



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

To: Ms Daphne Naidoo
Electoral Commission

Per email: NaidooD@elections.org.za

Re: **FW de Klerk Foundation Submission on the Draft Electoral Code of Conduct: Measures to Address Disinformation in Local Government Elections**

Date: Tuesday, 28 July 2026 (**Deadline for comments: Wednesday, 29 July 2026**)

INTRODUCTION

Dear Ms Naidoo

1. We refer to the [invitation](#) by the Electoral Commission ("the Commission") for written submissions on its draft [Electoral Code of Conduct countering Disinformation in Local Government Elections](#) ("the Code").
2. The FW de Klerk Foundation ("the Foundation") is a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Our vision is to make our constitutional democracy a reality for all South Africans.
3. To this end, the Foundation seeks to promote the Constitution and monitors developments, including legislation and policy, that may affect the Constitution. The Foundation does so in the interest of everyone in South Africa.
4. As such, the Foundation's written submission will focus on those issues in the Code that may / could affect the Constitution.
5. The Foundation welcomes the opportunity to make this written submission and expresses its willingness to engage with the Commission to discuss same,

including its willingness to make an oral submission should such an opportunity arise.

EXECUTIVE SUMMARY

6. A breach of the Code is subject to sanction as contemplated under the principal Act and/or any other relevant law.¹ The principal Act classifies sees a contravene of its:
 - 6.1. Section 69(2) prohibition² as criminal offences,³ and liable to a fine or to imprisonment for a period not exceeding 10 years; and
 - 6.2. Electoral Code of Conduct⁴ as a criminal offence and liable to a fine or to imprisonment for a period not exceeding 10 years.⁵
7. While the Foundation welcomes the Commission's efforts to safeguard electoral integrity and counter disinformation, it is concerned that several provisions in the Code:
 - 7.1. Are potentially *ultra vires*, because **they go beyond** the statutory prohibitions and the duties imposed in the [Local Government: Municipal Electoral Act, 2000](#)⁶ ("the principal Act");
 - 7.2. Are **vague**;
 - 7.3. Could potentially "chill" political speech that the Constitution sees as protected expression; and
 - 7.4. Are **irrational** by imposing positive obligations that may be impossible to fulfil.
8. The Foundation believes that, taken together, these provisions are contrary to the Republic's founding value of the **rule of law**⁷ insofar as these provisions are:

¹ Paragraph 15 of the Code.

² Section 69(2) of the Local Government: Municipal Electoral Act.

³ Section 80 of the Local Government: Municipal Electoral Act.

⁴ Schedule 1 to the Local Government: Municipal Electoral Act.

⁵ Section 66 read with section 79 of the Local Government: Municipal Electoral Act.

⁶ Act 27 of 2000.

⁷ Section 1(c) of the Constitution.



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

- 8.1.1. Contrary to the rule of law's **principle of legality** by being *ultra vires*; and
 - 8.1.2. Contrary to the rule of law's **doctrine of vagueness**; and
 - 8.1.3. Contrary to the rule of law's **rationality** requirement by being overbroad and extending further than necessary.
9. Additionally, the Foundation believes the provisions open the Code up to a legal challenge for potentially **unreasonably and unjustifiably limiting**⁸ the following **constitutional rights**:
- 9.1. The right to freedom of expression ⁹;
 - 9.2. Political rights¹⁰; and/or
 - 9.3. The right to just administrative action¹¹ (should the Code constitute administrative action under the [Promotion of Administrative Justice Act, 2000](#),¹² hereinafter referred to as "PAJA").

LEGAL FRAMEWORK

International Law:

10. [Customary international law](#) is law in the Republic unless inconsistent with the Constitution or legislation.¹³

⁸ In contravention of section 36 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

⁹ Section 16 of the Constitution.

¹⁰ Section 19 of the Constitution.

¹¹ Section 33 of the Constitution;

¹² Act 3 of 2000.

¹³ Section 232 of the Constitution.

11. When interpreting the **Bill of Rights**, courts have a [constitutional duty](#) to “*consider international law*”.¹⁴ And they may consider foreign law in such interpretation.¹⁵
12. When interpreting **any legislation**, courts “[must prefer](#)” any reasonable interpretation that is consistent with international law.¹⁶
13. Considering the above, it is prudent for the Commission to heed and give effect to South Africa’s international human rights law obligations when drafting legislation that directly affects fundamental rights, including the right to freedom of expression and political rights.
14. South Africa has [ratified](#) the following international instruments:

Instrument	Article	Right / Duty	Key Provision
Universal Declaration of Human Rights ¹⁷	Article 19	Freedom of Expression	Everyone has the right to freedom of opinion and expression, including the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

¹⁴ Section 39(1)(b) of the Constitution.

¹⁵ Section 39(1)(c) of the Constitution.

¹⁶ Section 233 of the Constitution.

¹⁷ Although not ratified by South Africa, it can be argued that the Universal Declaration of Human Rights is binding on the Republic as customary international law in terms of section 232 of the Constitution.

THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

International Covenant on Civil and Political Rights ¹⁸	Article 19	Freedom of Expression	Protects the right to hold opinions without interference and the right to freedom of expression, including the freedom to seek, receive and impart information and ideas through any medium. Restrictions are permissible only where provided by law and necessary to protect the rights or reputations of others, national security, public order, public health, or morals.
	Article 20	Prohibition of Hate Speech and War Propaganda	Prohibits propaganda for war and the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.
	Article 21	Freedom of Assembly	Recognises the right of peaceful assembly. No restrictions may be placed on its exercise other than those imposed in conformity with the law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.
	Article 22	Freedom of Association	Everyone has the right to freedom of association with others, including the right to form and join political parties, trade unions and other groups. Restrictions are permissible only where prescribed by law and necessary in a democratic society to protect

¹⁸ Ratified in New York on 16 December 1966.

			national security, public safety, public order, public health or morals, or the rights and freedoms of others.
	Article 25	Right to Political Participation	Every citizen has the right and opportunity, without unreasonable restrictions, to take part in the conduct of public affairs; to vote and to be elected at genuine periodic elections held by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors; and to have equal access to public service.
<u>African Charter on Human and Peoples' Rights</u>	Article 9	Freedom of Expression	Every individual has the right to receive information and to express and disseminate opinions within the law.
	Article 13	Right to Political Participation	Every citizen has the right to participate freely in the government of their country, either directly or through freely chosen representatives in accordance with the provisions of the law, and the right of equal access to the public service and to public property and services.
	Article 28	Duty to Respect Fellow People	Every individual has a duty to respect and consider fellow human beings without discrimination and to promote mutual respect, tolerance and understanding.
<u>African Charter on Democracy, Elections, and Governance, 2011</u>	Article 5	Commitment to Democracy and the Rule of Law	State Parties commit to promoting democracy, the principle of the rule of law and human rights and recognise popular participation through universal suffrage as an inalienable right of the people.



FW de Klerk
FOUNDATION

THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

	Article 17	Duty of States and Independent Electoral Bodies for Democratic Elections	State Parties commit to holding transparent, free and fair elections and, to that end, to establishing and strengthening independent and impartial national electoral bodies, establishing national mechanisms to redress election-related disputes in a timely manner, and ensuring fair and equitable access by contesting parties and candidates to state-controlled media during elections.
--	------------	--	---

15. Additionally, the following United Nations (“UN”) instruments must be considered:

Instrument	Article / Principle	Right / Duty	Key Provision
UN Global Principles for Information Integrity, 2024	"Societal Trust and Resilience"	Principle for information integrity	Names elections as a pivotal moment when risks to information spaces are most pronounced and can deepen polarisation, undermine participation in public life and, in extreme cases, incite violence. Calls for robust trust and safety practices consistently enforced across languages, and for protecting election workers and others targeted by online harassment.
	"Technology Companies"	Recommendations	Recommends that platforms publish human rights risk assessments before and throughout elections and enforce policies against disinformation, harassment and violence targeting candidates and women in public life. Political advertising should be clearly labelled, including AI-generated

			content, and kept in searchable libraries showing the funder, amount spent and targeting. Platforms should disclose funding to political bodies and candidates and State content-removal requests, and safeguard journalists during elections.
	"States"	Recommendations	Recommends that States protect all electoral stakeholders' access to accurate and timely information throughout electoral processes, promote inclusive political participation and leadership, and uphold the rights of women in public life against discrimination, abuse, harassment and threats of violence.
	"All Political Actors"	Recommendations	Recommends that political actors maintain election integrity by refraining from and publicly denouncing efforts to undermine information on voter eligibility, polling, ballot counting and results; denounce and address harassment of candidates and officials, especially women; and disclose advertising funding sources and any data-driven targeting techniques.
UN Development Programme's Action Coalition on Information Integrity in Elections' recommendations, 2025	"Recommendations for Governments"	Guidance on policy regarding information integrity in elections	Recommends that governments develop codes of conduct for political parties, candidates and content producers (including influencers); strengthen legal and regulatory frameworks against disinformation, hate speech and online manipulation while fully upholding international standards on freedom of expression, access to information and data protection, with safeguards against misuse or censorship; promote transparency in political advertising and campaign



FW de Klerk
FOUNDATION

THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

			financing; invest in national media and digital literacy strategies; support the sustainability of independent, public-interest media; and ensure the inclusion of diverse stakeholders in electoral coordination mechanisms.
	"Recommendations for Election Management Bodies (EMBs)"	Guidance on policy regarding information integrity in elections	For governments: strengthen legal and regulatory frameworks against disinformation, hate speech and online manipulation while fully upholding international standards on freedom of expression, access to information and data protection (with safeguards against misuse or censorship); promote transparency in political advertising and campaign financing; develop codes of conduct for parties, candidates and content producers; invest in media and digital literacy. For EMBs: publish accurate information, build inclusive multi-stakeholder coalitions, and formalise relationships with technology companies.
<u>UNESCO's Practical Guide: Counteracting Electoral Disinformation, 2022</u>	"Preparing to fight misinformation: anticipation, active transparency, and rapid response."	Guidance on policy regarding countering electoral disinformation	Generate information in advance and be the primary source against attempts to mislead the public. Respond with speed, transparency and clarity; produce a glossary of electoral terms for citizens, CSOs and journalists; run media and information literacy campaigns for journalists; coordinate with fact-checkers; keep a direct press channel with dedicated staff on Election Day;

