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**TO: SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF FREEDOM
OF OPINION AND EXPRESSION**

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SUBMISSION BY MEDIA MONITORING AFRICA:

GENDER JUSTICE AND THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION

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INTRODUCTION

1. Media Monitoring Africa (MMA) welcomes the opportunity to provide this submission to the Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression (Special Rapporteur) regarding gender justice and the right to freedom of opinion and expression. MMA commends the Special Rapporteur on selecting this thematic area for the upcoming report to the General Assembly, as it is one that urgently needs to be addressed in order to ensure the full realisation of fundamental rights, both on- and offline.
2. MMA's submission focuses specifically on the experiences of women journalists in South Africa. In preparing this submission, MMA interviewed Janet Heard, the Managing Editor of the Daily Maverick, in order to get a first-hand account of the experiences of women journalists in the country. Heard's comments are attached to this submission and marked as "Annexure A". Additionally, MMA has included various case studies from South Africa that highlight the extent of the challenges and concerns.
3. Having had regard to the specific questions posed by the Special Rapporteur, this submission is structured as follows:
 - 3.1. **First**, an overview of MMA.
 - 3.2. **Second**, certain overarching considerations.
 - 3.3. **Third**, our submission regarding the barriers, challenges and threats faced by women journalists in exercising their freedom of opinion and expression.
 - 3.4. **Fourth**, our submission regarding the relevant legal frameworks.
 - 3.5. **Fifth**, our submission regarding the measures that can be taken by relevant actors to respect, protect and promote the rights of women journalists.
4. These are dealt with in turn below.

OVERVIEW OF MEDIA MONITORING AFRICA

5. MMA is a not-for-profit organisation that has been monitoring the media since 1993. MMA's objectives are to promote the development of a free, fair, ethical, and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are media ethics, media quality and media freedom.

6. MMA has over 28 years' experience in media monitoring and direct engagement with media, civil society organisations, state institutions and citizens. MMA is the only independent organisation that analyses and engages with media according to this framework. In all of our projects, we seek to demonstrate leadership, creativity and progressive approaches to meet the changing needs of the media environment.
7. Of relevance to the present submission, we draw attention to the fact that, in 2019, MMA launched the Real411, which is a publicly accessible online reporting platform for members of the public to report incidences of harassment, hate speech, incitement and disinformation. In doing so, MMA has partnered with various organisations, including the South African National Editors' Forum (SANEF), the South African Human Rights Commission (SAHRC), the Independent Electoral Commission (IEC) and the Press Council of South Africa (PCSA), as well as various social media platforms. The Real411 seeks to provide an independent, transparent and accountable complaints mechanism to address online harms, including the harassment of women journalists online.
8. For more information about MMA, please visit: www.mediamonitoringafrica.org.

OVERARCHING CONSIDERATIONS

Constitutional underpinning

9. As a point of departure, MMA notes that the Constitution of the Republic of South Africa, 1996 (the Constitution) is the supreme law of the country,¹ which contains an extensive and progressive Bill of Rights. As explained therein, the Bill of Rights "is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."² The Bill of Rights applies to all law, and binds both the state and private actors, to the extent applicable.³
10. The Bill of Rights enshrines the right to freedom of opinion and expression, including press freedom.⁴ The right to freedom of opinion and expression does not extend to propaganda for war, incitement of imminent violence, or the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes

¹ Section 2 of the Constitution.

² Section 7(1) of the Constitution.

³ Section 8 of the Constitution.

⁴ Section 16(1) of the Constitution.

incitement to cause harm.⁵ In addition to this internal limitation provision, the Bill of Rights further provides that a right may only be limited by a law of general application, and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁶

11. The South African courts have repeatedly affirmed the importance of the right to freedom of expression, including media freedom. The Constitutional Court has described it as “a *sine qua non* for every person’s right to realise her or his full potential as a human being”.⁷ It is both a fundamental right in itself, as well as a crucial enabling right necessary to realise an array of other rights and the founding values contained in the Constitution. In *SANDU*, the Constitutional Court held:⁸

“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.”

12. While recognising the indispensable role that the media play in fostering democracy and the free flow of information, the Constitutional Court has also emphasised the duty of the media to be “scrupulous and reliable”:⁹

“In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If

⁵ Section 16(2) of the Constitution.

