**SPEAKING NOTES**

**LEGAL FRAMEWORK REGARDING THE PROTECTION OF JOURNALISTS**

**SANEF ROUNDTABLE – 28 SEPTEMBER 2018**

1. **Global context regarding safety of journalists**
	1. The United Nations Educational Scientific and Cultural Organisation (UNESCO) conducts a study every 2 years in which it identifies global trends in several spheres of the media industry. Some of the key findings regarding the safety of journalists from the World Trends in Freedom of Expression and Media Development: 2017/2018 Global Report prepared by UNESCO:
	2. Between 2012 and 2016, 530 journalists were killed (these are only the incidents that were brought to UNESCO’s attention), an average of two deaths per week. The good news is that there has been an overall decline in killings across Africa. However, impunity for crimes against journalists remains the norm, with justice in only one in 10 cases.
	3. Globally there has also been a substantial rise in other forms of violence against journalists, including in kidnapping, enforced disappearance, arbitrary detention and torture.
	4. Digital safety is an increasing concern for journalists across all regions, with threats posed by intimidation and harassment, disinformation and smear campaigns, website defacement and technical attacks, as well as arbitrary surveillance. Women journalists, in particular, have experienced increasing online abuse, stalking and harassment.
	5. For women journalists especially, misogynistic cyber harassment has continued to be a significant threat, potentially silencing journalists and hindering media pluralism in terms of gender diversity in media production.
	6. Threats to digital safety pose a new and evolving risk, especially in relation to online harassment and the protection of confidential sources.
	7. There have been numerous cases across all regions, and throughout democratic and other societies, of both state and non-state actors using malware to spy on journalists and activists. This trend has been facilitated by the rise of inexpensive surveillance technologies that are readily available for purchase by both state and non-stake actors alike.
	8. A 2017 survey conducted by the Council of Europe of 940 journalists throughout 47 Member States found that in the face of physical violence or coercion, 15 per cent of journalists abandon covering sensitive, critical stories, while 31 per cent tone down their coverage and 23 per cent opt to withhold information.
	9. Journalists across the globe have reported digitally-mediated threats of death, bombing, violence against themselves and family members, rape, abuse and insult.
	10. An analysis of more than two million tweets performed by the think tank Demos found that women journalists experienced approximately three times as many abusive comments as their male counterparts on Twitter.
	11. The report also finds that one of the most significant political trends impacting media systems around the world is the widepsread de-legitimation by political actors of the media. Government actors and other powerful actors initiate and engage in the process of systematic attacks on the media by trivializing it, or sometimes characterizing it as an ‘enemy’ or part of the political opposition which has widespread implications for the independence and well-being of the sector. A common tactic is to blur the distinction between mainstream news media, and the mass of unverified content on social media – this includes dismissing credible news stories as fake news.
	12. De-legitimation is a subtle and effective form of propaganda, reducing the public’s confidence in the media to perform a collective and vital function as a check on government. De-legitimating:
		1. encourages and reinforces attacks on the media by other factions in society;
		2. encourages and reinforces attacks on the media by other factions in society;
		3. has the power to intimidate journalists;
		4. disrupts public faith in the foundational principles of the function of the media and press, as well as the credibility of facts and science.
	13. The de-legitimizing can be seen as part of a greater problem of political and social polarization, including sustained attacks on the legitimacy of public institutions, including independent judiciaries, throughout the world.
2. **Domestic legal framework**
	1. The starting point is section 16(1) of the Constitution

(1) Everyone has the right to freedom of expression, which includes –

 (a) freedom of the press and other media;

 (b) freedom to receive or impart information or ideas;

 (c) freedom of artistic creativity;

 (d) academic freedom and freedom of scientific research.

* 1. In *SANDF v Minister of Defence* the Constitutional Court made the following observation on the importance of the right to freedom of expression:

Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

* 1. The media play a particular role in exercising the right to freedom of expression. Importantly our courts have acknowledged that this role does not only serve the interests of the media but the interest of the public.
	2. In *SABC v Director of Public Prosecutions* the Constitutional Court made the following observations:

This Court has also highlighted the particular role in the protection of freedom of expression in our society that the print and electronic media play. Thus everyone has the right to freedom of expression and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.