	General recommendations"		monitor traditional and social media; and enhance active transparency.
	"Most relevant periods for disinformation as risks to electoral integrity"	Guidance on policy regarding countering electoral disinformation	Prepare stage-specific information across the electoral cycle. Pre-electoral: electoral rolls, eligibility, consultation/audit dates, accepted ID documents, candidate and party-list conditions, and campaign-finance and public-resource rules. Election Day: material handling, roles of station authorities and party inspectors, accessibility, voting secrecy, and vote-counting procedures. Post-electoral: material custody, data uploading and cross-checks, and provisional versus final counts. Publicise reporting channels at each stage.
UNESCO Guidelines for the Governance of Digital Platforms, 2023	"Specific measures for electoral integrity"	Recommendations	Recommends that platforms run a transparent electoral-cycle risk assessment before major elections and referendums, with input from electoral stakeholders and a gender approach. Platforms should ensure access to election-related information and diverse viewpoints and prevent automated tools from hindering it; promote independent factchecking; clearly identify political advertising with the funder, amount and



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

			targeting disclosed; track the monetization of party posts; and retain political ads and funding data in a public, regularly updated library.
--	--	--	---

16. Remaining cognisant that a breach of the Code is a criminal offences,¹⁹ and liable to a fine or to imprisonment for a period not exceeding 10 years, the Foundation is concerned the Code breaches South Africa's international law obligations.

17. Specifically, the Foundation submits that due to the substantive concerns set out below (see paragraphs 28 through 60) the Code fails to meet *either* South Africa's obligations in terms of international law, *or* the UN's guidance on misinformation during elections.

18. Briefly, the Foundation believes to Code be contrary to:

18.1. Article 19 of the International Covenant on Civil and Political Rights²⁰ insofar as paragraph 6(b) of the Code does not *either* (i) require the content to be false, *or* (ii) define "*may be construed as supporting*". The result is that a person can break the code (and be guilty of a crime) by saying something true. Simultaneously, they cannot know in advance what is prohibited. This, while article 20 of the **Covenant requires a high threshold for restricting freedom of expression** and specifically warns against the "*abuse of vague domestic legislation*".²¹

¹⁹ Sections 66, 79 and 80 of the Local Government: Municipal Electoral Act read with schedule 1 to the Act.

²⁰ Which protects the right to hold opinions without interference and the freedom to seek, receive and impart information and ideas of all kinds, and permits restrictions only where they are provided by law and are necessary to protect the rights or reputations of others, national security, public order, public health or morals.

²¹ [Rabat Plan of Action](#) at para 8.

18.2. Article 17 of the African Charter on Democracy, Elections and Governance²² insofar as the paragraphs below fail to stipulate a fair process whilst simultaneously imposing too little time for such process to be completed:

18.2.1. Paragraph 7(d) of the Code requires office-bearers, representatives, members and supporters, every political party and candidate undertakes to take steps **within 24 hours** to publicly retract and/or correct any disinformation or other false and misleading information disseminated by the party or its nominated candidates; and

18.2.2. Paragraphs 11(a) and 15 of the Code require disinformation to be reported to the Commission's Online Complaints Mechanism within **72 hours**.

18.3. The United Nations Global Principles for Information Integrity, the United Nations Development Programme Action Coalition on Information Integrity in Elections, or the United Nations Educational, Scientific and Cultural Organization Guidelines for the Governance of Digital Platforms,²³ insofar as:

18.3.1. Paragraphs 9(b) and 11(b) of the Code result in only the political party's name being required, without requiring disclosure of who paid for, and who was targeted by, the political advertisement; and

18.3.2. Paragraph 3(c) of the Code defines political advertising as an advertisement “*broadcast on a broadcasting service*” for payment, while section 2 states that the Code applies to content that is “*both online and offline, and to both paid and unpaid*”, resulting in the Code not viewing a paid social media post by a political party and/or candidate as a broadcast by a broadcaster that requires labelling.

²² Which requires State Parties to establish and strengthen national mechanisms that redress election-related disputes in a timely manner.

²³ Which all require disclosure of who paid and who was targeted.



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

18.4. Finally, the Code binds only political parties and candidates – i.e. government communications and paid influencers fall outside the Code entirely - while article 17 of the African Charter on Democracy, Elections and Governance requires State Parties to ensure that there is a binding code of conduct governing legally recognised political stakeholders, government and other political actors before, during and after elections.

19. The Foundation is willing to submit a detailed analysis upon request.

The Constitution & case law

20. The state:

20.1. The **Bill of Rights applies to all law**, and binds the state, including Parliament;²⁴ and

20.2. The state must **respect, protect, promote and fulfil all the rights** in the Bill of Rights.²⁵

21. Limitation of rights: A right contained in the Bill of Rights can only be limited by section 36, or “*elsewhere in the Bill*” – i.e. by an internal limitation clause as is the case in section 16(2).²⁶

22. Interpreting a law:

22.1. All laws must be interpreted in a way that promotes “*the spirit, purport and objects of the Bill of Rights*”.²⁷

²⁴ Section 8(1) of the Constitution.

²⁵ Section 7(2) of the Constitution.

²⁶ Section 7(3), read with section 36, of the Constitution.

²⁷ Section 39(2) of the Constitution.

