respect of public bodies) and 52 (in respect of private bodies).

27 Promotion of Access to Information Act chapter 4.

which allow redaction of information which could justify non-disclosure, to facilitate partial release of information not requiring protection. In addition, PAIA allows the release of certain protected information after the expiration of 20 years.

While PAIA has served as one of the many points of reference in the development of the ACHPR Model Law, a number of challenges have arisen in the course of its implementation, which warrant consideration in assessing the South African elections against the recommended standards in the Guidelines. In particular, while some progress has been achieved towards the proactive release of information, it has been slow and inadequate.

Where proactive disclosure is not made, or inadequate information is made automatically available, recourse has to be made through the formal request procedures in PAIA or other sector specific statutes regulating access to information. This process incurs fee costs, demands the completion of cumbersome PAIA application forms, and requires a requester to wait for a period of potentially 60 days after a PAIA application is lodged for the information to be provided, if at all.

While some judicial precedent has been developed in respect of formal requests to access information, none has to date involved the duty to proactively disclose information to the extent required by the Model Law<sup>28</sup> and article 3 of the Guidelines “that all information held by relevant electoral stakeholders is subject to full disclosure,” limited only by the exemptions set out in articles 7 and 8 of the Guidelines.

Together with such concerns regarding the country’s legal framework to effectively manage information in the interest of the public, practical challenges with the execution of PAIA requests, as reported by the South African Human Rights Commission (SAHRC)<sup>29</sup> in the course of its remit to monitor compliance with PAIA and supported by reports from other watchdog organisations, indicate that implementation of PAIA is generally poor.

One of the key factors which prevent people from exercising their rights to receive and impart information is poor information management. Many public bodies do not have a culture of information management or effective systems for the management and release of information. Records are not kept, organised, or maintained to allow the information they contain to be proactively disclosed or to ensure they are accessible and provided to persons who request them.

Poor records or information management may be attributed to a plethora of internal and external factors. In some instances systems and processes are not in place because of resource constraints or are due to the absence of strategic leadership; in others the power of information may not fully be recognised; while in others a culture of secrecy may be prevalent.

The Africa Freedom of Information Center report on the state of access to information in Africa indicates that<sup>30</sup> less than 50 percent of requests submitted resulted in the release of records. The report recommends that PAIA would be strengthened if requests were deformed, and if state institutions were better equipped with resources for records creation and management, with a greater emphasis on proactive disclosure of information.<sup>31</sup>

28 Model Law on Access to Information for Africa art 7 (Proactive disclosure) – ACHPR ‘Model Law on Access to Information for Africa’ (2013) <https://www.achpr.org/legalinstruments/detail?id=32> (accessed 29 July 2020).

29 SAHRC ‘PAIA Annual Report 2015-17’ (September 2017) 5 <https://www.sahrc.org.za/home/21/files/Annual%20Report%20landscape%201517.pdf> (accessed 29 July 2020).

30 Africa Freedom of Information Centre *State of Right to Information in Africa Report in the context of the Sustainable Development Goals* (2017) 127-133.

31 As above.

The South African Access to Information Network's Shadow Report indicates that only 40.8 percent of a total of 169 requests submitted to public bodies during the period 1 June 2017 - 31 July 2018 were granted in full or in part.<sup>32</sup>

The report noted the regular failure by public information officers to cite any, or adequate, reasons for refusing access to records, which frustrates the objectives of PAIA and demonstrates poor record keeping and a lack of accountability on the part of the relevant public body. In some cases they have also denied being in possession of requested records, or did not provide reasons at all.<sup>33</sup> These trends reinforce the urgent need for PAIA reform to mandate the creation of records and to compel the deployment of significant investments in records management by public institutions. Such a need is in line with article 4 of the Guidelines, which recommends that information records must be created, kept, organized, maintained and managed in a manner that facilitates the right of access to information.

Other organisations have previously reported<sup>34</sup> that most research respondents were reluctant to use PAIA because they did not believe their requests would receive a response and that submitting formal requests would take time.<sup>35</sup>

Beyond the duty to provide information automatically, such perceptions, together with the barriers encountered in the formal information request processes and procedures, mean that the public is seriously disadvantaged from active participation in the thinking, planning and ability to hold authorities to account in the context of the elections. These disadvantages take on more pronounced adverse dimensions in the context of local government elections as they do little to broaden and deepen opportunities for participation.

Recent decisions by the South African courts demonstrate the judiciary's appreciation of the need for access to information by the media and the public at large. The jurisprudence further recognises that one of the determinants in exercising the right to vote, is the right to information. The judicial pronouncements indicate an acknowledgment of the inherent disadvantages of the right of access to information, where access is resisted and recourse to the courts is required to assert this right.

The case of *Nova Property Group Holdings v Cobbett*<sup>36</sup> applies to the media and other requestors and is relevant to information requests during election times. This is so, given that the period when elections are to be held are prescribed and the window to compel necessary information through the courts is unlikely, unless exceptionally persuasive circumstances exist to meet existing, urgency tests/standards. According to the court:

Journalists must be able to have speedy access to information such as the securities register... Interference with the ability to access information impedes the freedom of the press. The right to freedom of expression is not limited to the right to speak, but includes the right to receive information and ideas. Preventing the press from reporting fully and accurately, does not only violate the rights of the

32 Access to Information Network *Shadow Report 2018 press release* amabhungane.org/wp-content/uploads/2019/09/190926\_ATI-Network\_-2018-Shadow-Report-Press-Statement-.pdf (accessed 29 July 2020).

33 ATI Network Shadow Report 2018 (2019) 3 cer.org.za/wp-content/uploads/2019/09/ATI-Network-Shadow-Report-2018.pdf (accessed 29 July 2020).

34 G Razzano 'Accessing information? What we know from user experiences' (2015) *Open Democracy Advice Centre* [http://www.opendemocracy.org.za/images/docs/publications/PAIA\\_Users.pdf](http://www.opendemocracy.org.za/images/docs/publications/PAIA_Users.pdf) (accessed 28 July 2020).

35 Razzano (n 34 above) 5.

36 [2016] ZASCA 63 (*Nova case*).



journalist, but it also violates the rights of all the people who rely on the media to provide them with ‘information and ideas ...’<sup>37</sup>

The media cannot be precluded from accessing information because the subject of the likely reportage considers that the reportage will be unfavourable and unfair....Citizens and public interest groupings rely on this right to uncover wrongdoing on the part of public officials or for accessing information to report on matters of public importance. The Constitutional Court has noted that the media has a duty to report accurately, because the “consequences of inaccurate reporting may be devastating.” It goes without saying that to report accurately the media must have access to information. Access to information is crucial to accurate reporting and thus to imparting information to the public.<sup>38</sup>

This judgment underscored the centrality of the media in our constitutional democracy. Where access is obstructed, the media is unable to fulfil its reporting functions to the general public, thereby impacting on public participation and accountability which are central to our democracy and must be constantly safeguarded.<sup>39</sup> Emphasizing the need to promote rather than limit information flows, the court referred to a default position favouring the disclosure of information even in limited form where uncertainty or the need to protect certain information may be justified. The court further noted:

State owned enterprises have to resist the impulse to immediately resist constitutionally permissible judicial scrutiny. This includes resistance to making information available that rightly belongs in the public domain. After all, they are, through the State, owned by the nation... there might well be commercial confidentiality that attaches to certain commercial contracts but the default position should be to make information available subject to justifiable redaction.<sup>40</sup>

In the case of *My Vote Counts NPC v Speaker of the National Assembly and Others*,<sup>41</sup> the issue before the Constitutional Court was whether Parliament failed to fulfil an obligation imposed by section 32 of the Constitution for a law to be passed to give effect to the right of access to information. The majority judgment of the court declined to grant this order primarily because of the doctrine of separation of powers and the failure of the applicants to challenge the constitutional validity of PAIA ‘frontally’.<sup>42</sup>

On the other hand, the minority noted the centrality of access to information for the meaningful exercise of the right to vote.<sup>43</sup> For the minority, this included knowing the private sources of political parties’ funding.<sup>44</sup> The minority noted the deficiencies of PAIA in that the Act operates ‘pairwise’ due to the fact that information is only granted on request, which does not allow the general electorate to be meaningfully informed by dozens of political parties on a systematic basis.<sup>45</sup> Furthermore, the application of PAIA only to records, and not more widely to information, as well as the lack of a duty for records to be created, were noted by the minority as inhibiting access to the political party funding.<sup>46</sup>

Properly interpreted, the right to know in the context of elections is so vital and intrinsically dependent on a determined span of time, that all information dimensions which encompass the

37 *Nova* case (n 36 above) para 37.

38 *Nova* case (n 36 above) para 42 quoting *City of Cape Town v South African National Roads Authority Limited & others* [2015] ZASCA 58 para 20.

39 *Nova* case (n 36 above) para 119.

40 *Nova* case (n 36 above) para 120.

41 [2015] ZACC para 31 (*My Vote Counts* case).

42 The majority judgment of the court declined to grant this order primarily because of the doctrine of separation of powers and the failure of the applicants to challenge the constitutional validity of PAIA – *My Vote Counts* case (n 41 above) para 121.

43 *Nova* case (n 36 above), para 40-41.

44 *Nova* case (n 36 above), para 42.

45 *Nova* case (n 36 above) para 95-96.

46 *Nova* case (n 36 above) para 97-101.

electoral process and its conduct should be made available proactively to the public in the pre-election period, during the election itself and after the conclusion of the election, unless the harm in the release of the information is imminent, and so significant as to warrant its non-disclosure.



## SECTION 2

# ELECTORAL STAKEHOLDERS AND THE SOUTH AFRICAN ELECTIONS ON MAY 8, 2019

The Republic of South Africa successfully and peacefully conducted its 6<sup>th</sup> national and provincial elections on 8 May 2019. In a country which only 25 years earlier entered democracy, this is a unique score card in the region, in so far as elections are concerned.<sup>47</sup>

The successes in progressively achieving an electoral process that meets international norms and standards; and which is regarded as a model of best practice, is attributable to a number of factors, including political will to vigilantly protect principles of democracy and the rule of law, respect for the constitutionally protected independence of the electoral management body, and civic education.

The 2019 elections have taken place in a robustly contested political milieu, characteristic of a healthy democracy. As a middle-income developing state, South Africa still bears the scars of apartheid, a crime against humanity, which was characterized by extreme socio-economic disparities. The large majority of people in the country have no access to land and continue to live in poverty without affordable access to vital communication mechanisms such as the internet. These conditions have the most telling, compounded effects on women, persons with disabilities, older persons and other vulnerable groups.

Despite gains achieved in the country over the 25 years since democracy, the challenge of poverty, continued inequality and high levels of unemployment remain. The 6<sup>th</sup> election, however presented new challenges confronting the management of the elections, and law enforcement during the elections in particular. These challenges arose in the form of instability within law enforcement itself, with organized labour representing some members of the police protesting outside of Parliament shortly before the elections; floods and fires in at least two provinces; threats of electricity outages; and high levels of public protest actions relating to service delivery, land rights and the demarcation of municipal and voting district boundaries ahead of the elections, amongst others.

Nevertheless, voting, counting and objections were dealt with within the legally prescribed timeframes and the final results announcement took place three days after the elections, as has become the norm in South Africa. Although the 66% voter turnout<sup>48</sup> was the lowest in South Africa's democratic history, the African Union observer mission<sup>49</sup> noted that the elections were peaceful, transparent, inclusive and credible; that the people of South Africa were given the opportunity to elect leaders of their choice; and that the 2019 elections satisfied the African Union and international standards for democratic elections. The SADC observer mission concurred, stating<sup>50</sup> that the elections "were conducted in an orderly and professional manner and within the requirements of the legal framework of the Republic of South Africa and further, in accordance with the revised SADC Principles and Guidelines Governing Democratic Elections (2015)."

## ELECTORAL SYSTEM AND STAKEHOLDERS

The South African electoral system is a closed-list proportional representation system, with elections every five years for the national and nine provincial legislatures, held simultaneously. Voters are presented with two separate ballots for the national and provincial elections. These ballots list all the

47 Examples of some states in the region where election-related violence featured prominently include Zimbabwe, Nigeria, Ethiopia, Egypt; Tunisia; Kenya and Cote D'Ivoire.

48 Business Insider SA 'While voter turnout was low, new numbers show there was massive online interest in the elections' (16 May 2019) <https://www.businessinsider.co.za/news24-biggest-publication-to-cover-south-africas-2019-general-elections-2019-5> (accessed 29 July 2020).

49 African Union Election Observation Mission (AUEOM) to the Republic of South Africa 'Preliminary statement' 8 May 2019 [https://au.int/sites/default/files/pressreleases/36589-pr-aueom\\_south\\_africa\\_preliminary\\_statement.pdf](https://au.int/sites/default/files/pressreleases/36589-pr-aueom_south_africa_preliminary_statement.pdf) (accessed 29 July 2020).

50 SADC Observer Mission 'Preliminary statement' 10 May 2019 [www.sadc.int/news-events/news/sadc-election-observation-mission-releases-its-preliminary-statement-2019-national-and-provincial-elections-republic-south-africa/](http://www.sadc.int/news-events/news/sadc-election-observation-mission-releases-its-preliminary-statement-2019-national-and-provincial-elections-republic-south-africa/) (accessed 29 July 2020).

political parties contesting the national and provincial elections. Voters cast one national and one provincial ballot for the party of their choice.<sup>51</sup>

The ACHPR Guidelines on Access to Information and Elections in Africa, on which this research is anchored, lists the electoral stakeholders that are expected to proactively disclose relevant information, before, during and after elections:

## APPOINTING AUTHORITY

The appointing authority refers to the authority that is authorized to oversee the appointment of members of the Election Management Body. In the case of South Africa, this refers to the appointment of members of the Independent Electoral Commission (IEC)<sup>52</sup> by the President after a selection process by a panel chaired by the Chief Justice and a Parliamentary endorsement of the recommended candidates.

## ELECTORAL MANAGEMENT BODY (EMB)

The EMB and its affiliates are responsible for ensuring that there is an efficient election management system. Information regarding the appointment, remuneration and conditions of service of members of the EMB must be disclosed to the public. In the case of South Africa, the IEC's role includes voter education, maintaining expertise and the use of technology in the context of elections; electoral law reform and general administration of elections'.<sup>53</sup> Thus, the electoral management body is crucial in ensuring elections are conducted in a non-partisan and transparent manner. The Guidelines' expectations are that EMBs such as the IEC disclose information on its organizational structure and membership and all information related to the management and administration of elections.

## POLITICAL PARTIES AND CANDIDATES

Political parties are the major contenders in the electoral contest and even after the elections, they potentially contribute to the consolidation of democracy.<sup>54</sup> South Africa has witnessed substantial growth in political parties contesting elections,<sup>55</sup> with 48 political parties participating in the 2019 national elections (19 more than in the 2014 elections).

The Guidelines require political parties to disclose organisational details, including administrative, procedural and financial information.

## LAW ENFORCEMENT AGENCIES

Law enforcement agencies are important stakeholders in the elections. They are expected to ensure stability throughout the electoral process and investigate incidents of election-related violence and crime in a professional manner.<sup>56</sup> Thus, the Guidelines require law enforcement agencies to disclose information regarding their preparation, planning and operations before, during and after the elections.

51 W Louw 'The South African Electoral System' (20 March 2014) [hsf.org.za/publications/hsf-briefs/the-south-african-electoral-system](http://hsf.org.za/publications/hsf-briefs/the-south-african-electoral-system) (accessed 29 July 2020).

52 Also alternatively referred to as the "Electoral Commission" (EC) in legislation and elsewhere.

53 IEC 'About us' <http://www.elections.org.za/content/about-us/what-we-do/> (accessed 6 April 2019).

54 C Nelson 'The role of political parties and elections in consolidating democracy in societies, with special reference to contemporary South Africa' 25 November 2018 <https://www.litnet.co.za/the-role-of-political-parties-and-elections-in-consolidating-democracy-in-societies-with-special-reference-to-contemporary-south-africa/> (accessed 6 April 2019).

55 N Marrian 'Record number of political parties contesting 2019 polls' *Mail & Guardian* 20 March 2019 <https://mg.co.za/article/2019-03-20-record-number-of-political-parties-contesting-2019-polls> (accessed 5 April 2019).

56 IEC 'The Electoral Code of Conduct' <http://www.elections.org.za/content/Parties/The-Electoral-Code-of-Conduct/> (accessed 5 April 2019).

## ELECTION OBSERVERS AND MONITORS

Electoral observation and monitoring are integral to the electoral processes. Observer missions typically include international, regional and local groups. Their involvement enhances democratic governance, transparency and credibility of elections.<sup>57</sup>

Election observers and monitors are expected to disclose information about their sources of funding, codes of conduct, conflict of interest and their mission reports.

The South African election system only makes provision for election observers (and not monitors).

## MEDIA AND INTERNET REGULATORY BODIES

Media and Internet Regulatory Bodies include the Independent Communications Authority of South Africa (ICASA) with its Complaints and Compliance Committee (CCC) dealing with complaints regarding election coverage of broadcasters; the *Broadcasting Complaints Commission of South Africa* (BCCSA) (not mandated to deal with election complaints) and the Press Council of South Africa, dealing with complaints against print and online media. These bodies are required to proactively disclose information about their codes of conduct and complaints procedures.

## MEDIA AND ONLINE MEDIA PLATFORM PROVIDERS

The role of the media in elections is well documented. Free and professional media are important in consolidating democracy, especially in the context of elections. The media provide information that citizenry require before, during and after elections, creating an environment for analysis, discussions and debate about matters related to elections. The media also play a watchdog role which contributes to safeguarding electoral transparency.<sup>58</sup> The media has to be professional and ethical. South Africa has a diverse and vibrant online and offline media sector that play a critical role in elections.

It is against this background that the media and online media platform providers are required to disclose the information outlined in the Guidelines.

## CIVIL SOCIETY ORGANISATIONS

Civil society plays a key role in elections. In South Africa, the role of civil society dates back to the anti-apartheid movement before 1994. Their role in the post-apartheid era has been about consolidating democracy and this has manifested in several roles that civil society play, including voter education.

Being a significant stakeholder in the elections, they are also expected to disclose information regarding their operations such as their aims, sources of funding, composition, their work on elections (voter education for example) and conflicts of interest.

57 African Commission 'Guidelines for African Union Electoral Observations and Monitoring Missions' [https://www.achpr.org/public/Document/file/English/au\\_instr\\_guide\\_elections\\_eng.pdf](https://www.achpr.org/public/Document/file/English/au_instr_guide_elections_eng.pdf) (accessed 29 July 2020).

58 Ace Project 'Media and elections' (2012) <http://aceproject.org/ace-en/topics/me/default> (accessed 5 April 2019).





### SECTION 3

## ASSESSMENT OF STAKEHOLDERS' COMPLIANCE WITH THE GUIDELINES

1. APPOINTING AUTHORITY
2. ELECTION MANAGEMENT BODIES
3. POLITICAL PARTIES AND CANDIDATES
4. ELECTION OBSERVERS AND MONITORS
5. LAW ENFORCEMENT AGENCIES
6. MEDIA AND INTERNET REGULATORY BODIES
7. MEDIA AND ONLINE MEDIA PLATFORM PROVIDERS
8. CIVIL SOCIETY ORGANISATIONS

# 1 APPOINTING AUTHORITY

## ACHPR GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA: MINIMUM STANDARDS

12. States Parties shall ensure that:

- (a) The process for the selection and appointment of members of the Election Management Body is clearly stipulated in law, and that it is transparent, widely publicised and allows for public participation; and
- (b) It proactively discloses the following categories of information in relation to the Election Management Body:
  - (i) Mode, criteria and process of appointment of members, including any requisite considerations such as gender balance, qualifications and experience;
  - (ii) Appointment process of members;
  - (iii) Remuneration and conditions of service of members; and
  - (iv) Procedure for the termination of appointed members of the Election Management Body.

The Guidelines<sup>59</sup> define the 'Appointing authority' as 'any person or institution within a state party that is authorised by law to oversee the appointment of members of the election management body.' While the issue of 'oversee[ing]' the appointment of members may appear confusing, in South Africa members of the election management body are appointed by the President on the recommendation of the National Assembly (NA), following nominations by a NA inter-party committee.<sup>60</sup>

The 'Election Management Body' is defined in the Guidelines as 'the body or bodies responsible for electoral management. It has the sole purpose of, and is legally responsible for, managing some or all of the elements that are essential for the conduct of elections, and direct democracy instruments such as referendums, citizens' initiatives and recall votes, to the extent that they are part of the legal framework.'<sup>61</sup> In South Africa this body is the Electoral Commission of South Africa (known as the IEC, or Independent Electoral Commission). Since 'state parties shall adopt legislative, administrative, judicial and other measures to give effect to these Guidelines', South Africa, as a state 'that [has] ratified the African Charter on Human and Peoples' Rights',<sup>62</sup> is duty-bound to give effect to the Guidelines in its appointment of the IEC and its officials.

The Electoral Commission Act (51 of 1996; as amended up to 2014) is the primary piece of legislation that gives rise to the appointment of the Electoral Commission and Electoral Court. Sections 6 and 7 of the Act deals with the appointment and removal of Commissioners. A panel comprising the President of the Constitutional Court, a representative of the South African Human Rights Commission, a representative of the Commission on Gender Equality, and the Public Protector are required to submit at least eight names of eligible candidates to the NA inter-party committee mentioned above (sec 6(3) of the Act), acting 'in accordance with the principles of transparency and openness ... with due regard to a person's suitability, qualifications and experience' (sec 6(5)). A Commissioner may only be removed from office by the President (after a recommendation by the Electoral Court) 'on the grounds of misconduct, incapacity, or incompetence' (sec 7(3)(a)(i-ii)).

59 Guidelines on access to information and elections in Africa (n 13 above) 10.

60 Electoral Institute for Sustainable Democracy in Africa 'South Africa: Independent Electoral Commission' <https://www.eisa.org.za/wep/souiec.htm> (accessed 24 May 2019).

61 Guidelines on access to information and elections in Africa (n 13 above) 10.

62 Guidelines on access to information and elections in Africa (n 13 above) 12.

Most of the wording of the Act concerning the appointment of Commissioners is taken from the South African Constitution.<sup>63</sup> But section 193 of the Constitution specifies that those appointed to commissions (including the Electoral Commission) must be South African citizens who are ‘fit and proper persons to hold the particular office’. Slabbert contends that, since the requirement of being ‘fit and proper’ is not defined or described in legislation, ‘It is left to the subjective interpretation of and application by seniors in the profession and ultimately the court.’<sup>64</sup> Most importantly from the perspective of this review, however, is whether the President appoints IEC Commissioners according to ‘the principles of transparency and openness ... with due regard to a person’s suitability, qualifications and experience’ – and how one measures this.

Evidence for the transparency and openness of the IEC Commissioners appointment process can be found in the Independent Electoral Commission’s Commissioners Interview Report 2018<sup>65</sup> and in the Portfolio Committee on Home Affairs’ minutes of a meeting on the ‘Electoral Commission appointment process (postponed)’.<sup>66</sup>

The Commissioners Interview Report aimed to identify and highlight ‘pertinent statements made by the eight shortlisted candidates’ for Commissioners positions at the IEC following interviews held on 26 to 27 June 2018. Highlights pertaining to transparency and openness cited in the report suggest that the interviewing panel was alive to both the positive and negative aspects of candidates’ profiles: speaking out against malfeasance; greater transparency with regard to the voter’s roll; the Public Protector’s findings for and against candidates; obviating political interference; broadening and enhancing voter education; recognition of human rights work; and the maintenance of integrity, impartiality and independence. This keenness on the part of the interviewing panel suggests a high degree of transparency and openness in the Commissioners appointment process.

This transparency and openness is manifested also at the next level: the decision of the Portfolio Committee on Home Affairs to seek public comment on the eight candidates available for possible appointment as IEC Commissioners. As the Portfolio Committee explained, in relation to the appointment of Commissioners ahead of the 2019 elections:

*The decision was taken to enable a participatory process in line with the strategic objectives of the Fifth Parliament, to achieve a public participation-led parliament. “The IEC is at the centre of South Africa’s democratic dispensation and the Committee wishes to include South Africans, so their voices are heard,” said Mr Hlomani Chauke, the Committee Chairperson. The decision is intended to find consensus on the final candidates among South Africans, especially for an important institution such as the IEC.*<sup>67</sup>

Not only is the public invited to submit comments on proposed Commissioners, as in the process outlined above, but the Constitution enjoins the involvement of civil society in the recommendation process (see 193(6)) and the involvement of the public in the proceedings of Parliament:

*The National Assembly must*

*(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and*

63 Constitution of the Republic of South Africa 1996 sec 1(1).

64 M Slabbert ‘The requirement of being a “fit and proper” person for the legal profession’ (2011) 14(4) *PER* [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812011000400008](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812011000400008) (accessed 22 May 2019).

65 My Vote Counts & Council for the Advancement of the South African Constitution (CASAC) ‘Independent Electoral Commission Commissioner Interview Report 2018’ (2018) <http://www.myvotecounts.org.za/wp-content/uploads/2018/08/IEC-Parliament-Report-August-2018.pdf> (accessed 22 May 2019).

66 Parliamentary Monitoring Group (PMG) ‘Electoral Commission appointment process (postponed)’ <https://pmg.org.za/committee-meeting/26849/> (accessed 22 May 2019).

67 PMG ‘IEC Commissioner candidates’ (2018) <https://pmg.org.za/call-for-comment/721/> (accessed 24 May 2019).

- (b) *conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—*
    - (i) *to regulate public access, including access of the media, to the Assembly and its committees; and*
    - (ii) *to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.*
2. *The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society (sec 59; emphasis added).*

Public participation appears therefore to be built into the Commissioners appointment process.

However public the Commissioners appointment may be, it is the National Assembly that makes the final recommendation to the President; and where one political party has a large numerical advantage in the NA, that party's recommendation is likely to hold sway.

In 2015, following the resignation of Adv Pansy Tlakula as Chairperson of the IEC after she was found by the Office of the Public Protector – ironically, a sister Chapter Nine institution<sup>68</sup> – to have influenced the tender process that called for a leasing contract for new premises for the IEC, a process for appointing a new Commissioner was initiated to ensure that the IEC was at full strength in the build-up to the 2016 local government elections. The Portfolio Committee on Home Affairs whittled down the shortlist of eight names given to it by the interviewing panel to two – Mr Glen Mashinini and Ms Janet Love. The ANC members of the Committee favoured Mashinini, while opposition party members favoured Love. The Portfolio Committee voted 5 (ANC) to 4 (opposition parties – the DA, the IFP and the EFF) in favour of Mashinini, whose name was therefore put forward to the NA. The numerical majority of the ANC in the NA ensured that Mashinini was the candidate recommended to the President for appointment as a Commissioner; and he was duly appointed Commissioner in April 2015 and as Chairperson of the IEC in October 2015; Love being appointed unanimously in the next vacancy as Commissioner in April 2016<sup>69</sup> and Vice-Chairperson of the Commission in November 2018.<sup>70</sup>

The transparency of the process was not in question here; but, according to all the opposition parties, the impartiality of Mashinini – a previous IEC Deputy Chief Electoral Officer – was: Mashinini had also been a Special Projects Advisor to Jacob Zuma, the very President who would subsequently appoint him IEC Commissioner. Despite strong dissent from opposition parties in the NA because of the relationship between Mashinini and the President, then, the NA recommended him for appointment.<sup>71</sup>

The case of Tlakula was more complicated: in legal action instituted in terms of the remedial action ordered by the Public Protector, she had been accused by the Electoral Commission<sup>72</sup> in *Electoral Commission v Abland (Pty) Ltd and Others (73405/2014)* [2017] ZAGPPHC 503 (3 August 2017)<sup>73</sup> of

68 The Constitution cap 9. See Department of Justice 'SA state institutions supporting constitutional democracy' [www.justice.gov.za/legislation/constitution/saconstitution-web-eng-09.pdf](http://www.justice.gov.za/legislation/constitution/saconstitution-web-eng-09.pdf) (accessed 29 July 2020).

69 My Vote Counts 'Monitoring the IEC Commissioner appointment process' Policy brief March 2018 <http://www.myvotecounts.org.za/wp-content/uploads/2017/03/IEC-Policy-Brief.pdf> (accessed 24 May 2019).

70 IEC 'Vice-Chairperson: Ms Janet Love' [www.elections.org.za/content/Dynamic.aspx?id=1013](http://www.elections.org.za/content/Dynamic.aspx?id=1013) (accessed 29 July 2020).

71 Parliamentary Monitoring Group 'Hansard: NA: Debate and vote on the recommendation for IEC Commissioner' 3 March 2015 <https://pmg.org.za/hansard/20122/> (accessed 29 July 2020).

72 As ordered by the Public Protector in Report no 13 of 2013/14, Inappropriate Moves, Remedial Action, page 219: [https://www.corruptionwatch.org.za/wp-content/uploads/migrated/REPORT%20NO%2013%20of%202013%202014%20\(3\).pdf](https://www.corruptionwatch.org.za/wp-content/uploads/migrated/REPORT%20NO%2013%20of%202013%202014%20(3).pdf) (accessed 29 July 2020).

73 [2017] ZAGPPHC 503 (3 August 2017) <http://www.saflii.org/za/cases/ZAGPPHC/2017/503.html> (accessed 29 July 2020).

having awarded a tender to a company which employed someone who was simultaneously her business partner in another company (and who also happened to be a senior MP for the ruling party); but the court found that the Commission itself (and not Tlakula) had taken decisions regarding the award of the tender, that Tlakula was not a member of the Commission when the tender decision was made, and that she had not influenced the tender process as alleged by the Commission – which, based on the judgment, had itself flouted the constitutional requirement that Chapter Nine institutions be ‘independent, and subject only to the Constitution and the law, and ... be impartial and ... exercise their powers and perform their functions without fear, favour or prejudice.’<sup>74</sup>

## (a) PROCESS OF APPOINTING THE ELECTION MANAGEMENT BODY

In the South African case, the appointing authority appears substantially to have met the requirements spelt out in the Guidelines, by clearly stipulating the process for the selection and appointment of members of the Election Management Body in law<sup>75</sup> (the Electoral Commission Act) – a process which is transparent and which allows for public participation. Whether the process is widely publicised is, however, doubtful.

There was apparently ‘universal’ consultation around the Electoral Commission Bill, 1996 that led to the eventual promulgation of the Electoral Commission Act:

*Apart from gathering information on an [sic] universal basis, in depth analysis, discussions also took place with representatives of various countries representing different approaches to electoral management, e.g. Kenya, Tanzania, Zambia, Zimbabwe, Mexico, Chile, Argentina, France, Germany, Hungary, Poland, the Russian Federation, India, Australia, Japan, Hong Kong and Singapore. The chairperson of the Independent Electoral Commission and the co-chairpersons of the Task Group for Local Government Elections were also consulted.*<sup>76</sup>

The extent to which public comment in South Africa was solicited is, however, unclear.