* 1. Since the advent of the Constitution our courts have through a series of cases fleshed out the attendant rights and protections that flow from the protection afforded to media freedom in our Constitution. These include:
		1. The right to attend and report on the proceedings of courts, tribunals, parliament and similar forums, which includes the right to take visual and audio recording for purpose of broadcast
		2. The right to access court papers;
		3. The right to protect the confidentiality of their sources;
		4. The High Court has interdicted a political organization from making threats, harassing and intimidating journalists online and offline, including by staging protest action at their homes or places of worship;
		5. The High Court has ruled that in the context of elections it is not acceptable for political parties to disclose the personal contact details of journalists and that there is an obligation on political parties not only to refrain from fueling threats, intimidation and harassment by their supporters against journalists but to take positive steps to call on their supporters to desist from taking such actions. The court did not accept that the alleged political affiliations or bias of a journalist can be an acceptable basis for threats, intimidation and harassment. This was based on the Electoral Code, which provides that:

Every registered party and every candidate- (a) must respect the role of the media before, during and after an election conducted in terms of this Act; (b) may not prevent access by members of the media to public political meetings, marches, demonstrations and rallies; and (c) must take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters.”

* + 1. The High Court has recently ruled that various sections of RICA are unconstitutional. One of the reasons is that the surveillance of journalists could lead to a breach of the confidentiality of their sources. Parliament has been directed to amend the legislation to deal with the issue of surveillance on journalists and the court has expressed that this should only be allowed in exceptional circumstances.
1. **International legal framework**
	1. The provisions of our Constitution as well as the case law mentioned above accords with South Africa’s international human rights obligations as well as well as the authoritative position that has been adopted on these issues by several international human rights bodies.
	2. South Africa is party to several international treaties that protect the right to freedom of expression:
	3. Article 19 of the Universal Declaration of Human Rights

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

* 1. Article 19 of the International Covenant on Civil and Political Rights (ICCPR)

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

* 1. In General Comment 34 the Human Rights Committee, which is the treaty body tasked with ensuring compliance with the ICCPR emphasized the important role of the media in democracy:

13. A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint

and to inform public opinion. The public also has a corresponding right to receive media output.

* 1. Article 9 of the African Charter on Human and People’s Rights states that:

*1. Every individual shall have the right to receive information.*

*2. Every individual shall have the right to express and disseminate his opinions within the law.*

* 1. In the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and People’s Rights in 2002, the Commission acknowledged the specific role that the media plays in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy. The African Commission is in the process of updating this Declaration and in the draft version that has been published the issue of safety for journalists receives specific attention.
	2. The issue of the safety of journalists has also received attention from the United Nations in recent years because it has been recognized as one of the key factors that inhibits media freedom.
	3. The UN General Assembly, the Human Rights Council of the UN and UNESCO have all adopted numerous resolutions which identify concerns around the safety of journalists. The UN has also adopted a Plan of Action on the safety of journalists which sets out how the UN will work with various stakeholders to implement interventions to enhance the safety of journalists.
	4. Un General Assembly Resolution 72/175 which was adopted on 19 December 2017 reflects in large part the tenor of the resolutions which have been adopted at UN level on this issue. The resolution states in relevant part:

Recognizing that the work of journalists often puts them at specific risk of intimidation, harassment and violence, the presence of which often deters journalists from continuing their work or encourages self-censorship, consequently depriving society of important information,

Deeply concerned by all human rights violations and abuses committed in relation to the safety of journalists and media workers, including killing, torture, enforced disappearance, arbitrary arrest and arbitrary detention, expulsion, intimidation, harassment, threats and acts of other forms of violence,

Expressing deep concern at the increased number of journalists and media workers who have been killed, tortured, arrested or detained in recent years as a direct result of their profession,

Recognizing that the number of people whose lives are influenced by the way information is presented is significant and that journalism influences public opinion,

Recognizing also the crucial role of journalists and media workers in the context of elections, including informing the public about candidates, their platforms and ongoing debates, and expressing serious concern that attacks against journalists and media workers increase during election periods,

Acknowledging the specific risks faced by women journalists in the exercise of their work, and underlining in this context the importance of taking a gender-sensitive approach when considering measures to address the safety of journalists, including in the online sphere, in particular to effectively tackle gender-based discrimination, including violence, inequality and gender-based stereotypes, and to enable women to enter and remain in journalism on equal terms with men while ensuring their greatest possible safety, to ensure that the experiences and concerns of women journalists are effectively addressed and gender stereotypes in the media are adequately tackled,

Acknowledging also the particular risks with regard to the safety of journalists in the digital age, including the particular vulnerability of journalists to becoming targets of unlawful or arbitrary surveillance or interception of communications, in violation of their rights to privacy and to freedom of expression,

Condemns unequivocally all attacks and violence against journalists and media workers, such as torture, extrajudicial killings, enforced disappearances, arbitrary arrest and arbitrary detention, as well as intimidation, threats and harassment, including through attacks on, or the forced closure of, their offices and media outlets, in both conflict and non-conflict situations;