⁶ Section 36 of the Constitution.

⁷ *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Others* [1996] ZACC 7; 1996 (3) SA 617 (CC) at para 26.

⁸ *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (4) SA 469 (CC) (*SANDU*) at para 7.

⁹ *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) at para 24.

they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16.”

13. MMA submits that any threats, harassment or intimidation of women journalists fundamentally undermines the right to freedom of opinion and expression, including media freedom, and imperils the ability of the media to discharge its constitutional obligations. A free press can only effectively function if the safety of journalists is respected, protected, promoted and fulfilled. This entails both a positive and negative obligation to ensure that steps are taken to realise media freedom and to hold to account those who seek to impede it.

Lack of enforcement and accountability

14. Despite a firm constitutional underpinning and several laws that seek to realise gender justice in the country, MMA remains deeply concerned by the lack of enforcement and accountability that occurs in practice. For instance, in the context of the non-consensual sharing of intimate images, both the Films and Publications Amendment Act 11 of 2019 (FPAA) and the Cybercrimes Act 19 of 2020 have been signed into law to address this issue, but neither of them has been brought into force as yet.
15. At a practical level, there have been a plethora of reports that the South African Police Service lack the training (including sensitivity training) or resources to appropriately investigate complaints of harassment and other offences, particularly when these take place online. Even where women journalists are harassed or threatened in the public domain, accountability for such offences has been a rarity. This has a chilling effect on the right to freedom of expression, and may result in women journalists self-censoring in order to avoid being trolled or being the recipients of other impermissible conduct.

Media and information literacy

16. South Africa remains one of the most unequal countries in the world, with the digital divide following a similar trajectory to the socio-economic divide in the country. Data prices remain exorbitantly high, with the Competition Commission of South Africa having described them as being “too high anti-poor”.¹⁰ Without proactive measures taken to bridge the digital divide in South Africa, women are at risk of being excluded from realising their fundamental rights online. In the context of the

¹⁰ TimesLive, “SA data prices ‘too high and anti-poor’ says Competition Commission”, 2 December 2019, accessible [here](#).

media, this includes excluding upcoming women journalists, bloggers, citizen activists and a range of others from participating in the public discourse.

17. However, access alone is insufficient. This must be accompanied with the relevant media and information literacy skills to ensure that when women do seek to exercise their rights online, they are able to do so safely and securely. The need for media and information literacy skills extends to all segments of the population, as the onus should not rest on women alone to protect themselves; rather, all members of the public should be made aware that there are significant consequences for committing offences online.

BARRIERS, CHALLENGES AND THREATS FACED BY WOMEN JOURNALISTS

18. Women journalists in South Africa face a wide range of barriers, challenges and threats. A selection of these are highlighted below, with practical examples from the experiences of women journalists in South Africa.

Harassment

19. According to journalist Pontsho Pilane, “dealing with harassment is part of the job” for women journalists.¹¹ Pilane explains that she oftentimes has to be accompanied by a male counterpart in order to perform her duties. As explained by Pilane about her experiences in reporting in the field:

“In mid-2013, I accompanied our (male) editor to Alexandra township to cover a story about allegations that ballot papers had been tampered with during national election. The township had erupted in violence as a result. Every time we separated even just for a minute I would get unsolicited advances from the men that I was interviewing.

Their advances ranged from asking me out on a date or for my phone number while scanning me from head to toe. Some said they would only talk to them if I accepted their advances. One man threatened to stone my editor; among his many sexist remarks, he said “*Ufeba nalabelungu, ubaletha ekasi lethu*” (You are whoring around with these white people and bring them to our neighbourhood). His contempt and anger was directed at me.

Nothing was different in Marikana, or has been in any other place I have reported. Men continuously feel the need to objectify me no matter how professional I try to be. While covering Marikana, a man pulled down his

¹¹ Daily Vox, “Female journalists: Dealing with harassment is part of the job”, undated, accessible [here](#).

pants and exposed himself to me; it was this incident that motivated us even more strongly to start #sexistSA.”

