



## CHAPTER 7

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# THE SOUTH AFRICAN REGULATORY REGIME IN PRINT, BROADCASTING AND ONLINE

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BY JOE THLOLOE

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## Joe Thloloe

Joe Thloloe, current director at the Press Council, is a well-respected South African journalist with over 50 years in the field. He began his life as a journalist in the early 1960s and has worked on a range of publications including *The World*, *Rand Daily Mail*, *Golden City Post and Drum magazine*, and is former deputy editor of the *Sowetan*. During the apartheid period he was harassed, detained and finally banned by the government – but refused to compromise his principles and ideals.

Joe Thloloe has also been actively involved in the media industry through the range of organisations and associations he has led. He is a former chairperson of the South African National Editors' Forum (Sanef), deputy chairman of the Southern African Editors' Forum (SAEF) and president of the Union of Black Journalists and Media Workers Association of South Africa.

Over the years, he has been honoured with a number of awards. In 1988, he was a Nieman Fellow at Harvard University and was presented with the Alan Kirkland Soga Lifetime Achiever at the eighth annual Mondi Shanduka Newspaper Awards in May 2009. In 2011, Rhodes University conferred an honorary Doctor of Laws degree on him. In 2012, he received the Order of Ikhamanga in silver, awarded for excellence in arts, culture, literature, music, journalism or sport.

Joe has played a pivotal role, not only in acting against poor journalism as press ombudsman from 2007 to January 2013, but also in defending press freedom through arguing for independent self-regulation.

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A survey of media regulation in South Africa shows that the media, like everybody else, are regulated in the first instance by the country's constitution and laws, and then by the codes they have voluntarily adopted to regulate themselves:

- the Press Council's South African Press Code;
- the Broadcast Complaints Commission's Code of Conduct for Free-to-Air Broadcasting Service Licensees and its Code of Conduct for Subscription Broadcasting Service Licensees; and
- the Digital Media and Marketing Association's Professional Code of Conduct.

The codes are the cornerstones of the regulatory systems in print, broadcasting, and online.

## STATUTORY REGULATION

South Africans have recognised that freedom of expression is one of the foundations of a democracy and for that reason they have enshrined it in the Bill of Rights, Chapter 2 of the Constitution. South Africans believe there can be no democracy unless people are allowed to have their say without fear.

Section 16 of the Bill of Rights says that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive and impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.


This wording in the Constitution conveys layers of meaning. It says that everyone has the right to freedom of expression and it also says that freedom of the press and other media are

part of this right to freedom of expression. It means that anyone is free to grab a piece of paper, scribble his or her thoughts on it, photocopy and distribute it. It means that everyone is free to choose his or her own medium, whether print, a blog, a video or even a tweet. And it means that freedom of the media is not limited to the big commercial companies, particularly nowadays when democracy has extended its warm embrace to the world of communications.

The next section in the Bill of Rights limits the right to freedom of expression by stating that it does not extend to propaganda for war; to incitement of imminent violence; or to advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

In addition to this section in the Constitution, there are other laws that restrict freedom of expression among other freedoms (for example, we have laws against trespassing). At the heart of these restrictions is the legislators' intention to ensure that people's rights are not violated by others under the guise of enjoying their own rights. In its code, the press acknowledges that it is subject to the same rights and duties as is the individual.

The media can and often are penalised by the civil or criminal courts for violating laws. The courts have awarded damages for defamation – for example R50 000 and costs awarded by the Supreme Court of Appeal to Mr Wallied Suliman of Cape Town in 2004, when he sued the Cape Times for R3 million for defamation for publishing his picture and a story that said he was one of three suspects arrested at the Cape Town airport just before they boarded a flight to Egypt.



The newspaper alleged the three were arrested in connection with a bomb blast in Cape Town. An important question then is: why is the press so vehemently opposed to the statutory media appeals tribunal when the state already has a role in regulating the media?