Also calls upon States to tackle sexual and gender-based discrimination, including violence and incitement to hatred, against women journalists, online and offline, as part of broader efforts to promote and protect the human rights of women, eliminate gender inequality and tackle gender-based stereotypes in society;

Calls upon all States to pay attention to the safety of journalists covering events in which persons are exercising their rights to peaceful assembly and freedom of expression, taking into account their specific role, exposure and vulnerability;

Emphasizes that, in the digital age, encryption and anonymity tools have become vital for many journalists to freely exercise their work and their enjoyment of human rights, in particular their rights to freedom of expression and to privacy, including to secure their communications and to protect the confidentiality of their sources, and calls upon States not to interfere with the use of such technologies and to ensure that any restrictions thereon comply with States’ obligations under international human rights law.

* 1. A 2013 Report of the High Commissioner for Human Rights into the safety of journalists submitted to the HRC contained several recommendations on best practice in relation to securing the safety of journalists. One of the key recommendations was as follows:

Unequivocal political commitment to ensuring that journalists can carry out their work safely is a critical prerequisite to any system of protection. In this regard, a clear public position should be taken at the highest levels of government regarding the important role of journalists in society and the need to ensure their full protection from violations of their rights. States should also support and facilitate the work of media organizations and civil society groups that are concerned with the protection of journalists and freedom of expression.

* 1. The need for political buy-in to any initiatives regarding the safety of journalists is crucial and this is one of the reasons why SANEF has decided to initiate this engagement.
1. **Proposed principles for agreement**
	1. No harassment of journalists online or offline. No encouraging directly or indirectly of supporters to harass journalists online or offline. For purposes of this clause harassment will have the same meaning as in the Protection from Harassment Act 17 of 2011.[[1]](#footnote-1)
	2. No intimidation of journalists online or offline, including by making direct or implied threats against their personal safety.
	3. No intimidation or harassment of journalists with a view to forcing them to reveal their sources.
	4. No encouraging party supporters to physically accost or stage protest actions against journalists at their homes or in public spaces.
	5. A journalist’s equipment such as cameras, recording equipment and cell phones must not be confiscated or deliberately damaged.
	6. Parties will not disclose to their supporters or to the public the personal information of a journalist such as contact details, home address, email address, ID number or personal information about a journalist’s family such as the identities of their spouses, children and family members.
	7. No interception of a journalist’s private communications through electronic or other means, whether done by the party or a third party who provides the information to the political party.
	8. Engagements with female journalists must not include harmful gendered stereotypes, objectification or sexualization of the journalist whether this is done verbally, in writing or through images.
	9. No insulting of specific journalists through the use of derogatory or profane language, particularly language that is based on any discriminatory characteristics such as race, gender, disability, sexual orientation or social and ethnic origin.
	10. When there are concerns about a story, criticism or comment should be focused on the story and should not target a specific journalist who has written the story unless there is verifiable evidence of ethical misconduct by the journalist. Such evidence must be provided to the journalist in question upon request.
	11. Parties agree not to make false allegations against journalists with a view to undermining their credibility.
	12. Parties agree not to make allegations that a journalist or media organization has published a story with a view to pursuing a specific political agenda unless they have verifiable evidence to that effect which must be made available upon request.
	13. Parties agree not to ban specific media organizations or journalists from events held by the party to which the media are invited, such as press conferences and party events that are open to the media.
	14. Parties will ensure that journalists are able to cover all protest actions, rallies or marches organized by the party without any physical violence or intimidation being directed at them by party supporters.
	15. Parties will take steps to make the content of this agreement known to their supporters including by publishing it on their social media accounts and their websites.
	16. Parties have a positive obligation to intervene by making appropriate public statements whenever it is brought to their attention that their supporters are carrying out any actions which contravene this agreement, regardless of whether those supporters are acting on instructions of the party or acting of their own accord.
	17. For purposes of this agreement a party supporter is any person who (viewed objectively by a reasonable person) appears to be acting in a manner that serves or defends the interest of the party or any of its leaders, regardless of whether the person is a member of the party or declares themselves to be a supporter of the party.
1. "harassment" means directly or indirectly engaging in conduct that the respondent knows or ought to

know -

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a

related person by unreasonably -

(i) following, watching, pursuing or accosting of the complainant or a related person, or

loitering outside of or near the building or place where the complainant or a related

person resides, works, carries on business, studies or happens to be;

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a

related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles,

electronic mail or other objects to the complainant or a related person or leaving them

where they will be found by, given to, or brought to the attention of, the complainant or a

related person; or

(b) amounts to sexual harassment of the complainant or a related person; [↑](#footnote-ref-1)