20. Pilane notes further that she raised this matter with her colleagues, “not only out of concern for my safety, but also because I felt I was unable to do my job efficiently because of such harassment”. According to Pilane, all the other female journalists she spoke to had the same concerns and their own stories about being harassed on the job, with the situation being worse for black journalists than for others. In Pilane’s words: “Our experiences are not made special because we are journalists and because this is just an occupational hazard. The issue here is gender-specific violence and the fact that women of colour, especially black women, bear the brunt of the violence.”

Physical violence and condonation

21. In September 2020, eNCA reporter Nobesuthu Hejana was pushed and shoved by members of the Economic Freedom Fighters (EFF), a leading opposition party in South Africa.¹² In response to this, a senior member of the EFF, Mbuyiseni Ndlozi, responded to this incident in a tweet by condoning the violence, stating that: “I really do not see harassment here. Merely touching her is not harassment. The touch has to be violent, invasive, or harmful to become harassment”.¹³
22. SANEF issued a statement in response to this, demanding an apology to Hejana and the women of South Africa.¹⁴ SANEF also called on the Gender Commission and Parliament to investigate the matter. SANEF described the tweet as “misogynistic”, and went on to state as follows:

“While it is unacceptable for anyone to be touching another person without their consent, in a country like ours, with alarming cases of gender based violence, it is horrifying that a member of parliament finds it okay for a group of men, to be harassing a woman.

It is equally horrific that Ndlozi thinks it is okay to tell women what constitutes harassment.

It is ironic that the incident happened during a protest by EFF, fighting for the dignity of black women and they themselves harassed a black woman.

¹² eNCA, “EFF slams harassment of eNCA crew”, 9 September 2020, accessible [here](#).

¹³ Independent Online, “Mbuyiseni Ndlozi lambasted for defending manhandling of eNCA reporter Nobesuthu Hejana”, 10 September 2020, accessible [here](#).

¹⁴ SANEF, “SANEF demands EFF apology”, 9 September 2020, accessible [here](#).

...

Women journalists have reported being groped, sexually harassed and have reported lude comments being made to them.

Political reporters in particular have also decried newsmakers commenting about the size of their bums and breasts, hitting on them and telling them what they should wear when coming for an interview.”

23. SANEF consequently called on all political leaders – both male and female – to urge their supporters to respect women journalists and allow them to do their work in safety, free from intimidation and harassment.

Online defamation

24. Earlier this year, SANEF noted “the harrowing online attack on another female journalist by a senior politician.”¹⁵ In this instance, the President of the African National Congress (ANC) Women’s League, Bathabile Dlamini, singled out journalist Qaanitah Hunter on Twitter following a story authored by Hunter titled “Bathabile Dlamini faces resistance over calls for ANCWL to support Magashule”.
25. In her tweet, Dlamini accused Hunter of deliberately “spreading lies” and being “bankrolled” by a “Master” to “destroy the ANC”. Her tweets further referred to Hunter as “misogynistic” and “an insult to the struggle for women’s emancipation”, and labelled her as an “information peddler”.
26. As explained by SANEF, there is ample evidence to show that the naming and targeting of journalists online leads to further harassment and intimidation by political party supporters, sometimes physical or in the form of death threats. In response to the tweets, News24’s lawyers called for an unconditional retraction of the accusations and for an apology to be published on Twitter and other platforms, noting the defamatory nature of the statements.

Trolling and disinformation

27. According to journalist Ferial Haffajee: “Not one of a suite of criminal cases laid against the EFF and its supporters for violence against journalists has got out of the starting blocks, suggesting that the party enjoys virtual impunity”.¹⁶ Haffajee has also noted that she and journalists who had written at length about state capture

¹⁵ SANEF, “SANEF shocked at Bathabile Dlamini’s attack on woman journalist”, 13 May 2021, accessible [here](#).

¹⁶ Daily Maverick, “An army of trolls marches on in mindless violence – and nobody is stopping them”, 7 March 2019, accessible [here](#).

had been victims of trolling on social media.¹⁷ For instance, Haffajee was linked to a tweet purporting to be from the Huffington Post, which said: “Ferial Haffajee: #Gordhan is clearly WMC stooge, going out of his way to clip wings of #Guptas #Oakbay”. The rest of the account comprised retweets of other posts that accused Pravin Gordhan, the then-Minister of Finance, of being a stooge for white monopoly capital and controlling certain journalists, including Haffajee. Another post, on a fake City Press website, has a picture of a woman sitting on a man’s lap with Haffajee and businessman Johann Rupert’s faces photo-shopped onto the bodies.