22.2. This includes, therefore, interpreting the Code to see if it meets the requirements of **the rule of law**,²⁸ which is one of the Republic's founding values²⁹ that must be upheld and promoted when interpreting the Bill of Rights.³⁰

23. Hierarchy of rights:

23.1. The Constitution also knows no hierarchy of rights;³¹

23.2. Rights should not be construed absolutely or individualistically in ways which deny that all individuals are members of a community;³² and

23.3. The Constitution requires³³ the state to protect and promote all the rights in the Bill of Rights, without preferring one over another.

24. Freedom of expression:

24.1. The Constitution expressly:

24.1.1. Protects the right to freedom of expression, explicitly stating that **this right includes** the right to freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, and academic freedom and freedom of scientific research;³⁴ and

24.1.2. States what the right to freedom of expression does **not** extend to, namely:

a) propaganda for war;

²⁸ See, for example, *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 108; *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 (CC) at para 69 and *Abahlali BaseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) at para 123.

²⁹ Section 1(c) of the Constitution.

³⁰ Section 39(1)(a) of the Constitution.

³¹ See, for example, *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) at para 84; *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae)* 2011 (4) SA 191 (CC) at para 148; *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 CC at para 3.

³² *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 31, citing *Bernstein v Bester* 1996 (2) SA 751 (CC) at para 67.

³³ Section 7(2) of the Constitution.

³⁴ Section 16(1) of the Constitution.



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

- b) incitement of imminent violence; and
- c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm (commonly referred to as “*hate speech*”).³⁵

24.1.3. The aforementioned three (3) grounds are **unprotected expressions** – and the state is allowed to regulate such “unprotected speech” as it sees fit.

24.1.4. However, once the state seeks to regulate speech that falls outside the three (3) grounds expressly listed in section 16(2), it limits expression protected by section 16(1) (“**protected expression**”). In such cases, **the state must demonstrate that the limitation satisfies the requirements of section 36.**

24.2. The following is apparent when examining the right to freedom of expression's importance:

24.2.1. It is one of the **most important rights in a democracy**,³⁶ because it is the means (i.e. vehicle) by which all other rights are defended and affirmed: In *Mandela v Felati*,³⁷ the Court explained it thus: “*In a free society all freedoms are important, but they are not equally important. Political philosophers are agreed about the primacy of freedom of speech. It is the freedom upon which all the other freedoms depend; it is the freedom without which the others would not long endure.*”

³⁵ Section 16(2) of the Constitution.

³⁶ *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (3) SA 409 (CC) at para 33; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 at para 24; and *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at para 7.

³⁷ *Mandela v Felati* 1995 (1) SA 251 (W) at 259. (Own emphasis.)

24.2.2. It is **indispensable to a democracy**, especially South Africa's democracy with **our history**. As the Constitutional Court has said freedom of expression:

- a) *"lies at the **heart** of a democracy";*³⁸
- b) *Plays an "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";*³⁹ and
- c) *"is of the **utmost importance** in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to **our recent past of thought control, censorship and enforced conformity** to governmental theories, freedom of expression — the free and open exchange of ideas — is **no less important than it is in the United States of America...** Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed."*⁴⁰

24.3. It is apparent when examining the right to freedom of expression's scope that it specifically includes the right to say things which are **offensive and even hurtful**:

24.3.1. In the matter of *Masuku and COSATU v SAHRC obo SAJBD*,⁴¹ the Supreme Court of Appeal ("SCA") emphasised that "**a hostile statement is not necessarily hateful in the sense envisaged under s 16(2)(c)**"⁴² and again that "**[t]he fact that particular expression may be hurtful of people's feelings, or wounding,**

³⁸ [South African National Defence Union v Minister of Defence 1999 \(4\) SA 469](#) ("Minister of Defence") at para 7. (Own emphasis.)

³⁹ *Minister of Defence* at para 7. (Own emphasis.)

⁴⁰ [S v Mamabolo 2001 \(3\) SA 409 \(CC\)](#) at para 37. (Own emphasis.)

⁴¹ [Masuku and COSATU v SAHRC obo SAJBD \(1062/2017\) \[2018\] ZASCA 180; 2019 \(2\) SA 194 \(SCA\); \[2019\] 1 All SA 608 \(SCA\) \(4 December 2018\)](#). ("*Masuku*").

⁴² [Masuku](#) at para 19.



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

distasteful, politically inflammatory or downright offensive, does not exclude it from protection ...⁴³

24.3.2. Similarly, in the case of *Moyo v Minister of Justice and Constitutional Development and Others*,⁴⁴ the SCA likewise held that: “[U]nless hate speech, incitement of imminent violence or propaganda for war as proscribed in s 16(2) of the Constitution are involved, no one is entitled to be insulated from opinions and ideas that they do not like, even if those ideas are expressed in ways that place them in fear. Indeed, in present day South Africa many will be afraid of the political and social possibilities that are advocated for daily in high stakes debates that characterise a transforming society with a violent, racist past. Obviously this may place many South Africans in a condition of subjective or ‘reasonable’ fear. **But that does not entitle them to expect the State to lock up those whose chosen forms of expression placed them in a subjective state of fear or might reasonably (but not in fact) have placed them in fear.**”⁴⁵

24.3.3. This approach was settled by the Constitutional Court in its *Qwelane* judgment (discussed below in paragraphs 48 to 57), where the Court expressly said that: “[e]xpressions that are merely hurtful, especially when understood in everyday parlance, are insufficient to constitute hate speech... offensive speech is protected by freedom of expression.”⁴⁶

⁴³ [Masuku](#) at para 32.