In its review, the Press Council argues: 'When the state gets involved in deciding what good journalism is, drawing up a code of practice and enforcing it, it would amount to taking the right to decide on what may or may not be published in a newspaper or magazine away from the newsroom and locating it in an external body. It would be limiting the right to press freedom.'<sup>1</sup>

The Council's 'firm view' is 'that state involvement of any kind in press regulation is incompatible with the constitutional value of media freedom. This includes involvement by Parliament, which is just as much an arm of the state as the executive. Democracy is not just exercised through the ballot box, and the elected majority does not get to determine arrangements in all areas of public life.'<sup>2</sup>

The Press Freedom Commission, an independent body created by the industry organisations Print and Digital Media South Africa and the South African National Editors' Forum and led by retired chief justice Pius Langa, arrived at the same conclusion from a different perspective: 'Commissioners analysed ... the responses received from the public via the oral and written submissions. The overwhelming majority preferred a model that characterised a form of regulation that involved public members and the press without state involvement, where press members were not dominant. It also looked at

models from the international experience and matched the analysis to the Bill of Rights in the SA Constitution.'<sup>3</sup>

## THE INSTITUTIONS

The three industry institutions that deal with regulation are the Press Council, the Broadcast Complaints Commission (BCCSA) and the Digital Media and Marketing Association (DMMA). The Press Council was founded by industry associations: the then Print Media South Africa (PMSA) now renamed Print and Digital Media South Africa (PDMSA); the Forum of Community Journalists (FCJ); the Association of Independent Publishers (AIP); and the South African National Editors' Forum (Sanef). Its main aim and objective is 'to promote and to develop ethical practice in journalism and to promote the adoption of and adherence to those standards by the South African press'.<sup>4</sup>

The BCCSA was formed by the National Association of Broadcasters of South and Southern Africa ('the NAB') with the objectives of ensuring 'adherence to high standards in broadcasting and to achieve a speedy and cost effective settlement of complaints against full members of NAB who have submitted themselves to the jurisdiction of the BCCSA and its Code'.<sup>5</sup>

The DMMA is an association of online publishers, which has among its objectives to 'develop and promote standards across all aspects of South African digital media and marketing industry'.<sup>6</sup>

## THE CODES

These address ethical issues in a way that the law does not. For example, the opening line of the Press Code states: 'The press exists to serve

<sup>1</sup> Review of Press Council of South Africa, August 2011, p 23.


<sup>2</sup> Op.cit. p 24

<sup>3</sup> Press Freedom Commission, Report on Press Regulation in SA, 2012, p 21, 2012. Accessed at [www.presscouncil.org.za](http://www.presscouncil.org.za).

<sup>4</sup> Constitution of the Press Council of South Africa, Section 2. Accessed at [www.presscouncil.org.za](http://www.presscouncil.org.za).

<sup>5</sup> Section 2 of BCCSA Constitution. Accessed at [www.bccsa.co.za](http://www.bccsa.co.za).

<sup>6</sup> DMMA Constitution. Accessed at [www.dmma.co.za](http://www.dmma.co.za).



society'. There is no law that places an obligation on the press to serve society: such a law would limit the freedom of expression guaranteed in the Constitution. Society has given journalists the right to express themselves, with or without the intention to 'serve' society. It is enough for society that a journalist's voice is heard in the marketplace of ideas. The more than 1 000 publications that subscribe to the Press Code have, however, voluntarily taken on the responsibility of 'serving' society and that is way beyond the obligations that the law imposes on them.

## THE PRESS CODE

The Press Code in South Africa has a longer history than the other media codes because online publishing is relatively new and broadcasting has only recently been freed from the National Party's iron control.

It is ironic that as we enter the teen years of the twenty-first century, with threats by the ANC to create a statutory media appeals tribunal receding, we remember that the system of press self-regulation was developed as the industry's defence against the threats of state regulation by the National Party government in the 1960s. The industry established its own code of practice and a mechanism to enforce it – both of which have changed over the decades. The current code came into operation at the beginning of 2013 after a two-year review process completed by both the Press Council and the Press Freedom Commission.