28. According to Haffajee, this has been an ongoing campaign. Haffajee noted that: “It’s all coming from what’s called an automated Twitterbot, so it’s a very orchestrated propaganda campaign.” Despite having reported this to Twitter, Haffajee noted that there are so many thousands that it becomes a very difficult thing to do. Haffajee also received a response from Twitter stating that: “Twitter allows parody, commentary, and fan accounts ... in full compliance with our parody, commentary, fan account policy”.

29. In Haffajee’s words:

“Technology has made it really simple to create fake sites, and they’re not parodies ... These are actual fake news sites meant to deceive the public.

All you need is a free design tool on a computer and not even very great skills if you look at some of the work. So technology has made it cheap to do. I think we’re just in an era of fake news now, where people either want to sow confusion and propaganda or they have a specific purpose.”

30. Haffajee went on to urge all journalists and media houses to start analysing the accounts, and noted that it would be worth engaging Twitter in a more coherent form to assess and show them the extent of the problem.

Doxing

31. In March 2019, journalist Karima Brown erroneously sent a WhatsApp message to a group created by the EFF, referring to an EFF event and stating: “Keep an eye out for this. Who are these elders. Are they all male and how are they chosen. Keep watching brief.” The same day, Julius Malema, President of the EFF, published a Twitter screenshot of the erroneously sent message, which included Brown’s name and personal mobile telephone number, which Malema circled in black. In his tweet, Malema claimed that Brown was “sending moles” to the EFF event; and the following day, a statement was issued on behalf of the EFF claiming that Brown was

¹⁷ News24, “Haffajee to take on ‘fake news’ Twitter trolls”, 22 January 2017, accessible [here](#).

an operative for the ANC and not a legitimate journalist. The EFF also published a statement on its Facebook page, repeating the claims that Brown was an ANC operative and a state agent.

32. Following the tweet and the statement, Brown received a barrage of anonymous threatening telephone calls and written threats on Twitter and WhatsApp from self-professed EFF supporters, which included deplorable insults and threats of rape, violence and death. Although Malema held a press conference thereafter stating that no person should be threatened with rape and violent crime, he maintained the position that Brown was not a legitimate journalist and was working as a state intelligence operative. Malema refused to delete the post and condemn the threats, despite requests from journalists, and only removed the post when Twitter threatened him with termination of his account.
33. Brown laid a complaint with the IEC, submitting that the EFF's conduct infringed the Electoral Act 73 of 1998, and requested the Chairperson of the IEC to instate criminal and civil charges against the EFF, but was informed by the IEC that it would not be instituting any proceedings against the EFF or Malema. Following this, Brown brought an urgent application in the South Gauteng High Court in Johannesburg, which yielded a judgment against the EFF.¹⁸ The central issue for the court to determine was whether the EFF's failure to condemn its supporters' threats and harassment was an infringement of the Electoral Code.
34. As summarised by Global Freedom of Expression at Columbia University, in acknowledging that the reasonableness of the steps to be taken would depend on the circumstances, the court noted that in the present case it would have been reasonable for the EFF and Malema to admonish their supporters once they had become aware of the harassment and to instruct them to refrain from continuing with the threats. Accordingly, the court held that the EFF's conduct "falls short of what a reasonable person would consider reasonable in all the circumstances [because] [w]hen requested to intervene and instruct their followers on Twitter to stop their harassment of Ms Brown, the EFF ignored the requests and Mr Malema refused to do so."
35. The court also remarked that the EFF's conduct "exhibited scant regard for the fact that Ms Brown, as a woman, was especially vulnerable to threats of rape and violence in a society in which gender-based violence is prevalent." Furthermore, the court commented that the EFF's submission that Brown should have provided them with the details of the individuals threatening her by obtaining the information from the cellular service provides and police and that they would then have taken

¹⁸ *Brown v Economic Freedom Fighters and Others*, Case No. 14686/2019, 6 June 2019; see, also, Global Freedom of Expression, Columbia University, "Brown v Economic Freedom Fighters", undated, accessible [here](#).

disciplinary action against the offenders was “untenable” given the EFF’s “disavowal of any responsibility for the conduct of their supporters.”