The Electoral Commission Act is available on the IEC website,<sup>77</sup> but downloading it is neither quick nor easy. One can also access the Act via a search on the IEC home page for ‘Electoral Commission Act’, which leads one to a PDF version; but the process for accessing it is indirect and not user friendly. There is no link to the Electoral Commission Bill. A search for ‘Appointment of Commissioners’ leads to a first search result entitled ‘Vision 2018’, an undated PDF document which summarises the IEC legislative environment. Alternatively, legislation can be accessed on the Parliamentary website or on government websites.

## (b) INFORMATION DISCLOSURE ON THE EMB

In terms of disclosure of various categories of information in relation to the Election Management Body,<sup>78</sup> the mode, criteria and process of appointment of members is spelt out in the Act; but while there is due regard to qualifications and experience, gender is not a specified criterion in the Act. As discussed above, the appointment process of members is detailed in the Act, as are the conditions of service of members and the procedure for the termination of appointed members:

1. *The term of office of a member of the Commission is seven years unless –*

74 The Constitution sec 181(2).

75 Clause 15 of the Guidelines on access to information and elections in Africa.

76 Republic of South Africa *Electoral Commission Bill* (1996) [https://cisp.cachefly.net/assets/articles/attachments/03771\\_electoral\\_commb35-1996.pdf](https://cisp.cachefly.net/assets/articles/attachments/03771_electoral_commb35-1996.pdf) (accessed 24 May 2019).

77 IEC ‘Document library’ <https://www.elections.org.za/content/IEC-Downloadable-Documents/> (accessed 29 July 2020).

78 Clause 15 of the Guidelines on access to information and elections in Africa.

- (a) *he or she resigns or dies at an earlier date*
- (b) *he or she is removed from office in terms of subsection (3); or*
- (c) *the President, on the recommendation of the National Assembly, extends the member's term of office for a specified period (Electoral Commission Act, sec 7).*

Remuneration is not specified in the Act itself; along with conditions of service, allowances and 'other benefits' it 'shall from time to time be determined by the President after consultation with the Commission on Remuneration of Representatives ...' (Electoral Commission Act, sec 7(2)). The grounds (misconduct, incapacity or incompetence) upon which a Commissioner may be removed from office by the President are spelt out in sec 7(3) of the Act, and the procedure for this is outlined therein: the Electoral Court makes a recommendation to this effect to a committee of the NA; and the majority of NA members make a resolution to that effect calling for the removal of the Commissioner – though the President may act as soon as the Electoral Court has made its recommendation.

In conclusion, while the Electoral Commission Act specifies in some detail the process for the selection and appointment of IEC Commissioners and discloses the various categories of information in relation to the IEC, as spelt out in the Guidelines, the accessibility of that information – beginning with the Act itself – is less clear. The IEC website does not foreground the legislative and regulatory framework within which the IEC was established and within which it functions; and the extent to which information disclosure is therefore 'proactive', as per the Guidelines, is limited.



## 2 ELECTION MANAGEMENT BODY

### ACHPR GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA: MINIMUM STANDARDS

13. To facilitate access to information, Election Management Bodies shall as part of their operations:
  - (a) Create, keep, organise and maintain records in a manner that facilitates access to information, including for vulnerable and marginalised groups;
  - (b) Adopt and implement flexible proactive disclosure arrangements that enable access to information without the need for individual applications;
  - (c) Establish clear and effective processes and procedures to deal with requests for information; and
  - (d) Formulate clear procedures for making requests for information, which must include the required format of requests, costs for reproduction, timeframes and formats for providing requested information.
14. An Election Management Body shall cause to be published, on an annual basis, accurate and updated information pertaining to its:
  - (a) Organisational structure;
  - (b) Strategic plan;
  - (c) Decision-making process;
  - (d) Procedure for the recruitment of both permanent and temporary staff and their conditions of service;
  - (e) Training policies;
  - (f) Code of conduct for employees, including declaration of assets;
  - (g) Budget and sources of funding, including donor funding, which shall be disaggregated accordingly;
  - (h) Mechanisms for voter identification;
  - (i) Procurement policy, processes and award of contracts; and
  - (j) Annual Report, including audited accounts.
15. An Election Management Body shall proactively disclose information relating to its membership including:
  - (a) Details of the professional background of its members;
  - (b) Policy on declaration of assets and interests by its members; and
  - (c) Its code of conduct and ethics.
16. The proactive disclosure of information by an Election Management Body is required at all stages of the electoral process. Certain categories of information shall be disclosed prior, during and after the conduct of elections.
17. During the pre-election period, an Election Management Body shall proactively disclose the following information:
  - (a) Detailed electoral calendar;
  - (b) Criteria, process and results for the delimitation of electoral boundaries in a simplified manner;
  - (c) List of constituencies or voting districts, if applicable;
  - (d) Full details of the voter registration process including criteria, qualifications, requirements and location of voter registration centres;
  - (e) Voters roll containing information allowing the unique identification of each voter, including the full name, identity number, photograph (where it exists), gender and age of each voter, and any subsequent amendments to this information;

- (f) Information on arrangements for the inspection of the voters roll by the public to allow for any necessary corrections to be made;
- (g) Operational plan for special or advance voting and diaspora voting (where applicable) relating to dates, time and method, including storage and security of ballot boxes until the general count;
- (h) Criteria for identification of the location of voting stations;
- (i) Location and number of voting stations;
- (j) Criteria and requirements for registration of political parties;
- (k) Details of applications made by political parties for registration as participants in the electoral process, specifying the number of applications made, the number of applications granted, the number denied and reason(s) for each denial;
- (l) Details of political parties registered as participants in the electoral process, specifying their number and names;
- (m) Qualification, rules and procedure for nomination of candidates by political parties;
- (n) Code of conduct applicable to political parties and candidates during the electoral campaign period;
- (o) Number and nature of complaints or petitions received by the Election Management Body and how they have been addressed;
- (p) Mediation and conflict resolution mechanisms in place for addressing election related complaints or petitions;
- (q) Policy on voter education;
- (r) List of service providers, the criteria for their selection and the content of their service contracts and details of the procurement process;
- (s) The criteria for accreditation of election observers and monitors;
- (t) Timelines for registration of international and domestic election observer missions;
- (u) Details of applications for accreditation by election observers and monitors, including the number of applications rejected and reasons for the rejection;
- (v) Criteria for accreditation of media during the electoral process (if applicable);
- (w) Details of application for accreditation by the media, including the number of applications received, number rejected and the reasons for the rejection;
- (x) Code of conduct for media (if any);
- (y) Number of complaints or petitions received and how they were addressed, if applicable;
- (z) Categories of observers admitted; and
- (aa) Register of the different categories of observers and deployment areas.

18. On Election Day and results announcement day(s), the Election Management Body shall proactively disclose the following information:

- (a) Location, as well as opening and closing times of voting stations;
- (b) Support mechanisms for voters and election officials through the provision of episodic and periodic reports of election day activities;
- (c) Information on the closing of voting and vote reconciliation, counting and results management system starting from vote counts at the voting station up to the announcement of final results;
- (d) Details of special votes cast including the counting and collation process;
- (e) Information on the occurrence of any technical glitches and how these have been addressed;
- (f) Information on all complaints or petitions received and how these have been addressed; and
- (g) Election results by polling station, which shall be conspicuously posted at each voting station and in publicly accessible electronic and online formats.

19. Upon the conclusion of elections, an Election Management Body shall proactively disclose the following information:
- (a) Progress in achieving timelines for the declaration of collated results which shall be within a reasonable time or as stipulated by law;
  - (b) Declaration and publication of final election results, down to the polling station level;
  - (c) Details of all objections, complaints or petitions received and how they were addressed;
  - (d) Calculations or allocations of seats and timeframes and processes for the adjustment of political party lists, where applicable; and
  - (e) Evaluation reports on the elections produced by the Election Management Body as well as by election observers and monitors.

The Independent Electoral Commission (IEC) of South Africa is established under Section 190 of the Constitution of South Africa with the mandate to manage national, provincial and municipal elections, ensure these elections are free and fair, and announce the results of these elections. The Electoral Commission Act (ECA) goes further to expound on the functions, powers, composition and operations of the election management body (EMB).<sup>79</sup> The IEC is guided by the Constitution, the ECA, the Electoral Act and relevant regulations in the implementation of its mandate.<sup>80</sup>

### ARTICLE 13 RECORD KEEPING AND ACCESS PROCEDURES

Similar to other state institutions, the IEC is guided by the Promotion of Access to Information Act, 2000, on the procedures for facilitating the right of access to information. This includes request format, cost of reproduction, timeframes and requested document format, but with limited provision for proactive disclosure. In the past, the IEC has received requests for information from the media, non-governmental organisations, political parties and candidates, and independent researchers. The IEC declined requests for information in cases where the records were exempted from public disclosure on the grounds outlined in chapter four of PAIA, or when it was established that the requester intended to use the information for commercial purposes.

The IEC proactively discloses public interest information through media briefings, its website and social media pages, mobile app, periodic and thematic publications and reports. In addition, if an individual desires one-on-one engagement, he or she can visit the Commission's national, provincial and local offices. Furthermore, the IEC also gives media platforms open access to selected election and results datasets through APIs (Application Programming Interfaces), which allows the media to analyse and disseminate the information contained. The IEC primarily uses radio, alongside other media, for information dissemination, given the public's preference of radio as a primary source of information in their own languages. Additionally, the IEC works with churches and the South African Broadcasting Corporation (SABC) that hold high public trust to disseminate relevant information.<sup>81</sup>

The IEC's website contains information about the work of the Commission, the electoral laws and regulations, history of election results, election reports, lists of political parties and candidates, the voters' roll statistics as well as other information on exercising the right to vote.<sup>82</sup> The Commission also developed a knowledge management centre, which is a repository of data reworked into usable

79 Electoral Commission Act No 51 of 1996 sec 3.

80 Electoral Act No 73 of 1998 as amended.

81 Interview with Mr Masego Sheburi IEC Deputy Chief Electoral Officer on 22 July 2019.

82 IEC 'Home' <https://www.elections.org.za/content/> (accessed 14 August 2019).

formats for the organization, stakeholders and external persons. During election periods, the IEC creates an interactive website where the public can have access to the election results.<sup>83</sup>

The IEC regularly maintains and updates its records to incorporate relevant developments, which are captured in their published reports, and made available on its website and at its offices. The IEC also develops some of its publications in braille to provide access to visually impaired persons, but such publications are limited. During voting, the IEC provides a braille sleeve ballot paper.

Regarding language accessibility of the IEC's publications, the Commission primarily produces documents in English, and in some cases these documents are then translated into the languages that are predominant in certain provinces where they are distributed. It is however difficult to distribute information in indigenous languages because political discourse is in English, and some technical terms do not have a local language equivalent.<sup>84</sup>

## ARTICLE 14 INTERNAL MECHANISMS, RECRUITMENT, PROCUREMENT AND REPORTING

To a large extent the provisions of article 14 of the Guidelines are legislated by the ECA. Article 6 of the ECA provides for the composition of the Commission, the qualification for appointment as commissioner, and the procedures for appointment. The organogram of the current Commission is available on the IEC website.<sup>85</sup>

The IEC is legally mandated to provide annual reports to Parliament on its activities, and the President on his or her own volition may request information from the Commission on the conduct of its affairs.<sup>86</sup> The Commission's annual reports, strategic documents, budget and other thematic reports are available on its website.<sup>87</sup> These reports shed light onto the strategic plan and decision making process of the Commission.<sup>88</sup> Hard copies and DVD copies of these reports are also available at the Commissions' national, provincial and local offices.

The appointment of commissioners including qualifications and terms and conditions of service are provided for in sections 6 and 7 of the ECA. The Act also provides for the appointment of a Chief Electoral Officer (CEO) in charge of the administration of the Commission.<sup>89</sup> The CEO liaises with members of the Commission to recruit the other officers and employees of the IEC.<sup>90</sup> Information on the conditions of service, remuneration, allowances, subsidies and other benefits are contained in regulations drafted by the Commission and published in the government gazette.<sup>91</sup>

The employment criteria for temporary staff such as presiding officers are developed in consultation with political parties. Upon agreement on the criteria, the Commission conducts recruitment, publishes the names of the selected persons, and political parties have a window period to raise objections on the suitability of the selected persons. The training policies for these staff members are available in internal manuals, and not proactively disclosed.<sup>92</sup>

83 Interview with Mr Masego Sheburi (n 81 above).

84 Interview with Mr Masego Sheburi (n 81 above).

85 IEC 'Organogram' <http://www.elections.org.za/content/about-us/organogram/> (accessed 14 August 2019).

86 Electoral Commission Act sec 14(1)&(2).

87 IEC 'Reports' <http://www.elections.org.za/content/About-Us/Reports/> (accessed 14 August 2019).

88 Clause 14 (a) (c) (g) and (j) Guidelines on access to information and elections in Africa.

89 Electoral Commission Act sec 12.

90 Electoral Commission Act sec 12 (4)&(5).

91 As above.

92 Interview with Mr Masego Sheburi (n 81 above).

The ECA provides for the sources of funding for the IEC. While the Commission receives a budgetary allocation from Parliament, it is free to source additional funding.<sup>93</sup> The IEC's financial records are audited by the Auditor General.<sup>94</sup> The procurement procedures of the Commission are provided for by law, including the Constitution, the Public Finance Management Act 1999, the Preferential Procurement Policy Framework Act 2000, the Broad-Based Black Empowerment Act 2003, the Promotion of Administration of Justice Act, and the Prevention of Corruption and Corrupt Practices Act 2004. As with other public organs the Commission should be guided by the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness in its procurement procedures.<sup>95</sup> The Commission has an eProcurement system to simplify its procurement process and through this platform it advertises contracts, and publishes successful awards of contracts.<sup>96</sup>

## ARTICLE 15 MEMBERSHIP DETAILS INCLUDING PROFESSIONAL BACKGROUND, WEALTH DECLARATION AND CODE OF CONDUCT

Details on the current composition of the IEC is available on its website, with a detailed professional background for each of the commissioners linked to the organogram.<sup>97</sup> The incumbent commissioners are Glen Mashinini (chairperson), Janet Love (vice-chairperson), Nomsa Masuku, Mosotho Moepya, and Judge Dhaya Pillay.<sup>98</sup>

The ECA requires members of the Commission to disclose any conflicting financial or other interests in the undertaking of their duties.<sup>99</sup> However, there was no readily available information on whether the members made such a declaration. If a member of the Commission seeks to undertake other paid work outside their work as a commissioner, he or she requires the permission of the president. However, this information is not readily available.<sup>100</sup>

Article 9 of the ECA provides for the conduct of members of the Commission. However, outside this, there is no readily available information on a detailed code of conduct and ethics.

## ARTICLE 17 PRE-ELECTION PROACTIVE DISCLOSURE REQUIREMENTS

### (a) ELECTION CALENDAR

A detailed election calendar for the elections at the different levels of government is available on the IEC's website, and it is also published in the government gazette.<sup>101</sup>

### (b) and (c) DELIMITATION AND LIST OF VOTING DISTRICTS

The mandate for delimitation of provincial and municipal boundaries in South Africa falls on the Municipal Demarcation Board.<sup>102</sup> The IEC then intervenes to demarcate the voting districts

93 Electoral Commission Act sec 13(1)&(2).

94 Electoral Commission Act sec 13(3).

95 Constitution of South Africa sec 217.

96 IEC 'Procurement and supplier registration' [http://www.elections.org.za/content/about-us/Procurement-and-supplier-registration-\(VotaQuotes\)/](http://www.elections.org.za/content/about-us/Procurement-and-supplier-registration-(VotaQuotes)/) (accessed 14 August 2019).

97 IEC 'Organogram' <http://www.elections.org.za/content/about-us/organogram/> (accessed 29 July 2020).

98 As above.

99 Electoral Commission Act sec 10.

100 Interview with Mr Masego Sheburi (n 81 above).

101 IEC 'Municipal by-elections' <http://www.elections.org.za/content/Elections/Elections-timetables-Municipal-by-elections/> (accessed 14 August 2019).

102 Municipal Demarcation Board (MDB) 'Legislative mandate' <http://www.demarcation.org.za/site/legislation/> (accessed 14 August 2019).

within municipalities through its Delimitation Directorate, and the criteria for this is legislated.<sup>103</sup> Delimitation of voting districts is done in consultation with the municipal or provincial party liaison committee, therefore allowing proactive disclosure of relevant information.<sup>104</sup> Other than legislative provisions, the Commission has internal guidelines for this process, and the focus is on ensuring the location of voting stations eases the voters' ability to exercise the right to vote, considering geographic, population and demographic changes. The deadline for publishing the list of voting districts and voting stations in the government gazette is provided for in the electoral calendar. This information is also posted in the national, provincial and local offices and on the IEC website.<sup>105</sup> Through the IEC website, voters can check whether their voting districts have changed.

#### (d) VOTER REGISTRATION

The voter registration process is regulated by the Voter Registration Regulations, 1998 and subsequent amendments. Details of voter registration as well as voter registration statistics are available on the IEC's website.<sup>106</sup> The Commission in addition works with partners such as churches, local NGOs and political parties to organise countrywide awareness raising campaigns on the process before and during the registration drive. The IEC also advertises necessary details such as requirements and location for registration on mainstream media as well as on its social media pages.<sup>107</sup>

#### (e) VOTERS' REGISTER

The voters' roll contains the consecutive number, identity number and name of each voter but no photograph of the voter.<sup>108</sup> IEC officials also record the age and gender of voters and the breakdowns of these statistics are available on the IEC's website.

#### (f) INSPECTION OF VOTERS' REGISTER

As required by law, a copy of the voters' roll is available for inspection at the IEC's offices during office hours.<sup>109</sup> Additionally, during voter registration days, a voter can visit their voting station or centre to inspect the voters' roll and/or update their personal details. The electoral calendar also provides for an inspection period, and this information is available on the IEC's website.<sup>110</sup>

A person can have access to a copy of the voters' roll in its entirety or a section thereof upon payment of the requisite fee.<sup>111</sup> A participating political party on the other hand can acquire the first copy of the voters' roll to be used for a particular election free of charge.<sup>112</sup> However, a political party that seeks the section of the voters' roll with additional information on addresses of voters, needs to pay a prescribed fee and they are obligated to use it only for election purposes or be guilty of an

103 IEC 'About voting districts and stations' <http://www.elections.org.za/content/Voters-Roll/About-voting-districts-and-stations/> (accessed 14 August 2019); Electoral Act as amended secs 60-63A.

104 Electoral Act as amended sec 62.

105 Interview with Mr Masego Sheburi (n 81 above).

106 IEC 'Voter registration process' <http://www.elections.org.za/content/Voters-Roll/Voter-registration-process/> (accessed 14 August 2019).

107 Interview with Mr Masego Sheburi (n 81 above).

108 Voter Registration Regulations 1998 as amended regulation 10.

109 Electoral Act as amended sec 16(1).

110 IEC 'About the voters' roll' <http://www.elections.org.za/content/Voters-Roll/About-the-Voters--Roll/> (accessed 14 August 2019).

111 Electoral Act as amended sec 16(2)-(4); Voter Registration Regulations, 1998 as amended regulation 8.

112 Voter Registration Regulations, 1998 as amended regulation 8.



offence.<sup>113</sup> Objections to the details in the voters' roll should be done through a written notice of objection to the national office of the Commission.<sup>114</sup>

#### (g) SPECIAL VOTING

Special voting procedures are provided for under the Election Regulations, 2004, and subsequent amendments.<sup>115</sup> Further operational plans as to special voting and diaspora voting, including date, time and requirements are contained in the electoral calendar and on the IEC's website.<sup>116</sup> This information is also widely shared during the voter education drives organised by the IEC as well as by political parties during election campaigns.<sup>117</sup>

In the case of overseas voting, the voter needs to serve the Commission with a notice of intention to vote abroad on the date provided for special voting on the election calendar as well as their location for voting.<sup>118</sup> The voter can also relay this intention through the IEC's mobile app, or call or SMS the IEC. The IEC works closely with the South African embassies, high commissions or consulates abroad to increase awareness on diaspora voting by posting the information on their websites.

While the ballot boxes for special votes are linked to a particular voting station, no information is shared on the storage and security measures for the votes. Special votes are counted with the rest of the votes after Election Day in the Republic, as is legally mandated.<sup>119</sup>

#### (h) and (i) VOTING STATIONS

The criteria for the location of voting stations are legislated and guided by logistical considerations on the number and distribution of voters, availability of suitable venues, and boundaries.<sup>120</sup> Usually the IEC opts for schools, churches, or municipal facilities. The actual selection of voting stations is a matter of internal discussions of the IEC and not publicly shared.<sup>121</sup> However, the location and number of voting stations are published in the government gazette, and voters can find their specific voting station through the IEC website, mobile app, call, SMS or visit to the IEC's offices.

#### (j), (k) and (l) REGISTRATION OF POLITICAL PARTIES

The criteria and requirements for the registration of political parties is provided for by law under the Regulations for the Registration of Political Parties, 2004.<sup>122</sup> Details on political parties and candidates are available on the IEC's website including online candidate nomination, registration procedures and political parties' funding information. The website also contains the political parties' candidate lists for every election, with details on the registration status of a political party, the participation level of the party, for example, in national/provincial or municipal elections, and the requisite contact details. However, details on reasons for denial of registration are not available to the public.<sup>123</sup>

113 Electoral Act as amended sec 16(4).

114 Electoral Act as amended sec 15; Voter Registration Regulations, 1998 as amended regulation 7.

115 Election Regulations 2004 cap 3A and 3B.

116 IEC 'Voting abroad' <http://www.elections.org.za/content/For-Voters/Voting-abroad/> (accessed 14 August 2019).

117 Interview with Mr Masego Sheburi (n 81 above).

118 Election Regulations 2004 as amended regulation 10.

119 Election Regulations 2004 as amended regulation 12 & 15C.

120 Electoral Act as amended sec 1.

121 Interview with Mr Masego Sheburi (n 81 above).

122 Electoral Commission Act 51 of 1996 as amended sec 23(1)(c).

123 IEC 'Political party list' <http://www.elections.org.za/content/Parties/Political-party-list/> (accessed 14 August 2019).

#### (m) NOMINATION OF CANDIDATES

Qualifications, rules and procedures on nomination of candidates by political parties are governed by the internal rules of political parties. The political parties then forward the lists of qualifying candidates to the IEC in a prescribed manner and within the timeline indicated in the election calendar.<sup>124</sup> These lists are checked by the IEC for compliance with the applicable legislative criteria and then gazetted and distributed to the Commission's offices. The Commission also makes media statements on the same.<sup>125</sup>

#### (n) CODE OF CONDUCT

The code of conduct which includes the responsibilities of political parties and candidates is contained in section 4 of schedule 2 of the Electoral Act. It is used in voter education campaigns and is also available online and in hard copy format at the national, provincial and local offices of the IEC.

#### (o) COMPLAINTS

The Commission discloses the number and nature of complaints or petitions relating to misconduct of political parties, together with the decisions made in a document that is made available to political parties upon request. In case of violations of the electoral code, the IEC first engages with the offending party to prompt compliance. In case of serious violations, the IEC provides details of the complaint to independent investigators, who assess the claim and give the accused party a right of reply, and finally provide the IEC with a formal recommendation. If there is proof of misconduct, the Commission forwards the complaint to the Electoral Court.<sup>126</sup>

#### (p) CONFLICT RESOLUTION

Political parties and aggrieved persons can approach the Commission for mediation and other conflict resolution measures for matters that fall within its mandate. Parties who are aggrieved by the decisions of the Commission concerning electoral matters can appeal to the Electoral Court.<sup>127</sup>

#### (q) VOTER EDUCATION POLICY

While the Commission publishes and circulates materials on voter education, it does not have a voter education policy. Decisions on voter and democracy education curricula are matters of internal discussion. Voter education materials are however available in the Commission's offices and are circulated during voter education drives, at workshops, on the Commissions' social media pages, and in mainstream media. The IEC also works with partners such as churches and local NGOs during voter education drives.<sup>128</sup>

Furthermore, the IEC conducts voter education in prisons.<sup>129</sup> However, they do not distribute leaflets, for security reasons. While political parties can accompany IEC officers during such drives, they may only observe proceedings and not campaign.

124 Electoral Act as amended sec 27 and Regulations concerning the submission of List of Candidates 2004 as amended.

125 Interview with Mr Masego Sheburi (n 81 above).

126 Electoral Commission Act sec 20(4)&(6) & Interview with Mr Masego Sheburi (n 81 above).

127 Electoral Commission Act sec 20 & Interview with Mr Masego Sheburi (n 81 above).

128 Interview with Mr Masego Sheburi (n 81 above).

129 There is no mention of information disclosures related to voting procedures for incarcerated voters in the section on Election Management Bodies in the Guidelines on access to information and elections in Africa.

## (r) SERVICE PROVIDERS

The selection of service providers is governed by the procurement processes discussed under article 14 above.

## (s), (t), (u), (z) and (aa) ELECTION OBSERVERS

The criteria and requirements for accreditation of election observers are provided for in sections 84 to 86 of the Electoral Act. Further details on timelines for registration both for international and local observers are advertised in mainstream media as well as on the Commission's social media pages. The applicants are informed individually in writing whether their accreditation was successful, as required by law.<sup>130</sup> However, details on the number of applications rejected and reasons for rejection are not publicly disclosed. Information on categories of observers admitted is available upon request. On deployment procedures, the Commission does not determine deployment location of election observers. The areas covered are disclosed in election observer reports.<sup>131</sup>

## (v), (w) and (x) MEDIA

The Commission does not accredit the media to cover elections, but it requires media accreditation for access to the result operations centres during elections. It also does not provide a code of conduct for the media, this is governed by legislation and self-regulation measures.<sup>132</sup>

## (y) COMPLAINTS

The number of complaints or petitions received by the Commission are published internally and are available at its offices upon request. During the 2019 elections, the Commission received 30 complaints on electoral code violations; seven of which were referred to an independent panel of attorneys for investigation and recommendations. The annual report of the IEC available on its website contains statistics on complaints and petitions but not details of the complaints in order to safeguard the relationship of confidentiality between political parties and the Commission.<sup>133</sup>

# ARTICLE 18 ELECTION DAY AND RESULTS ANNOUNCEMENTS

## (a) VOTING STATIONS: LOCATION AND TIMES

As discussed above under article 17(h) and (i), the locations of voting stations are published in the government gazette, and voters can find their voting stations by confirming their registration details online or via sms. Voting stations are open between 7am and 9pm as provided in section 36 of the Electoral Act. The Commission can however extend the hours to midnight, if necessary, to ensure free and fair elections.<sup>134</sup>

## (b), (c) and (d) INFORMATION FLOW FROM CLOSE OF VOTING TO RESULTS ANNOUNCEMENT

There is a continuous flow of information from the Commission to the public, from election day on the voting and counting process until the final results announcements, including information on the special votes, through press briefings and updates on the Commission's website and social media

<sup>130</sup> Electoral Act as amended sec 84 (4)(B).

<sup>131</sup> Interview with Mr Masego Sheburi (n 81 above).

<sup>132</sup> See section on Media and internet regulatory bodies for more information.

<sup>133</sup> Interview with Mr Masego Sheburi (n 81 above).

<sup>134</sup> Electoral Act as amended sec 36(7)(a).

pages. The Commission is bound to follow the procedures on voting and counting as detailed in the Electoral Act.<sup>135</sup>

#### (e) TECHNICAL GLITCHES

Details on technical glitches are disseminated through mainstream media, the Commission's social media pages, and also in the political party liaison committees. During the 2019 election, the unreliability of the indelible ink was one practical concern that was raised. Twenty-two cases were reported to the South African Police Service. In the immediate aftermath of the elections, the IEC provided progress updates and then referred enquiries to the police, prosecuting authority and courts.

#### (f) COMPLAINTS AND PETITIONS

Aggrieved persons can raise complaints or petitions (referred to as objections) regarding the election results with the Commission for determination under section 55 of the Electoral Act. Appeals lie to the Electoral Court.<sup>136</sup> The Commission determines these objections before the final results announcement. During the 2019 elections the Commission received 56 objections; of these 4 were withdrawn, 5 upheld as valid and corrective action taken, and 47 dismissed.<sup>137</sup> This information is also reflected in the final election report.<sup>138</sup>

## ARTICLE 19 POST-ELECTION

#### (a) TIMELINES

Section 57 of the Electoral Act provides that the Commission shall declare the final results within seven days after Election Day, following the determination of all objections. The public is continuously updated on this process through mainstream media and the IEC's online pages. The live results tallies are visible on screens in the results operations centres and on the IEC website, throughout the counting process.<sup>139</sup>

#### (b) and (c) RESULTS DECLARATION

The Commission only declares the final seat allocations for the National Assembly and nine provincial legislatures at the final results announcement. However, the full results for individual polling stations, as well as objections and resolutions are available on the Commission's website, and available at the Commission's offices.

#### (d) SEAT ALLOCATIONS

The seat allocations for the National Assembly and nine provincial legislatures are calculated when the results for all the voting districts have been announced and tallied. The Commission then makes a public announcement of the final results and seat allocations. In the 2019 elections this happened on the third day after the elections, well within the seven-day deadline.

135 Electoral Act as amended sec 35 to 36.

136 Electoral Act as amended sec 55(5)&(6).

137 Interview with Mr Masego Sheburi (n 81 above).

138 IEC 'Reports' <http://www.elections.org.za/content/About-Us/Reports/> 72.

139 Interview with Mr Masego Sheburi (n 81 above).

## (e) EVALUATION REPORTS

The IEC releases the final election report of every election to be tabled in Parliament and publishes it on its website. For the 2019 election, this was done during the course of 2020. A consolidated summary of observer observations is also contained in the final election report.

## CONCLUSION

While the IEC mostly complies with the Guidelines, this review provides a good reference for the IEC to evaluate what information it proactively discloses to the public, which information they do not and reasons why, and what changes need to be made. The interview with the Deputy CEO of the IEC and senior staff, together with a review of the relevant legislative provisions, show a need to better integrate information about the public interest activities of the IEC and the entire voting process into the voter and democracy education process. This should all become part of a holistic policy framework on voter and democracy education, which would significantly contribute towards enhancing the transparency of the entire electoral process and further enhance the IEC's compliance with obligations regarding proactive disclosure of information.