⁴⁴ [Moyo v Minister of Justice and Constitutional Development and Others 2018 \(2\) SACR 313 \(SCA\)](#) (“Moyo”).

⁴⁵ *Moyo* at para 31. (Own emphasis).

⁴⁶ [Qwelane](#) at para 103. (Own emphasis.)

24.3.4. The Court has also held that we are obliged to **delineate the bounds of the constitutional guarantee of free expression generously** and that unless an expressive act is excluded by section 16(2), it is protected expression.⁴⁷

24.4. The following is apparent when examining the right to freedom of expression's relation to other rights:

24.4.1. The Constitutional Court has held⁴⁸ freedom of expression to be a “web of mutually supporting rights”,⁴⁹ because it is closely related to other constitutional rights such as freedom of religion,⁵⁰ dignity,⁵¹ freedom of association,⁵² political rights⁵³ and the right to assembly⁵⁴.

24.4.2. The Constitutional Court has also said that “[t]hese rights taken together protect the rights of individuals not only individually to form and **express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions.** The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, **even where those views are controversial.** The corollary of the freedom of expression and its related rights is **tolerance by society of different views.** Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the **public airing of disagreements and the refusal to silence unpopular views.**”⁵⁵

⁴⁷ [Laugh It Off Promotions CC v SAB International \(Finance\) BV t/a Sabmark International \(Freedom of Expression Institute as Amicus Curiae\) 2006 \(1\) SA 144 \(CC\)](#) para 47.

⁴⁸ *Minister of Defence* at para 8.

⁴⁹ [Case and another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others 1996 \(3\) SA 617 \(CC\)](#) at para 27.

⁵⁰ Section 15 of the Constitution.

⁵¹ Section 10 of the Constitution.

⁵² Section 18 of the Constitution.

⁵³ Section 19 of the Constitution.

⁵⁴ Section 17 of the Constitution.

⁵⁵ *Minister of Defence* at para 8. (Own emphasis.)



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

24.4.3. Importantly, the Constitutional Court stressed the close link that exists between the right to freedom of expression and political rights, and that the right to vote is "*indispensable to, and empty without, the right to free and fair elections*"⁵⁶ The Court further held that **statutory prohibitions that impose tough penalties and sanctions must be interpreted narrowly, in favour of liberty.**⁵⁷

24.4.4. Similarly, the Constitutional Court has held that expression falling outside the categories listed in section 16(2) remains protected expression and **any regulation of such expression constitutes a limitation of the right requiring justification** (in terms of section 36).⁵⁸

25. Just administrative action:

25.1. The Constitution expressly protects everyone's the right to administrative action that is lawful, reasonable and procedurally fair ("just administrative action").⁵⁹ It also provides that everyone whose rights have been adversely affected by administrative action have the right to be given written reasons.⁶⁰

25.2. The [Promotion of Administrative Justice Act, 2000](#),⁶¹ ("PAJA") is the subsidiary legislation that gives effect to this right, which allows for the judicial review of administrative action.⁶²

⁵⁶ [Democratic Alliance v African National Congress and Another](#) 2015 (2) SA 232 (CC) at para 4.

⁵⁷ [Democratic Alliance v African National Congress](#) at paras 129 through 131.

⁵⁸ [Islamic Unity Convention v Independent Broadcasting Association and Others](#) 2002 (4) SA 294 at paras paras 33 and 34.

⁵⁹ Section 33(1) of the Constitution.

⁶⁰ Section 33(2) of the Constitution.

⁶¹ Act 3 of 2000.

⁶² Section 6 of the PAJA.

25.3. Should the Code constitute administrative action, it would be subject to stricter scrutiny under PAJA.⁶³

25.4. *Alternatively*, if the Code is not administrative action, but rather executive action, it would still be subject to scrutiny, albeit under the less exacting constraints imposed by the rule of law, specifically, the principle of legality.⁶⁴

Subsidiary legislation

26. The principal Act:

26.1. The principal Act empowers the Commission to compile, issue and amend or replace any **other** Code (apart from the principal Act's Electoral Code of Conduct contained in schedule 1 to the Act) to promote free, fair and orderly elections.⁶⁵

26.2. Item 9 of this Electoral Code of Conduct⁶⁶ prohibits a variety of conduct during an election.

26.3. Also, the principal Act limits the right to freedom of expression⁶⁷ by prohibiting both the making of false statements intentionally (or without reasonably believing it to be true) **and** the publication of false information with the intent to disrupt, affect or influence an election or its outcome.⁶⁸

26.4. The Municipal Electoral Regulations, 2000⁶⁹ are the regulations published under the principal Act.

27. PAJA:

27.1. PAJA defines administrative action widely as "*any decision taken by an organ of state, when exercising a public power or performing a public*

⁶³ Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC) ("Minister of Defence") at para 27.

⁶⁴ Minister of Defence at para 27.

⁶⁵ Section 88 of the Local Government: Municipal Electoral Act.

⁶⁶ Schedule 1 to the Local Government: Municipal Electoral Act.

⁶⁷ Section 16 of the Constitution.

⁶⁸ Section 69 of the Local Government: Municipal Electoral Act.

⁶⁹ GN R848 of 2000.