In the introduction to its Review, the Press Council elaborated on why it had embarked on the two-year review process: 'The Press Council of SA, in its current incarnation, is approaching the end of its first five-year term, and this is an ap-


propriate time to review its workings. It is also in a situation where it must respond to political pressures – the ANC resolved at its Polokwane conference in 2007 to investigate the desirability of creating a statutory media appeals tribunal (MAT). This resolution was amended at the ANC's National General Council in Durban in September 2010 to a request to Parliament to investigate all forms of press regulation, with the intention of deciding which is best for South Africa.<sup>7</sup>

The Press Council review was the first stage. The second stage started when the Council handed its report to the industry bodies that constituted the Council – at the time the South African National Editors Forum (Sanef), the Newspaper Association of SA, the Forum of Community Journalists, the Magazine Publishers' Association of SA and Association of Independent Publishers of SA – and they, in turn, chose to hand the review to the PFC to examine it and conduct its own investigation to recommend what it deemed to be the most desirable structure and process.

The new code that resulted was developed after the Press Council had looked at more than 100 codes from around the world, including those of our neighbours on the continent. It is thus a compilation of the best from South Africa and around the world.

The preamble codifies the philosophical foundations for the journalism of the publications that subscribe to it: 'to serve society'; 'to enable citizens to make informed judgments on the issues of the day'; 'our work is guided at all times by the public interest, understood to describe information of legitimate interest or importance to citizens'; 'we commit ourselves to the highest standards of excellence, to maintain credibility and keep the trust of our readers'; 'always

<sup>7</sup> ANC conference resolutions: On communications and the battle of ideas. Accessed at <http://www.anc.org.za/docs/res/2013/resolutions53r.pdf>



striving for truth, avoiding unnecessary harm, reflecting a multiplicity of voices in our coverage of events, showing a special concern for children and other vulnerable groups, and acting independently’.

The code then goes on to prescribe what good journalists should do, and should refrain from doing, when gathering news and reporting. At the core of the code is the prescription: ‘The press shall take care to report news truthfully, accurately and fairly ... in context and in a balanced manner, without any intentional or negligent departure from the facts...’

On the coverage of news, the code covers:

- Gathering of news
- Reporting of news
- Independence and conflicts of interest
- Dignity, reputation and privacy
- Discrimination and hate speech
- Advocacy
- Comment
- Children
- Violence
- Headlines, posters, pictures and captions
- Confidential and anonymous sources
- Payment for articles

Almost all newspapers and magazines subscribe to the Press Code. The bulk of them are members of PDMSA, the Forum of Community Journalists and Association of Independent Publishers.


## **THE BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA**

In order to understand regulation in broadcasting, we need to look at the broader context and

then locate the Independent Communications Authority of South Africa (Icasa) and the BCCSA. On the eve of democracy at the beginning of the 1990s, the broadcasting landscape changed radically. The state broadcaster, previously the only broadcaster through SABC radio and television, was transformed into a public service broadcaster and numerous new players were added. The post-1994 parliament enacted legislation to enable first the Independent Broadcasting Authority and then its successor Icasa to regulate electronic communications in South Africa ‘in the public interest’. The reason for the sharp difference between print and broadcasting is that Icasa manages a limited national asset, our radio frequency spectrum. Parliament wrote the mandate for Icasa’s management of this asset in the Electronic Communications Act, which says:

the broadcast authority has to ‘ensure that broadcasting services, viewed collectively –

- i) promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all language and cultural groups and provide entertainment, education and information;
- ii) provide for regular –
  - aa) news services;
  - bb) actuality programmes on matters of public interest;
  - cc) programmes on political issues of public interest; and
  - dd) programmes on matters of international, national, regional and local significance;
- iii) cater for a broad range of services and specifically for the programming needs



of children, women, the youth and the disabled;

- protect the integrity and viability of public broadcasting services;
- ensure that, in the provision of public broadcasting services –
  - i) the needs of language, cultural and religious groups;
  - ii) the needs of the constituent regions of the Republic and local communities; and
  - iii) the need for educational programmes, are duly taken into account;
    - ensure that commercial and community broadcasting licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in the Republic;
    - ensure that broadcasting services are effectively controlled by South Africans.

As a result of this mandate nobody is allowed to broadcast without a licence from Icasa, and the licences are doled out carefully in the public interest. Icasa has the powers to stipulate the conditions for the broadcasting licence and these include adherence to Icasa's code of conduct.