### 3 POLITICAL PARTIES AND CANDIDATES

#### ACHPR GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA: MINIMUM STANDARDS

20. Political parties and candidates (including independent candidates) shall proactively disclose the following information:
- (a) Constitution, names of office bearers as well as the policies of the political party;
  - (b) Symbols, logos or trademarks associated with the political party;
  - (c) Number of registered members;
  - (d) Criteria and procedure for nomination and election of candidates for internal and external office;
  - (e) Process for dispute resolution and the relevant appeal mechanisms;
  - (f) Mechanisms for public participation, including any special mechanisms for persons with disabilities;
  - (g) Mechanisms for monitoring of the nomination process and proceedings;
  - (h) Names of party agents or representatives responsible for or on duty at various stages of the electoral process;
  - (i) Assets, investments, membership subscriptions, subventions and donations; and
  - (j) Financial schemes initiated.
21. The legal framework of States Parties shall provide for the proactive disclosure by political parties of:
- (a) Receipt of campaign funding from both public and private sources;
  - (b) Campaign expenditure broken down into distinct line items and specifying the sources of funding and actual amounts;
  - (c) Annual audited financial reports; and
  - (d) All other information, proactively disclosed or available on request.
22. States Parties shall adopt laws requiring the proactive disclosure of information on the use by all political parties of all state resources, providing for the following:
- (a) Financial resources, covering the period starting one year before and ending six months after elections, including Government or central bank contracts with currency printers, Central Bank or Monetary Policy Committee reports, and Central Bank reports on Government issued bonds;
  - (b) Institutional resources, covering the period starting six months before and ending three months after elections, including advertising rates and the allocation of airtime and space to all political parties in State-supported media coverage, vehicle or flight logs and fuel allocations to Government departments, and service agreements, contracts and tenders awarded, their amounts and budgets;
  - (c) Regulatory resources, covering the period starting one year before and ending six months after elections, including documentary justification for requests for approval of supplementary budgets by Parliament, supplementary budgets passed by Parliament and political party finance legislation; and
  - (d) Enforcement resources, covering the period starting six months before and ending three months after elections, including details of records of the elections deployment strategy for the police, military, paramilitary and other law enforcement agents involved in ensuring security throughout the electoral process.

The Guidelines contain definitions of key concepts pertinent to sections 20 to 22 on political parties and candidates. According to the Guidelines, a 'relevant private body' refers to a body that would otherwise be a private body but is owned partially or totally, or controlled or financed, directly or indirectly, by public funds, or a body that carries out a statutory or public function or a statutory or public service. This is understood not to include a political party because (a) political parties in SA are not owned or controlled by the state and are only partly funded by the state; and (b) are treated as



a private body in SA law, and even when a party wins an election, its representatives in government, rather than the party itself, perform the 'statutory or public functions'.

Section 32 'Access to information' in the Bill of Rights in the Constitution provides that

1. *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.'*

In line with the thrust of s.32, PAIA provides for a distinction between the right of access to information held by public bodies and that held by private bodies.

The Western Cape High Court in *Idasa v ANC & Others*<sup>140</sup> determined that political parties are private bodies. As a result, the court declined to require that political parties must disclose private funding or private donors.

Recently, however, the Constitutional Court mandated private funding disclosure as part of the right to make informed ('effective') political / electoral decisions, in the case of - *My Vote Counts NPC v Minister of Justice and Correctional Services and Another*.<sup>141</sup> Parliament subsequently adopted the Political Party Funding Act (PPFA) in 2018. This is discussed further below.

#### (a) CONSTITUTION, NAMES OF OFFICE BEARERS AS WELL AS THE POLICIES OF THE POLITICAL PARTY

**Note:** 'policies' is understood to mean policies for governing the internal affairs of a political party, which includes the party's constitution.

**Note:** Independent candidates are currently<sup>142</sup> not permitted to stand for public office on national and provincial levels in terms of South African law. Section 1 'Republic of South Africa' in the Constitution provides that –

*The Republic of South Africa is one, sovereign, democratic state founded on the following values:*

...

- (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.'*  
(Emphasis added)

Section 26 'Requirements for parties to contest elections' read with s.27 'Sub mission of lists of candidates' and s.31 'List of parties entitled to contest election and final list of candidates' of the Electoral Act 1998 envisage only the registration of political parties to contest elections, and that candidates must be representatives of registered political parties.

**Note:** For purposes of this study, examples are given of only a selected few of the 48 parties that contested the national elections in 2019. They are the African National Congress (ANC), the Democratic Alliance (DA), the Economic Freedom Fighters (EFF), the Inkatha Freedom Party (IFP),

140 [2005] ZAWCHC 30; 2005 (5) SA 39 (C) [2005] 3 All SA 45 (C) (20 April 2005).

141 [2018] ZACC 17.

142 On 11 June 2020 the Constitutional Court ruled that the Electoral Act 73 of 1998 is unconstitutional because it excludes independent candidates from standing to be elected for National Assembly and Provincial Legislatures. This declaration has been suspended for 24 months to allow Parliament an opportunity to remedy the defect giving rise to the unconstitutionality. See K Mafolo 'ConCourt ruling paves way for independent candidates to contest elections' 11 June 2020 *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-06-11-concourt-ruling-paves-way-for-independent-candidates-to-contest-elections/#gsc.tab=0> (accessed 28 July 2020).

the Freedom Front Plus (FF+) and the African Christian Democratic Party (ACDP). These parties constitute the vast majority of the current representation in the Sixth Parliament.

## CONSTITUTIONS

Parties' constitutions are generally available on their websites. Prominent examples include the ANC,<sup>143</sup> DA,<sup>144</sup> EFF<sup>145</sup> and IFP.<sup>146</sup> However, the constitutions of the FF+<sup>147</sup> and ACDP<sup>148</sup> could not be found on their websites.

## PARTIES' OFFICE BEARERS

The names of parties' office bearers and the top leadership are available on the websites of the ANC,<sup>149</sup> DA,<sup>150</sup> EFF,<sup>151</sup> IFP,<sup>152</sup> FF+<sup>153</sup> and ACDP.<sup>154</sup>

## PARTIES' POLICIES

Parties' policies and manifestos are generally available on their websites, with exceptions. No policy documents or election manifesto could be found on the ANC main website,<sup>155</sup> or on its 'Archive' page, although some discussion documents could be found under the 'Documents' link.<sup>156</sup> However,

- 143 African National Congress (ANC) 'Constitution of the ANC' <https://www.anc1912.org.za/constitution-anc> (accessed 30 July 2020). The website also contains the Freedom Charter – ANC 'Freedom Charter' <https://www.anc1912.org.za/freedom-charter> (accessed 30 July 2020).
- 144 Democratic Alliance (DA) 'Constitution' <https://www.da.org.za/why-the-da/constitution> (accessed 30 July 2020); DA 'Democratic Alliance Federal Constitution' (8 April 2018) <https://cdn.da.org.za/wp-content/uploads/2018/07/26170657/DA-Constitution-Adopted-by-Fed-Congress-on-8-April-2018.pdf> (accessed 30 July 2020).
- 145 Economic Freedom Fighters (EFF) 'EFF Constitution' <https://effonline.org/documents/> (accessed 30 July 2020). A signed version of the EFF's Constitution and Code of Conduct and Revolutionary Discipline was found at EFF 'EFF Constitution, Code of Conduct and Revolutionary Discipline' <http://www.myvotecounts.org.za/wp-content/uploads/2019/04/EFF-Constitution-x-Code-of-Conduct-Secretary-General-2017.pdf> (accessed 30 July 2020).
- 146 Inkatha Freedom Party (IFP) 'Constitution of the Inkatha Freedom Party' (2012) <http://ifp.org.za/wp-content/uploads/2015/03/Our-Constitution.pdf> (accessed 30 July 2020).
- 147 Freedom Front Plus (VF Plus) 'Home' <https://www.vfplus.org.za/> (accessed 30 July 2020).
- 148 African Christian Democratic Party (ACDP) 'African Christian Democratic Party Constitution' (7 December 2013) <https://www.acdp.org.za/> (accessed 30 July 2020).
- 149 ANC 'ANC Officials' <https://www.anc1912.org.za/officials> (accessed 30 July 2020); ANC 'National Executive Committee' <https://www.anc1912.org.za/national-executive-committee> (accessed 30 July 2020); ANC 'Provincial leadership' <https://www.anc1912.org.za/provincial-leadership> (accessed 30 July 2020) & ANC 'NEC subcommittees and the teams of deployees' <https://www.anc1912.org.za/nec-subcommittees-and-teams-deployees> (accessed 30 July 2020).
- 150 DA 'Our people' <https://www.da.org.za/our-people> (accessed 30 July 2020); DA 'National Assembly members' <https://www.da.org.za/our-people/national-assembly-members> (accessed 30 July 2020); DA 'NCOP members' <https://www.da.org.za/our-people/ncop-members> (accessed 30 July 2020); DA 'Provincial leaders' <https://www.da.org.za/our-people/provincial-leaders> (accessed 30 July 2020); DA 'Members of the Provincial legislature' <https://www.da.org.za/our-people/mpls> (accessed 30 July 2020) & DA 'Councillors' <https://www.da.org.za/our-people/ward-councillors-map> (accessed 30 July 2020).
- 151 EFF 'Provincial Command Teams' <https://effonline.org/pct/> (accessed 30 July 2020).
- 152 IFP 'Our leadership' <http://www.ifp.org.za/who-we-are/our-leadership/> (accessed 30 July 2020).
- 153 See VF Plus 'Executive Management' <https://www.vfplus.org.za/executive-management> (accessed 30 July 2020), VF Plus 'National Executive Committee' <https://www.vfplus.org.za/national-executive-committee> (accessed 30 July 2020); VF Plus 'Provincial leaders' <https://www.vfplus.org.za/provincial-leaders> (accessed 30 July 2020) & VF Plus 'Youth' <https://www.vfplus.org.za/youth> (accessed 30 July 2020).
- 154 ACDP 'About' <https://www.acdp.org.za/about> (accessed 30 July 2020).
- 155 Even after entering the phrase 'policy discussion documents' in the search window on the party's home page (ANC 'Home' <https://www.anc1912.org.za/> accessed 30 July 2020); while the search phrase 'policy discussion document' produced a link only to the party's constitution.
- 156 Not found at ANC 'Home' <https://www.anc1912.org.za/> (accessed 30 July 2020); ANC 'Discussions' <https://anc1912.org.za/discussions> (accessed 30 July 2020).

an internet search found the ANC's 2019 General Election manifesto on its special election website<sup>157</sup> and on Politics Web<sup>158</sup> and on other websites.<sup>159</sup>

The DA's policies are available on its website,<sup>160</sup> as is its 2019 general election manifesto.<sup>161</sup>

The EFF's policies are set out in broad terms in its constitution (see above), but no election manifesto was found at the designated link on its official website.<sup>162</sup> However, an internet search found an apparently genuine version (i.e. apparently signed by party leader Julius Malema) of its detailed manifesto on the Daily Maverick website.<sup>163</sup>

The IFP's policy document and its election manifesto are available on its website.<sup>164</sup>

The FF+ website didn't yield a detailed policy document or statement, but brief points were found under the 'Policy' tab on its home page. Its 2019 election manifesto is available on its website.<sup>165</sup>

The ACDP's website yielded its policies<sup>166</sup> and its election manifesto.<sup>167</sup>

### (b) SYMBOLS, LOGOS OR TRADEMARKS ASSOCIATED WITH THE POLITICAL PARTY

Sub-section (2) of s.15 'Registration of parties' in the Electoral Commission Act 51 of 1996 provides that the prerequisites for registration by the IEC include the 'name of the party'; 'the distinguishing mark or symbol of the party in colour'; 'the abbreviation, if any, of the name of the party consisting of no more than eight letters'. Sub-section (3) requires that any application for registration must include the party's 'deed of foundation' and its constitution.

Parties' symbols/logos and colours are generally evident on their respective websites, but are not always described in their constitutions or founding documents, where these documents were found.

Rule 1 'NAME' in the ANC's constitution details the party's name, its acronym and colours. Appendix 1 to the party's constitution deals with 'ANC Logo and Colours' and also prescribes the shape, colours and dimensions of the ANC flag. The name of the DA is prescribed in s.1.1.1 of the party's constitution 2018. While the party's logo appears prominently on its website,<sup>168</sup> its design is not specified in the party's constitution. The EFF's founding manifesto was not available on the EFF's official website.<sup>169</sup> However, Paragraph B 'Logo and colours' in the party's constitution describes in some detail the party's logo and colours. The IFP's constitution makes no mention of its logo or colours, but the full-

157 A search for "manifesto" on the ANC website provides a link to the election website with the manifesto: <https://voteanc.org.za/manifesto> (accessed 30 July 2020).

158 ANC 'The ANC's 2019 election manifesto' 13 January 2019 <https://www.politicsweb.co.za/documents/the-ancs-2019-election-manifesto> (accessed 30 July 2020).

159 For example, a PDF version is available for download from ANC 'ANC 2019 Election Manifesto' <https://www.polity.org.za/article/anc-2019-election-manifesto-2019-01-14> (accessed 30 July 2020).

160 DA 'Policies' <https://www.da.org.za/why-the-da/policies> (accessed 30 July 2020).

161 DA 'The manifesto for change' <https://manifesto.da.org.za/> (accessed 30 July 2020).

162 EFF 'Documents' tab <https://effonline.org/wp-content/uploads/2019/07/2019-EFF-MANIFESTO-FINAL-1.pdf> (accessed 6 August 2020).

163 EFF 'EFF 2019 Election Manifesto' <https://www.dailymaverick.co.za/wp-content/uploads/2019-EFF-MANIFESTO-FINAL.pdf> (accessed 30 July 2020).

164 IFP 'Our policies' <http://www.ifp.org.za/our-policies/> (accessed 30 July 2020) & IFP 'Our 2019 Manifesto' <http://www.ifp.org.za/our-2019-manifesto/> (accessed 30 July 2020).

165 VF Plus 'Policy' tab <https://www.vfplus.org.za/verkiezingsmanifes-2019> (accessed 6 August 2020).

166 ACDP 'Our policies' <https://www.acdp.org.za/our-policies> (accessed 30 July 2020).

167 ACDP 'Manifesto' <https://www.acdp.org.za/manifesto/> (accessed 30 July 2020).

168 DA 'Home' <https://www.da.org.za/> (accessed 30 July 2020).

169 EFF 'Documents' tab <https://effonline.org/wp-content/uploads/2019/07/Founding-Manifesto.pdf> (accessed 6 August 2020).

colour logo is on the website.<sup>170</sup> In the case of the FF+ and the ACDP, their constitutions were not found on their websites, but their logos are displayed in full colour on their respective websites.<sup>171</sup>

### (c) NUMBER OF REGISTERED MEMBERS

No details of registered members were found on any party's website, and it appears that this information is not generally published proactively, or at least not in a prominent location. This information may, however, be available to members, or, less likely, to a member of the public through a PAIA application.

In recent research undertaken by the civil society organisation (CSO) My Vote Counts (MVC) it has explored various aspects of intra-party democracy (IPD), including whether various political parties maintain any record of their membership and whether that information is available to the public. In their findings<sup>172</sup> they report on responses received from the ANC, DA, EFF and IFP, the four largest parties in the Sixth Parliament.

According to the ANC's Constitution, the "functioning of branches" is audited.<sup>173</sup> While MVC reports that the ANC has responded to media enquiries on membership audits that have been conducted and that the party has also released press statements to alert the public that membership audits have been conducted, these responses and enquiries are 'not accompanied by any records of the audited outcomes'.<sup>174</sup>

Regarding the DA, the MVC report states that 'According to the DA's Constitution, the party has annual membership audits.<sup>175</sup> Given that it is a policy of the DA not to disclose the number of members in the party,<sup>176</sup> the party would not disclose any records of membership audits. There is no publicly available information indicating if these audits are taking place.'<sup>177</sup>

Regarding the EFF, the MVC report states as follows: 'There is no indication in the EFF's Constitution of whether membership audits are conducted. The EFF has responded to the media that membership audits have been conducted, but these responses have not been accompanied by any records of membership audits. According to the June 2014 *Guidelines Towards the National People's Assembly of the Economic Freedom Fighters*, audits must be conducted before elective conferences.'<sup>178</sup>

As concerns the IFP, the MVC report states 'There is no indication in the IFP's Constitution of whether membership audits are conducted. The IFP has responded to the media that membership audits have been conducted, but these responses have not been accompanied by any records of membership audits. MVC has not been able to source any membership audit guidelines of the party.'<sup>179</sup>

170 IFP 'Home' <http://www.ifp.org.za/> (accessed 30 July 2020).

171 VF Plus (n 147 above) & ACDP (n 148 above).

172 My Vote Counts 'Intra-Party democracy questionnaire findings' 24 April 2019 <http://www.myvotecounts.org.za/wp-content/uploads/2019/04/IPD-FINDINGS.pdf> (accessed 30 July 2020).

173 ANC's Constitution adopted at the 54th National Conference sec 19.9.10.

174 My Vote Counts (n 172 above) 1.

175 DA's Constitution adopted by the Federal Congress on 8 April 2018 sec 3.1.4. Available at: <https://cdn.da.org.za/wp-content/uploads/2018/07/26170657/DA-Constitution-Adopted-by-Fed-Congress-on-8-April-2018.pdf> (accessed 30 July 2020).

176 "Membership numbers confidential – DA." Available at: <https://www.news24.com/SouthAfrica/News/Membership-numbers-confidential-DA-20121017-3> (accessed 30 July 2020).

177 My Vote Counts (n 172 above) 2.

178 My Vote Counts (n 172 above).

179 My Vote Counts (n 172 above).

## (d) CRITERIA AND PROCEDURE FOR NOMINATION AND ELECTION OF CANDIDATES FOR INTERNAL AND EXTERNAL OFFICE

This information was sought in parties' constitutions.

### **ANC: Criteria applicable to internal office**

The Definitions section in the ANC constitution includes "candidate duly endorsed", which means a candidate nominated and elected democratically by the constitutional structures of the ANC at the appropriate levels, and endorsed by the NEC,<sup>180</sup> the PEC<sup>181</sup> or the Branch.

Rule 6.1 'Gender and Affirmative Action' in the party's constitution, records the party's 'endeavour to reach the objective of full representation of women in all decision-making structures', and accordingly 'the ANC shall implement a programme of affirmative action, including the provision of a quota of not less than 50% (fifty per cent) of women in all elected structures of the ANC, to enable such effective participation'. (Emphasis added)

Elections and composition of the ANC's NEC are governed primarily by Rule 12 in terms of which '[a] person must have been a member in good standing of the ANC for at least 10 (ten) years before she or he can be nominated for election to the NEC', and in accordance with Rule 6, 'not less than 50% (fifty per cent) of the directly elected and co-opted members of the NEC shall be women'. Rule 19 governs elections to and composition of Provincial Executive Committees. Elected members 'shall consist of the Provincial Chairperson, Deputy Chairperson, Secretary, Deputy Secretary, Treasurer and not more than 30 (thirty) other persons elected by the Provincial Conference. A person must have been a member in good standing of the ANC for 7 (seven) years before she or he can be nominated to a Provincial Executive Committee of the ANC.' The same gender requirement is applicable.

### **ANC: Procedures applicable to internal office**

Rule 12 prescribes in detail the procedures applicable for election to and the composition of the NEC. Notably, sub-rule 12.7.1 provides that the National Conference elects the NEC, which includes the "top six"<sup>182</sup> of the party's NEC and 80 additional members. Certain other elected office bearers are members *ex officio*.<sup>183</sup> After the National Conference, the new NEC must elect a National Working Committee (NWC). The NWC consists of the top six and 'additional elected members', the number of whom 'shall not exceed one-quarter of the composition of directly elected members'.<sup>184</sup> In accordance with Rule 14, the party's Electoral Commission organises and exercises oversight in respect of internal elections at each national conference, which takes place every five years.

### **ANC: Criteria applicable in respect of external office**

Rule 25.18 in 'Management of Organisational Discipline' provides that 'any member, office bearer or public representative found guilty by a Disciplinary Committee of [one or more of a few specified] act[s] of misconduct ... shall be ineligible to be or remain as a member of the ANC and shall be expelled from the Organisation'. Specific acts of misconduct are detailed in Rule 25. The implications of these provisions read together with the specified acts of misconduct are, unsurprisingly, that once a person is no longer a member of the party, they are not eligible for nomination and appointment to external office as a representative of the ANC.

180 National Executive Committee – See ANC (n 149 above).

181 Provincial Executive Committee – See ANC (n 149 above).

182 The top six are the President; Deputy President; National Chairperson; Secretary General; Deputy Secretary General; and Treasurer General.

183 ANC's Constitution rule 12.3.3.

184 ANC's Constitution rule 13.2.

## **ANC: Procedures applicable in respect of external office**

Rule 12.1 of 'National Executive Committee' provides that the NEC is the highest organ of the ANC between National Conferences and has the authority to lead the organisation, subject to the provisions of this Constitution. Among other powers and responsibilities, the NEC convenes the National Conference and the National General Council (NGC) and carries out the decisions and instructions of these bodies, including the periodic (i.e. annual) updating of the party's list of candidates, specifically the 'selection and adoption' of candidates for Parliament. The NEC appoints annually a National List Committee (NLC) of not fewer than five and not more than nine persons for the selection and adoption of candidates for Parliament.<sup>185</sup> The NEC must draw up regulations for the procedures to be followed in such a selection process. The NLC must report to the NEC prior to the implementation of its recommendations. Similarly, provincial structures for the adoption of candidates shall report to the NLC. The NEC may sign deployment contracts with public representatives and may recall any public representative. Similar provisions in respect of candidates for provincial legislatures are set out in Rule 19 'Provincial Executive Committee', although deployment and recall are dealt with only by the NEC.

In 2018 the ANC produced a document entitled '2018 National List Guidelines: CANDIDATE SELECTION PROCESS FOR 2019 ELECTIONS', although, despite its title, it deals with the nomination and selection process of candidates for both national and provincial lists.<sup>186</sup> This document notes that –

*The ANC Constitution 2012 Rule 12.2.11 and Rule 19.9.15 mandates the NEC to facilitate the appointment of National and Provincial List Committees to manage the ANC candidate selection process. The NEC has approved the candidate selection process guidelines in terms of which the process will be managed and administered. These guidelines are hereby presented to yourselves to assist you to conduct the list nomination BGMs.<sup>187</sup>*

## **DA: Criteria applicable in respect of internal and external office**

The DA's constitution includes a definition of "good standing", which means that, 'at the time of nomination, the member will truthfully declare all details that may be required by the Federal Executive, and that he or she has been a member for at least 30 days, and that he or she is not in arrears with any monies owing to the Party arising from whatever cause, excluding where proof is submitted of the arrears being the result of Party administrative negligence/problems. The fact that the Party may have entered into a payment arrangement for any arrears shall not render the person in good standing.' (Emphasis added) 'Any member of the Party wishing to make themselves available for election as any office-bearer in any structure in the Party or as a public representative, must be a member in good standing with the Party.'<sup>188</sup>

The DA's 2018 Regulations for Nomination of Candidates for 2019,<sup>189</sup> developed in terms of the party's constitution, set out nomination and selection procedures for aspirant public representatives, that include certain criteria and refer to other criteria that must be established separately. Firstly, Regulation 8 'Evaluation of Approved Aspirant Candidates' requires that the Party 'must evaluate

<sup>185</sup> It is assumed that this is a reference to the National Assembly and the NCOP.

<sup>186</sup> ANC '2018 National list guidelines' (2018) [https://www.anc1912.org.za/sites/default/files/ANC%20List%20Process%20Guidelines\\_0.pdf#pdfjs.action=download](https://www.anc1912.org.za/sites/default/files/ANC%20List%20Process%20Guidelines_0.pdf#pdfjs.action=download) (accessed 30 July 2020).

<sup>187</sup> ANC Branch General Meetings.

<sup>188</sup> DA constitution sec 2.2.4.

<sup>189</sup> DA 'Democratic Alliance Regulations for the Nomination of Candidates' (2019) <http://www.myvotecounts.org.za/wp-content/uploads/2019/04/Regulations-for-Nomination-of-Candidates-2019-approved-by-Fedex-5-May-2018.pdf> (accessed 30 July 2020).



every approved aspirant candidate in the manner provided in these regulations, and will submit the evaluation to the panel considering that candidate's selection...'.<sup>190</sup>

Various sub-regulations part of Regulation 8 require that the evaluation 'will consist, in the case of approved aspirant candidates who are not serving public representatives, of a performance evaluation system approved by the Federal Council', and that the evaluation of aspirant candidates who are public representatives 'must be conducted in terms of the performance evaluation system approved by the Federal Council'. Various office-bearers 'may apply to the [Federal Candidates' Election Committee] FCEC that any person be prohibited from being nominated as an aspirant candidate on the grounds that he or she -

- has failed to carry out his or her duties as a current or former public representative; and/or
- is not a fit and proper person to be a candidate of the Party.

Any such application must be accompanied by a full motivation, specifying the grounds on which the application is based, and the FCEC must develop guidelines for these grounds.'

#### **DA: Procedures applicable in respect of internal and external office**

The DA constitution includes a definition of a "presiding officer", which means a person appointed by the Federal Executive to preside over the election of office-bearers at any congress of the Party. Procedures for the nomination and selection of candidates for both internal and external office are dealt with in broad terms in section 2.2 'Nomination and Selection of Candidates' of the DA's constitution. Among other things, this subsection provides that the Federal Council must adopt regulations for the nomination and selection of candidates, and that '[a]ny member of the Party wishing to make themselves available for election as an office-bearer in any structure within the Party or as a public representative, must be a member in good standing with the Party.'

The regulations alluded to do not appear to be proactively disclosed on the party's website, but they were found on the website of the CSO My Vote Counts.<sup>191</sup> According to Regulation 1.1 'These Regulations are drawn up in terms of clause 2.2 of the [DA's] Federal Constitution. The selection of all Party candidates for public representative office must take place in terms of these regulations.' The Federal Congress elects the party's Federal Leader, Federal Chairperson and Deputy Federal Chairpersons. In addition, at the Federal Congress, the Federal Council elects the Council's Chairperson, two Deputy Chairpersons and a Federal Chairperson of Finance.<sup>192</sup>

#### **EFF: Criteria applicable in respect of internal office**

Section 5 'Rights of Members' of the party's constitution provides that every member of the EFF shall have the right to vote and be voted for in any office of the EFF in accordance with such rules and regulations as adopted by the CCT (Central Command Team). The 'rules and regulations' mentioned do not appear to be available on the party's website.

#### **EFF: Procedures applicable in respect of internal office**

According to s.20(3) of 'Organisational Principle of the EFF', all '[t]he leading bodies of the EFF at all levels are elected through democratic consultation'. The concept of 'democratic consultation' is not defined. A document found through an internet search entitled 'A step-by-step guide to the

<sup>190</sup> DA regulation 8.1.

<sup>191</sup> DA (n 189 above).

<sup>192</sup> My Vote Counts (n 172 above).

institutionalisation of the EFF<sup>193</sup> sets out in a fair amount of detail the procedures to be followed to elect various internal office bearers, including the use of secret ballots if positions are contested.

#### **EFF: Criteria and procedures applicable in respect of external office**

The EFF's constitution does not deal with any procedures to be followed when nominating and selecting candidates for external office, for example, public representatives.

#### **IFP: Criteria applicable in respect of internal and external office**

Section 6 in Chapter II 'Membership Duties, Obligations and Rights' in the IFP's constitution provides that a member shall be eligible to occupy an official position in the relevant party structure 'only after serving for a period not shorter than twelve (12) months as an ordinary member unless the relevant structure is newly established'. A member of the Party shall enjoy the right to elect and to be elected to any office of the Party at any level, provided that it does not give rise to a conflict of interests or a clash of responsibilities between holding certain internal offices while at the same time being an external municipal office bearer.<sup>194</sup> All Party structures shall participate in the nomination process starting with Branches which are in good standing and which shall nominate a candidate for each of the following positions at a Branch Conference convened for this purpose: National Executive Committee – s.11; Women's Brigade National Executive – s.12; and Youth Brigade National Executive – s.13.<sup>195</sup>

#### **IFP: Procedures applicable in respect of internal and external office**

The party's National Council is required to establish a 'Political Oversight Committee'<sup>196</sup> that is authorised to 'deploy members to various Party structures and nominate candidates (after consultation with relevant stakeholders) as political office bearers and senior managers at all three levels of government'. The National Council (NC) is the supreme decision-making body between general conferences and constitutes the National Executive Committee (NEC).<sup>197</sup> Nomination and electoral procedures are set out in detail in Chapter IV of the party's constitution.

#### **FF+ and ACDP**

Constitutions not found.

### **(e) PROCESS FOR DISPUTE RESOLUTION AND THE RELEVANT APPEAL MECHANISMS**

Parties' constitutions were consulted, where available. It appears that most parties' constitutions assume that disputes will relate exclusively to disciplinary matters, rather than also, for example, disputes concerning nominations and elections.

#### **ANC**

The NEC appoints the Integrity Commission (IC) and the National Dispute Resolution Committee (NDRC) 'with terms of reference to be approved by the NEC'.<sup>198</sup> Party officials and the NEC may refer to the IC 'any unethical or immoral conduct by a member which brings or could bring [or] has the potential to bring or as a consequence thereof brings the ANC into disrepute'. The NDRC's

193 EFF 'A step-by-step guide to the institutionalisation of the EFF' 3 July 2014 <https://www.politicsweb.co.za/party/a-stepbystep-guide-to-the-institutionalisation-of-> (accessed 30 July 2020).

194 IFP Constitution sec II(13).

195 IFP Constitution sec IV(10).

196 IFP Constitution sec III(16)(e).

197 IFP Constitution sec IV(6).

198 ANC Constitution Rule 24.

powers and procedures are set out in Appendix 4 to the party's constitution, as are those of the NDRC Appeal Committee. Rule 25 deals with the 'Management of Organisational Discipline'. Acts of misconduct are set out in some detail, as are the mandate and jurisdiction, procedures and powers of the Provincial and National Disciplinary Committees and the National Disciplinary Committee of Appeal, rights of appeal and review, and the ultimate right of review that is vested in the party's NEC.

## **DA**

Subsection 2.5 of the DA's constitution deals with standards of conduct of party members and public representatives. Chapter Ten of the DA's constitution deals with 'The Federal Legal Commission [FLC], Disciplinary Panels and Mediation'. The chapter provides that the FLC has a very wide mandate, including to determine any dispute referred to it, to decide on the legality of any provision of the party's constitution or any provincial constitution, or any rule or decision by any party structure, to 'deal with' appeals and to review decisions, to conduct hearings and investigations, and to refer matters to mediation.

## **EFF**

Section 21 of the EFF's constitution 'Central Tasks of EFF Structures, Formations and Other Entities', provides details to 'enforce discipline'. It appears that each structure or formation (for example, the Women and Youth Commands) is responsible for maintaining discipline and resolving disputes. The 'entire organisation is accountable to the National People's Assembly',<sup>199</sup> and '[t]he guiding principle is that at all times the individual is subordinate to the organisation, the minority is subordinate to the majority, the lower level is subordinate to the higher level, and the entire EFF is subordinate to the CCT.'<sup>200</sup> The Central Command Team (CCT) is the structure with overall authority outside of the National People's Assembly (NPA).<sup>201</sup>

Section 22 'Code of Conduct and Discipline' provides that the CCT 'shall adopt a Code of Conduct which will be the EFF's guide on how issues of discipline and conduct are internally handled. The code of conduct shall be consistent with organisational principles of the EFF contained in the Constitution.' No further guidance is provided in the party's constitution appearing on its website regarding the resolution of disputes per se. However, the 2017 version<sup>202</sup> of the party's constitution and Code of Conduct provides extensive details concerning general principles (which include the rules of natural justice), specific offences, disciplinary structures (e.g. National Disciplinary Committee, Central Command Team and National People's Assembly) and procedures, and possible sanctions.