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

function in terms of any legislation which adversely affects the rights of any person and which has a direct, external legal effect, but does not include any decision taken, or failure to take a decision, in terms of section 4(1)".⁷⁰

27.2. For the Code to be considered administrative action, it must:⁷¹

27.2.1. Be a decision of an administrative nature;

27.2.2. Be taken by an organ of state;

27.2.3. In its exercise of a public power, or its performance of a public function;

27.2.4. Be made in terms of a law or an empowering provision;

27.2.5. Adversely affect rights;

27.2.6. Have a direct and external legal effect; and

27.2.7. Not fall under any of the listed exclusions.

27.3. Furthermore, the Constitutional Court stated⁷² that whether a decision is of an administrative nature depends primarily on the **nature of the power**. The Court stated that "*a series of considerations may be relevant*", including the "*source of power*", the "*nature of the power*," "*its subject matter*", "*whether it involves the exercise of a public duty*," and "*how closely it is related to policy matters, which are not administrative, and on the other to the*

⁷⁰Section 1(a)(i)(ii) of PAJA. (Own emphasis.)

⁷¹ *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 33.

⁷² [*President of the Republic of South Africa v South African Rugby Football Union 2000 \(1\) SA 1 \(CC\)*](#) ("SARFU") at para 143.

*implementation of legislation, which is”.*⁷³

27.4. Section 88 of the principal Act expressly empowers the Commission to compile, issue, amend or replace an electoral code. Thus, the Commission's decision to issue the Code is arguably a “decision” taken by an organ of state in exercising a public power in terms of legislation, as required by section 1 of PAJA.

27.5. In applying the *SARFU* factors to determine if the decision is of an administrative nature:

27.5.1. The **source of the power** is section 88 of the principal Act.

27.5.2. The **nature of power** is regulatory, as the Code seeks to regulate electoral conduct, specifically expressive conduct;

27.5.3. The Code's **subject matter** concerns the regulation of conduct during municipal elections, which **falls within the Commission's statutory functions**;

27.5.4. The Commission is issuing the Code as an exercise of its power, which power involves the Commission's **exercise of its public duty** to; and

27.5.5. The power appears more closely related to the **implementation of legislation** than to policy matters, as the Commission is exercising a power given to it by legislation to regulate elections.

27.6. As a result of the above, **the Foundation submits that the Code is subject to PAJA and subject to stricter scrutiny to ensure it respects, protects, promotes and fulfils⁷⁴ the right to just administrative action.**

⁷³ SARFU at para 143.

⁷⁴ Section 7(2) of the Constitution.



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

SUBSTANTIVE COMMENTS ON REGULATIONS

28. At the outset it is important to note that a breach of the Code is subject to sanction as contemplated under the principal Act and/or any other relevant law.⁷⁵ The principal Act classifies sees a contravene of its:

28.1. Section 69(2) prohibition⁷⁶ as criminal offences,⁷⁷ and liable to a fine or to imprisonment for a period not exceeding 10 years; and

28.2. Electoral Code of Conduct⁷⁸ as a criminal offence and liable to a fine or to imprisonment for a period not exceeding 10 years.⁷⁹

29. In keeping with [*Democratic Alliance v African National Congress*](#)⁸⁰ the **Code's prohibitions** (that impose tough penalties and sanctions) **must be interpreted narrowly, in favour of liberty.**

30. Potentially *ultra vires* provisions:

Paragraph of Code	Description
Paragraph 6(b)	<i>"In giving effect to these commitments, every political party and candidate undertakes not to produce, disseminate, sponsor or encourage the dissemination of any information or content that may reasonably be construed as supporting or encouraging the dissemination of</i>

⁷⁵ Paragraph 15 of the Code.

⁷⁶ Section 69(2) of the Local Government: Municipal Electoral Act.

⁷⁷ Section 80 of the Local Government: Municipal Electoral Act.

⁷⁸ Schedule 1 to the Local Government: Municipal Electoral Act.

⁷⁹ Section 66 read with section 79 of the Local Government: Municipal Electoral Act.

⁸⁰ A at paras 129 through 131.

	<i>disinformation</i>⁸¹ or that may contribute to the fuelling or escalation of <i>disinformation</i> counter to the objects of the Disinformation Code."
--	---

31. The provision's drafting means:

31.1. It would apply **even** where that information / content itself is not false – only requiring that it support or encourage the dissemination of disinformation; and

31.2. It does not require intention; and

31.3. It could encompass protected political commentary, criticism, rhetoric, interpretation, opinion and advocacy.

32. The provision exceeds the Act's prohibition, which is only limited to intentionally false statements.⁸² Accordingly, the Foundation submits that paragraph 6(b) of the Code is *ultra vires*.

33. Furthermore, the phrase "*supporting or encouraging*" causes the provision to be **vague**, because it does not indicate what degree of connection is required between the impugned conduct and the actual dissemination of "*disinformation*".

34. This is contrary to the [*Islamic Unity Convention v Independent Broadcasting Association*](#) where the Constitutional Court pointed out that **restrictions must be clear, because a person must know what conduct is prohibited**.⁸³

35. Altogether, the current drafting opens the Code up for judicial review under PAJA on the grounds that:

35.1. It is *ultra vires*, because it was not authorised to do so by the empowering provision;⁸⁴ and

⁸¹ Defined by the Code as "the publication of any false information, knowing it to be false or without believing on reasonable grounds that the statement is true, with the intention of disrupting or preventing an election, creating hostility or fear in order to influence the conduct or outcome of an election, or influencing the conduct or outcome of an election."