The members of the National Association of Broadcasters (NAB) acknowledged the Icasa code, but preferred a system similar to that enjoyed by the press. The NAB negotiated with the Independent Broadcasting Authority that its members be exempted from the IBA code if they subscribed to an NAB Code. The negotiations resulted in the formation of the BCCSA in 1993.


The Electronics Communications Act exempts 'a broadcasting service licensee who is a member of a body which has proved to the satisfaction of the Authority that its members subscribe and adhere to a code of conduct enforced by that body by means of its own disciplinary mechanisms, provided such code of conduct and disciplinary mechanisms are acceptable to the Authority.'

The BCCSA has two codes, one for free-to-air broadcasting service licence holders and the other for broadcasters that provide subscription services. Both codes have their roots in the statutory regulation of broadcasting. Over the years, the BCCSA's codes and the Icasa code have grown very close to each other. There are also striking similarities between the broadcasting codes and the much older Press Council Code. On some matters related to news and newsgathering, for example, identical words are used – largely because the ethical issues that media have to grapple with are the same the world over and across technical platforms.

**Table 1: Comparison between the section on news in the Press Code and in the broadcasting codes**

PRESS COUNCIL'S CODE	BCCSA AND ICASA CODES
<p><b>2. Reporting of News</b></p> <p>2.1. The press shall take care to report news truthfully, accurately and fairly.</p> <p>2.2. News shall be presented in context and in a balanced manner, without any intentional or negligent departure from the facts whether by distortion, exaggeration or misrepresentation, material omissions, or summarisation.</p> <p>2.3. Only what may reasonably be true, having regard to the sources of the news, may be presented as fact, and such facts shall be published fairly with due regard to context and importance. Where a report is not based on facts or is founded on opinion, allegation, rumour or supposition, it shall be presented in such manner as to indicate this clearly.</p> <p>2.4. Where there is reason to doubt the accuracy of a report and it is practicable to verify the accuracy thereof, it shall be verified. Where it has not been practicable to verify the accuracy of a report, this shall be stated in such report.</p> <p>2.5. A publication shall seek the views of the subject of critical reportage in advance of publication; provided that this need not be done where the publication has reasonable grounds for believing that by doing so it would be prevented from publishing the report or where evidence might be destroyed or sources intimidated. Reasonable time should be afforded the subject for a response. If the publication is unable to obtain such comment, this shall be stated in the report.</p> <p>2.6. A publication shall make amends for publishing information or comment that is found to be inaccurate by printing, promptly and with appropriate prominence, a retraction, correction or explanation.</p> <p>2.7. Reports, photographs or sketches relating to indecency or obscenity shall be presented with due sensitivity to the prevailing moral climate. A visual presentation of explicit sex shall not be published, unless public interest dictates otherwise.</p> <p>2.8. Journalists shall not plagiarise.</p>	<p><b>11. News</b></p> <p>(1) Broadcasting service licensees must report news truthfully, accurately and fairly.</p> <p>(2) News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by:</p> <p>(a) Distortion, exaggeration or misrepresentation.  (b) Material omissions; or  (c) Summarisation.</p> <p>(3) Only that which may reasonably be true, having reasonable regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with reasonable regard to context and importance.</p> <p>(4) Where a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate, clearly that such is the case.</p> <p>(5) Where there is reason to doubt the correctness of the report and it is practicable to verify the correctness thereof, it must be verified. Where such verification is not practicable, that fact must be mentioned in the report.</p> <p>(6) Where it subsequently appears that a broadcast was incorrect in a material aspect, it must be rectified forthwith, without reservation or delay. The rectification must be presented with such a degree of prominence and timing as in the circumstances may be adequate and fair so as to readily attract attention.</p> <p>(7) The identity of rape victims and other victims of sexual violence must not be divulged in any broadcast, whether as part of news or not, without the prior valid consent of the victim concerned.</p> <p>(8) Broadcasting service licensees must advise viewers in advance of scenes or reporting of extraordinary violence, or graphic reporting on delicate subject-matter such as sexual assault or court action related to sexual crimes, particularly during afternoon or early evening newscasts and updates.</p> <p>(9) Broadcasting service licensees must not include explicit or graphic language related to news of destruction, accidents or sexual violence which could disturb children or sensitive audiences, except where it is in the public interest to include such material.</p>





There are some marked differences between the press and the broadcasting codes because of technical differences between them. For example, the Press Council emphasises the treatment of children as the subjects of stories, while in their codes the broadcasters put emphasis on the material to which children are exposed.