## **IFP**

Sections 13-17 in Chapter III 'Organisation of the Party' of the party's constitution provide that the party's National Council shall establish a 'Political Oversight Committee' that is authorised to deal with conduct and disciplinary matters relating to both party office bearers and public representatives. Where public representatives are involved, 'decisions of a disciplinary committee shall be enforced by the Political Oversight Committee'.<sup>203</sup> Section 27 of Chapter III establishes a number of portfolios or 'study groups', one of which is '[x] Ethics and Party Discipline'. It is unclear whether this portfolio's mandate relates to internal party policy and/or public policy. Discipline in the Party 'shall be strictly enforced by Disciplinary Committees responsible for discipline at the

199 'Organisational Principle of the EFF' in the EFF Constitution sec 20(1).

200 EFF Constitution sec 20(4).

201 EFF Constitution sec 13.

202 As above.

203 IFP Constitution sec 5.

following levels: (a) Constituency; (b) District; (c) Province; and (d) National Council.<sup>204</sup> The 'National Council shall appoint a National Disciplinary Committee and a separate National Appeal Committee'.<sup>205</sup> Chapter XI includes a code of conduct, as well as detailed procedures and sanctions. No mention is made of any mechanism or associated procedures to deal with other 'disputes'.

### **FF+ and ACDP**

Constitutions not found.

## **(F) MECHANISMS FOR PUBLIC PARTICIPATION, INCLUDING ANY SPECIAL MECHANISMS FOR PERSONS WITH DISABILITIES**

**Note:** It is presumed that this item refers to public participation in parties' general activities, and not in election-related activities. Reference is made to parties' constitutions, where available.

### **Public participation**

There doesn't appear to be any specific mention by any party of enabling public participation in party activities or structures, but all parties' constitutions impose responsibilities on branches to maintain contact with the public and communities, informing and educating the public about each party's policies and programmes, and to keep themselves informed of peoples' needs, ideas and opinions.<sup>206</sup>

### **Affirmative action, including persons with disabilities**

Similarly, there doesn't appear to be any special mention in any party's constitution of initiatives to enable participation by persons with disabilities in party activities. However, various other affirmative action or anti-discrimination provisions are disclosed by some of the parties.<sup>207</sup>

The DA perhaps comes closest by listing as misconduct, discrimination on various grounds, including disability.<sup>208</sup> The IFP constitution includes a closed list of grounds for non-discrimination, i.e. 'race, origin, sex, colour or creed',<sup>209</sup> while the EFF's constitution makes no mention of persons with disabilities. Among its success stories, the FF+ claims that it has '[e]nsure[d] in Parliament that white women and disabled people are also considered for empowerment and continues to oppose discrimination against white and brown men'.<sup>210</sup>

## **(g) MECHANISMS FOR MONITORING OF THE NOMINATION PROCESS AND PROCEEDINGS**

**Note:** This item is understood to mean internal party processes and proceedings. Parties' constitutions and other documents were consulted, where available.

The ANC's constitution provides for an electoral commission to be appointed to manage and oversee elections to the NEC.<sup>211</sup>

The DA's Federal Executive may appoint a person as presiding officer to preside over the election of

204 IFP Constitution sec 1 (Disciplinary Procedure Rules).

205 IFP Constitution sec 9.

206 ANC Constitution Rule 23.8 (Branches, Zonal and Sub-Regional Structures); DA Constitution sec 3.7.2; EFF Constitution sec 8 & IFP Constitution sec 7.

207 The ANC has a quota of not less than 50% (fifty per cent) of women in all elected structures.

208 DA Constitution sec 2.5.4.11.

209 IFP Constitution sec 6 (Aims and Objectives of the Party).

210 VF Plus 'Success' <https://www.vfplus.org.za/success> (accessed 30 July 2020).

211 ANC Constitution Rule 14 (The Electoral Commission).

office-bearers at any congress of the Party.<sup>212</sup>

The EFF's constitution doesn't deal with this matter, but it is addressed in a document entitled 'A step-by-step guide to institutionalising the EFF',<sup>213</sup> which was found through an internet search and published by *PoliticsWeb*. Its provenance and current application are unclear. The document provides for an electoral commission to oversee internal electoral processes, but doesn't address how it will be appointed or constituted, or whether it is an internal or external entity.

Voting at the IFP's 'Annual' General Conference 'shall be by secret ballot or by such other method as the President may recommend and the Conference approve'.<sup>214</sup> It seems possible that the President and the Conference may decide to appoint one or more persons to organise and oversee voting at the Conference,<sup>215</sup> and that similar role-players may take similar decisions at conferences of the Women's and Youth Brigades.

No constitutions or similar documents were found for the FF+ and the ACDP.

#### (h) NAMES OF PARTY AGENTS OR REPRESENTATIVES RESPONSIBLE FOR OR ON DUTY AT VARIOUS STAGES OF THE ELECTORAL PROCESS

No pertinent information was found on the IEC website, or on the websites of the abovementioned parties – although the IEC website displays rules for party agents, the rules do not mention any requirement concerning the display of their names.<sup>216</sup>

However, the matter is dealt with to some extent in s.35 'Officers at voting stations' of the Electoral Act 73 of 1998, which provides for the presence of a duly appointed presiding officer and other 'voting officers'. Section 58 'Appointment of party agents' of the Electoral Act provides for political parties to appoint party agents. Section 59 'Powers and duties of agents' requires that party agents, while present in a voting station or any other prescribed venue, must wear the prescribed identification indicating that the person is an agent and which party they are representing. None of these provisions explicitly require that party agents' names be published or disclosed.

However, in terms of standard IEC operating practice, the name and other relevant personal information about each party agent must be provided in an IEC form and is recorded in a voting station diary by the presiding officer (PO) at each polling station. It is standard practice that the PO will provide the name of a party agent upon request.<sup>217</sup> To the extent that party agents' names must be provided to the PO and that this information is readily available on request, a practice of proactive disclosure is arguable.

#### (i) ASSETS, INVESTMENTS, MEMBERSHIP SUBSCRIPTIONS, SUBVENTIONS AND DONATIONS

All websites have an invitation to donate to and/or join the party. Financial information about the parties is not disclosed on their websites.

Currently, some details of parties' income and expenditure involving public funds are included in each party's audited annual reports to the IEC in terms of the Public Funding of Represented Political Parties Act 1997 (PFRPPA).<sup>218</sup> These audited reports from parties are currently not required to contain

212 DA Constitution 2018, Definitions.

213 As above.

214 IFP Constitution sec VIII(8).

215 IFP Constitution sec VIII(6).

216 IEC 'Party Agents' <http://elections.org.za/content/Elections/Party-Agents/> (accessed 30 July 2020).

217 Exchange of emails on 8 June 2020 with the Manager: Electoral Matters, IEC Western Cape Province.

218 IEC 'Party Funding' <https://www.elections.org.za/content/Parties/Party-funding/> (accessed 30 July 2020).

details of donations or funding support from sources other than the Fund. The IEC publishes an annual report setting out the details of public funding allocated to each political party represented in the national and provincial legislatures, as well as parties' general income and expenditure, balance sheets, statements of assets and liabilities, including investments, and cash flow, for example.<sup>219</sup>

Political parties also receive funding from the budgets of Parliament and the provincial legislatures in order to enable them to perform their functions and responsibilities in the legislatures. Allowances for Party Leadership Support, Party Support and Constituency work are transferred to political parties represented in Parliament in terms of section 34 of the Financial Management of Parliament and Provincial Legislatures Act 10 of 2009 (FMPPLA).<sup>220</sup> Parties are required to submit audited reports to these legislatures on their expenditure of these allocations.

In summary, while subventions are disclosed and reported, none of these requirements stipulate the disclosure of assets, investments, membership subscriptions or donations.

#### (j) FINANCIAL SCHEMES INITIATED

Financial schemes, understood to be investment mechanisms, are not disclosed by any parties, as far as could be determined from parties' websites. The ANC's website includes a link to a known permanent fundraising mechanism, the Progressive Business Forum<sup>221</sup> and a link to an election campaign fundraising initiative.<sup>222</sup>

## POLITICAL PARTY FINANCE DISCLOSURES IN TERMS OF SECTION 21 OF THE GUIDELINES

### (a) RECEIPT OF CAMPAIGN FUNDING FROM BOTH PUBLIC AND PRIVATE SOURCES

#### **Private and foreign funding**

**Note:** Current and prospective South African law does not comprehensively and consistently distinguish clearly between 'campaign' funding and funding for other purposes.

At the core of the electoral transparency conundrum is the issue of political party funding. My Vote Counts sums up the obligation for funding disclosure:

'Political parties perform an important public function and wield significant influence and even power when elected; openness and transparency about the private sources of their support will ensure that no undue influence is exercised and no special interests are served at the expense of the greater good'.<sup>223</sup>

219 The 2018 report is available at the link above.

220 Parliament of the Republic of South Africa 'Annual Report 2017/18' (27 August 2018) 123 <https://www.parliament.gov.za/storage/app/media/BusinessPubs/AnnualReport2017-2018.pdf> (accessed 30 July 2020).

221 Progressive Business Forum 'Home' <http://www.pbf.org.za/> (accessed 30 July 2020).

222 Chancellor House was a known investment vehicle for the ANC. See Judith February 'Chancellor House the focus of Hitachi's \$19m SEC settlement - Op-Ed' Daily Maverick 29 September 2015 <https://www.dailymaverick.co.za/article/2015-09-29-op-ed-chancellor-house-the-focus-of-hitachis-19m-sec-settlement/#.Vgqg7d-qqkp> (accessed 6 August 2020). Chancellor House Holdings still exists, but its current relationship with the ANC is unclear. See Chancellor House Holdings (Pty) Ltd <https://www.chh.co.za/> (accessed 6 August 2020). The CCH homepage bears a bold banner across the top, reading as follows: "Chancellor House Holdings (Pty) Ltd will not invest in companies that tender for any work or conduct procurement directly or indirectly with RSA's National, Provincial or Local Government spheres, Government Agencies and State Owned Entities."

223 My Vote Counts 'Political party funding' <https://www.myvotecounts.org.za/campaigns/political-party-funding/> (accessed 5 April 2019).



Previously, South Africa only had the Public Funding of Represented Political Parties Act 103 of 1997 which regulated public funding of political parties and did not have a law that places an obligation on political parties or independent candidates to disclose their private funding/donations.

The Constitutional Court has ruled on private funding and emphasised disclosure of information on private funding of political parties and independent candidates **noting that this information must be 'reasonably accessible' to the public.**<sup>224</sup> According to the judgment, information on political party funding is 'essential for the effective exercise of the right to make political choices and to participate in the elections'. Party funding information must be 'recorded, preserved and made reasonably accessible.'<sup>225</sup> The Constitutional Court judgment in *My Vote Counts (MVC) vs the Minister of Justice and Correctional Services and Another*, ordered Parliament to amend PAIA and make provision for disclosure of political party funding.<sup>226</sup>

Following this judgment, South Africa's Parliament has passed the Political Party Funding Act 6 of 2018 (PPFA) to regulate political funding and the PAIA Amendment Act 31 of 2019 to comply with the judgment. The PPFA has been signed by the President and was promulgated in the Government Gazette in January 2019,<sup>227</sup> with implementation expected to be phased in over a three year period.<sup>228</sup> Regulations enabling the implementation of the PPFA are yet to be finalised and promulgated. The IEC invited and received 4 300 public comments on draft Regulations and subsequently held public hearings in early August 2019.<sup>229</sup> President Ramaphosa assented to the PAIA Amendment Act in May 2020 and it was promulgated in the Government Gazette on 3 June 2020.<sup>230</sup>

When the PPFA comes into effect,<sup>231</sup> it will require political parties and independent candidates to create and preserve records of individual donations in excess of R100 000 in value and to disclose them to the IEC on a quarterly basis. The IEC will then report to the public.<sup>232</sup> Parties will also be required to disclose donations in kind and loans.<sup>233</sup> The Act also includes restrictions on cumulative donations during a year.<sup>234</sup> Juristic persons or entities who make a donation to a political party must, in addition, themselves proactively report any such donations to the IEC.<sup>235</sup>

Private or foreign donors will also be permitted to make donations to a Multi-Party Democracy Fund rather than to an individual political party.<sup>236</sup> The Fund will be operated by the IEC, which will disburse funds to parties partly on an equitable basis and partly in proportion to their representation in the National Assembly and in the provincial legislatures.

224 *My Vote Counts (MVC) vs The Minister of Justice and Correctional Services and Another* [2018] ZACC 17 (21 June 2018) (CC) para 91 (*My Vote Counts* 2018 case).

225 *My Vote Counts* 2018 case (n 224 above) para 91.

226 As above.

227 Government Gazette No 42188 29 January 2019.

228 E Van Diemen 'IEC will "spare no effort" to ensure Party Funding Act in place before 2021 local govt elections' News24 1 August 2019 <https://www.news24.com/SouthAfrica/News/iec-will-spare-no-effort-to-ensure-party-funding-act-in-place-before-2021-local-govt-elections-20190801> (accessed 30 July 2020).

229 IEC 'Public Hearings on the Draft Regulations on Political Party Funding Act' <http://www.elections.org.za/content/Parties/Public-Hearings-on-the-Draft-Regulations-on-Political-Party-Funding-Act/> (accessed 30 July 2020).

230 J Felix 'New bill requiring political parties to reveal donors now law' News24 4 June 2020 <https://www.news24.com/news24/southafrica/news/new-bill-requiring-political-parties-to-reveal-donors-now-law-20200604-2> (accessed 30 July 2020).

231 No date has been set for when the Act will come into force.

232 Proposed PPFA Regulations Regarding Represented Political Party Funding Regulation 9. Cumulative donation limits are prescribed in Regulations 7 and 8.

233 Definitions of 'donation' and 'donation in kind' in section 1 of the PPFA.

234 PPFA sec 8 read with the proposed PPFA Regulations Regarding Represented Political Party Funding.

235 PPFA sec 9(2).

236 PPFA sec 3.

Notably, nothing in the PPFA's disclosure requirements detracts from existing rights, in terms of PAIA.<sup>237</sup> The implication seems to be that a member of the public may lodge an access to information request in terms of PAIA for additional and more detailed information where it is not proactively disclosed as required in terms of the PAIA Amendment Act, read with the relevant provisions of the PPFA.

### **Public funding**

Political parties represented in legislatures receive public funding, and its disbursement and use are disclosed, albeit the latter in limited detail. The public funding is not provided solely for the purpose of or during the period of political campaigns. Rather, it is provided to political parties for a range of authorised activities, from two primary sources. First, funding is paid to political parties on an annual basis from the Represented Political Parties Fund (the Public Fund) operated by the Electoral Commission (IEC). The Public Fund is established for the purpose of funding political parties that participate in Parliament and provincial legislatures.<sup>238</sup> The Fund will be credited with 'moneys appropriated to the Fund by Parliament...'. This allocation takes place annually via the Appropriation Act passed by Parliament.<sup>239</sup>

Second, in terms of s.34 of the Financial Management of Parliament Act 10 of 2009, the Executive Authority<sup>240</sup> must make regulations concerning the allocation and use of any funds provided by Parliament to political parties or to Members of Parliament. The regulations must, among other things, regulate the allocation of funds in an equitable manner; specify the purposes for which funds may be used; stipulate the responsibilities of the Members of Parliament and parties to account for allocated funds; and require parties to submit audited financial statements in the prescribed format to Parliament's Accounting Officer.

There is no record<sup>241</sup> that these regulations have been made and promulgated, which appears to indicate that, for the moment, Parliament's Policy on Political Party Allowances of 2005 may still apply.<sup>242</sup> Funding is provided to political parties represented in the National Assembly of Parliament to support their ability to perform a range of internal administrative functions, to support the party leader specifically, as well as to operate constituency offices in the broad public interest, i.e. on a non-partisan basis to all members of the public.

The new Political Party Funding Act will replace the existing Public Funding Act and will continue to provide for public funding to political parties through the Represented Political Party Fund (s.2). Section 21 of the PPFA requires the Commission to administer both the Represented Political Party Fund and the Multi-Party Democracy Fund.

### **(b) CAMPAIGN EXPENDITURE BROKEN DOWN INTO DISTINCT LINE ITEMS AND SPECIFYING THE SOURCES OF FUNDING AND ACTUAL AMOUNTS**

Existing and prospective South African law does not clearly distinguish between campaign expenditure and other forms of expenditure in terms of reporting, except that, currently, parliamentary funding

237 PPFA sec 9(4) 'Disclosure of donations to political party'.

238 Public Funding Act 1997 sec 1(1) read with sec 5.

239 Public Funding Act sec 1(2). See IEC (n 218 above).

240 The Speaker of the National Assembly and the Chairperson of the National Council of Provinces acting jointly.

241 The most comprehensive and reliable source of current legislation is University of Pretoria 'Laws of South Africa' at <http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation> (accessed 30 July 2020). There is no record here, or on Parliament's website, that these regulations have ever been promulgated.

242 Parliament of the Republic of South Africa 'Policy on political parties allowances' 20 July 2005 <https://www.parliament.gov.za/storage/app/media/BusinessPubs/policy-on-political-parties-allowances2.pdf> (accessed 30 July 2020).

may not be used for campaign purposes. In terms of the Public Funding Act,<sup>243</sup> each party's report need contain information only in respect of certain prescribed 'generally descriptive categories' in relation to authorised purposes, viz. (a) personnel expenditure; (b) accommodation; (c) travel expenses; (d) arrangement of meetings and rallies; (e) administration; and (f) promotions and publications. It is possible to envisage that expenditure in terms of these categories may or may not be related to electoral campaigns.

### (c) ANNUAL AUDITED FINANCIAL REPORTS

In respect of the funding provided to political parties from the Public Fund, each party is required to submit audited annual reports to the IEC.<sup>244</sup> The IEC publishes an overall audited annual report based on the political parties' reports – the 'Represented Political Parties' Fund Report'.<sup>245</sup> The 2018 report is available on the IEC's website.<sup>246</sup>

Political parties are required to submit to Parliament and to each provincial legislature audited annual financial statements in respect of funding received from those institutions.<sup>247</sup> However, very limited information concerning overall allocations, expenditure and unused funds returned is included in Parliament's annual reports.

In terms of the new PPFA, each political party will also be required to submit audited annual statements to the IEC in respect of donations from permitted private and foreign sources.<sup>248</sup>

The PPFA requires the Commission to submit detailed financial reports to the Auditor-General (AG) to be audited, and then to submit both its report and the AG's report to Parliament.<sup>249</sup>

### (d) ALL OTHER INFORMATION, PROACTIVELY DISCLOSED OR AVAILABLE ON REQUEST

In terms of existing law, any request by any person who wishes to obtain any other information about a political party and its finances will be dealt with in terms of PAIA and/or the internal policies of the party concerned. Where efforts to use the existing and new legislation to access relevant information are unsuccessful, in principle, two primary options are available to any information requester. Firstly, s.34 of the Constitution enables any dispute concerning the interpretation, application or implementation of any law to be challenged by a competent court of law –

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

243 Regulation 8. 'Generally descriptive categories of purposes in connection with which amounts are spent'. 'Regulation under section 10 (1) of the Public Funding of Represented Political Parties Act 1997'. Published under Proclamation R117 in Government Gazette 19478 of 20 November 1998 and amended by Proc. R47 GG 27986 31/8/2005.

244 Public Funding Act 1997 sec 6.

245 Required in terms of sec 8 of the Public Funding of Represented Political Parties Act 1997.

246 IEC (n 218 above).

247 This is required in terms of either regulations in terms of sec 34 of the Financial Management of Parliament Act 10 of 2009, or Parliament's Policy on Political Party Allowances of 2005, whichever currently applies. See discussion above.

248 PPFA sec 12.

249 PPFA sec 22.

However, litigating a matter through the court system is usually extremely time-consuming and expensive. It is, as a result, not a readily available solution when difficulties are encountered with accessing information, as they often are.<sup>250</sup>

Secondly, therefore, s.34 signals the availability of alternative forums for resolving complaints and disputes concerning access to information. Section 40 of the Protection of Personal Information Act 4 of 2013 mandates the Information Regulator (IR) as the body designated to investigate and resolve ('enforce compliance') complaints concerning refusals of access to information. The IR is also authorised to develop codes of conduct and recommend reforms where there are gaps or weaknesses in applicable laws.

## USE OF STATE RESOURCES IN TERMS OF SECTION 22 OF THE GUIDELINES

The Guidelines contain a definition of 'state resources', which refers to any monetary and other resources that are directly or indirectly under the control of Government or a political entity at the national, regional or local level, which may be human, financial, institutional, regulatory or enforcement related.

In South African law, use of state resources for a party's political purposes is prohibited primarily in terms of the Public Service Act 1994, but effective mechanisms for reporting, monitoring or enforcement are almost non-existent.

The conduct of public servants as employees of the public service is regulated in terms of s 195 of the Constitution 1996, and sections 2 and 3 of the Code of Conduct for Public Servants issued in terms of the Public Service Act, 1994. Section 195 of the Constitution of 1996, which deals with the 'Basic values and principles governing public administration' provides in subsection (1) that public administration 'must be governed by the democratic values and principles enshrined in the Constitution, including that a 'high standard of professional ethics must be promoted and maintained', 'efficient, economic and effective use of resources must be promoted', 'services must be provided impartially, fairly, equitably and without bias', 'public administration must be accountable,' and 'transparency must be fostered by providing the public with timely, accessible and accurate information'.

Section 2 of the Public Service Code of Conduct<sup>251</sup> 'Relationship with the Public' provides that, among other things, '[a]n employee ... 'will serve the public in an unbiased and impartial manner in order to create confidence in the Public Service'; ... 'does not unfairly discriminate against any member of the public on account of ... political persuasion...; and 'does not abuse his or her position in the Public Service to promote or prejudice the interest of any political party or interest group...'. Section 3 'Relationship among Employees' provides among other things that a public servant 'deals fairly, professionally and equitably with other employees, irrespective of ... political persuasion ...'; and 'refrains from party political activities in the workplace.'

250 The South African Human Rights Commission (SAHRC) is mandated by section 184(1)(c) of the Constitution to 'monitor and assess the observance of human rights' in South Africa. This mandate includes the right of access to information enshrined in section 32 of the Bill of Rights. In its most recent annual report on the right to access to information *Promotion of Access to Information Act (PAIA) Annual Report 2018/2019*, the SAHRC notes (p24) the continuing trend of unacceptably poor reporting by public bodies on their compliance. Nevertheless, the SAHRC reports that 'Public bodies are not adhering to the timeframes as stipulated under PAIA. The Commission again notes numerous deemed refusals as a result of non-responsiveness to the requests received by public bodies. ... A noticeable trend in the reporting year is the increase in internal appeals based on deemed refusals. Deemed refusals are instances when public bodies fail to respond to a request. This demonstrates a disregard for requests submitted and impedes the achievement of the transparency imperatives that PAIA seeks to promote.' See South African Human Rights Commission (SAHRC) 'Promotion of Access to Information Act (PAIA) Annual Report 2018/2019' (25 September 2020) 24 [https://www.sahrc.org.za/home/21/files/PAIA%20annual%20report%201819\\_FINAL-25.9.2019.pdf](https://www.sahrc.org.za/home/21/files/PAIA%20annual%20report%201819_FINAL-25.9.2019.pdf) (accessed 30 July 2020).

251 Public Servants Code of Conduct, promulgated in terms of the Public Service Act, 1994. See Public Service Commission 'Code of Conduct for Public Servants' <http://www.psc.gov.za/documents/code.asp> (accessed 30 July 2020).

Compliance with the Code is the ultimate responsibility of the Public Service Commission (PSC),<sup>252</sup> which is tasked and empowered to investigate, monitor, and evaluate the organisation and administration of the Public Service. The PSC also has an obligation to promote measures that ensure effective and efficient performance within the Public Service, and to promote values and principles of public administration as set out in the Constitution throughout the Public Service. The PSC derives its mandate from sections 195 and 196 of the Constitution, 1996.

The PSC administers the toll-free National Anti-Corruption Hotline (NACH) which members of the public or of the public service may use to lodge an anonymous or named complaint, including about the alleged abuse of state resources for electoral purposes. However, the PSC lacks the capacity to investigate these complaints itself and refers them to the relevant head of department for internal investigation and appropriate corrective or disciplinary action. The PSC monitors and notes the outcome of investigations, and reports back to the complainant/whistle-blower, where known. It also produces periodic public reports on disciplinary action relating to various forms of financial misconduct. While 'abuse of resources' is one of the forms of misconduct included in the reports, information is summarised and quantified at a high level of abstraction; whether or not the abuse of resources is election-related is not mentioned.<sup>253</sup> There is no apparent reason why that type of detail cannot be included in these reports after each general election. Indeed, the PSC produces a new Guide on Governance for each new administration after general elections held every five years, recognising the significance of this exercise in democratic accountability.

Conduct of the national and provincial executives is regulated by the Executive Members' Ethics Act, 1998 (Executive Ethics Act)<sup>254</sup> and the Executive Code of Conduct, 2000 (Executive Code)<sup>255</sup> issued in terms of the Act. Read together, the Act and Code, prohibit all members of the executive, at national and provincial levels from abusing their office to improperly benefit anyone, or exposing themselves to a conflict of interest, or compromising the credibility or integrity of their office or of the government.<sup>256</sup> Compliance with the Act and Code is the responsibility of the Office of the Public Protector (OPP), which is established by s181 of the Constitution.<sup>257</sup>

At least two incumbents of the OPP have made findings regarding significant inconsistencies and anomalies in the Executive Ethics Act and the Executive Code. Public Protector (PP) Adv Lawrence Mushwana and his successor PP Adv Thuli Madonsela between them undertook at least six investigations relating to the Act,<sup>258</sup> although none relate to abuse of state resources in an electoral context.

Early in Jacob Zuma's first term as president, in one of her first reports, Madonsela found that President Zuma's late submission of his declaration of financial interests, assets and liabilities to the

252 Public Service Commission mandate. Public Service Commission 'Mandate' <http://www.psc.gov.za/about/mandates.asp> (accessed 30 July 2020) & Constitution of the Republic of South Africa 1996 cap 10.

253 The most recent available example of such a report is the Public Service Commission 'Factsheet on completed disciplinary proceedings on financial misconduct for the 2016/2017 financial year' November 2017 <http://www.psc.gov.za/documents/reports/2017/Factsheet%20on%20Financial%20Misconduct%202016-2017%20financial%20year%20-%20final%20printing%20%2026-01.docx.pdf> (accessed 30 July 2020).

254 Executive Members Ethics Act 82 of 1998. See Office of the Public Protector South Africa 'Legislation' <http://www.pprotect.org/legislation/docs/EXECUTIVE%20MEMBERS%20ETHICS%20ACT%2082%20OF%201998.pdf> (accessed 30 July 2020).

255 Executive Members Code of Ethics, promulgated in terms of the Executive Members Ethics Act, 1998. See Parliamentary Monitoring Group 'Code of Ethics for Members of the Executive' 9 May 2000 <http://www.pmg.org.za/minutes/20000508-code-ethics-members-executive> (accessed 30 July 2020).

256 Executive Ethics Act sec 2(2) & Executive Code sec 2(3).

257 Office of the Public Protector 'Our mandate' <http://www.pprotect.org/?q=content/our-mandate> (accessed 30 July 2020).

258 Office of the Public Protector South Africa 'Report on an investigation into an alleged breach of section 5 of the Executive Ethics Code by President JG Zuma' (21 April 2010) Report No. 1 of 2010/11 [http://www.pprotect.org/sites/default/files/legislation\\_report/PPREPORTEMEA%2520PZ21042010%2520\\_2\\_.pdf](http://www.pprotect.org/sites/default/files/legislation_report/PPREPORTEMEA%2520PZ21042010%2520_2_.pdf) (accessed 30 July 2020).

secretary of the Cabinet on 10 March 2010 (PP 2010) constituted only partial compliance with section 5 of the Executive Ethics Code. Madonsela's report recognised that there was some confusion in the Act and Code concerning the person to whom such declarations should be submitted. However, she also signalled her dissatisfaction with repeated failures by Cabinet and Parliament to comply with recommendations by her predecessor to rectify these and other weaknesses in these instruments. These recommendations were contained in five investigation reports involving breaches of the Executive Ethics Code and Act. She noted further that this ongoing executive and legislative failure had resulted in a situation of 'systemic failure' in several aspects of the administration of this vital tool of executive transparency and accountability (PP 2010: 14, para. 5.4). The report found that this situation should be dealt with by Cabinet as a matter of urgency (PP 2010: 14, para. 6.6), and recommended a series of urgent, time-bound remedial steps including the introduction of sanctions for non-compliance with the code and report-backs on progress with implementation (PP 2010: 17ff, para. 7). The anomalies have yet to be corrected by the national legislature. This is an indication of inadequate and ineffective implementation of the PP's remedial action.

The disclosure of financial interests by members of the executive (national and provincial) cannot be said to amount to proactive disclosure. The disclosures are made in terms of legal requirements and are lodged internally with the respective cabinet secretaries. Their public parts are accessible upon request by any person. Section 2(2)(c) of the Executive Ethics Act requires that the Code -

'must at least include the information, and be under the same conditions of public access thereto, as is required by members of the National Assembly as determined by that House from time to time, but may prescribe the disclosure of additional information'.

As most members of the national executive are also Members of Parliament,<sup>259</sup> the effect is that at least the public part of their annual disclosures is proactively made available on the websites of the national Parliament<sup>260</sup> and the Parliamentary Monitoring Group's People's Assembly website.<sup>261</sup>

The conduct of Members of Parliament is regulated by the Code of Conduct for Members of Parliament, 1999 (MPs' Code).<sup>262</sup> The Code requires MPs to annually disclose their financial interests in a document that has a public and a private part. MPs don't ordinarily have direct access to or dispositive authority concerning the allocation or use of meaningful quantities of state assets, which perhaps explains why the MPs' Code does not mention or regulate their use of public resources. However, members of the national and provincial executives, and MPs, do exercise informal political influence over the ruling party's many sympathetic 'deployees' in the public sector. This generally accepted fact constitutes a reasonable basis for more specific regulation of this particular risk.

With reference to 22 (d) of the Guidelines, the National Joint Operational and Intelligence Structure (NATJOINTS) is responsible for safety and security surrounding elections in South Africa. Crucially, NATJOINTS includes the IEC. NATJOINTS reports to the Justice, Crime Prevention and Security Cluster (JCPS) Directors-General (DGs). NATJOINTS, represented by the South African Police Service, routinely provides the National Assembly with a 'state of readiness' report and risk assessment prior

259 Section 87 of the Constitution provides that once the person elected as President by the National Assembly assumes office (i.e. after being sworn in by the Chief Justice), she or he ceases to be a Member of Parliament. In addition, s.91(3)(c) provides that the President is authorised to appoint at least two members of the national Cabinet from outside the National Assembly, which means that those individuals would be subject only to the Executive Ethics Act and Code.