⁸² Section 69(2).

⁸³ At para 40 citing *Investigating Directorate, Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2001 (1) SA 545 (CC) at paras 23 and 24.

⁸⁴ Section 6(2)(a)(i) of PAJA.



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

35.2. It breaches the rule of law's doctrine of vagueness and is, therefore, unconstitutional or unlawful.⁸⁵

36. Due to the provision's limitation of protected expression and political rights, the state will also bear the onus of having to justify this limitation in terms of section 36 of the Constitution's justification analysis.

37. The Foundation recommends remedying the defect by redrafting the paragraph to read: ***"In giving effect to these commitments, every political party and candidate undertakes not to intentionally assist, promote or materially contribute to the dissemination of disinformation."***

Paragraph of Code	Description
Paragraph 10(b)	<i>"Cognisant of the increasing role of online platforms in the spread and amplification of disinformation or other false and misleading information, including via social media platforms and messaging applications through the use of digital technologies, every political party and candidate undertakes to put in place appropriate and effective measures in order to to take reasonable steps to monitor content on their own or associated online platforms in order to identify any posts comprising disinformation, including user-generated content by a third party, and take rapid action to publicly correct and limit the further spread of the disinformation."</i>

⁸⁵ Section 6(2)(i) of PAJA.

38. The above provision effectively requires the **policing of third-party speech**. While the Foundation notes that paragraph 7(c) of the Code⁸⁶ limits oversight obligations to communications under direct control, it is unclear how its paragraphs 7 and 10 are to be harmonised and/or reconciled, as they appear to contradict one another.
39. The Foundation is concerned that the Code may effectively encourage parties and ward and/or independent candidates to remove lawful, but **controversial speech to avoid sanctions**.
40. This creates a classic "chilling effect" on political speech, which would be contrary to the case law on freedom of expression cited above.
41. Furthermore, both the imposing of such an obligation on political parties and ward and/or independent candidates, as well as the policing itself, exceed the Act's prohibition.⁸⁷
42. Accordingly, the Foundation believes paragraph 10(b) of the Code to be *ultra vires*.
43. Taken together, paragraphs 6(b) and 10(b) of the Code make it vulnerable to judicial review under PAJA to the extent that they extend beyond the prohibition contained in the principal Act.⁸⁸
44. The Foundation recommends limiting the obligation to online accounts and platforms **under the direct ownership or control** of the party or candidate.

⁸⁶ Paragraph 7(c) of the Code reads "*With respect to office-bearers, representatives, members and supporters, every political party and candidate undertakes to exercise oversight **only** in respect of communications and platforms **under their direct control**."* (Own emphasis.)

⁸⁷ Section 69(2) of the Local Government: Municipal Electoral Act. See also item 9 of Schedule 1 to the Act.

⁸⁸ Section 6(2)(a)(i) of PAJA.



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

45. Vague and/or overbroad provisions:

Paragraph of Code	Description
Paragraph 13(b)	<i>“Moreover, every political party and candidate undertakes not to create, support or propagate any views that improperly undermine the credibility of, trust in or lawful work of the Commission, the Commissioners or staff, be it through words, conduct or inaction.”</i>

46. The Foundation points out that paragraph 13(b) of the Code attempts to regulate conduct that is broader than “disinformation” (as defined by the Code).

47. Importantly, the Code itself fails to define what would constitute “*improperly undermine*”. While paragraph 14 attempts to cure this problem by preserving lawful criticism,⁸⁹ this does not help to define and/or clarify the meaning of “*improperly undermine*”.

48. Accordingly, the Foundation is concerned that the above provision is **vague and overbroad** (i.e. extending further than necessary), because it would include the following actions within its ambit:

48.1. Criticising electoral management;

48.2. Criticising administrative failures;

48.3. Criticising voter roll issues; and

48.4. Criticising ballot administration,

⁸⁹ Paragraph 14 reads: “*Nothing in this Code shall be construed as limiting lawful criticism, opinion, commentary or fair reporting concerning the Commission, the Commissioners or its staff*”.

49. Should either a political party or a wared / independent candidate do any of the above, they could potentially be accused of undermining trust in the Commission's work.
50. **This would constitute breach of the Code and open them to its tough sanctions if convicted, namely a criminal record and paying *either* a fine or up to a decade's imprisonment.**
51. Thus, a court may regard paragraph 13(b) as creating uncertainty that chills legitimate political criticism.
52. The Foundation submits that paragraph 13(b) opens Code up for judicial review under PAJA on the grounds that:
- 52.1. It is *ultra vires*, because it was not authorised to do so by the empowering provision;⁹⁰
- 52.2. It breaches the rule of law's doctrine of vagueness and is, therefore, unconstitutional or unlawful;⁹¹ and
- 52.3. Is contrary to the purpose of the empowering provision, because it extends further than necessary (i.e. is overbroad).⁹²
53. Provisions that impose mandatory censure obligations:

Paragraph of Code	Description
Paragraph 5(d)	<i>"Accordingly, every political party and candidate commits to take immediate steps to publicly retract and correct any disinformation or other false and misleading information that has been disseminated by them, for them or on their behalf, and to publicly censure any person responsible for</i>

⁹⁰ Section 6(2)(a)(i) of PAJA.