Broadcasters have a watershed period – between 21h00 and 05h00 for free-to-air television and between 20h00 and 05h00 for subscription television – before which programming ‘which contains scenes of explicit violence and/or sexual conduct and/or nudity and/or grossly offensive language intended for adult audiences must not be broadcast’. The section on children in the Press Code starts with a quotation from Section 28.2 of the Bill of Rights in the South African Constitution, which states: ‘A child’s best interests are of paramount importance in every matter concerning the child.’ It then proceeds: ‘The press shall therefore exercise exceptional care and consideration when reporting about children under the age of 18. If there is any chance that coverage might cause harm of any kind to a child, he or she shall not be interviewed, photographed or identified unless a custodial parent or similarly responsible adult consents, or a public interest is evident.’

## **DIGITAL MEDIA AND MARKETING ASSOCIATION’S CODE**

The DMMA describes itself on its website as ‘an independent, voluntary, non-profit association focused on growing and sustaining a vibrant and profitable digital industry within South Africa’. It says that it currently represents over 205 members, ‘including local online publishers and creative, media and digital agencies, between them

accounting for more than 16 million local unique browsers and 440 million page impressions’.

Broadly, the DMMA code addresses the same editorial ethical issues as do the BCCSA and the Press Council. On content, for example, it says:


A member shall not intentionally or knowingly publish content that:

- contains a visual presentation of explicit violent sexual conduct, bestiality, incest or rape or extreme violence which constitutes incitement to cause harm;
- results in any unreasonable invasion of privacy;
- encourages or incites any person to engage in dangerous practices or to use harmful substances;
- induces or promotes racial disharmony;
- causes grave or widespread offence;
- degrades, defames or demeans any person; and/or
- is illegal or unlawful.

These principles echo the press and the BCCSA codes. The DMMA code goes into the technicalities of online publishing in the same way that the BCCSA Code goes into the technicalities of broadcasting.

## **STRUCTURES THE PRESS COUNCIL**

The Press Council, the custodian of the Press Code, is the body that has to ultimately sanction any changes. As a result of its review, a revamped Press Council was appointed at the beginning of 2013. This council – a system of ‘independent co-regulation’ – is now chaired by retired Deputy Judge President Phillip Levisohn, formerly of the KwaZulu-Natal High Court, and



has six press and six public representatives. This is a change from the outgoing Press Council that was chaired by a press representative and had six press and five public representatives voting at any given time. The new structure has given a bigger voice to non-industry representatives.

Industry associations that constitute the Press Council nominate the press representatives. The public members are selected by an appointments panel chaired by a retired judge, this time by retired Constitutional Court Justice Yvonne Mokgoro.

The council does not adjudicate when there are complaints but, rather, oversees the functioning of the entire system, which includes the adjudication system, with a public advocate, a press ombudsman and a panel of adjudicators chaired by retired Gauteng Judge President Bernard Ngoepe.

## **THE BCCSA**

A committee consisting of the chairperson of the BCCSA, the chairperson of the NAB and two external people appointed by the BCCSA and chaired by an external person, appoints the 12 commissioners of the BCCSA for five years. Six commissioners are appointed 'as a result of their interest and/or expertise in the broadcasting media' and six are appointed 'as a result of their interest and/or expertise in matters which relate to the interests of viewers and or listeners'. The chairperson of the BCCSA is appointed for a term of five years at the annual general meeting of the Commission, and may not necessarily be a member of the Commission.

## **THE DMMA**

The members of the DMMA are online publishers/marketers and advertisers. They elect an

executive committee of eight people to manage day-to-day affairs.