260 Parliament of the Republic of South Africa 'Registers of Members' Interests' <https://www.parliament.gov.za/register-members-interests> (accessed 30 July 2020). The most recent version of the register available on Parliament's website dates from 2019. See also Parliament RSA Joint Committee on Ethics and Members' Interests 'Register of members' interests' (2017) <https://www.parliament.gov.za/storage/app/media/Ethics/2017Register.pdf> (accessed 30 July 2020).

261 People's Assembly 'Members' interests' <https://www.pa.org.za/interests/> (accessed 30 July 2020).

262 Parliament 'Code of Conduct' <https://www.parliament.gov.za/code-conduct> (accessed 30 July 2020).



to each election, and includes a threat assessment and plans for deployment of security personnel to ensure a peaceful election environment before, during and after election day. Before the May 2019 general election, NATJOINTS reported that it had 'established Priority Committees at National and Provincial levels' and gave a detailed briefing to the Portfolio Committee on Police concerning its preparations.<sup>263</sup> For more details on this, see section below on Law Enforcement Agencies.

## CONCLUSION

The accessibility of information in regard to these sections of the Guidelines is quite uneven. Political parties are regarded in existing South African law as private entities or voluntary associations,<sup>264</sup> or 'voluntary corporations',<sup>265</sup> and therefore their *internal* functioning is not extensively regulated by law. This is consistent with the provisions of the African Charter on Human and People's Rights, which provides in article 10(1) that 'Every individual shall have the right to free association provided that he abides by the law'. Similarly, s.18 of the Bill of Rights in the South African Constitution provides that 'Everyone has the right to freedom of association'. Likewise, s.19(1) protects the right of every citizen to freely make political choices, which includes the right (a) to form a political party; (b) to participate in the activities of, or recruit members for, a political party; and (c) to campaign for a political party or cause. Regulation by the state carries risks of undue interference with these fundamental rights and has been approached cautiously.

Due to their legal status, political parties tend to be quite sensitive about some internal information, including how they organise their internal elections and how candidates for internal elections raise their funding. The CSO My Vote Counts is currently pursuing a campaign<sup>266</sup> initiated some years ago by Idasa<sup>267</sup> to examine the extent to which political parties' internal operations and elections adhere to and promote democratic norms, including how internal electoral contests are funded.

There is, however, a strong argument to be made that, as political parties receive fairly large sums of public and private funding, their rights to privacy concerning their 'internal' affairs should have some limits, as this funding has a potentially significant external impact on the democratic process and the quality of democracy. Further, the right of adult citizens to vote in free, regular democratic elections is enshrined in s.1(d) and s.19(2) and (3) of the Constitution.

The effect of the Constitutional Court's 2018 judgment in *MVC v Minister of Justice and Correctional Services*, in which it held that, to the extent that PAIA did not previously require political parties and

263 Parliamentary Monitoring Group 'General Election 2019 preparations: SAPS briefing' 19 March 2019 <https://pmg.org.za/committee-meeting/28164/> (accessed 30 July 2020); Parliamentary Monitoring Group 'Briefing to the Portfolio Committee on Police: National and Provincial Elections 2019 State of Readiness' 19 March 2019 [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/190319Election\\_State\\_of\\_Readiness.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/190319Election_State_of_Readiness.pdf) (accessed 30 July 2020).

264 *Institute for Democracy in South Africa and Others v African National Congress and Others* (982/03) [2005] ZAWCHC 30 (20 April 200) para 52 <http://www.saflii.org/za/cases/ZAWCHC/2005/30.html> (accessed 30 July 2020).

265 G Orr 'Private Association and Public Brand: the dualistic conception of political parties in the common law world' (2014) 17 *Critical Review of International Social and Political Philosophy* 332 – 349, cited by Justice Kate O'Regan J 'Political Parties in South Africa: The Interface between Law and Politics' (2010) 11-12, Keynote address at Political parties: The missing link in our Constitution? Conference, Cape Town, 27 August 2010 in fn13 on p10. O'Regan summarises the South African legal position as follows: 'Generally our law has taken the view that associations (whether incorporated or not) have a duty to act fairly towards their members, at least in disciplinary proceedings conducted by in-house or domestic tribunals. The extent to which the provisions of the Bill of Rights bind these different associations in their relationship with their members, or with third parties, is less clear, although the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000, would require them not to discriminate unfairly against members or others. ... Although the Constitutional Court has stated that the constitutions of political parties must be consistent with section 19 of the Constitution (the right to form and participate in the activities of political parties), so far it has not had to provide guidance as to what is required of a constitution in order for it to conform to section 19. See *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC) at paras 73 – 74 (per Moseneke DCJ and Jafta J).

266 My Vote Counts 'Intra-party democracy (IPD)' <http://www.myvotecounts.org.za/intra-party-democracy-ipd/> (accessed 30 July 2020).

267 G Pienaar & J Sylvester *Internal Party Integrity Management in South Africa* (2010).

independent candidates in national, provincial or local elections<sup>268</sup> to record, preserve and disclose substantial private donations, that statute was unconstitutional. The Court made this finding on the basis of every voter's right to make an informed choice when exercising the right to vote. The Court held that the identity of political parties' donors and the extent of their support are essential pieces of information enabling voters to make informed political choices.<sup>269</sup>

Political parties' disclosure practices in recent elections were quite weak, although the larger, more established parties tend to have the resources required that enable greater proactive disclosure, at least of their electoral platforms and their policies.

The current gap regarding the usually detailed ANC website is regarded as a temporary aberration arising from a transition from its previous URL ([www.anc.org.za](http://www.anc.org.za)) to its comparatively new URL ([www.anc1912.org.za](http://www.anc1912.org.za)).

Although it is ordinarily in political parties' own interests to disclose their electoral platform and the identity of their candidates for election, this study has shown that even some of the more established political parties do not do so. Even less consistently do they proactively disclose their party's constitution and the internal procedures and criteria for selecting candidates. It can be difficult for smaller or new political parties to afford the associated costs.

The law currently requires that information regarding the identity of candidates must be provided to the IEC in order for their parties to compete in the elections, but not these parties' electoral platform or internal constitution. The IEC should give consideration to pursuing legislative reform in this regard, so that potential voters are able to develop a more comprehensively informed understanding of registered political parties' policies and the extent to which they purport to adhere internally to democratic norms. In the interim, the IEC should require parties that it registers to participate in elections to provide it with these core documents and information, and should proactively disclose this important information by uploading it in the IEC's own website.

The use of state resources is prohibited in law, but is not well-monitored and policed. There is a significant gap in the legal framework requiring proactive disclosure of the use of state resources. Over the years, there has been a trend of media reports concerning the abuse of various state resources, such as social relief food parcels and vehicles.

In order to determine the real extent of the alleged abuse, it is recommended that the Office of Public Protector and the Public Service Commission scale up their proactive monitoring of the use of state resources within their mandates before and during election campaigns.

The OPP has the power to undertake investigations on own initiative<sup>270</sup> and should consider more sustained and regular exercise of its public education, investigative and reporting powers in terms of the Executive Ethics Act and Code before and after election time.

Likewise, the PSC already undertakes periodic monitoring of financial misconduct investigations and related disciplinary action, including with regard to abuse of state resources. It should intensify its focus on these activities in the year leading up to elections and especially during election campaigns. More particularly, the PSC should require all public service entities within its mandate to furnish it with detailed plans regarding the proactive control of state resources during the year leading up to general and provincial elections.

268 The judgment does not apply to internal election in political parties.

269 *My Vote Counts* 2018 case (n 224 above) para 91.

270 Public Protector Act 23 of 1994 sec 6(4)(a).

## ACHPR GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA: MINIMUM STANDARDS

23. Election observers and monitors shall proactively disclose the following categories of information:

- (a) Names and details of key office bearers in the observer or monitoring mission;
- (b) Code of conduct for observers and monitors;
- (c) Financial or non-financial assistance received from any donor or any political party or candidate, including the incumbent government;
- (d) The Election Observation Mission Report, specifying the methodology, deployment plan as well as the assessment of the conduct and outcome of the elections. This shall be published widely and timeously, with preliminary reports issued within 30 days and final reports issued within 90 days;
- (e) Conflict of interest or political affiliations of local observers or monitors, if any; and
- (f) Sources of funding for any organisations

The Constitution of South Africa provides for political rights, including the right to vote during elections.<sup>272</sup> It also protects the right of citizens to free, fair and regular elections. Election observers contribute to free and fair elections with proposals to further strengthen democratisation processes. According to the IEC, observers help build public confidence in the honesty of electoral processes. "Observation can help promote and protect the civil and political rights of participants in elections. It can lead to the correction of errors or weak practices, even while an election process is still underway. It can deter manipulation and fraud, or expose such problems if and when they do occur. When observers issue positive reports, it builds trust in the democratic process and enhances the legitimacy of the governments that emerge from elections."<sup>273</sup>

The Electoral Act 73 of 1998 provides for the responsibilities of the IEC, among which is the accreditation and powers of observers in Section 84. The Regulations on the Accreditation of Observers, 1999<sup>274</sup> make provision for the accreditation, information disclosure and conduct of observers. As part of the accreditation process, observer missions need to disclose details on the organisation, contacts, mission coordination and the names of all the observers; and provide a commitment that observer mission members will comply with the South African Code of Conduct for Observers.

In terms of the Code, accredited observers must:<sup>275</sup>

- Observe the election impartially and independently of any registered party or candidate contesting the election;
- Remain non-partisan and neutral;
- Be competent and professional in observing the election;

271 The Electoral Act 73 of 1998 sec 84, makes provision for election observers, but not for election monitors.

272 South African Constitution of 1996 sec 19.

273 IEC 'Observers' <http://www.elections.org.za/content/Elections/Observers/> (accessed 5 April 2019).

274 IEC 'Regulations on the accreditation of observers 1999' <https://www.elections.org.za/content/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=1395> (accessed 30 July 2020).

275 IEC 'Observers' <https://www.elections.org.za/content/Elections/2016-Municipal-Elections/Observers/> (accessed 30 July 2020).

- Provide the Commission with a comprehensive review of the elections taking into account all relevant circumstances including:
  - the degree of impartiality shown by the Commission;
  - the degree of freedom of political parties to organise, move, assemble and express their views publicly;
  - the opportunity for political parties to have their agents, observe all aspects of the electoral process;
  - the fairness of access for political parties to national media and other resources of the state;
  - the proper conduct of polling and counting of votes;
  - any other issue that concerns the essential freedom and fairness of the election.

The regulations also state that, if the Commission finds that an accredited person, to a material extent, failed to comply with the conditions of accreditation, the Commission may cancel the accreditation.

The information disclosed by the observer missions to the IEC, their reports or any actions taken by the IEC in terms of the regulations are however not made available proactively on the IEC website.

This research further examined preliminary statements issued by international observers for the 2019 elections such as the African Union Electoral Observer Mission, SADC Electoral Observation Mission, SADC-ECF, Friedrich Naumann Foundation for Freedom's (FNF) and Electoral Institute for Sustainable Democracy in Africa (EISA). The statements primarily concentrated on the quality of electoral conduct, noting the good practices while also highlighting the challenges faced.

The Friedrich Naumann Foundation's statement was punctuated with positive remarks such as that 'democracy in South Africa is alive and well'.<sup>276</sup> The SADC observer mission reinforced this observation, predominantly underscoring the exemplary approach and professionalism associated with the conduct of the elections.<sup>277</sup> Local observers such as AFRIFORUM and the South African Council of Churches, concurred with the international observers' sentiments.

On the challenges, the Friedrich Naumann Foundation observed that there were issues with the sealing of ballot boxes; the use of forms for voters voting outside their designated voting stations, which sometimes led to chaotic situations and polling stations running out of ballots, and with the positioning of voting booths, which did not always guarantee a secret vote.<sup>278</sup>

The statements disclosed the names of the heads of their missions and the composition of the mission delegations. None of the reports disclosed their own codes of conduct; conflicts of interest or political affiliations, the methodology<sup>279</sup>, deployment plan, financial or non-financial assistance. EISA's arrival statement revealed the observer mission's methodology, stating that it is 'guided by its

276 J Maaten 'Despite Challenges, Democracy in South Africa is Alive and Well: Preliminary Statement from the Friedrich Naumann Foundation for Freedom Sub-Saharan Africa on South Africa's Elections' 10 May 2019 <https://africa.fnst.org/content/despite-challenges-democracy-south-africa-alive-and-well> (accessed 31 May 2019).

277 Southern African Development Community (SADC) 'The SADC Election Observation Mission Preliminary Statement' 12 May 2019 <https://www.sadc.int/news-events/news/sadc-election-observation-mission-releases-its-preliminary-statement-2019-national-and-provincial-elections-republic-south-africa/> (accessed 30 July 2020).

278 Maaten (n 276 above).

279 Except for EISA.

commitments as an endorser of the Declaration of Principles for International Election Observation (DOP)”<sup>280</sup>

As a result of the non-compliance with the Guidelines as set out above, it is recommended that the Regulations on the Accreditation of Observers be reviewed and adjusted to incorporate the minimum standards in the Guidelines, compelling observer missions to proactively disclose all the information required to the public.

280 Electoral Institute for Sustainable Democracy in Africa ‘Arrival Statement of The EISA Election Observation Mission to the 2019 National and Provincial Elections in South Africa’ 1 May 2019 <https://www.eisa.org.za/pdf/sou2019eom.pdf> (accessed 30 July 2020).

## ACHPR GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA: MINIMUM STANDARDS

24. In ensuring the maintenance of law and order during the course of the electoral cycle, law enforcement agents shall proactively disclose their:
- (a) Code of conduct and roles during the electoral period;
  - (b) Training and operational plan and manuals for the electoral period;
  - (c) Deployment plans from pre-election through to post-election period;
  - (d) Budgetary allocations and actual expenditure for the electoral period;
  - (e) Details of any reported election related crimes, including the number of cases reported and steps taken to investigate, prosecute or withdraw such cases; and
  - (f) Details of any arrangements whereby any other persons or groups are authorised by law enforcement agencies to perform specific law enforcement related tasks during the electoral period.

The South African Police Service (SAPS) is one of the custodians of public safety and security established in terms of the Constitution<sup>282</sup> to serve at multiple spheres of government. Through the IEC, SAPS is the lead mechanism for safety and security during both local government and national elections. The constitutional objectives prescribed for the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.<sup>283</sup> Respect for the law would include respect for national laws like PAIA.

Free flow of information between communities and law enforcement agencies such as the police is critical in all phases of the election process. This level of interaction is beneficial to law enforcement as it promotes civic understanding, cooperation and support, informs expectations and promotes confidence in law enforcement. It also contributes to healthier perceptions of SAPS as neutral and effective, while allowing law enforcement to gather local information for planning, risk management, conflict management and resolution, and enforcement actions. The mutual sharing of information from national through to local levels can be instrumental for the effective exercise of the right to vote, for public order policing and for democratic political activity.

SAPS has committed to improving service delivery to communities through a Service Delivery Improvement Plan (SDIP) with a view to achieving safer communities as envisaged in the National

281 Selected references for this report compiled by the SAHRC: United States Agency for International Development (USAID) *Best Practices in Electoral Security: A Guide for Democracy Human Rights and Governance Programming* (2013) [https://www.usaid.gov/sites/default/files/documents/1860/Electoral\\_Security\\_Best\\_Practices\\_USAID-1.pdf](https://www.usaid.gov/sites/default/files/documents/1860/Electoral_Security_Best_Practices_USAID-1.pdf) (accessed 30 July 2020); PMG Minute Briefing Parliamentary Committee Police 19 March 2019 [www.pmg.org.za](http://www.pmg.org.za) (accessed 30 July 2020); SADC 'SADC Principles and Guidelines Governing Democratic Elections' (2015) <https://www.eisa.org.za/pdf/sadc2015principles.pdf> (accessed 30 July 2020); ACE Project 'The ACE Encyclopaedia: Media and elections (2012) [https://eos.cartercenter.org/uploads/document\\_file/path/323/Media\\_and\\_Elections\\_2013.pdf](https://eos.cartercenter.org/uploads/document_file/path/323/Media_and_Elections_2013.pdf) (accessed 30 July 2012); R Montana 'Elections' 11 July 2019 <https://www.opengovguide.com/topics/elections/> (accessed 30 July 2020); Office of the High Commissioner for Human Rights: Training Manual on human rights monitoring, 304- b309; Independent Electoral Commission of South Africa: Observers Handbook, 2019 National and Provincial Elections; IEC 'Vision 2018: The Electoral Commission' (2018) [https://www.elections.org.za/content/About-Us/Vision-2018-\(PDF\)/](https://www.elections.org.za/content/About-Us/Vision-2018-(PDF)/) (accessed 30 July 2020).

282 Constitution sec 205.

283 In line with its statutory remit under the South African Police Service Act 68 of 1995.

Development Plan.<sup>284</sup> The SDIP is a 3 year plan to be implemented in terms of the Batho Pele principles and discussed more fully below in the context of facilitating transparency, accountability and access to information by the administration. The SDIP for the police therefore provides added impetus to proactive disclosure efforts by the law enforcement arm during the electoral process, including modes of disclosure and accessibility of information to all special needs and vulnerable sectors.

The SAPS Annual Performance Plan for 2019-2020 records that detailed planning for the 2019 election commenced during 2018. Implementation of the plan was reported to take place through multi-level structures with ultimate accountability for decision-making residing with Director Generals of key Departments within the Justice and Security Cluster. Preparation for the elections included a series of consultative processes in each province. These engagements took the form of roadshows which were concluded before the elections. The consultative processes included meetings with provincial government departments, constitutional bodies such as the South African Human Rights Commission (SAHRC) and observer missions. In addition, SAPS presented its election management plan in so far as safety and security were concerned to provincial legislatures and to the national parliamentary oversight committee.

Oversight, accountability and transparency of the performance of SAPS is observed through a multiparty parliamentary committee of Parliament.<sup>285</sup> Parliamentary briefings by SAPS on the elections were delivered in the pre- and post-election periods. The reports and discussions before the parliamentary committee are provided in the form of minutes and included a presentation by SAPS electronically. Certain briefings to the parliamentary committee are open and its records are public. These records are therefore accessible through selected websites and on request, as they do not appear on the SAPS website.

While not specifically identified for proactive disclosure in the Guidelines, the Constitution<sup>286</sup> requires that complaints regarding alleged misconduct of or offences by a member of SAPS are investigated by an independent complaints body. Given contestation around levels of confidence in SAPS in general, the disclosure of such conduct by SAPS during the electoral period in respect of election enforcement activities would contribute significantly in strengthening the credibility of SAPS. Transparency in respect of misconduct would demonstrate amongst others an intent to hold officials accountable. In addition, such disclosures would add value to evaluating police conduct and service during elections, and for future planning for the delivery of enforcement services during elections. No proactive disclosure of such alleged misconduct or offences on the part of SAPS was provided by SAPS in relation to the electoral period.

The drafters of the constitution recognised the value of transparency in promoting participatory democracy through provisions which entrench the right of access to information, as well as the Batho Pele (the people first) principles in the public service.<sup>287</sup> The Batho Pele principles represent government's commitment to consult with the public, to provide accurate information about public services, and to be open and transparent amongst others. However, translating these ideals into government practice across all levels and spheres of government has been slow.

The Batho Pele principles are relied on by SAPS in their SDIP and informs their approach to achieving the goal of safer communities. By expressly making a commitment towards embracing these principles in future work, as stated in the SDIP, SAPS appears to clearly indicate that the concept of

284 SAPS Annual Performance Plan 2019/2020 78.

285 Constitution sec 199(8).

286 Constitution sec 205(6).

287 Constitution sec 195.



information sharing/proactive disclosure of information and transparency are not alien to the police and security services.

An evaluation of proactive disclosure efforts by SAPS in the course of discharging their law enforcement responsibilities during electoral periods, provides some tangible evidence of attempts at embracing this duty. These attempts, however welcomed, also provide opportunities to identify what has worked, areas which require strengthening and areas where existing deficits require redress.

The legislative scheme regulating freedom of information relies to some extent on the foundational Batho Pele principles, supported by the constitutional values of openness, responsiveness and accountability, as well as the constitutional right of access to information and the enactment of PAIA.<sup>288</sup> This regime includes the proactive or automatic disclosure of information in its scheme. However, where information is not automatically made available, information may only be accessed through a formal request for such information in terms of PAIA.

PAIA itself has failed to adequately yield the desired results of open government envisaged when the legislation was first passed in 2000. Some of the challenges inherent in the legislation are detailed in the context of the election below. Seen in this context, and notwithstanding general progressive improvement by SAPS of its compliance with PAIA, an approach favouring sustained, automatic disclosure of more information would encourage and strengthen public cooperation, participation, and confidence. Apart from facilitating ease of access through proactive disclosure, enforcement bodies would if anything also have the added advantage of deploying fewer resources for the administration of formal information requests.

The proactive release of enforcement related information was at times sporadic at various points in the electoral process, and despite some effort, information was not always available for access by the majority at will, or by persons with disabilities or by children. This observation is however alive to the fact that information released during the election took the form of joint public communications, which integrated the provision of generalised information regarding a number of matters by the National Joint Operations and was not limited to enforcement operations.

Nonetheless, as this report demonstrates, enforcement specific information could have been made automatically available separately, in addition to that information which was included in the general integrated announcements/communications to the public in the course of the elections.

Thus while significant progress has been noted in respect of the 2019 elections, general accessibility for persons with special needs, adequacy of information in respect of detail; the span of information and accuracy of information demonstrated deficits where the presumption in favour of proactive disclosure could have been embraced more fully. These deficits suggest a lack of appreciation of the spirit of PAIA, and the advantages of freedom of information to the operations of SAPs and to its public image in the hosting of elections.<sup>289</sup>

## LEGISLATIVE CONSTRAINTS

Various provisions in PAIA impede the achievement of its purported legislative objectives. One of the many challenges in the legal framework is that while PAIA creates a right to access records, it does not provide an obligation for public or private institutions to create records. Other legislation

288 Other legislation and policy impacting on the freedom of information in South Africa include the government adopted policy governing the classification of information – the Minimum Information Security Standards, legislation such as the Protection of State Information Act of 1982.

289 PAIA secs 14, 15, 17 & 32.

regulates the management of records once created, but does not necessarily create a general duty to create records per se. Viewed narrowly, no specific legislation places a duty on SAPS to generate records specifically in the election period, however related legislation requires public bodies to produce records for governance purposes including in respect of specific conduct involving areas such as expenditure and performance. In the circumstances, no real obligation exists for the creation of full records by SAPS in the election period.

The Batho Pele principles, however, envisages that both the provision of information and promotion of transparency is observed in the public service. These principles, together with recognition of the right to access information in the Constitution envisages a duty to provide information whether in record form or otherwise. The statute in the form of PAIA merely serves to regulate the realisation of the constitutional right and is oriented largely for the provision of access to recorded information on receipt of a request for such access. However, both the Constitution and the statute embody objectives aimed at accountability and transparency; and recognise the need for information to protect other rights. In this sense, all actors involved in enforcement activities bear a constitutional responsibility to comply with the law.

A short-coming in PAIA is as indicated that where information has not been made proactively available, and such information is sought, the information will likely have to take the form of a formal request for information in accordance with the prescripts of PAIA or other sector specific statutes regulating access to information. This process incurs fee costs, demands the completion of cumbersome PAIA application forms, and requires a requester to wait for a period of potentially 60 days after a PAIA application is lodged for the information to be provided, if at all.

In addition, there are several grounds of refusal created under PAIA which legitimately allows a public or private institution to reject information requests.<sup>290</sup> Given these exemptions to disclosures of information provided under PAIA, the provisions of section 46 and 70 of PAIA are meant to create an override to the withholding of information because of the public interest in the disclosure of the information. These provisions require disclosure if the information requested shows a serious contravention or failure to comply with the law, or when there is an imminent and serious public safety or environmental risk *and* the public interest clearly outweighs the harm contemplated in the ground for refusal. The override is intended to apply in respect of provisions which contain internal limitations which must be demonstrated to justify limitation or refusal of access to the information requested.

Reports by civil society actors indicate that the trends in the handling of information requests by public institutions show that they have frequently failed to grant access to information based on the public interest provision of PAIA. In the circumstances, it is unlikely that a generous interpretation is to be accorded to the public interest override on general exemptions allowed in PAIA, in the context of information requests relating to the elections. In the current environment, arguably requests for information that could be refused in terms of PAIA, but which could be granted because of the public interest override, would include requests for information relating to cyber threats or attacks which could have serious implications for the personal information of registered voters and for the integrity of the electoral systems itself. The scenarios for the triggering of the public interest override in the context of elections are many, but no information about formal requests made to enforcement agencies in terms of PAIA, or the responses to these requests were available at the

290 The grounds for refusal are listed in sections 34-45 (for public bodies) and 63-69 (for private bodies) of PAIA and include the protection of privacy of a third party who is a natural person; protection of commercial information of a third party; protection of certain confidential information of a third party; protection of safety of individuals and protection of property; protection of records privileged from production in legal proceedings; commercial information of a private body; and protection of research information of third party and private body.

time of this report. In any event the PAIA framework would render the currency of information requested in the course of an election of little value given the timelines applicable to formal information requests lodged in terms of the legislation.

Other constraints of PAIA include the lack of internal appeal mechanisms for certain public institutions like the IEC and all private bodies. This means that in respect of institutions like the IEC, users of PAIA must rely on the SAHRC to secure a remedy or approach the courts directly, as PAIA does not make particular reference to the Electoral Court in the event of non-disclosure of election-related information.<sup>291</sup> Noting the implications of cumbersome, time-consuming and costly resort to litigation and the courts, the need for more expeditious and simpler remedial action is important where information has been refused or is not made available. An inherent concern regarding the creation and publication of categories of records by public bodies is evident in the discretion conferred on the Minister of Justice allowing the Minister to exempt certain public bodies from provisions requiring the publication of a 'notice' (roadmap) of the categories of records they hold.<sup>292</sup> The provision requires the publication of all categories of records held by public and private bodies, and further that these categories of records indicate which are available only on request and those available automatically. The Minister, in terms of PAIA, may provide an exemption from the publication of the 'roadmap/notice' on own accord on the basis of financial, administrative or security reasons. Such discretion creates further barriers to the public's right to access information. While organs of state such as SAPS have not ever been granted such an exception, intelligence agencies which have participated in the enforcement actions relating to the elections have received such exemptions in the past. In such instances, where enforcement agencies collaborate in events such as elections, the absence of a PAIA roadmap poses additional barriers to requestors who seek institution specific election related information from such bodies.

Although PAIA provides a mechanism for the automatic accessibility of records, and requires public bodies to make available the categories of information recorded in their notices to the SAHRC, all information listed in the notices received by the Commission are rarely made available on public platforms such as websites. Low compliance by public and private bodies with this requirement defeats the objective of this provision for easy access to records.

A preliminary search of the SAPS website revealed a need for cohesive plans around the release of information. SAPS had released information through the media in the joint communications, in addition it had provided information to Parliament during the election, but the plans it provided to Parliament by way of example were not available on its website. The release of information in this sense did not lend itself to a conclusion of an unwillingness to release the information, but pointed instead to a need to ensure sustained availability of the information at any point after its release through the preferred means. Proactive disclosure should also not be interpreted to mean proactive disclosure only to specific groups or categories of people such as Parliamentarians. In the event that information is not made practically available given contextual considerations such as time and resources, such information must at the very least be made automatically available as soon as reasonably possible, once the inhibiting factor/s are past.

291 PAIA provides the exclusive statutory regime governing the exercise of the fundamental right to receive information embodied in section 32 of the Constitution (*Institute for Democracy in South Africa and Others v African National Congress and Others* 2005 (5) SA 39 (C) para 29). Requests for information therefor need to be made through PAIA and not through the normative recordal of the right to access information in the Constitution. However, in South Africa the right to request certain information is provided for in other laws, in addition to PAIA. Where such legislation allows quicker access to information, it preferred over PAIA which contains a number of procedural actions, subject to time limits of 30 days, to further extensions and ultimately for appeals.

292 PAIA sec 14(5).

## INSTITUTIONAL ARRANGEMENTS

For purposes of securing enforcement during the electoral period, the IEC establishes security requirements for every election and formally relies on SAPS as the primary security agency to provide security services.

Institutional arrangements entered into between the different spheres of government and between government departments, resulted in a number of security cluster establishments.<sup>293</sup> Two key mechanisms resulted from these arrangements. The first is the National Joint Operational Centre (NATJOINTS) and the provincial structure, being the Provincial Joint Operation Centre (PROVJOC).

Both these mechanisms were in place for previous elections as well. Instructions from SAPS to the NATJOINTS are sent through to the local level to the PROVJOC. The arrangement includes matters relating to communications and media engagements, briefings and the release of information. The NATJOINTS provided its briefing on the status of safety and security during the pre-election phase to the parliamentary portfolio committee on police in March 2019, followed by a further briefing after the election.

The communication and liaison aspect involved the Government Communications and Information System (GCIS), SAPS, the Independent Communications Authority of South Africa (ICASA) and the IEC. In so far as communications were concerned, a media protocol regulated interactions with the media and release of information.

The protocol was relied on to inform the issuing of media releases and briefings, monitor the media, conduct awareness campaigns and coordinate all general security related communication activities.

At the level of internal institutional arrangements with SAPS, media enquiries regarding policing and security matters were to be addressed to specific contact communication officers at provincial and national level who were designated to address such enquiries. The details of such contact persons were communicated to the media but not to the general public.

## EXTENT OF PROACTIVE DISCLOSURE BY LAW ENFORCEMENT

Both PAIA and the Guidelines recognize that access to information is not an absolute right and may be subject to limitation. Refusal of access to information on justifiable grounds must be aligned with regional and international standards and best practices on freedom of information. The Guidelines allow for refusal of information if the release of such information would cause prejudice to law enforcement, in particular the prevention and detection of crime, apprehension or prosecution of offenders, and the administration of justice. This standard is also reflected in PAIA.<sup>294</sup> In addition, PAIA permits refusal of access to records in respect of certain operations of public bodies including those involving evaluative or audit processes, and consultations at the discretion of the public body. However, neither the Guidelines, nor PAIA, should be interpreted to mean that all information relating to the prevention, detection and investigation of crime should never be made automatically available. This reading resonates with the need to provide information on such matters at all points during and after the election, withholding only that which is narrowly permissible in law. One of the most commonly raised grounds for the refusal of information on request and limits to proactive disclosure is on the basis of national security. The Guidelines define national security as referring to military strategy, tactics, exercises or operations undertaken in the preparation for hostilities or

293 The National Joint Operational Center, National Joint and Intelligence Structure, Joint Operations Committee, Intelligence Coordinating Committee, National Intelligence Coordinating Committee, Provincial Joint Operational Center, Provincial Joint and Intelligence Structure & Provincial Joint Operations Committee.