36. The court held that the EFF was “fully aware of their actions and specifically the consequences of their inaction, the impact thereof on their supporters and the conduct and consequences which followed”. It held that even if the EFF “did not deliberately intend them, they at least stood reckless to the results which, although they may not have foreseen them initially, were reasonably foreseeable once they had been brought to their attention on more than one occasion from different sources.”
37. Accordingly, the court held that by failing to instruct their supporters to comply with the Electoral Code, the EFF were themselves in violation thereof. However, of concern, the court stated that: “While the conduct of the [EFF] must be severely criticised and the supine attitude they adopted to their obligations condemned, the provocative stance adopted by Ms Brown constitutes a weighty mitigating factor in determining the appropriate sanction.” Ultimately, the court issued a formal warning against the EFF to serve as “guidelines” for their obligations and future conduct, and as a deterrent, but declined to order the EFF to apologise to Brown.
38. As noted by Global Freedom of Expression, this judgment presented a mixed outcome – but did at least acknowledge that a disregard for the safety of journalists, particularly women journalists, is an infringement of the Electoral Code.

RELEVANT LEGAL FRAMEWORKS

Discrimination

39. The Constitution guarantees that the right to equality, including that everyone is equal before the law and has the right to equal protection and benefit of the law.¹⁹ Equality includes the full and equal enjoyment of all rights and freedoms, and the Constitution requires that legislative and other measures be taken to promote the achievement of equality.²⁰ Gender and sex are listed amongst the prohibited grounds,²¹ in terms of which discrimination is presumed to be unfair unless it is established that such discrimination is indeed fair.²²

¹⁹ Section 9(1) of the Constitution.

²⁰ Section 9(2) of the Constitution.

²¹ Section 9(3) of the Constitution.

²² Section 9(5) of the Constitution.

40. To give effect to this provision, Parliament enacted the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). With regard to the prohibition of unfair discrimination on the ground of gender, PEPUDA provides that no person may unfairly discriminate against any person on the ground of gender, including gender-based violence; female genital mutilation; the system of preventing women from inheriting property; any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child; any policy or conduct that unfairly limits access of women to land rights, finance and other resources; discrimination on the ground of pregnancy; limiting women's access to social services or benefits, such as health, education and social security; the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons; or systemic inequality of access to opportunities by women as a result of the sexual division of labour.²³
41. PEPUDA goes on to provide that no person may disseminate or broadcast any information, or publish or display any advertisement or notice, that could reasonably be construed or understood to demonstrate a clear intention to unfairly discriminate against any person.²⁴ This is subject to the proviso that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution is not precluded by this section.

Harassment

42. PEPUDA also prohibits harassment, providing that no person may subject any person to harassment.²⁵ Harassment is defined as unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences, and which is related to sex, gender or sexual orientation, or a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.²⁶

²³ Section 8 of PEPUDA.

²⁴ Section 12 of PEPUDA.

²⁵ Section 11 of PEPUDA.

²⁶ Section 1 of PEPUDA.

43. In addition to PEPUDA, the Protection from Harassment Act 17 of 2011 (PHA) was enacted to afford victims of harassment an effective remedy against such behaviour through the form of a protection order. The definition of harassment differs from that of PEPUDA, and is defined in the PHA as follows:²⁷

“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”.

44. Harm in this context means any mental, psychological, physical or economic harm.²⁸
45. The PHA sets out the prescribed manner to apply for a protection order,²⁹ and notes that if a person is not represented by a legal representative, the clerk of the court must inform the complainant or person of the relief available, as well as the right to also lodge a criminal complaint against the respondent of *crimen iniuria*, assault, trespass, extortion or any other offence which has a bearing on the *persona* or property of the complainant or related person.³⁰ Notwithstanding the provisions of any other law, an application for a protection order may be brought on behalf of the complainant by any other person who has a material interest in the well-being of the complainant or related person.³¹ The PHA also deals specifically with the

²⁷ Section 1 of the PHA.

²⁸ Id.

²⁹ Section 2(1) of the PHA.

³⁰ Section 2(2) of the PHA.