## **COMPLAINTS PROCEDURES PRESS COUNCIL**

In the revamped Press Council, the public advocate (a newly created position, held by Latiefa Mobarra) receives all complaints and acts as the complainants' champion throughout the process. The public advocate has 15 working days in which to negotiate an amicable settlement with the publication on behalf of the complainant. If no settlement is reached in that period, the complaint is escalated to the ombudsman's office. Ombudsman Dr Johan Retief may decide the matter on the papers submitted to him or he may have a hearing to listen to evidence from the complainant and from the publication. For the hearing, he sits with one public representative and one press representative from a pool described as the 'panel of adjudicators'.

The decisions of this ombudsman's panel are taken by majority vote. After a ruling, either party may appeal to the chair of appeals, Judge President Ngoepe. If the chair of appeals does grant leave to appeal, he hears the appeal with one press representative and up to three public representatives drawn from the panel of adjudicators. The press and public representatives on this appeals panel will be different from the representatives who heard the matter at the ombudsman's level.

The Press Council no longer bars parties whose complaints have been dealt with from asking the courts to review the decision. The Council has done away with the waiver that complainants had to sign to agree that they would not approach a court or another tribunal on a complaint that the Council had dealt with.



## BCCSA

The BCCSA's registrar receives all complaints and the BCCSA chairperson appoints an adjudicator or convenes a tribunal to hear the complaint. The tribunal consists of the chairperson and one listener/viewer representative, and one representative of the electronic media. Decisions are by majority vote. The BCCSA still insists that complainants sign a waiver: 'When at any stage of the proceedings, the chairperson is of the opinion that it is in the interest of fairness that a complainant must waive his or her rights to further legal recourse, the chairperson shall require the complainant to waive such rights. If a complaint deals with a matter already before a South African Court the Commission will not consider it.'

## DMMA

The DMMA has had very few complaints – 12 in 2012. The complainant sends an e-mail and the executive committee will take it up with the representative of the company 'and usually things are resolved amicably at this point', according to Director Theresa Vitale. She says that because of a recent hate speech complaint, however, the DMMA has decided to appoint a regulatory person to its board 'to advise on how to determine what qualifies as hate speech, especially if it has been removed from a specific site and the process going forward'.<sup>8</sup> The complaints that DMMA has received in the past year relate to hate speech, defamation, incorrect quotes, terms and conditions on sites, advertisers who are not happy with campaign results, copyright, and spam.

## SANCTIONS PRESS COUNCIL

The Press Council's complaints procedures provides for a caution or reprimand for the publication; apologies; publication of the findings, and the right of reply. The Press Council does not impose monetary fines for content, but does provide for such fines, for suspension or even for the expulsion of publications from the system if they fail to appear for adjudication hearings or for repeated non-compliance with the rulings of the office. In the lifespan of the last Press Council, defiance of that kind has never been displayed by any publication that subscribes to the Press Code.

## BCCSA

In addition to the same sanctions that the PCSA can impose, the BCCSA has the power to impose fines of up to R60 000. However, in 17 years and more than 16 000 complaints registered by the end of 2011, the BCCSA has imposed fines 'maybe 45 times',<sup>9</sup> the largest being R30 000 twice levied on the SABC.

Recently the BCCSA imposed a fine of R15 000 on a broadcaster which had repeated an offence, publishing adult material before the watershed period, for the seventh time. We should, however note that the fines were not related to editorial content, but to breaches of the broadcaster's licence conditions.

## DMMA

The DMMA has not had to wield the big stick, but it does have it in its arsenal. A member may be suspended 'for a defined period or until such time that the member can demonstrate to the

<sup>8</sup> E-mail correspondence between Vitale and Thlooe.

<sup>9</sup> Chairperson of the BCCSA, Kobus van Rooyen, quoted in Review of Press Council, August 2011, p 51.

Exco's satisfaction that the breach has been remedied or corrective measures have been undertaken'.<sup>10</sup> The member could even be expelled.

## CONCLUSION

We have seen the areas where the regulatory regimes in print, broadcast and online are similar, and where they differ. What is clear from this survey is that if the country is to enjoy good journalism, journalists have to be

held accountable – citizens should know the various codes and hold publications to what they voluntarily promise to deliver.

This chapter has not provided detailed comparison with practices in other countries, but this brief survey does indicate that our laws and the practices of the media are in line with the best around the world. South Africa still respects freedom of expression and has refrained from statutory regulation that would restrict that right for its citizens.