294 PAIA secs 38, 39, 40 & 41.

in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities, as well as such intelligence. Such intelligence must relate to the defence of the state; detection, prevention, suppression or curtailment of subversive or hostile activities, methods and technical equipment for collecting, assessing or handling intelligence information, or the identity of a confidential source or of the quantity, characteristics, capabilities, vulnerabilities or deployment of anything being designed for use as a weapon or other equipment.<sup>295</sup>

However, the Guidelines clearly do not include in the definition of 'military' enforcement, arms like the police. South Africa has made some effort to shift the perception of police as associated with the Apartheid militarised South African Police Force to a South African Police Service. There is therefore a significant opportunity for police services to embrace opportunities to foster and strengthen this image of a service as opposed to a militarised agency by supporting transparency. Favouring maximum disclosure and the promotion of access to information, including through proactive disclosure, as the default position would be instrumental in accelerating such a shift.

It should be noted that the Guidelines prescribe **minimum categories of information to be proactively disclosed** by law enforcement agencies considered necessary for safeguarding the legitimacy and integrity of the electoral process. These areas include the Code of Conduct and roles of enforcement; training, operational plan and manuals; deployment plans, budgetary information, information relating to criminal offences; and the role of other parties in the implementation of the enforcement actions. Consequently, law enforcement agencies must proactively disclose key information of public interest about structure, functions, powers, decision-making processes and decisions; revenue and expenditure, amongst others, in relation to the electoral process.<sup>296</sup> Given the exemptions permitted by the statute and supported by the Guidelines, the five areas identified in the Guidelines as the minimum information needing to be proactively disclosed by law enforcement institutions are canvassed below in respect of SAPS.

In general, enforcement responses in respect of each of the five areas stipulated as minimum areas where information could proactively be disclosed was good. On closer examination however, some areas were identified which if addressed could give better effect to the fundamental right to access information which finds resonance in regional instruments such as the Guidelines. Recommendations are provided in respect of these matters to encourage information holders toward the promotion of greater transparency, participation, and accountability by favouring maximum disclosure of information beyond the minimum required in the Guidelines.

#### (a) CODE OF CONDUCT AND ROLES DURING THE ELECTORAL PERIOD

A security guide<sup>297</sup> was provided internally for reference purposes within SAPS. However, no dedicated SAPS code of conduct was proactively made public. Two SAPS codes are in place in the form of a Code of Conduct and a Code of Ethics. Both codes are of a general nature reflecting on the core mission and values of SAPS. In addition, both codes reflect on a commitment to uphold and respect the law, including respect for fundamental rights.

The security guide, developed specifically in respect of the elections, provides a wide range of information which is a combination of detailing conduct during risk and emergency situations, to a range of possible contraventions of the Electoral Act by various role-players such as party agents, types of criminal activities for the prosecution of individuals in circumstances where they impair

295 Guidelines on access to information and elections in Africa (2017) 11.

296 Guidelines on access to information and elections in Africa clause 3.

297 NPE Security Guide (2019). Treated as confidential.

the freeness and fairness of elections, security checklists, hints, and contact information regarding communications at provincial and national level.

The two codes and the security guide however, even if read together, are unlikely to adequately serve the need for specificity required in the context of joint operations during an election. This view is supported by recent jurisprudence where the conduct of SAPS and SANDF in the enforcement of 'Lockdown Regulations' during the COVID-19 State of National Disaster was scrutinised.<sup>298</sup> While that matter dealt with a case where soldiers and police officers had allegedly beaten a member of the public to death in the course of enforcing the "Lockdown Regulations", the rationale of the court in respect of the need for a dedicated Code of Conduct for such joint operations is instructive of the need for such codes to guide public order enforcement in all special operations. An excerpt of the judgement is provided below:

*"Moreover the ordinary SAPS code of conduct, whatever it says, is surely not tailored for joint operations with the SANDF. It would not pre-suppose to guide SAPS members on how to interact with SANDF members of different ranks, how to guide them or how to restrain them during policing exercises, searches, arrests, and so forth. In the context of a joint operation especially in the extraordinary circumstances of the lockdown, there is a clear and pressing need for a proper code of conduct and operational procedures specially developed for this joint operation"<sup>299</sup>*

The election period poses similar needs for specific codes to guide and inform the conduct of SAPS, SANDF and other enforcement officials who work jointly during the period. If anything, such a code would be necessary to make clear to such actors and to the public their respective roles and responsibilities, but also to ensure that deviations from the code may be identified and appropriately remedied. For this purpose, it would not suffice to simply regulate conduct through a general code known only to the enforcement arms themselves, but it would be vital for such a code to be made applicable to all persons conducting law enforcement activities, and for such a code to be widely, publicly available.

#### (b) TRAINING AND OPERATIONAL PLAN AND MANUALS FOR THE ELECTORAL PERIOD

Operational plans were made available through the IEC in provincial cluster briefings with key stakeholders such as Chapter 9 institutions and government. The operational plans were presented to Parliament and could be accessed on the internet.

For the most part, the operational plan which was made public was a high level summary of key operational mechanisms, actions, and duty bearers, together with a description of their respective roles and responsibilities. The plan provided statistical information regarding voting stations and number of personnel to be deployed at such stations. In addition, threat assessments and contingency planning were documented. The operational plan spanned all three phases of the election.

SAPS did not release detailed information regarding training proactively, but made reference in general to the training of personnel in the course of media briefings. More detailed information regarding training was provided to Parliament and during stakeholder briefing sessions.

Parliament was advised that select SAPS members were trained on specific legislation, protocols, codes and regulations in preparation for the elections. These trainers in turn conducted training

298 *M Khosa and Others v Minister of Defence and Military Veterans, Minister of Police and others* unpublished judgement Gauteng High Court (*Khosa* case) <http://www.saflii.org/za/cases/ZAGPPHC/2020/147.pdf> May 2020 page 59-60 (accessed 30 July 2020).

299 *Khosa* case (n 298 above) para 117.



sessions for approximately 900 officials in the various provinces as part of the contingency planning for the provision of law enforcement services during the election. Applying the train-the-trainers methodology, training was expanded by members who had already been trained, to remaining members deployed during the election period.

In addition to the training of police members, a further 3 500 police reservists were trained nationally in the period before the elections to serve in the provinces and at the national level. Police reservists, in accordance with the SAPS Reservist Policy framework, were provided with general orientation and training for a period of 3 to 6 months. It is unclear whether the reservists deployed for the purposes of the election were from a cohort which had already completed the reservist training, and whether they were subsequently trained specifically about their roles and responsibilities in respect of the elections. It is also unclear what form of performance assessment and evaluation was conducted for both members and reservists in respect of services performed in the course of the election.

In addition, a combination of 1 351 enforcement officers, comprising both SANDF and SAPS members, were reportedly provided further training on the responsibilities and role of Presiding Officers. These members were trained to serve as presiding officers in all provinces, should the need have arisen.

The role played by law enforcement officials in respect of the 45 000 civic and democracy events planned by the IEC<sup>300</sup> is not available. Specific information regarding the training of private security officials, officials of the state security agency or the SANDF was similarly not available or provided on request.

It appeared from periodic media reports that SAPS had provided a number of media briefings in the course of the elections, which included some reference to training and deployment as indicated above. These media briefings were of a general nature, but made reference to the structure and composition of the law enforcement mechanisms, as well as roles and responsibilities. Though this was commendable, information provided could be expanded to provide greater detail to include other issues highlighted in this report, about which SAPS either failed or neglected to disclose adequate information, either directly to the public or through the media, proactively.

### (c) DEPLOYMENT PLANS FROM PRE-ELECTION THROUGH TO POST-ELECTION PERIOD

The SAPS reports indicated that 51 000 SAPS members, and 3 500 SAPS reservists were deployed for the election. Apart from being deployed at voting stations during the day of the election, law enforcement officers were present during the casting of special votes permitted in terms of the Electoral Act. These special votes were cast in the days before the proclaimed day of the election. In addition, law enforcement officials attended at the 243 correctional service facilities for purposes of transporting ballot boxes containing votes of some 15 000 inmates.

Additional officers not in uniform, for the purposes of discreet policing, had been deployed in areas identified as high risk. These areas had been identified through the pre-election monitoring of activities by state security personnel, information from community members and the SAPS' own intelligence units.

According to media briefings, the law enforcement arm comprised SAPS officials, the State Security Agency (SSA) personnel and SANDF members. However, statistical information regarding SANDF and SSA deployment was not provided. With regard to the role of SANDF, however, SAPS indicated that SANDF personnel would provide support on a needs basis in relation to disasters. The SANDF

300 IEC 2019 *Strategic Plan* (2019).



was notably on standby in each province and provided support in respect of three provinces which had experienced floods and fires in the period prior to the elections.<sup>301</sup>

Accredited observers reported that officials of SAPS were visible at all voting stations visited during the election. In addition, reports indicated that certain stations had a higher number of police officers than others. Observers indicated that the number of police officers deployed at larger stations was higher, with the lowest number of two police officers at the smallest voting stations. In addition, a number of observers reported that no female officers were present at some of the voting stations they had visited.

While the operational plan of the safety and security cluster did not specifically provide numbers of officers deployed to each station, information provided during the parliamentary and media briefings did indicate that higher numbers of police and security officials were to be deployed in areas identified as unstable or which were assessed as being high risk areas. Six SAPS members were deployed to such areas, four to medium risk stations and two officers to low risk stations.<sup>302</sup> The voting stations had each been assessed for risk prior to the election, thereby informing the number of law enforcement officials deployed to particular voting stations and specific clusters of areas.

In addition, general reference was made to the static protection provided at warehouses containing election material such as ballot papers for the duration of the elections. Other deployments not accounted for in actual numbers included officials who provided escort services to IEC officials and protection of voting material; and those who served in reaction teams at cluster levels, in medium to high risk areas. Deployment was necessary for the movement of ballot papers and boxes, protection of key and strategic national points; protection of voters and increasing visibility and deterrence through patrols during the pre-election period. Law enforcement officials also reported on escort services provided to presiding officers who administered special votes during the special voting period, held shortly before the proclaimed date of the national vote.

Post-election enforcement actions are vital to the entire election process, notably because the elections itself and its outcomes carry an extremely high risk of ensuing political instability, and may in fact jeopardise democratic outcomes of an otherwise legitimate election. Information about such post-election enforcement actions therefore serve an important purpose in concluding the election period.

In countries like South Africa, characterised by its apartheid past, nascent democracy, abiding vast socio-economic disparities and inequality, large numbers of vulnerable groups in communities, emerging radical political ideology and competing interests; existing fault lines are easily capable of turning into major fractures, both during and post elections. While the enforcement agencies appeared to appreciate the need to maintain vigilance during the post-election period in identified high risk areas, a fuller appreciation of the need to provide more frequent and detailed information regarding measures adopted in the post-election period in general and in the high risk areas was necessary. Such an appreciation would take into account public memory which impacts on voter confidence in future elections. Instability, violence and intimidation post-elections have a very real

301 Parliamentary Monitoring Group (PMG): Meeting minutes. The affected coastal provinces were KwaZulu Natal, the Western Cape and the Eastern Cape [www.pmg.org.za](http://www.pmg.org.za) (accessed 30 July 2020).

302 Media Briefing by the Minister of Police and members of JPCS cluster on the State of Readiness for the Elections, 02/05/19. See <https://www.saps.gov.za/newsroom/msspeechdetailm.php?nid=20354> (accessed 30 July 2020).

effect on voter confidence and in fact may be one of a number of reasons for the decrease in voter turn-out at the polls noted in South Africa's 6<sup>th</sup> election.<sup>303</sup>

Proactive disclosure regarding the measures taken to secure safety and stability post elections therefore has profound effects on wider public confidence in the elections and in enforcement across all groups and those who are vulnerable in particular. Inadequate information about these measures by SAPS post elections was therefore an area which requires strengthening in the future.

SAPS reports made reference to dedicated crime intelligence structures (in place before the pre-election period) which informed strategic deployment decisions both in terms of location and number, before and on the day of the election.<sup>304</sup> However, information regarding specific deployments in terms of the numbers or categories of enforcement personnel deployed in the period post-election was not automatically available. Specific information regarding plans to maintain stability in such areas or the duration of such plans was also not readily available. Reference was instead made in media communications to general deployment numbers per province and to efforts to secure stability in areas categorised as medium and high risk ("hotspots") following the elections and an assurance that police would manage such situations on a needs basis after the election.

#### (d) BUDGETARY ALLOCATIONS AND ACTUAL EXPENDITURE FOR THE ELECTORAL PERIOD

The SAPS annual budget of R97.5 billion during 2019 was increased by an additional ring fenced appropriation of R180 million for the electoral period. In its briefing to the Parliamentary Portfolio Committee on Police and the Independent Police Investigative Directorate, it transpired that the additional funds were required for costs associated with payments of escorting voting material, static protection at voting stations and mobilising reaction teams. The budget was made publicly known to the media and to Parliament.<sup>305</sup>

Subsequent reports of the actual expenditure during the period were far more difficult to access as the report is incorporated in minutes of the parliamentary committee to which SAPS had presented its report. The minutes of the meeting is however only available through licensed access and is therefore not readily in the public domain.

In addition, the annual report of SAPS does not include specific line item breakdowns of the actual expenditure incurred during the elections. The annual report simply records an actual amount allocated without disaggregation of the budgetary breakdown. Based on analysis of general trends in SAPS expenditure, over 70 percent of its annual allocated budget is directed at personnel expenditure. In a brief response to Parliament, SAPS indicated that the allocated budget was insufficient as a number of reservists would be called upon to supplement existing capabilities, thereby increasing its costs for enforcement. The details of the exact nature of these costs were not provided, but having regard to the SAPS Policy on Reservists, it is unlikely to have included costs on the same scale as those associated with remuneration of active members of the police service, as reservists appear to be treated as volunteers.<sup>306</sup>

303 Noting South Africa's ranking on the Global Peace Index, in which South Africa ranks at number 125 out of the 163 countries rated on the basis of levels of societal safety amongst others. The GPI is referred to in the report of the Institute of Economics and Peace (2018).

304 High risk areas were identified in the Limpopo, KwaZulu-Natal and North West Provinces. Teams were formed at the national level to be deployed to various parts of the country in response to information regarding hotspots from the Intelligence Coordinating Committee.

305 Parliamentary Monitoring Group 'Report of the Portfolio Committee on Police on the 2019/20 budget vote 23, Annual Performance Plan (APP) of the Department of Police (SAPS)' 9 July 2019 <https://pmg.org.za/taled-committee-report/3857/> (accessed 30 July 2020).

306 South African Reserve Police Service – Policy Framework and Guidelines: Establishment and Functioning (2012).

(e) DETAILS OF ANY REPORTED ELECTION RELATED CRIMES, INCLUDING NUMBER OF CASES REPORTED AND STEPS TAKEN TO INVESTIGATE, PROSECUTE OR WITHDRAW SUCH CASES

Information regarding arrests and court appearances were provided periodically by the police through the media, both in the course of the elections and shortly thereafter. No further information regarding the arrests and prosecution of suspects had been put in the public domain. The last SAPS report reflecting statistics of other election related arrests, non-election related arrests and court appearances was provided publicly through a media briefing a week after the election.

Briefly, SAPS reported through its NATJOINTs that 22 suspects had been arrested after attempting to vote twice during the election. Another 24 suspects had been arrested on fraud and intimidation charges. During the period 203 arrests were made, with 188 of these charges constituting general offences. 53 persons had appeared before court within a week of the elections.<sup>307</sup>

In a later submission by SAPS to the SAHRC these statistics changed. The SAPS response indicated that 226 arrests had been made arising from 200 cases registered with SAPS. Eight of the cases related to double or multiple voting and resulted in 27 arrests.

	Pre-election	During Election	Post-Election
Cases	97	103	0
Investigation	27	47	0
In court	20	40	0
Guilty	3	1	0
Undetected	16	5	0
Withdrawn	6	6	0
Nolle Prosequi	13	0	0

SAPS reported that a team is monitoring progress of the cases.

Public release of information regarding arrests was provided during all phases of the election, largely through print and broadcast media. However, it is noted that more frequent and detailed information was provided in the days leading up to the election and on the day of the election, than was made available in the post-election period. Areas with a high risk for instability, referred to as “hotspot areas”, were identified and communicated prior to and during the election through media briefings and interviews, but this issue was marked by a paucity of information post the election.

Proactive information about the hotspot areas was made available by SAPS publicly and periodically via different mediums, but lacked detail in certain respects, as indicated above. The provision of substantive information in respect of the Vuwani area of the Limpopo province which had experienced protest action around municipal demarcation during the previous election was welcomed and is a practise which should be retained in future elections. In Vuwani, threats of intimidation were reported and police intervention together with community engagement resulted in four voting stations which had been closed by election officials being reopened<sup>308</sup> shortly after the commencement of the voting period.

SAPS also provided public information about the arrest of a spokesperson of a community formation in the Vuwani area during the actual election and provided further information regarding the arrest

307 Media reports 13 May 2019.

308 SAPS ‘Home’ [www.SAPS.gov.za](http://www.SAPS.gov.za) (accessed 29 June 2019).

they made the following day. The alleged offender had been charged and appeared in court a day after the election. The approach taken to proactively share detailed information about this hotspot and to sustain information flows should be extended to all high risk areas, and could be expanded to provide clear information about the ongoing management of such areas in the period after the election.

Proactive disclosure both in respect of high risk areas, and measures adopted to stabilize such areas (including the deployment of a higher number of personnel to the identified areas) were conducted for the duration of the electoral period. Information released during the period was provided through a number of platforms such as the SAPS website, print and broadcast media. In addition, affected areas were brought to the attention of the parliamentary oversight committee of the police and documented in public records. The release of the information was of particular significance in providing an assurance of a safe and stable environment for the casting of votes, as it permitted messaging to reach both the affected and surrounding areas.

Despite generally commendable communications, more information regarding enforcement efforts in respect of each of the affected areas, as was the case in Vuwani, could have been adopted in the post-election period. This approach would significantly have enhanced efforts to assure, deter and secure cooperation from the public during this critical period.

In addition, comprehensive information and frequency of messaging regarding the management of instability and the assurance of safety, would improve completeness of information provided. The advantages of such an approach would be an increase in confidence in SAPS and in the intelligence information of the law enforcement arm beyond the election period. Low levels of information sharing post-election may be attributable to a misplaced belief on the part of the enforcement services that the primary objective of the service delivery function is completed once election results are announced. The post-election period and indeed the period which follows, are in fact integral to the integrity of the entire election.

The proactive disclosure of election-related prosecution in the post-election period is but one element of an important function in the electoral process. Reports relating to the prosecution of offences during such periods should be provided periodically in all phases of the election to demonstrate active enforcement and follow-through to the public. In this regard, measures should be implemented to ensure that information relating to election related crime, and prosecution should continue to be provided beyond the post-election period, until outcomes may be reported. The sharing of such information assists the public to hold law enforcement and prosecutorial arms of government accountable and provides assurance for the upholding of constitutionally guaranteed human rights and policies for future elections. Such information should therefore systematically and periodically be made proactively available to the public in all phases of the election and thereafter, where finalisation and prosecutorial outcomes extend beyond the post-election period.

#### (f) DETAILS OF ANY ARRANGEMENTS WHEREBY ANY OTHER PERSONS OR GROUPS ARE AUTHORISED BY LAW ENFORCEMENT AGENCIES TO PERFORM SPECIFIC LAW ENFORCEMENT RELATED TASKS DURING THE ELECTORAL PERIOD

Apart from law enforcement agencies, private security personnel contributed indirectly to law enforcement through the provision of security services largely at voting stations, areas with key government installations, and premises housing election materials such as ballot boxes and voting papers. These security services are in place at premises such as schools, which were designated as voting stations, in the ordinary course of their employment. As such, private security personnel did not form part of the mandated law enforcement mechanism deployed during the electoral period. Persons providing such services were vetted by SAPS through the Private Security Industry Regulator

and permitted to be present during the elections at such premises, in addition to the regular law enforcement officials.

SAPS provided brief details regarding such private security personnel in its briefing to the parliamentary committee during the pre-election period.

The operational plan and structures put in place to ensure free, fair and credible elections encompassed a top down operation through to local areas. No information has been made available on the manner, form or frequency of information sharing by law enforcement structures at the community level, with civil society stakeholders, community and faith based formations and traditional leadership. The law enforcement report, however, indicates that the Department of Local Government and Traditional Affairs participated at all stages of the electoral process as a key stakeholder, but lacked clear information regarding the role played by traditional authorities and traditional leaders in promoting and supporting law enforcement efforts.

## ASSESSMENT AND RECOMMENDATIONS

The SAHRC reports that structural arrangements and mechanisms implemented for law enforcement in the pre-election period appeared vastly improved from the previous election and were largely successful. In addition, the integration of communications and decision-making between key organs of state represented in the law enforcement structures provided for synergy in planning and coordinated and cooperative implementation.

One of the key successes in planning for the implementation resided in the periodic, timely release of information by SAPS through the joint communications channels. Such information was released through central bodies such as the IEC and other government agencies. Centralisation allowed for integrated release of information. While this approach was largely effective in providing an overall picture to the electorate, in each stage of the election, the proactive availability of more detailed information in respect of certain aspects of enforcement would significantly have strengthened enforcement efforts during the election, and heightened public confidence in the enforcement mechanisms.

In the big picture scenario however, information provided appeared to have responded to basic public information needs as determined by the NATJOINTS, and for the most part appeared to have informed perceptions of stability, safety and security. The candid disclosure of medium and high risk areas, together with the release of information regarding police conduct to stabilise such areas, contributed to increasing confidence that no-one would be prevented from voting. However, opportunities exist to strengthen information flows during the post-election period on a number of fronts.

Another area of improvement was noted in respect of information flows providing insights into operational measures adopted to provide free and fair elections. The mixed operations between SAPS, SANDF and SSA, characterized by periodic information flows to the public, were key indicators of this improvement. However, these information flows, although commendable, may be significantly strengthened and will contribute to increased public confidence if enforcement components plan toward improving the provision of information during the post-election period.

Enough emphasis cannot be placed on the relationship between access to information and public confidence in law enforcement during the electoral period. The need for timely and effective communications is especially pronounced in countries like South Africa which has a fairly large number of people residing in rural areas of the country. The proactive release of information to the public, wherever they may be located during this period is instrumental in strengthening public

confidence that the electoral process is transparent; and that the risk of danger and threats to people, processes and outcomes are being well managed.<sup>309</sup>

However, it is also important to note that law enforcement is dependent on real-time, effective communications. Such communication systems are necessary among the range of role players involved in the election process. An effective communications architecture is necessary to facilitate rapid communication of information between key role players such as the election officials, party officials, the election management body, SAPS, observers and the public, and for mitigating, preventative and control actions to be taken for management of the election environment. This need is particularly acute in geographical areas which were identified as potentially high risk, vulnerable or unstable. In this instance, law enforcement operational plans revealed a real paucity of information about communications and response channels for the public, save for a protocol which was made available to the media but not to the wider public. The need for such protocols to be made publicly available is an important aspect to be addressed in the future.

While public messaging through the EMB and the media had been sustained throughout the electoral period, the inclusion of law enforcement-specific information was scant in some respects and at certain points during the election period. Areas where disclosure was close to non-existent related to the work, deployment and non-restricted activities of SSA and SANDF officials, in comparison to information provided in respect of SAPS.

The lack of reportage on police misconduct and outcomes thereof, and the general nature of information provided about matters impacting or affecting stability in enforcement itself, were missed opportunities to provide more information about these issues.

Fleeting reference to the SSA and SANDF in general reports involving enforcement operations, and inadequacy of detail around both budget and expenditure relating to their operations and work was not surprising given conventional secrecy which blankets the work of such arms. It would take some familiarity and appreciation of the benefits of freedom of information laws, norms and standards for the conventional default position by such bodies, which invariably favour secrecy, to be overcome. Strengthened appreciation through training and familiarity will go a long way to improving confidence levels sufficiently, to bolster proactive disclosure of information by intelligence apparatus and SAPS.

The inclusion of reservists in such sensitisation and training efforts conducted in the course of training SANDF and SAPS members is also recommended. Such efforts should be given increased emphasis over and above inclusion in the standard training curriculum for enforcement officials during the election specific training. A clear commitment in terms of political will together with a commitment to reorient enforcement arms toward transparency and information sharing are necessary steps for dynamic shifts in the culture of such institutions to take root. The Guidelines provide an important lens through which reflection is warranted to evaluate current attitude and practise, and full implementation is recommended in the context of promoting the disclosure of information. A failure to do so will allow for a 'tick box' approach to the duty to proactively disclose information to prevail.

The provision of information to the media encouraged reporting on high risk areas and this issue gained currency for newsworthiness as the day of the election approached. Apart from information

309 According to research, public trust in the police varies, with some 76% of households surveyed in the research indicating they had trust in the police, and 57% indicating they were satisfied with SAPS in their areas. Low trust patterns in the police were noted by persons who had been victims of crimes, women, and persons who were employed. AA Olotola & PO Bello 'An exploration of the factors associated with public trust in SAPS' (2016) 8 *International Journal of Economics and Finance Studies* 219-236.

provided through media reports; law enforcement-related information had been communicated primarily to law enforcement structures, other organs of state, constitutional bodies, observer missions and national parliament to secure wider release of such information. In this sense, only what was deemed to be 'of interest' to the public from the lens of enforcement officials was proactively released and disseminated in respect of law enforcement. Such messaging took the form of general reporting on deployment, stability – particularly in respect of middle to high risk areas – and reporting on offences largely through mainstream media.

Comparatively, messaging in this election was more frequent and more widely cast than messaging in previous national elections. While this improvement is appreciated, the opportunity to share an expanded range of law enforcement related information proactively and more widely could have been taken up if clear general objectives and plans for content release were in place at the outset. Operational planning would therefore benefit from the inclusion of specific plans for the systematic and periodic release of more frequent messaging on a wider range of enforcement matters during the election period and where relevant, beyond such a period.

The type of messaging platform and target audiences also warranted closer consideration in planning for the release of information. Messaging opportunities about law enforcement per se could have been undertaken in a more systematic and sustained manner through community radio, to universities and identified vulnerable groups. Targeted messaging, in this sense missed reaching important groups of voters in their respective communities.

Mainstream media was the predominant platform for the dissemination of information, but community media and dedicated community based publications were potentially powerful dissemination platforms which could have been better utilised to reach particular audiences to support accessibility. Such interventions would significantly strengthen cooperation between enforcement agencies and stakeholders, reduce fear, encourage conversation and promote civic education and participation in the electoral process, particularly in respect of groups who are voting for the first time and those who are at risk of not voting.<sup>310</sup>

Access to information about public safety, or the role of the police before, during and after the election, also did not feature prominently in the IEC's voter education efforts. Instead, SAPS leadership provided curated information through media releases about law enforcement efforts, public safety and matters of concern such as protest actions in the pre-election phase, during the election itself and shortly after the elections. Integrated, accessible communication for communities which includes information about enforcement plans, codes, and complaints would therefore greatly have enhanced voter education efforts and allayed public concerns for safety.

An unusual occurrence in the form of protest action by organized labour relating to SAPS officials took place in the pre-election period outside of Parliament. The protest action highlighted the need for stability in the enforcement mechanisms itself in the preparation for an election. The protest action was significant in that public confidence in SAPS is closely related to an expectation that the very agency entrusted with enforcing the law would itself be stable, in order to provide an effective service during the election. The matter was swiftly resolved and covered only briefly in the media during the pre-election phase. Publicly available information regarding the resolution of the labour action was provided to allay concerns expressed by the Parliamentary Oversight Committee and the public. This event, together with considerations regarding the provision of information on police and

310 A decrease of 7.5% in the number of persons voting during the election were noted as compared with the number that had voted during the previous 2014 elections, amounting to a decrease from 18 654 771 to 17 671 616 voters. S Morais '2019 vs 2014: What the numbers tell us about the general elections' News24 12 May 2019 <https://www.news24.com/news24/elections/news/2019-vs-2014-what-the-numbers-tell-us-about-the-general-elections-20190512> (accessed 31 July 2020).



defence force related misconduct, highlights the fact that the internal workings and developments affecting key stakeholders who facilitate the securing of free and fair elections are often neglected.

Although statistics regarding arrests, investigation, and prosecution were for the most part provided proactively to the public, it is noted that the statistical accounts vary. These variations, however marginal, should be actively engaged and reports of such statistics should be provided in the course of the post-election period, until their conclusion. Evaluative reports which provide and analyse comparative trends, and emerging trends would also be of value to the public and to enforcement itself for future elections and performance management.

It is strongly recommended that the category of information regarding arrests, investigations and prosecutions should also include statistics and outcomes of offences and prosecutions involving law enforcement officials, including defence force and private security officials, during the electoral process. There is perhaps a view that such information is of internal value only, or that such information has no bearing on the external dimensions of enforcement actions during an election. Such views would highlight the need for wider orienting to strengthen an appreciation for the advantages of transparency and accountability referred to earlier. Although not expressly required in terms of the Guidelines, the inclusion of information about election related police misconduct, protest action, and details about the outcomes of such conduct would heighten transparency and accountability in law enforcement, related to the overall electoral process. Systematic and clear reporting about the outcomes of election related police misconduct therefore warrant inclusion for the purposes of strengthening transparency, performance and accountability in the conduct of an election.

The need to identify and report on misconduct and offences by enforcement officials relates closely to the need for an election specific code of conduct for enforcement officials. Such a code would provide clear guidance to the range of persons involved in enforcement activities, including private enforcement officials and reservists during an election; and should be widely disseminated prior to the election to achieve this purpose. The need for a code applicable to all enforcement actors is perhaps best demonstrated in the context of persons such as reservists who do not necessarily serve in the enforcement sector on a permanent basis or for reward. Such officials are likely not to be the subject of stringent performance and accountability in SAPS or to have benefitted from the rigorous training required of permanent members of the service. A code which clearly articulates the behavioural norms and standards would assist addressing the deficits inherent in serving during the elections as a reservist or a defence force member trained to respond differently to public order matters such as the elections. The development and dissemination of such a code serves also to make it widely and clearly known what conduct is expected and acceptable; and what conduct would constitute a deviation from acceptable standards.

In respect of enforcement, an election specific code, and reporting on the outcomes of actions taken to address misconduct, are insufficient mechanisms if they are seen in isolation of the need for a mechanism for the investigation of enforcement related offences which potentially violate basic rights such as the right to access information. To this end, existing complaint resolution mechanisms through the EMB or through other independent complaints processes need to be made available to allow expeditious resolution of enforcement related complaints arising in the course of the election period.<sup>311</sup>

311 In as much as the Independent Police Investigations Directorate is mandated to investigate police misconduct, a mechanism that permits expeditious, independent responses to such misconduct during the period of the election is necessary, for immediate real-time resolution of election related misconduct.