³¹ Section 2(3) of the PHA.

requirement for electronic communications service providers to furnish particulars to the court.³²

46. In terms of the court's powers when issuing a protection order, the court may prohibit the respondent from engaging in or attempting to engage in harassment; enlisting the help of another person to engage in harassment; or committing any other act as specified in the protection order.³³ The court may impose any additional conditions on the respondent which it deems reasonably necessary to protect and provide for the safety and well-being of the complainant or related person.³⁴

Incitement to violence

47. As mentioned above, the Constitution provides that the incitement of imminent violence does not enjoy constitutional protection under the right to freedom of expression.³⁵ The prohibition against incitement is also dealt with in legislation, including the Riotous Assemblies Act 17 of 1956 (RAA). As set out in the RAA:³⁶

A person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner, or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences of his act, conduct, speech or publication would, under the circumstances, be the commission of public violence by members of the public generally or by persons in whose presence the act or conduct took place or to whom the speech or publication was addressed."

48. The RAA goes on to provide that any person who incites, instigates, commands or procures any other person to commit any offence, whether at common law or against a statute or statutory regulatory, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing the offence would be liable.³⁷
49. The Riotous Assemblies Act has been the subject of a constitutional challenge, in which the Constitutional Court held section 18 to be unconstitutional and inconsistent with section 16(1) of the Constitution, to the extent that it criminalises

³² Section 4 of the PHA.

³³ Section 10(1) of the PHA.

³⁴ Section 10(2) of the PHA.

³⁵ Section 16(2) of the Constitution.

³⁶ Section 17 of the RAA.

³⁷ Section 18 of the RAA.

the incitement of another to commit “any offence”.³⁸ Parliament has been given 24 months to rectify the defect, during which time the provision is to be read as “any serious offence”.

50. Incitement is also dealt with in terms of the recently enacted Cybercrimes Act, which has been signed into law but not yet brought into force. In particular, the Cybercrimes Act provides that:³⁹

“Any person who discloses, by means of an electronic communication service, a data message to a person, group of persons or the general public with the intention to incite –

- (a) the causing of any damage to property belonging to; or
- (b) violence against,
a person or group of persons, is guilty of an offence.”

Non-consensual sharing of intimate images

51. The Cybercrimes Act also deals with the non-consensual sharing of intimate images. In this regard, it provides as follows:⁴⁰

“(1) Any person (“A”) who unlawfully and intentionally discloses, by means of an electronic communications service, a data message of an intimate image of a person (“B”), without the consent of B, is guilty of an offence.

(2) For purposes of subsection (1) –

(a) “B” means –

- (i) the person who can be identified as being displayed in the data message;
- (ii) any person who is described as being displayed in the data message, irrespective of the fact that the person cannot be identified as being displayed in the data message; or
- (iii) any person who can be identified from other information as being displayed in the data message; and

(b) “intimate image” means a depiction of a person –

(i) real or simulated, and made by any means in which –

- (aa) B is nude, or the genital organs or anal region of B is displayed, or if B is a female person, transgender person or intersex person, their breasts, are displayed; or

³⁸ *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25; 2021 (2) SA 1 (CC).

³⁹ Section 14 of the Cybercrimes Act.

⁴⁰ Section 16 of the Cybercrimes Act.

- (bb) the covered genital or anal region of B, or if B is a female person, transgender person or intersex person, their covered breasts, are displayed; and
- (ii) in respect of which B so displayed retains a reasonable expectation of privacy at the time that the data message was made in a manner that –
 - (aa) violates or offends the sexual integrity or dignity of B; or
 - (bb) amounts to sexual exploitation.

52. This issue is also dealt with in the FPAA, which provides that:⁴¹

- (1) No person may expose, through any medium, including the internet and social media, a private sexual photograph or film if the disclosure is made –
 - (a) without the consent of the individual or individuals who appear in the photograph or film; and
 - (b) with the intention of causing that individual harm.
- (2) It is a defence for a person charged with an offence under this section to prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime.
- (3) The prohibition referred to in subsection (1) shall apply notwithstanding that the individual who appears in the photograph or film might have consented to the original creation of such photograph or film.
- (4) For the purposes of this section and section 24E a photograph or film is 'private' if, judging from the context in which the photograph or film is taken or made, it was not intended by any individual in the photograph or film to be seen by others.
- (5) For the purposes of this section a photograph or film is 'sexual' if such photograph or film –
 - (a) it shows all or part of an individual's exposed female breasts, anus, genitals or pubic area;
 - (b) it shows something that a reasonable person would consider to be sexual because of its nature; or
 - (c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.
- (6) For the purposes of this section and sections 24E, 24F and 24G, the internet service provider shall be compelled to furnish the Board or a member of the South African Police Services with information of the identity of the person who published the private sexual photograph or film."