⁹¹ Section 6(2)(i) of PAJA.

⁹² Section 6(2)(f)(ii)(bb) of PAJA.

THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

	<i>disseminating such disinformation”.</i>
Paragraph 7(d)	<i>“With respect to office-bearers, representatives, members and supporters, every political party and candidate undertakes to take steps within twenty-four hours to publicly retract and/or correct any disinformation or other false and misleading information disseminated by the party or its nominated candidates.”</i>
Paragraph 7(e)	<i>“With respect to office-bearers, representatives, members and supporters, every political party and candidate undertakes to where appropriate and within their control, publicly condemn and appropriately sanction any member or nominated candidate for acting in contravention of the Act, the Disinformation Code or other relevant law.”</i>

54. The Foundation points out that contrary to PAJA’s requirement of procedural fairness⁹³ none of the above prohibitions require:

54.1. The statement concerned to be proved false; or

54.2. An investigation be completed, which investigation was subject to procedural fairness where the party concerned had a chance to state his/her side⁹⁴.

55. Additionally, paragraph 7(d)’s strict 24-hour requirement reinforces the fact that there is no investigation to verify if the statement is false. The Foundation submits that procedural fairness cannot be sacrificed on the altar of prohibiting misinformation. Rather, the Foundation recommends that the focus should be on investigating promptly and acting promptly and reasonably **once the falsity has been established**.

⁹³ Section 3(1) of PAJA.

⁹⁴ The *Audi alteram partem* rule as reflected in section 3(2) of PAJA.

56. As a result, these provisions create the risk that political parties or ward and/or independent candidates may feel compelled to retract statements that are:

56.1. Contestable;

56.2. Opinion-based; or

56.3. Interpretations of facts.

57. This would be contrary to, for example, [Democratic Alliance v African National Congress](#), where **the Constitutional Court distinguished between fact and opinion for purposes of deciding whether or not section 89(2)(c) of [Electoral Act, 1998](#)'s applied.**⁹⁵

58. The Foundation points out that section 89 of the Electoral Act, 1998 and section 69 of the principal Act are identical:

Section 89 of the Electoral Act, 1998	Section 69 of the Local Government: Municipal Electoral Act, 2000
Section 89 Intentional false statements (1) No person, when required in terms of this Act to make a statement, may make the statement- (a) knowing that it is false; or (b) without believing on reasonable grounds that the statement is true. (2) No person may publish any false information with the intention of- (a) disrupting or preventing an	Section 69 Intentional false statements (1) No person, when required in terms of this Act to make a statement, may make the statement- (a) knowing that it is false; or (b) without believing on reasonable grounds that the statement is true. (2) No person may publish any false information with the intention of- (a) disrupting or preventing an

⁹⁵ At paras 165 through 168.



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

election; (b) creating hostility or fear in order to influence the conduct or outcome of an election; or (c) influencing the conduct or outcome of an election.	election; (b) creating hostility or fear in order to influence the conduct or outcome of an election; or (c) influencing the conduct or outcome of an election.
---	---

59. Accordingly, the Code should also distinguish between fact and opinion.

RECOMMENDATIONS

60. Taken together, the Code's provisions restrict political viewpoints, criticism and speech capable of affecting reputation, even where such speech is not false.
61. Contrastingly, the principal Act is concerned with the prohibition of false information, and does not authorise restrictions on lawful expression merely because it may contribute to controversy, criticism or reputational consequences.
62. These provisions open up the Code for judicial review under PAJA, alternatively the rule of law. The provision also limits rights protected in the Bill of Rights and will result in the state having to prove that such limitations pass constitutional muster under section 36.

63. To avoid the above problems, the Foundation thus recommends that the provisions be redrafted as follows:

Paragraph of Code	Description
Paragraph 6(b)	<i>In giving effect to these commitments, every political party and candidate undertakes not to intentionally assist, promote or materially contribute to the dissemination of disinformation.</i>
Paragraph 10(b)	Every political party and candidate must take reasonable steps to monitor content published on online accounts and platforms under its direct ownership or control. If disinformation appears on those accounts or platforms, the party or candidate must take reasonable steps to correct it and limit its further spread.
Paragraph 13(b)	Every political party and candidate must not intentionally publish or distribute disinformation about the Commission, its Commissioners or its staff in a manner that contravenes the Act or undermines the integrity of elections.
Paragraph 5(d)	Every political party and candidate must take reasonable steps to promptly retract and correct any disinformation disseminated by them, for them or on their behalf. Where appropriate, they must take reasonable disciplinary or corrective measures against any person acting on their behalf who is responsible for disseminating such information.
Paragraph 7(d)	Every political party and candidate must, as soon as reasonably practicable after becoming aware that disinformation or other false and misleading information has been disseminated by the party or its



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

	nominated candidates, take reasonable steps to retract or correct that information.
Paragraph 7(e)	Where appropriate and within their control, every political party and candidate must take reasonable disciplinary or corrective measures against any member or nominated candidate who acts in contravention of the Act, this Code or other applicable law, and may publicly communicate the outcome where it is in the public interest to do so.

64. The Foundation trust that this submission will be of assistance to the Commission.

Sincerely,

Daniela Ellerbeck

Constitutional Rights Programme Manager

FW de Klerk Foundation

Email: daniela@fwdeklerk.org

END.