Such mechanisms, together with codes and accountability measures, would considerably strengthen and enhance enforcement efforts during an election. The creation of an accessible complaints mechanism or platform is necessary for allegations to be speedily investigated and resolved to mitigate risks of continued violations by errant officials in the course of the election. Both the code and complaints mechanisms should ideally be popularised before the election and information about them sustained in the course of an election.

A more general recommendation of wider application is that SAPS and other law enforcement agencies urgently review, improve and train officials on data management policies. Such policies and training will greatly assist in managing and creating records; strengthen meta-data and information management; developing the capacity and understanding of legal obligations in respect of basic rights such as the provision of access to information, and processes for the proactive release of accurate, timely and comprehensive information.

The need for effective data management policies take on more urgent dimensions in the face of global cyber criminality and terrorism which have direct implications for enforcement related work. In addition, the inevitable transition to technology for the purposes of modifying the conduct of elections in the near future, dictate the need for such urgent reforms. Enforcement should ideally provide assurances around data management plans and practise for the purposes of the election together with EMBs noting it bears an equivalent gravity to the management of adverse risk associated with instability in communities, and takes place in an environment that may not always carry the same level of visibility as community order policing.

Reforms in respect of the elections themselves however will remain ineffective if a wider culture shift is not initiated within the enforcement arms. One dimension of a willingness to adopt such an orientation toward transparency and accountability would in this sense require the review, reconciliation and reform of legislation and policy such as PAIA, the Minimum Information Security Standards; the Protected Disclosures Act; National Archives and the Record Service of South Africa Act and the South African Protection of State Information Bill.<sup>312</sup> In addition, such shifts would be supported by clear demonstrations of political will<sup>313</sup> to embrace accountability, transparency and public participation in respect of enforcement related actions during and beyond the elections.

312 The Protection of State Information Act 1982. The Protection of State Information Bill (widely referred to as the 'Secrecy Bill'), seeks to amend the South African Protection of Information Act of 1982, and has been awaiting presidential assent since 2013.

313 BJ Roberts *et al.* 'The unconvinced vote: The nature and determinants of voting intentions and the changing character of South African electoral politics' (2019) 46(4) *Politikon* 481-498.

### ACHPR GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA: MINIMUM STANDARDS

25. Media and internet regulatory bodies shall adopt regulations on media coverage during elections that ensure fair and balanced coverage of the electoral process and transparency about political advertising policy on media and online media platforms. Such regulations shall proactively disclose to the public:
  - (a) The complaints procedure against media organisations that violate the regulations;
  - (b) The enforcement mechanism for ensuring compliance with the decisions taken and sanctions imposed;
  - (c) The code of conduct for online media; and
  - (d) Details of all complaints or petitions received during the electoral period and how these were addressed.
26. The body responsible for regulating the broadcast media and any other relevant national security, public or private body involved in the provision of telecommunication services shall refrain from shutting down the internet, or any other form of media, during the electoral process.
27. In exceptional cases in which a shutdown may be permissible under international law, the reasons for any shutdown shall be proactively disclosed. Such limitation shall:
  - (a) Be necessary and proportional in a democratic society.
28. Any decision of the Media or Internet Regulatory Body shall be subject to judicial review, which shall be undertaken on an expedited basis.

South Africa has a dynamic and pluralistic media landscape, including print, broadcasting and online media. The public broadcaster, South African Broadcasting Corporation (SABC), dominates both TV viewership and radio audiences, and broadcasts in all official languages.<sup>314</sup> Other prominent players in the broadcast sector include eMedia Holdings (e.tv/eNCA), Kagiso Media, Primedia and pay TV platform Multichoice.<sup>315</sup> Leading companies in print and online media include Media24, Independent News and Media (INM), Arena Holdings (formerly TisoBlackstar), Caxton, Mail & Guardian and Daily Maverick.<sup>316</sup>

With these varied media platforms, it is worth considering whether media and internet regulatory bodies, and media and online media platform providers have ensured that South African audiences have meaningful access to information especially during the election period. Special attention is given to the extent of proactive disclosure as advocated in the Guidelines.<sup>317</sup> In doing so, this and the next section of the research look at the media and online media platform providers and the relevant regulatory bodies, particularly the legislative and institutional framework and how it has affected practice on the ground. While PAIA is a logical starting point for promoting the realisation of the constitutional right of access to information, the availability of supporting legislation and institutions tasked with implementation ensure that this right is actualised.

314 OMD 'Media facts 2018: South Africa and Southern African Development Community' [http://www.omb.co.za/media\\_facts/OMD\\_Media\\_Facts\\_2018.pdf](http://www.omb.co.za/media_facts/OMD_Media_Facts_2018.pdf) 7 & 11.

315 OMD (n 314 above) 7.

316 As above.

317 Guidelines on access to information and elections in Africa clause 25-29.

## FIRST, AN OVERVIEW OF THE REGULATORY BODIES

The Independent Communications Authority of South Africa (ICASA) was established pursuant to section 192 of the Constitution of South Africa to 'regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society.'<sup>318</sup> ICASA is empowered to inquire whether the activities of a person or broadcaster are in compliance with the statute or their license, and take appropriate action.<sup>319</sup>

The ICASA Complaints and Compliance Committee (CCC) was established under section 17(A) of the ICASA Act. The CCC is tasked with investigating, hearing and determining cases referred to it by ICASA, complaints received by the CCC, election related complaints and allegations of violation of the ICASA Act and relevant statutes.<sup>320</sup> It also plays an advisory role to ICASA regarding performance of its functions and achievement of the objectives of the ICASA Act.<sup>321</sup>

The National Association of Broadcasters (NAB) is a voluntary member organisation for the broadcasting industry.<sup>322</sup> The objective of the organisation is to promote a pluralistic and diverse broadcasting system and favourable operating climate founded on 'principles of democracy, diversity and freedom of expression.'<sup>323</sup> The NAB established the Broadcasting Complaints Commission of South Africa (BCCSA) as an independent judicial tribunal that determines complaints submitted against full members of the NAB who have acceded to its jurisdiction and the code of conduct.<sup>324</sup> However, the BCCSA does not have the requisite jurisdiction to handle election disputes, as such complaints can only be dealt with by the CCC.<sup>325</sup>

The Press Council of South Africa (PCSA) is an independent co-regulatory body (comprising members of the public and the press), for print and online media.<sup>326</sup> There is a majority of public representatives in both the Press Council and the Adjudication Panel.<sup>327</sup> This body seeks to uphold and protect the constitutional rights of freedom of expression and media freedom.<sup>328</sup> In addition, it aims to promote and develop ethical journalism among print and online media.<sup>329</sup> The Press Council, through its complaints mechanisms, that include the Public Advocate, Ombud and Appeals Panel, uses alternative dispute resolution mechanisms to settle disputes on editorial content, based on journalistic ethics and conduct as prescribed by the Press Code of Ethics and Conduct for South African Print and Online Media.<sup>330</sup>

## LEGAL AND REGULATORY FRAMEWORK

In South Africa, the right of access to information is an independent, stand-alone right, alongside the right to freedom of expression, which includes press freedom.<sup>331</sup>

318 ICASA Act 13 of 2000 sec 2.

319 ICASA Act sec 4B.

320 ICASA Act sec 17B (a).

321 ICASA Act sec 17B (b).

322 National Association of Broadcasters 'About' <https://www.nab.org.za/content/aboutpage> (accessed 19 April 2019).

323 As above.

324 BCCSA Constitution sec 2.

325 Section 14 of the BCCSA's Free-to-Air Code of Conduct for Broadcasting Service Licensees.

326 Press Council 'Home' <https://presscouncil.org.za/> (accessed 18 April 2019).

327 Interview with Izak Minnaar, Press Council member, on 6 May 2019.

328 Constitution of the Press Council of South Africa sec 2.1.

329 Constitution of the Press Council of South Africa Sec 2.2.

330 Constitution of the Press Council of South Africa Sec 2.4 & 2.5.

331 The Constitution of South Africa sec 16(a).

South Africa has a comprehensive regulatory framework to protect and promote these rights that include both statutory and self-regulatory measures.

Outside PAIA, various media laws and regulations seek to facilitate access to information, including during the election period.

It should be noted however, that PAIA does not provide for adequate proactive disclosure of information, contrary to the spirit and letter of the African Commissions' Model Law on Access to Information and the Guidelines.

The Broadcasting Act<sup>332</sup> establishes the SABC. <sup>333</sup>The public corporation has a duty to inform, educate and entertain the public through its television and radio programmes.<sup>334</sup> Additionally, the SABC is obligated to ensure its programming meets 'the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence....'<sup>335</sup> Potential appointees to the SABC's Board of Directors are expected to declare any direct or indirect conflict of interest in the telecommunications, broadcasting or print media industry.<sup>336</sup> In addition, during deliberations by the Board in the course of their duties, any conflicting interests must be revealed, without which the Board's deliberations are considered invalid.<sup>337</sup>

The Electronic Communications Act (ECA)<sup>338</sup> seeks to regulate electronic communication in the public interest, with the aim of promoting 'open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services.' Section 57(1) provides that during an election period, public broadcasting services (and other broadcast licensees if they so choose) are required to air party election broadcasts produced on behalf of a certain political party and provided by the party.<sup>339</sup> ICASA is responsible for determining the duration and timeslots for party election broadcasts (PEBs), after consultation with the broadcasters and political parties, with due consideration to equitable treatment of the political parties.<sup>340</sup> ICASA also schedules all the PEBs on radio and television services to ensure equitable allocation of broadcast time in line with the election broadcast regulations issued before each election.<sup>341</sup>

Broadcasting licensees are not obligated to feature political advertisements during an election period<sup>342</sup> - but in the event that they do so, they are required to allow any political party participating in the elections, upon request, to also feature their political adverts.<sup>343</sup>

332 Act No 4 of 1999.

333 Broadcasting Act secs 6 & 7.

334 Broadcasting Act sec 8(d).

335 Broadcasting Act sec 10(1)(d).

336 Broadcasting Act sec 17(1) & (2).

337 Broadcasting Act sec 17(3).

338 Act 36 of 2005.

339 Section 1 of the ECA defines a party election broadcast as 'a direct address or message broadcast free of charge on a broadcasting service and which is intended or calculated to advance the interests of any particular political party.' Additionally, election period in this case refers to 'the period commencing with the date on which the election day is proclaimed and ending on the day immediately following upon the day on which candidates of any of the political parties are declared elected.'

340 ECA secs 57(2) and 57(3).

341 ECA sec 58(3).

342 Section 1 of the ECA defines a political advertisement as 'advertisement broadcast on a broadcasting service which is intended or calculated to advance the interests of any particular political party, for which advertisement the relevant broadcasting service license has received or is to receive, directly or indirectly, any money or other consideration'.

343 ECA sec 58(1).

No PEBs or political adverts should be featured 48 hours before the commencement of voting.<sup>344</sup> The guidelines on party election broadcasts and political adverts are further elaborated upon in the Elections Broadcasting Regulations.<sup>345</sup>

Broadcasting services are also required to ensure equitable treatment in their programming during the election period. In the event that a programme discusses elections or political parties, the broadcaster should afford reasonable opportunities for the discussion of conflicting views, and allow political parties to respond to criticism raised during such programmes.<sup>346</sup> The Guidelines on Election Coverage further expounds on the obligations of broadcasters as outlined by the ECA.<sup>347</sup>

Section 8 of the Electoral Code of Conduct<sup>348</sup> requires political parties and candidates to respect the role of the media during and after elections.<sup>349</sup> It also prohibits political parties and candidates from denying the media access to 'public political meetings, marches, demonstrations and rallies.'<sup>350</sup> Additionally, they are tasked to take reasonable measures to protect journalists from 'harassment, intimidation, hazard, threat or physical assault' from their agents or supporters.<sup>351</sup>

The Press Council's Press Code<sup>352</sup> requires print and online media to ensure their independence and avoid conflict of interests. In particular, in section 2, it obligates the media to not allow commercial, political, personal or other non-professional considerations to influence reporting, and avoid conflicts of interest, as well as practices that could lead readers to doubt the media's independence and professionalism; not accept any benefit which may influence coverage; indicate clearly when an outside organization has contributed to the cost of newsgathering; and keep editorial material clearly distinct from advertising and sponsored events.

## COMPLAINTS PROCEDURES

In conformity with article 25 of the Guidelines, media regulators provide for complaints procedures against media organisations. Broadcasters that are in violation of election related regulations may be subjected to disciplinary procedures before the ICASA CCC. During the election period, ICASA is also empowered to receive public complaints regarding party election broadcasts (PEBs) and political adverts, within 48 hours of such broadcast.<sup>353</sup> ICASA forwards complaints to the CCC, which treats all complaints regarding violation of election regulations as urgent.<sup>354</sup> ICASA will communicate to the concerned parties about the outcome of the complaint within 48 hours of receiving the complaint.<sup>355</sup> A license holder in violation of the Election Broadcasting Regulations is liable to a fine not exceeding R1 000 000.<sup>356</sup>

344 ECA secs 57(7) and 58(6).

345 Gazette Notice 101 of 2014 Regulations on Party Election Broadcasts, Political Advertisements, the Equitable Treatment of Political Parties by Broadcasting Licensees.

346 ECA sec 59(1).

347 Annexure B Election Broadcasting Regulations.

348 Electoral Act 73 of 1998 schedule 2.

349 Electoral Code sec 8(a).

350 Electoral Code sec 8(b).

351 Electoral Code sec 8(c).

352 The Press Code of Ethics and Conduct for South African Print and Online Media

353 Election Broadcasting Regulations Regulation 7.

354 Regulations Governing Aspects of the Procedures of the Complaints and Compliance Committee of the Independent Communications Authority of South Africa (CCC Regulations) Regulation 6. Election Rules refers to the obligations outlined under sections 57, 58 and 59 of the ECA.

355 Election Broadcasting Regulations Regulation 7.

356 Election Broadcasting Regulations Regulation 9.

The CCC is required to ensure proper record management of complaints, notices and record of proceedings and findings, which should be available for public inspection at their offices during normal working hours.<sup>357</sup> Further details on CCC's procedures, judgements and relevant rules and regulations are detailed in the Complaints and Compliance Committee Terms of Reference; Regulations governing aspects of the Complaints and Compliance Committee Communications Authority of South Africa; Rules and Procedures of the Complaints and Compliance Committee, and Complaints and Compliance Committee Handbook.<sup>358</sup>

The Press Council allows complainants to submit online complaints regarding editorial content of publishers, from both print and online platforms, who have acceded to the jurisdiction of the Press Council's Press Code and its complaints procedures. Complaints must be lodged within 20 working days of publication.<sup>359</sup> The Press Council's Public Advocate can also institute a complaint on his or her own motion to the Ombud, within 30 working days, following the publication of material that contravenes the Press Code and is in the public interest.<sup>360</sup> Priority is given to disputes regarding elections, to ensure speedy resolution.<sup>361</sup>

Public complaints are first handled by the Press Council's Public Advocate with a view to try and mediate a solution with the publication, and in the event a complaint is not resolved among the parties, it is forwarded to the Ombud, who adjudicates the matter, either through written submissions or a hearing.<sup>362</sup> If the Ombud selects to hold a hearing, a public and press member from the Press Council's Adjudication Panel, join the Ombud to consider the matter.<sup>363</sup> Appeals against the ruling of the Ombud lie to the Appeals Panel with the approval of the Chair of Appeals.<sup>364</sup>

Possible sanctions against a respondent may include: caution or reprimand; order for a correction, retraction or explanation, apology, publication of the proceedings by the respondent; or publication of the reply to the complainant.<sup>365</sup> Repeat offenders may be directed to pay fines, or they could be suspended or expelled in extreme cases of non-compliance.<sup>366</sup> The adjudicating body can also make supplementary or ancillary orders or issue a directive to implement their findings.<sup>367</sup> These procedures are public records (available on the Press Council's website) unless they concern legally confidential matters.<sup>368</sup>

ICASA has never implemented internet shutdowns as alluded to in sections 26 to 28 of the Guidelines, nor is there regulatory provision for such measures. This is commendable under international standards and practice and should be emulated by other jurisdictions in Africa that have implemented, or threatened or considered implementing internet shutdowns.

357 ICASA Act sec 17C(3), (4) & (7)(a)(b).

358 ICASA 'Complaints and Compliance Committee' <https://www.icasa.org.za/pages/complaint-and-compliance-committee> (accessed 17 April 2019).

359 Complaints Procedure & section 4 of the Constitution of the Press Council of South Africa sec 1.3.

360 Complaints Procedure sec 1.9.

361 Complaints Procedure sec 1.5.

362 Complaints Procedure secs 1 & 2.

363 Complaints Procedure secs 3.4.

364 Complaints Procedure sec 4.

365 Complaints Procedure sec 7.2.

366 Complaints Procedure sec 8.2.

367 Complaints Procedure sec 7.2.4.

368 Complaints Procedure sec 9.3.



### ACHPR GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA: MINIMUM STANDARDS

29. Print, broadcast and online media, whether publicly or privately owned, shall proactively disclose the following:
- (a) Editorial and ethical codes or guidelines utilised in undertaking election coverage, including provisions prohibiting incitement to discrimination, hostility or violence, if any;
  - (b) Sanctions for transgressions of these codes or guidelines;
  - (c) Complaints procedures for handling breaches of these codes or guidelines;
  - (d) Number of complaints received and how these were addressed;
  - (e) Code of conduct for staff on procedural matters;
  - (f) Criteria for the allocation of airtime or news coverage for political campaign advertisements and activities;
  - (g) Polling methodologies and margins of error;
  - (h) Actual allocation of airtime or news coverage for political campaign advertisements and activities;
  - (i) Plan for transparent repository of all political advertisements, including those targeted at individuals or specific groups on online media;
  - (j) Coverage plan for election day;
  - (k) Criteria for the selection of election commentators, political analysts or other experts;
  - (l) Guidelines on responsible use of online media; and
  - (m) Conflict of interest media ownership information, political affiliations or party support arrangements, if any.

Compliance by media and online media platform providers with the Guidelines on the right of access to information during elections can be analysed based on adherence to relevant legislative and regulatory provisions, as well as self-regulatory measures, such as company policies, etc. Some publications have their own complaints mechanisms or have an ombud to deal with general or election related complaints, while other media organisations only subscribe to industry regulatory and complaints mechanisms. Levels of compliance varies among public and private media.

#### PUBLIC MEDIA

In 2004, the SABC published its editorial policies, pursuant to section 6 of the Broadcasting Act, following public consultation with its staff and the South African general public.<sup>369</sup> In 2018, SABC published a revised version of this policy for public comment, noting that it is aware that, as the public broadcaster with a relatively extensive radio and TV audience, its newsroom is vulnerable to pressure from political parties during the election period.<sup>370</sup> The SABC's editorial policy states that decisions on election coverage are founded on principles of objectivity, accuracy, fairness,

369 SABC 'SABC editorial policy' (2004) <https://www.sabcnews.com/sabcnews/sabc-2004-editorial-policies/> (accessed 31 July 2020).

370 South African Broadcasting Corporation (SABC) 'SABC Editorial Policies – draft for discussion' (July 2018) 25-26 [http://web.sabc.co.za/digital/stage/editorialpolicies/SABC\\_Editorial\\_Policies\\_Draft\\_for\\_Public\\_Comments.pdf](http://web.sabc.co.za/digital/stage/editorialpolicies/SABC_Editorial_Policies_Draft_for_Public_Comments.pdf) (accessed 31 July 2020).

impartiality and balance. SABC is also bound by the provisions of the ICASA Act on election coverage under sections 58 to 60, as well as ICASA's regulations.<sup>371</sup> SABC's editorial policy has a universal service access policy, that seeks to ensure its services are accessible to a wide audience.<sup>372</sup> In the 2018 revised draft, the section adds that, in applying the principle of equitable treatment, SABC endeavours to feature every official language in South Africa in its programming.<sup>373</sup>

On criteria for political advertisements, party election broadcasts (PEBs) and coverage of activities of political parties, the SABC is bound by the ICASA Elections Broadcasting Regulations. Furthermore, in line with ICASA's policies, SABC does not accept sponsorship for television news and current affairs, including native advertising, to enhance editorial independence and integrity in their programming. However, this does not apply to radio news, weather forecasts and sports announcements during news time.<sup>374</sup> In the 2018 draft, further provisions for editorial independence are included by prohibiting SABC's editorial staff from directly or indirectly declaring their support for any political party, such as wearing party outfits, electioneering or taking photos with political party members.

SABC's Head of News Research approves opinion polls conducted by SABC.<sup>375</sup> For opinion polls conducted outside SABC, journalists are required to report on methodology, results, get expert opinion and seek the advice of SABC's Market Intelligence, on the 'validity of the methods used and interpretation of the findings. While not specific to elections, the policy also provides guidelines on programming that does not further discrimination, hostility or violence. The policy also addresses issues of conflict of interest.

Public complaints regarding violation of SABC policies or codes are handled by the Manager: Broadcast Compliance. The 2018 draft adds that the Broadcast Compliance Department submits information on complaints received with their bi-annual reports to ICASA.<sup>376</sup>

This editorial policy<sup>377</sup> covers the requirements of article 25 (a), (b), (c), (d), (f), and (g) of the Guidelines.

On article 29 (m) on media ownership, the Broadcasting Act establishes SABC as a public broadcaster with the government as the sole shareholder.<sup>378</sup>

Details on the coverage plan for election day,<sup>379</sup> and criteria for selection of election commentators and other experts were however not available.<sup>380</sup> SABC set up a website dedicated to the 2019 elections, with news on voter information, political parties and developments in the electoral race.<sup>381</sup>

The public broadcaster has been on the receiving end of demands from political parties for more news coverage during the 2019 election cycle. This was witnessed when the African National Congress (ANC) complained of a media blackout. William Bird from Media Monitoring Africa (MMA)

371 SABC (n 370 above) 25.

372 SABC (n 370 above) 35.

373 SABC (n 370 above) 28.

374 SABC (n 370 above) 26.

375 SABC (n 370 above) 23.

376 SABC (n 370 above) 16.

377 Note that the final version of the SABC Editorial Policies was published in 2020, still incorporating the clauses referred to in this report – final version accessible here: [http://web.sabc.co.za/digital/stage/editorialpolicies/SABC\\_Editorial\\_Policies\\_2020.pdf](http://web.sabc.co.za/digital/stage/editorialpolicies/SABC_Editorial_Policies_2020.pdf)

378 Broadcasting Act sec 7.

379 Guidelines on access to information and elections in Africa clause 29(j).

380 Guidelines on access to information and elections in Africa clause 29(k).

381 SABC News <https://www.sabcnews.com/sabcnews/category/features/elections-2019/> (accessed 21 April 2019).

however came to the defence of SABC stating that there was no evidence that SABC was indeed giving unfair coverage to the ANC.<sup>382</sup>

Smaller parties have also complained of poor coverage of their issues.<sup>383</sup> For instance the African Content Movement (ACM) lost a court application against the public broadcaster seeking to coerce it to conduct a live broadcast of the launch of the party manifesto, citing unfair coverage of smaller political parties.<sup>384</sup>

However, the public broadcaster is yet to publish an access to information manual as required by section 32 of PAIA. During the 2017-2018 period, SAHRC reported that SABC was among the 32 state owned entities that failed to comply with section 32 reporting under PAIA.<sup>385</sup>

## PRIVATE MEDIA

While most private media owners have websites that showcase their services, investors and brands, they do not give elaborate information concerning their internal editorial and ethical policies.<sup>386</sup> However, it should be noted that private and community media may find it unnecessary to draft additional editorial and ethical codes, but rather comply with the guidelines on election coverage under the relevant regulations, complaints procedures and enforcement mechanisms provided by the CCC and the Press Council.<sup>387</sup> If this is the case, then the requirements of articles 29 (a), (b), (c), (d), (f), (g), and (h) are covered by the relevant regulations.

Article 29 (j) and (k), requirements on selection of election commentators, political analysts and other experts, and coverage plans for election day, may be regarded as internal matters by media houses and therefore not proactively disclosed to the public.<sup>388</sup> However, on general election coverage, some media platforms made efforts to promote coverage during the election period including on election day. Some private media companies have websites dedicated to the coverage of the 2019 elections, such as IOL, TimesLIVE and News24.<sup>389</sup>

On conflict of interest under article 29 (m) of the Guidelines, companies such as Arena Holdings, Caxton, eMedia Holdings, and Multichoice Group Limited are listed on the Johannesburg Stock Exchange (JSE). Information on ownership can be gleaned from their Annual Financial Statements.<sup>390</sup> However, this is not the case for Independent News and Media, Kagiso Media, Media24 and Primedia.

382 N Modjadji & C Blignaut 'ANC lashes SABC, hints at taking control' City Press (1 April 2019) <https://city-press.news24.com/News/anc-lashes-sabc-hints-at-taking-control-20190401> (accessed 19 April 2019).

383 SABC News 'Political parties criticise SABC on election coverage' <http://www.sabcnews.com/sabcnews/political-parties-criticise-sabc-on-election-coverage/> (accessed 19 April 2019).

384 R Nqola 'Motsoeneng: ACM must be covered equally like all other political parties' EWN (7 April 2019) <https://ewn.co.za/2019/04/08/motsoeneng-acm-must-be-covered-equally-like-all-other-political-parties> (accessed 19 April 2019).

385 SAHRC 'Promotion of Access to Information Act (PAIA) Annual Report 2017/18' (2018) 24 [https://www.sahrc.org.za/home/21/files/FINAL%20Promotion%20of%20Access%20to%20Information%20Act%20\(PAIA\)%20Annual%20Report%202017-18.pdf](https://www.sahrc.org.za/home/21/files/FINAL%20Promotion%20of%20Access%20to%20Information%20Act%20(PAIA)%20Annual%20Report%202017-18.pdf) (accessed 31 July 2020).

386 Tiso Blackstar Group 'Home' <http://www.tisoblackstar.com/> (accessed 31 July 2020); Independent Media 'About us' <https://www.independentmedia.co.za/our-company/about-us/> (accessed 31 July 2020); E.tv 'Home' <https://www.etv.co.za/> (accessed 31 July 2020); Viacom CBS Inc 'Home' <https://www.viacomcbs.com/> (accessed 31 July 2020); & Multichoice 'Home' <https://www.multichoice.com/> (accessed 19 April 2019).

387 Interview with Kate Skinner Executive Director South African National Editors' Forum (SANEF) on 14 May 2019.

388 As above.

389 Independent Online (IOL) '#Elections2019' <https://www.iol.co.za/trends/elections2019> (accessed 19 April 2019); Times Live 'Elections 2019' <https://www.timeslive.co.za/elections-2019/> (accessed 19 April 2019); News24 'Elections' <https://www.news24.com/Elections/> (accessed 19 April 2019).

390 Johannesburg Stock Exchange 'Find an equity issuer' <https://www.jse.co.za/current-companies/companies-and-financial-instruments> (accessed 15 May 2019).

For companies not listed on the JSE, though the information is not hidden, it is not readily available to the ordinary citizen without some research effort. This is especially so for smaller media companies.<sup>391</sup> However, for larger players such as Media24 and Independent News and Media, a quick search through their websites reveals they are owned by the Naspers and Sekunjalo Group respectively.<sup>392</sup>

Where information is not readily available, the Companies Act offers some recourse. The Act provides that any person with a beneficial interest in a company can inspect the Memorandum of Incorporation and other selected documents upon request to the company, in the prescribed manner, and in accordance with PAIA.<sup>393</sup> The Companies Act also obligates a company to ensure that certain company records are available for public inspection. Section 26 (3) provides that a company member can access the register of members and register of directors of a company, during business hours for free, however anyone else must pay a fee of not more than R100. The Act further provides that the right to access to information provided therein are in addition to the provisions of section 32 of the constitution, PAIA and other relevant regulations.<sup>394</sup>

It can be concluded that the media in South Africa is not openly partisan. It is difficult to identify party affiliations from the content of the news.<sup>395</sup> This is in sharp contrast with the apartheid era where party affiliations, either pro-government or pro-opposition were evident from publications. Corporate interests however, play a part in eroding editorial independence more so than political interests. Additionally, community radio stations are often vulnerable to pressure to support certain political parties, with some related instances of alleged harassment or intimidation of their journalists.<sup>396</sup>

## ONLINE PLATFORM PROVIDERS

The spread of misinformation, disinformation, propaganda and “fake news” on online media platforms is an important subject of discussion in the current election discourse. The internet provides a platform that allows for unprecedented speed in the spread of information.<sup>397</sup> For the 2019 elections, the IEC and Media Monitoring Africa, in collaboration with various online platform providers and civil society organisations, have set up an online complaints portal, Real411.org, to combat the spread of disinformation on online and social media platforms.<sup>398</sup> This is to ensure that the electorate has access to accurate information to inform their actions.

Another IEC/MMA pilot project during this period, was an online political advertisement repository.<sup>399</sup> Registered political parties were asked to upload their official online advertisements onto the platform, to enable the public to compare and distinguish between legitimate political advertising, and authentic political advertising being distributed as disinformation.

391 Interview with Reginald Rumney Director of the Centre for Economics Journalism in Africa, on 21 May 2019.

392 Media24 ‘About us’ <https://www.media24.com/about-us/> (accessed 15 May 2019); Independent Media ‘About us’ <https://www.independentmedia.co.za/our-company/about-us/> (accessed 15 May 2019).

393 Companies Act sec 26(1).

394 Companies Act sec 26(4).

395 Interview with Reginald Rumney (n 391 above).

396 As above.

397 K Wilkinson ‘Voters’ choice and future governments: fact-checking in election season’ 3 May 2019 <https://africacheck.org/2019/05/03/voters-choice-and-future-governments-fact-checking-in-election-season/> (accessed 4 June 2019).

398 B Mohale ‘IEC receives over 70 disinformation complaints’ Media Monitoring Africa 5 May 2019 <https://www.mediamonitoringafrica.org/iec-receives-over-70-disinformation-complaints/> (accessed 4 June 2019).

399 Padre ‘Home’ <https://padre.org.za/> (accessed 4 June 2019)

In addition, companies such as Facebook have developed strategies to handle misinformation and disinformation.<sup>400</sup> Facebook informs their subscribers on how to identify misleading or false information, and may reduce the visibility of the information or remove it altogether.<sup>401</sup> Facebook also operates advertising policies for election integrity. However, while South Africa is currently not among the countries with a Facebook political advertisement policy, it requires that all political adverts must comply with local laws on elections and campaigns. Non-compliance will result in removal of such adverts from Facebook's platforms, including WhatsApp and Instagram.

These examples demonstrate some level of compliance with the requirements of sections 29 (b), (f), (h), (i), (l) & (m) of the Guidelines.

400 Facebook 'Facebook terms and policies' <https://www.facebook.com/policies> (accessed 4 June 2019).

401 Facebook Help Centre 'Tips to spot false news' <https://www.facebook.com/help/188118808357379> (accessed 4 June 2019).