⁴¹ Section 18F of the FPAA.

53. The Domestic Violence Act 116 of 1998 (DVA) has also been used to obtain relief against the non-consensual sharing of intimate images. In the *KS* matter, the court directed the respondent to hand over and place in temporary custody of the sheriff of the court all digital devices under his control for a forensic expert appointed by the applicant's attorneys to identify and permanently remove any photograph, video, audio or records of the applicant.⁴²

Non-consensual sharing of personal information

54. The Protection of Personal Information Act 4 of 2013 (POPIA) is South Africa's comprehensive data protection law, which restricts the processing of personal information. To the extent that personal information about a person is disclosed, an aggrieved party can approach the Information Regulator or an aggrieved party for relief.

Gender-based violence

55. In addition to the DVA, there are three new bills pending before Parliament that seek to address gender-based violence in the country. These are the Domestic Violence Amendment Bill, the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill, and the Criminal and Related Matters Amendment Bill. As noted by Global Citizen, these bills aim to tackle three key issues that relate to gender-based violence: the process of applying for a protection order; the police not taking harassment claims seriously; and the lack of accountability and adequate punitive measures for offenders.⁴³

RECOMMENDATIONS FOR KEY STAKEHOLDERS

56. It is clear that the challenges facing women journalists are significant, multi-faceted and nuanced. As mentioned above, there is also a racial dynamic, in which the evidence suggests that women journalists of colour are disproportionately affected by the harassment, threats and other similar conduct.
57. Based on MMA's various experience, our recommendations include the following:
- 57.1. **Government:** As a starting point, it is imperative that the state recognise its positive obligation with regard to media freedom. Urgent measures need to be taken to address these challenges, particularly as South Africa approaches its local government elections later this year. All members of

⁴² *KS v AM* [2017] ZAGPJHC 297; 2018 (1) SACR 240 (GJ).

⁴³ Global Citizen, "Understanding South Africa's new gender-based violence laws", 23 September 2020, accessible [here](#).

Parliament should publicly commit to respecting, protecting, promoting and fulfilling the right to freedom of expression. Furthermore, government should provide incentives to media organisations are able to take harassment and threats against women journalists seriously, as well as to act against them. Such incentives may include tax reductions for specialised anti-trolling units within news organisations, as well as off-setting any legal costs that may be incurred in the exercising of protection of journalists in their taxes.

- 57.2. ***Police and prosecuting authority:*** The police and prosecuting authority should be appropriately capacitated with the necessary training and resources to be able to effectively investigate complaints of threats and harassment by women journalists. This should include sensitivity training to ensure that they handle such complaints appropriately. It is particularly relevant that cyber units are established and/or strengthened to be able to investigate online harms that may occur.
- 57.3. ***Constitutionally mandated bodies:*** Bodies such as the SAHRC and the IEC also have a key role to play in assisting women journalists who have been subject to such attacks. The cost of seeking independent legal services and approaching the courts can be a deterring factor when seeking to vindicate one's rights. In this regard, such bodies should establish a clear charter setting out their roles and responsibilities in respect of media freedom and how this can be realised within their mandate. This should also deal with the methods of cooperation between such bodies and other public and private institutions.
- 57.4. ***Regional and international bodies:*** Regional and international bodies should provide clear guidance, along with potential tools and instruments that can be used and applied by local bodies, to encourage governments to take the issue more seriously and take concrete steps when such harassment occurs. Such guidance may include clear recommendations on actions government can and should take. Clear communication that condemns such action, together with swift and easy mechanisms to stop such harassment, are essential to protect freedom of expression and to give meaning to gender equality.
- 57.5. ***Social media platforms:*** It is clear that the social media platforms can – and must – do more to protect women journalists. It is unacceptable that, for instance, a journalist who is being trolled is met with a response that such trolling may be put down to parody, commentary or fandom. Social media platforms need to act swiftly and responsibly in investigating such complaints, and should establish a dedicated reporting line for journalists

to log complaints that will be treated in an expedited manner. Platforms should make use of their verified user processes to identify women journalists to facilitate the easy reporting of harassment and trolling. When it occurs, social media platforms should take swift action against those accounts that have been reported. Furthermore, we recommend that platforms allocate meaningful resources to combat trolling behaviour, both through the use of open and accountable artificial intelligence, as well as through ongoing campaigns across their platforms. There should also be ongoing campaigns to promote freedom of expression and gender justice.

- 57.6. **Media organisations:** MMA submits that media organisations can do more to support their women journalists. This includes assisting with appropriate legal action when needed, providing psycho-social support, and supporting women journalists in circumstances where they do not feel safe or comfortable. Media organisations should also be allies to each other and use their platforms to highlight the plight of women journalists when threats and harassment occur.
58. Lastly, MMA would urge the above-mentioned stakeholders to endorse and make use of the Real411 platform, as a means to credibly investigate complaints of harassment and have them dealt with in an efficient manner. As part of this process, MMA engages reviewers to assess each complaint from a legal, media and technical lens, and then assists by referring the complaint to the relevant body for further action, as may be appropriate in the circumstances. This mechanism can assist the state, the constitutionally mandated bodies and the social media platforms in discharging the obligations that they owe to the public in the interests of media freedom.

CONCLUSION

59. MMA reiterates its appreciation for the opportunity to provide this submission. This report will be an important and much-needed development in furthering the realisation of fundamental rights for women – including women journalists – both in South Africa and globally. MMA remains willing and available to provide any further information to the Special Rapporteur that may be of assistance in the finalisation of this report.

**MEDIA MONITORING AFRICA
14 JUNE 2021**

ANNEXURE A: INTERVIEW WITH JANET HEARD

Janet Heard is the Managing Editor of the Daily Maverick. MMA is grateful for the following inputs that were received:

What barriers, challenges and threats do women in the public sphere face in exercising their freedom of opinion and expression online and offline?

Women's voices are heard less in the public sphere, with men assuming an automatic right to be heard and other men still enabling this inequity. In journalism, women journalists are targeted especially viciously and with personal swipes online, often in a bid to intimidate and silence them. This can have a chilling effect on freedom of expression online and offline

Women journalists, especially younger members, often do not know how to navigate threats and do not always report them to their line manager. They feel alone, and do not know how best to respond to online and offline attacks.

What specific measures have platform providers and intermediaries taken to protect women's freedom of opinion and expression; protect women from online gender-based violence, harassment, intimidation and disinformation; promote women's equal access to the digital space; address grievances and provide remedies to women users; and ensure accountability of the intermediaries?

SANEF, MMA and other South African media bodies have been working on public awareness campaigns and also newsroom campaigns to build up a united response to harassment and intimidation. This also includes applying pressure on political parties to act responsibly and to enforce a code among their supporters that is not abusive and that does not condone the spread of disinformation and misinformation.

To what extent do you find these measures to be fair, transparent, adequate and effective in protecting women's human rights and promoting women's empowerment?

There is a lot of lip service to these issues, but the impact needs to be tangible and implemented on the ground in newsrooms and other places. There needs to be practical application, and also not just preaching to the converted.

What do you think internet intermediaries should do to protect women's right to freedom of opinion and expression and make the online space safe for women?

Public awareness and education is key, and women need to feel that they are being heard, and that they can operate in safe spaces online, without fear of being targeted.

What role has legacy media played in aggravating or addressing the challenges women face in exercising their freedom of expression? What do you think the legacy media can do to empower women and make the public space safe for them, especially for women journalists?

When women journalists are targeted, their media bosses need to respond and tackle the issue head on, to put a stop to it. They should not turn a blind eye, but support the journalist, and call on media organisations to assist where necessary. They should have a policy in place to tackle the challenges that women have that prevent the public space from being safe.

Can you think of any examples of good practices by states, internet intermediaries or other stakeholders to enhance women's right to freedom of opinion and expression and empowerment and public participation of women?

Empowerment courses, public awareness and gender sensitivity education is important in newsrooms and elsewhere; encouraging women to speak first, not last; and to encourage women leadership for younger members to have strong role models.