### ACHPR GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA: MINIMUM STANDARDS

30. Subject to exceptional circumstances in which it can be shown that their operations will suffer demonstrable harm, civil society organisations involved in the electoral process shall proactively disclose the following information:
- (a) Organisational aims and objectives;
  - (b) Membership and composition;
  - (c) Details of key staff and office bearers;
  - (d) Sources of funding;
  - (e) Operational plans, methodology, manuals and their implementation for civic and voter education;
  - (f) Possible conflict of interest, which may include the promotion of a particular religious, ethnic or political interest or bias or prejudice in cases where they participate in both voter education and election observation; and
  - (g) Campaign funders.

South Africa has a rich history of civil society organisations, many of which were and have been active since the days of apartheid. These organisations play a significant role in society by picking up the government's deficits in services and social protection for citizens.<sup>402</sup>

According to William Gumede, South Africa has a “diverse, dynamic and assertive” civil society that holds the government accountable, monitor human rights, and demanded constitutionally guaranteed rights such as freedom of expression and the right to access to information.<sup>403</sup>

In the context of elections, Shauna Mottiar notes that “the role of civil society in elections often takes the form of support for the institutional processes of a democratic election as well as the more substantive development of a democratic electorate”.<sup>404</sup> The election-related roles include election assessment, electoral law reform and review, voter education, information dissemination and many more. A case in point is the Electoral Institute for Sustainable Democracy in Africa (EISA) with an extensive mandate that includes providing technical support to political parties; managing election-related conflict; election assessment and support for electoral management bodies, sub-regional and regional election institutions; and also work with other civil society organizations, in strengthening their participation in the electoral process.<sup>405</sup>

In 2012, South Africa had an estimated civil society network of more than 85 000 NGOs involved in what Catherine Wijnberg describes as “filling in the gaps in a society where care is not being

402 C Wijnberg ‘A dire consequence: The demise of the South African NGO’ *NGO Pulse* 20 November 2012 <https://www.ngopulse.org> (accessed 31 July 2020).

403 W Gumede ‘How civil society has strengthened democracy in South Africa’ *Democracy works* Policy Brief: 2018 <https://democracyworks.org.za/policy-brief-28-how-civil-society-has-strengthened-democracy-in-south-africa/> (accessed 5 April 2019).

404 S Mottiar ‘The role of civil society in elections: The KwaZulu-Natal Democracy and Elections Forum – reducing conflict dynamics and promoting peace’ (2010) 9 *Journal of African Elections* 110.

405 ACE Project ‘Electoral Institute for Sustainable Democracy in Africa (EISA)’ <http://aceproject.org/about-en/ace-partners/EISA> (accessed 5 April 2019).

provided by anyone else - from feeding the aged, caring for orphans, saving the rare leopard toad, to helping rape victims. They are the caring face of society that has become hardened to the suffering of others, and dismissive of those not strong enough or wealthy enough to care for themselves".<sup>406</sup>

These organisations are in three main legal forms: Trusts, Section 21 companies and Voluntary Associations. The Voluntary Associations are either Non-Governmental organisations (NGOs), Community-Based organisations (CBOs) or Faith-Based organisations.

The overarching legislation that currently regulates the Non-Profit sector is the Non-profit Organisations Act, 1997 (Act 71 of 1997) and the sector falls under the Directorate of Non-profit Organisations within the Department of Social Welfare.

Registration as an NPO is free and occurs through social development offices in local municipalities. The entire process of registration is supposed to take approximately two months, but takes much longer and delays prompt some applicants to approach the Directorate in Pretoria directly.

It is a criminal offence for an organisation to operate under the pretence of being a registered NPO. Most NGOs can be contacted through the South African National NGO Coalition (SANGOCO) and Southern African Non-Governmental Organisation Network (SANGONET).<sup>407</sup>

Funding of NGOs occurs through Government, philanthropy of donors and the socially aware. However, the economic downturn has led to corporates and governments alike, reducing funding support.<sup>408</sup> Furthermore, according to Rebecca Davis, even setting aside the financial crisis, international funding support has been dwindling ever since South Africa was re-classified as a middle-income country and deemed able to carry more of its financial burden. Then there's the issue of fickle donor appetites: certain causes become celebrated and then fall away".<sup>409</sup> Lastly a civil society funding expert pointed to the way in which South African NGOs were run, their financial management and their accountability as being partly responsible for funding issues.<sup>410</sup>

A civil society funding expert confirmed that South Africa is no longer considered "messed up enough to warrant throwing money at things like democracy projects anymore. There's been a shift away from funding democracy work because we've had four successful elections and our institutions are reasonably strong, so we're not on a crisis watch list in this regard".<sup>411</sup> This has been complicated by a general move towards focussing on socio-economic rights rather than on civil and political rights. However, the past ten years of corruption<sup>412</sup> seems to have unlocked funding for democracy consolidation again, albeit not in the form of voter education.

## INSTITUTIONAL FRAMEWORK

The role of civil society in post-apartheid South Africa has been about consolidating democracy. By and large, as Mottiar observed, "the role of civil society in elections often takes the form of support for the institutional processes of a democratic election as well as the more substantive development

406 NGO Pulse 'Non-governmental organisations (NGOs) play a significant role in today's society' 1 February 2018 <http://www.ngopulse.org/article/2018/02/01/non-governmental-organisations-ngos-play-significant-role-today%E2%80%99s-society#> (accessed 31 July 2020).

407 Register a non-profit organisation <https://www.gov.za> (accessed 31 July 2020).

408 Wijnberg (n 402 above).

409 R Davis 'The great NGO funding crisis, Part III: Adapt or die' *Daily Maverick* 3 April 2013 <https://www.dailymaverick.co.za/article/2013-04-03-the-great-ngo-funding-crisis-part-iii-adapt-or-die/> (accessed 31 July 2020).

410 As above.

411 As above

412 W Gumede 'Policy brief 28: How civil society has strengthened democracy in South Africa' 8 May 2018 <https://democracyworks.org.za/policy-brief-28-how-civil-society-has-strengthened-democracy-in-south-africa/> (accessed 31 July 2020).



of a democratic electorate”.<sup>413</sup> The role as described by Mottiar contrasts with that of the previous era in which voter education took centre stage and there was a lot of funding availed for it. The dearth in voter education funding has led to the Independent Electoral Commission being the main, if not the only body, driving voter education, which is one of its legislative functions. The media, through online social media platforms, does some voter education.

If President Ramaphosa’s annual address at the opening of the National House of Traditional Leaders is anything to go by, they were primarily expected to “continue to encourage all eligible voters to register and participate in the elections. We call on traditional leaders to actively promote free and fair campaigning and to ensure that all voters are able to exercise their democratic right”<sup>414</sup> Similarly, no concerted voter education program could be found amongst religious leaders and institutions.

The civil society organisations executing democracy consolidation as outlined by Mottiar are as follows: The Electoral Institute for Sustainable Democracy in Africa (EISA); Media Monitoring Africa (MMA); My Vote Counts; OpenUp and Social Surveys Institute – this table is a summary of their online compliance with the requirements in the Guidelines:

Disclosure compliance checklist	Social Surveys	EISA	MMA	My Vote Counts	OpenUp
a. Organisational aims and objectives	Yes	Yes	Yes	Yes (very detailed)	Yes
b. Membership and composition	No (not a membership organisation)	No (not a membership organisation)	No (not a membership organisation)	No (not a membership organisation)	No (not a membership organisation)
c. Details of key staff and office bearers	Yes, only board details	Yes	Yes	Yes	Yes
d. Funding sources	Yes	No	Yes	Yes (past and present)	No
e. Operational plans, methodology, manuals, civic and voter education implementation	No	No	No	No	No
f. Possible conflict of interest	No	No	No	No	No
g. Campaign funders	Yes	No	No	No	No

As can be seen from the table, proactive disclosure is a mixed bag. A possible complication is the concise descriptions used in the Guidelines,<sup>415</sup> which with refinement may elicit clearer responses.

413 Mottiar (n 404 above) 110.

414 News24 ‘Ramaphosa asks traditional leaders to help encourage voters’ All4Women 20 February 2019 <https://www.all4women.co.za/1692017/news/south-african-news/ramaphosa-asks-traditional-leaders-to-help-encourage-voters> (accessed 31 July 2020).

415 The brief descriptions in the Guidelines on access to information and elections in Africa of some of the requirements may need to be expanded upon for clarity – for example, to explain the difference between “sources of funding” and “campaign funders”.

In this assessment, it appears that most of the organisations described what they do rather than indicate their aims and objectives; they turned out not to be membership organisations; and there may be overlaps between 'sources of funding' and 'campaign funders'. Also, while necessary to disclose, the sharing of operational plans, methodology, manuals as well as civic and voter education implementation details may prove problematic for certain organisations due to competition for funding and intellectual property issues.



## SECTION 4

# IMPLEMENTATION AND RECOMMENDATIONS

## THE RIGHT OF ACCESS TO INFORMATION AND THE RIGHT TO VOTE

In the 2018 Constitutional Court judgment in the case of *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* on private funding of political parties and independent candidates, Chief Justice Mogoeng Mogoeng held that the State is under an obligation that flows from a proper reading of sections 32 (Access to Information), 19 (Political Rights) and 7(2) of the Constitution, to do everything reasonably possible to give practical and meaningful expression to the right of access to information and the right to vote. According to the Chief Justice this is because the exercise of the right to vote must be an informed choice. This means that there is a vital connection between the proper exercise of the right to vote and the right of access to information.<sup>416</sup>

The following extracts from the judgment provide general guidance on the interdependent relationship between the right of access to information and the right to vote:

[34] For every citizen to be truly free to make a political choice, including which party to join and which not to vote for or which political cause to campaign for or support, access to relevant or empowering information must be facilitated. Not only must the information be “held” in one form or another, it must also be reasonably accessible to potential voters. They need it to be able to make a quality decision to vote for a particular political party or independent candidate.<sup>417</sup>

[35] For, there is a vital connection between a proper exercise of the right to vote and the right of access to information. The former is not to be exercised blindly or without proper reflection. In this regard, Ngcobo CJ made the following observations: “In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.”<sup>418</sup>

[72] It is enough to lay down a principle that requires the State to ensure that the information be recorded, preserved and disclosable in a reasonably accessible manner and that it is not to be paid for. Millions of voting South Africans are unemployed. And even those who are employed need every Rand they earn to meet their basic necessities. Those who stand to benefit from these people’s vote or participation in the elections ought to be agreeable to a regulatory framework that facilitates the recordal, preservation and reasonable access to information that could shed more light on who they really are and whose favours they might have to return. That information is indeed essential for voting and imparting information.<sup>419</sup>

[73] More importantly, it remains the primary duty of the State to ensure that it facilitates access to information that would enhance the enjoyment of fundamental rights.<sup>420</sup>

The ACHPR Guidelines provide practical direction on what kind of information and how it should be disclosed to the public by electoral stakeholders, through the following definitions<sup>421</sup>:

***‘Information’*** includes any original or copy of documentary material irrespective of its physical characteristics, such as records, correspondence, fact, opinion, advice, advertisement, memorandum, data, statistic, book, drawing, plan, map, diagram, photograph, audio or visual record, and any other tangible or intangible

416 Parliament of the Republic of South Africa ‘Briefing note: Analysis of the Promotion of Access to Information Amendment Bill’ [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/191106Briefing\\_Note\\_-\\_Analysis\\_of\\_PAIA\\_Amendment\\_Bill.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/191106Briefing_Note_-_Analysis_of_PAIA_Amendment_Bill.pdf) (accessed 31 July 2020).

417 *My Vote Counts* 2018 case (n 224 above) para 14

418 *My Vote Counts* 2018 case (n 224 above) para 15, quoting from *President of the Republic of South Africa v M & G Media Limited* [2011] ZACC 32; 2012 (2) SA 50 (CC); 2012 (2) BCLR 181 (CC) para 10.

419 *My Vote Counts* 2018 case (n 224 above) para 28.

420 *My Vote Counts* 2018 case (n 222 above) para 29.

421 Guidelines on access to information and elections in Africa clause 1.

*material, regardless of the form or medium in which it is held, in the possession or under the control of the information holder to whom a request has been made under these Guidelines.*

**'Proactive disclosure'** refers to a regular flow of information by routinely providing information to the public without the need to make a request.

**'Publish'** means to make available in a form and manner that is easily accessible to the public and includes providing copies or making information available through broadcast and electronic means of communication.

In light of the above, it becomes especially important for electoral information holders to fully appreciate the relationship between custodianship of information on behalf of the public, and the proactive release of such information in the pursuit of mutual interests of democracy, peace and stability.

Within this context, principles of proactive disclosure, open government, transparency and public accountability need to be re-emphasised and mandated within government and the private sector. This becomes especially important at a time when there are new challenges relating to the deliberate creation and dissemination of false information to create impacts that have real consequences and threaten the stability of South Africa's democratic dispensation. An example of this is the Bell Pottinger debacle in South Africa, where a deliberate campaign was created to incite racial hatred that serves the agenda of minority interests.<sup>422</sup> Such nefarious conduct in the course of elections – whether they are at a national or local government level – in a country like South Africa has enormous implications for peace, stability and the exercise of the right to vote. Restrictions on the flow of information allow misinformation (as was seen in the Bell Pottinger matter) to flourish and demonstrates the importance of transparency to identify and distinguish fake information from real information and allowing various actors to be held accountable for generating false information. The ability to make such a distinction is of course significantly dependent on the release of information that may be interacted with in the interests of transparency and accountability.

For the 2019 elections, in recognition of the potentially negative impact of disinformation via digital platforms on the freeness, fairness and credibility of the electoral process,<sup>423</sup> the IEC and Media Monitoring Africa (MMA) launched a joint initiative to pilot a public complaints mechanism for digital disinformation and hate speech on social media and other online platforms.<sup>424</sup> Material published in contravention of legislative provisions and the South African electoral code of conduct were reviewed by a digital disinformation complaints committee. They liaised with existing complaints bodies and social media platforms and advised the IEC on ways to swiftly deal with offensive content and to counter disinformation.

This is a practical example of an intervention aimed at ensuring that citizens are able to make informed choices, based on access to credible information, when they exercise their right to vote.

The African Union Observer Mission noted<sup>425</sup> that youth were markedly absent from voting in the 2019 elections and more needed to be done to educate and encourage this group of the population to participate in the election. Social media and other online platforms provide opportunities to more effectively interact with such audiences, promoting active political participation by the public. The proactive release of real-time, accurate information through the use of diverse ICT platforms would

422 Reuters 'Bell Pottinger fights for survival after South Africa scandal' *Eye Witness News* 8 September 2017 <http://ewn.co.za/2017/09/08/bell-pottinger-fights-for-survival-after-south-africa-scandal> (accessed 31 July 2020).

423 IEC (n 10 above) 35.

424 The Real411 platform, as described in UNESCO *Elections and media in digital times* (2019) 43 <https://unesdoc.unesco.org/ark:/48223/pf0000371486> (accessed 31 July 2020).

425 AUEOM (n 49 above) clause 11.

go a long way to further strengthening the electoral processes and encourage active participation in many sectors of society in South Africa, including the youth.

It is submitted that the release of more information proactively strengthens the overall objective of holding free and fair elections. Such releases ensure widespread awareness, reduce suspicion, fear and speculation. Limitations on the flow of information should be exceptional and even then, information withheld should be released at the soonest reasonable opportunity after the justification for restriction had been addressed. The release of maximum information proactively needs to become a characteristic of the South African election landscape.

## RECOMMENDATIONS ON COMPLIANCE WITH THE GUIDELINES

As recorded in this publication, while South African electoral stakeholders already comply with many of the requirements listed in the Guidelines, there are some issues that need attention to improve pro-active disclosure of electoral information.

This section deals with recommendations on the implementation of the Guidelines and the need for reform of the enabling legislation for access to information; followed by a summary of the recommendations related to the assessment of electoral stakeholders in the previous sections; and the possible wider application of this assessment.

### 1. OVERSIGHT AND IMPLEMENTATION OF THE GUIDELINES

#### ACHPR GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA: IMPLEMENTATION

31. State Parties shall adopt legislative, administrative, judicial and other measures to give effect to these Guidelines.
32. State Parties shall facilitate the dissemination of these Guidelines to relevant electoral stakeholders, as well as all stakeholders in the electoral process such as Parliament, the Judiciary, National Human Rights Institutions and the electorate.
33. State Parties shall ensure that relevant electoral stakeholders are trained in relation to the content of these Guidelines. In particular, these Guidelines shall form part of the training curriculum for officials of Election Management Bodies, election observers, political parties, law enforcement agencies, media and internet regulatory bodies, media and online media platform providers, and civil society organisations participating in the electoral process.
34. State Parties shall, in each Periodic Report submitted to the African Commission in accordance with Article 62 of the African Charter, provide detailed information on the measures taken to facilitate compliance with the provisions of these Guidelines.

The South African Human Rights Commission, the Information Regulator and the IEC will need to jointly oversee and facilitate the implementation of articles 31 to 34 of the Guidelines.

The SAHRC has a broad mandate arising from the Promotion of Access to Information Act. With the phased implementation of the Protection of Personal Information Act, the Information Regulator will also take over the monitoring functions of PAIA which seek to ensure the right of people to access information is being complied with. However, the SAHRC will retain the responsibility to sensitise people about their civil and political rights, which will include the right to expression, to receive information and to participate.

The IEC, in conjunction with the SAHRC and Information Regulator, will need to ensure that the right to information and the right to expression are promoted and protected in the course of their electoral work and that a culture of information sharing and proactive disclosure is embedded in all spheres of government. This effort will enhance an understanding that rights are related and that the link between service delivery protests and other protest-related action which marked the electoral period is often a manifestation of the frustration for want of information around integrated development plans, budgets, delivery and action plans by communities. More significantly, the SAHRC should be able to draw on regional instruments like the Charter, Model Law, Declaration and protocols to emphasize the duty to provide information as one of the essential prerequisites to public participation and democratic agency.

In particular, based on their respective legal mandates, the SAHRC, IEC and Information Regulator will need to:

- (a) take responsibility for the promotion and dissemination of the Guidelines to relevant electoral stakeholders, as well as Parliament, the Judiciary, the Public Service Commission, the Public Protector and the electorate;
- (b) advise the Executive and Parliament on appropriate legislative, administrative, judicial and other measures to give effect to the Guidelines;
- (c) recommend to the named electoral stakeholders to, in the interim, use the Guidelines as an implementation checklist until article 31 of the Guidelines has been implemented;
- (d) consider, guide and oversee implementation of the recommendations in this report;
- (e) provide training and other support for the relevant electoral stakeholders on the implementation of the Guidelines;
- (f) assist with the preparation of regular reports on compliance with the Guidelines, for incorporation into South Africa's Periodic Reports for the African Commission in accordance with article 62 of the African Charter.

The Guidelines in respect of the elections are but one important step in setting minimum standards for the proactive release of selected information. It would behove institutions such as the SAHRC, the Information Regulator and the IEC to encourage and build confidence in the promotion of access to information and proactive disclosure beyond the minimum standards in the Guidelines.

## 2. PAIA REFORM

As demonstrated in the assessments contained in this report, to effectively deal with citizens' right to information, accountability, transparency and the demands of the digital age, a complete legislative review is needed to update and improve the efficiency of PAIA, which was promulgated nearly twenty years ago.

- (a) The South African legislative framework for access to information – PAIA and related legislation dealing with aspects of access to information – needs to be benchmarked against and updated in line with the Model Law on Access to Information in Africa and the Declaration of Principles on Freedom of Expression and Access to Information in Africa, which serve as the ideal standards for access to information laws in Africa.



(b) On proactive disclosure, the provisions of sections 15 and 52 of PAIA need to be better aligned with the Model Law's list of information that should be automatically made available without a formal request being lodged.<sup>426</sup>

(c) For public access to the proactively disclosed information, the ACHPR Declaration provides direction on the online publication of information and the use of open data standards, to be incorporated into PAIA:

Information required to be proactively disclosed shall be disseminated through all available mediums, including digital technologies. In particular, States shall proactively publish information in accordance with internationally accepted open data principles.<sup>427</sup>

(d) PAIA also needs to be amended to comply with the provisions set out in the Declaration on the duty of the state to enable citizens to exercise their access to information rights online:

States shall recognise that universal, equitable, affordable and meaningful access to the internet is necessary for the realisation of freedom of expression, access to information and the exercise of other human rights.<sup>428</sup>

States shall, in cooperation with all relevant stakeholders, adopt laws, policies and other measures to provide universal, equitable, affordable and meaningful access to the internet without discrimination ...<sup>429</sup>

(e) The application of PAIA needs to extend beyond access to records only, but to all information needed to exercise access to information rights.

(f) PAIA should be updated to include a duty to create, keep, maintain, organise and manage records, regardless of the medium of storage, to facilitate information access for the public, in line with article 6 of the Model Law and article 4 of the Guidelines.

(g) The requesting and remedial processes in PAIA need to be more expeditious, simple, clear and accessible. These reforms are particularly necessary in time-bound contexts such as elections and pandemics and where information made available proactively is inadequate or unclear, or where information has been refused or is not made available. Such reforms would include deformatising the request process, making provision for oral submissions, limiting the imposition of fees to instances where the volume of information requested places a significant financial burden on the public institution, review of the effectiveness of the public interest override clauses and the introduction of effective internal review and appeal processes for denied PAIA requests (or, in the event of non-disclosure of election-related information, the possible involvement of the Electoral Court in such appeals). Prescribed timeframes also require revision to shorten waiting periods and to allow for urgent and time bound requests such as for life threatening situations, pandemics or election matters.

426 Article 7 of the Model Law provides for the automatic disclosure of detailed administrative information, policies, contracts, licenses, permits, authorisations and public-private partnerships granted by the public body or relevant private body, reports, budget, revenue and expenditure information among several others.

427 Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019 principle 29(3) <https://www.achpr.org/presspublic/publication?id=80> (accessed 31 July 2020) (Declaration of Principles).

428 Declaration of Principles principle 37(2).

429 Declaration of Principles principle 37(3).

### 3. APPOINTING AUTHORITY

- (a) Efforts should be made to better publicise the selection and appointment processes followed when Electoral Commission vacancies are filled.
- (b) Access to the enabling legislation, the Electoral Commission Act, on the IEC website should be made more user friendly.
- (c) The IEC website should foreground the legislative and regulatory framework within which the IEC was established and within which it functions.

### 4. ELECTION MANAGEMENT BODY

- (a) The IEC should develop a voter and democracy education policy in consultation with all relevant stakeholders including political parties, security agencies, civil society and community based organisations, election observers, faith based organisations and donors, among others. This policy and voter education curricula should be proactively disclosed to the public.
- (b) Voter education should include material on the accessibility of information during election times, and the proactive disclosure obligations by electoral stakeholders listed in the Guidelines.
- (c) The IEC should proactively disclose the internal manuals that provide details on training policies for temporary election officials.
- (d) The IEC should consider publishing the nature of and determination of complaints received in regard to violations of the electoral code. This should also be published in IEC reports alongside details of the statistics on complaints and petitions received by the Commission.
- (e) Where the IEC refuses to register a particular political party, reasons for the denial of registration should also be available on the IEC's website alongside other details provided under the political party list.
- (f) In the event that a member of the Commission declares a conflict of interest in the course of undertaking their duties, such information should be proactively disclosed to the public. Further, the IEC should proactively disclose the details of paid work done by permanent commissioners outside their work in the Commission, if approved by the President.
- (g) The Commission should proactively disclose the number and details of accredited election observers for a particular election, as well as information on election observers whose applications for accreditation were rejected and the reasons thereof.

### 5. POLITICAL PARTIES AND CANDIDATES

- (a) Parties should ensure that their constitutions, policy documents, election manifestos as well as criteria and procedure for nomination and election of candidates for internal and external office are publicly accessible online.
- (b) To assist voters to easily access and better understand political parties' policies and internal democratic processes, the IEC should compel parties competing in elections to – in addition to their candidate lists – also submit their constitutions, procedures and criteria for selecting candidates and election manifestos for publication on the IEC website.

- (c) Parties should proactively disclose details of their registered membership numbers and regular membership audits; as well as records of assets, investments, membership subscriptions, donations and financial schemes, as required in article 20 (i) and (j) of the Guidelines.
- (d) Parties should publish their processes for dispute resolution and appeal mechanisms for both disciplinary matters and for disputes concerning nominations and elections.
- (e) The names of party agents or representatives responsible for or on duty at various stages of the electoral process should be published, including on the IEC and/or party websites.
- (f) The IEC, Parliament and provincial legislatures should disclose to the public details of the use of public and private funding by political parties for both campaigning and other purposes, as submitted by parties in terms of existing legislation, in compliance with article 21 of the Guidelines.
- (g) Parliament should make public the regulations in terms of s.34 of the Financial Management of Parliament Act 10 of 2009 concerning the allocation and use of funds provided by Parliament to political parties or to Members of Parliament.
- (h) The Public Service Commission should establish effective mechanisms for reporting, monitoring and enforcement of the prohibitions in the Public Service Act and the Public Service Code of Conduct on the use of state resources for a party's political purposes. This should include a requirement for public service entities to furnish the PSC with details on special measures to control state resources during the year leading up to elections. It is specifically recommended that PSC reports such as the Guides on Governance issued every five years after general elections should include details on the abuse of state resources by parties (if any), in compliance with the Guidelines.
- (i) The Office of the Public Protector should, before and during election campaigns, use its power to undertake investigations on its own initiative<sup>430</sup> into the alleged use of state resources by political parties. It should also consider more sustained and regular exercise of its public education, investigative and reporting powers in terms of the Executive Ethics Act and the Executive Code before and after election time.

## 6. ELECTION OBSERVERS

- (a) Observer missions should publicly confirm endorsements of multilateral conventions such as the Declaration of Principles for International Election Observation. They should also disclose their own codes of conduct, conflicts of interest or political affiliations, as well as their methodology, deployment plan and details of financial or non-financial assistance.
- (b) The IEC should proactively publish on its website the information disclosed by observer missions, their reports and any actions taken by the IEC in terms of the Regulations on the Accreditation of Observers.
- (c) It is also recommended that the IEC review the Regulations on the Accreditation of Observers to incorporate the minimum standards set out in the Guidelines.

430 Public Protector Act 23 of 1994 sec 6(4)(a).

## 7. LAW ENFORCEMENT AGENCIES

- (a) SAPS should proactively publish on its website all election related law enforcement agency briefings, reports, crime statistics, training plans, detailed operational and deployment plans and comprehensive budgetary and expenditure information presented to Parliament and other bodies; as well as all public statements, crime stats updates, complaints details, statistical data on deployments and incidents, communication protocols for the media and the public, as well as other relevant records to be easily accessible to the public; and also ensure post-election updates and sustained availability of the information at any point after its release.
- (b) In line with the Batho Pele principles and the spirit of PAIA, law enforcement agencies should, via training of members and reservists, instil a culture of sustained, automatic disclosure of more information to encourage and strengthen transparency, public cooperation, participation and confidence; and ensure general accessibility to information for persons with special needs, the adequacy of information in respect of detail, and the accuracy of information.
- (c) Access to information about public safety and the role of law enforcement agencies before, during and after the election should feature prominently in the IEC's voter education efforts.
- (d) Codes of conduct for joint operations applicable to all persons conducting law enforcement activities during elections should be developed. An accessible complaints mechanism should be established to speedily investigate and resolve allegations of code violations, addressing misconduct which potentially violate basic rights, such as the right to access information. Both the codes and complaints mechanisms should be popularised before the election and information about them sustained in the course of an election, including reporting on the outcomes of actions taken to enforce such codes.
- (e) Details of investigations of alleged offences by SAPS officers or members of other law enforcement agencies in respect of election enforcement activities, as well as the statistics and prosecution outcomes, should be proactively disclosed to the public to demonstrate an intent to hold officials accountable and protect the integrity of the overall electoral process.
- (f) The approach taken by SAPS to proactively share detailed information about enforcement activities in hotspots such as the Vuwani area in the Limpopo province and to sustain information flows should be extended to all high risk areas, and could be expanded to provide clear information about the ongoing management of such areas in the period after the election.
- (g) Proactive disclosure regarding the measures taken to secure safety and stability post elections builds public confidence in the elections and in enforcement activities. Inadequate information about these measures by SAPS post elections was therefore an area which requires strengthening in the future.
- (h) Information about election related crime and prosecution should be provided during all phases of the election and should continue to be released systematically and periodically beyond the post-election period, until prosecutorial outcomes may be reported. This approach will demonstrate active enforcement and follow-through to the public, providing assurance for the upholding of constitutionally guaranteed human rights and policies for future elections.

- (i) Information should be made available on the manner, form and frequency of information sharing by law enforcement structures at the community level, with civil society stakeholders, community and faith based formations and the role played by traditional authorities and traditional leaders in promoting and supporting law enforcement efforts.
- (j) SAPS and other law enforcement agencies should review and improve data management policies and train officials in creating and managing records, working with meta-data and information management systems, understanding the legal obligations in respect of basic rights such as access to information, and processes for the proactive release of accurate, timely and comprehensive information.

## 8. MEDIA AND REGULATORY BODIES

- (a) In the run-up to elections, media organisations should publish and promote their internal editorial codes and/or adherence to industry codes and guidelines applicable to election coverage, including institutional procedures to lodge complaints and sanctions for transgressions. Details and outcomes of election related complaints should also be published.
- (b) Industry codes, guidelines or regulations for elections should be publicised, with details on complaints procedures, enforcement mechanisms and sanctions; and details and outcomes of election related complaints should be published.
- (c) Editorial codes for elections should comply with the proactive disclosure requirements in article 29 of the Guidelines; to for instance make provision for media ownership disclosures, publication of criteria for the selection of election analysts, election day coverage plans, possible conflicts of interest regarding political affiliations or party support, and reporting on political pressure and intimidation of journalists.

## WIDER USE OF THIS ASSESSMENT

Other states may draw on these recommendations in their efforts to put mechanisms and procedures in place to comply with the Guidelines and to ensure that there is a conducive environment for the enjoyment of the right of access to information prior, during and after elections.

Where laws that promote access to information do not exist, efforts should be made to introduce such legislation in conformity with the Model Law on Access to Information for Africa, the Declaration on Principles of Freedom of Expression and Access to Information and the Guidelines. In the case of existing laws that do not promote proactive disclosure of information, there should be relevant amendments.

Further steps may include joint efforts by electoral institutions, human rights bodies, academia and civil society to promote the Guidelines in the run-up to elections; the development of protocols and mechanisms for online and other proactive disclosure of electoral information based on the Guidelines; provision of training for electoral stakeholders on record management, proactive disclosure and information dissemination; ensuring that the electorate know their rights regarding access to election related information; and setting up in-country and sub-regional networks to support, monitor and assess compliance with the Guidelines.

Such steps to counter the common occurrence of non-implementation of access to information principles and legislation should be prioritised and backed with the necessary resources and by appropriate institutions to promote electoral transparency and integrity.





DEMOCRACY      INDEPENDENCE      ELECTIONS  
CITIZENS      MEDIA      CREDIBILITY      RIGHTS  
GOVERNANCE      VOTE      TRANSPARENCY  
INFORMATION      FREEDOM      BALLOT

