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Democracy, Governance and Service Delivery

21 July 2017

To: The Hon. Mr V Smith MP  
 Chairperson: Ad Hoc Committee on the Funding of Political Parties  
 Parliament of the Republic of South Africa  
 PO BOX 15  
 Cape Town, 8000  
 Email: [cbalie@parliament.gov.za](mailto:cbalie@parliament.gov.za)

Dear Mr Smith

**RE: Written submission by the HSRC's Democracy, Governance and Service Delivery research programme (DGSD) to the Ad Hoc Committee on the Funding of Political Parties**

This letter is in reference to the recent call for written submissions to the Ad Hoc Committee established to enquire into the funding of political parties, dated 24 June 2017.

Attached as an addendum to this letter is a brief submission from the HSRC's Democracy, Governance and Service Delivery research programme (DGSD) that sets out a number of considerations regarding aspects of funding of political parties.

DGSD is available at the request of the Ad Hoc Committee for further discussion and oral representations on the issues set out in the attached submission, and generally concerning the transparency and regulation of political finance.

Yours Sincerely

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**Submission to the Ad Hoc Committee on the Funding of Political Parties**

**by the**

**Democracy, Governance and Service Delivery (DGSD) research programme**

**21 July 2017**

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## **1. Overview of Submission**

This submission is structured as follows –

- The HSRC
- Background
- Key issues
- Discussion of results of the Money, Politics and Transparency Research Project
- Proposals

## **2. The HSRC**

The HSRC is well-established as a South African statutory research agency for the human and social sciences. Its work is governed by the Human Sciences Research Council Act (2008) and it is accountable to the Parliament of the Republic of South Africa. The HSRC reports annually to Parliament, in accordance with the Public Finance Management Act (1999) and related Treasury Regulations. It has a proud record of unqualified audit reports from the Auditor General.



In terms of its founding legislation, the HSRC is required to undertake public interest research in order to address developmental challenges in South Africa through its academic and applied research. It conducts relevant research to guide policy making in the public-sector and to inform decision making by members of the public. It is mandated to inform the effective formulation and monitoring of policy and to evaluate its implementation, as well as to stimulate public debate through the effective dissemination of research findings. The agenda of the HSRC is aligned with national priorities and global developmental challenges, which include poverty reduction through economic growth and innovation, and human and social advancement through skills enhancement, job creation, quality education, and the promotion of human rights. The HSRC is invited twice annually to provide inputs to the Standing Committee on Appropriations on aspects of the budget, and is called on an ad hoc basis by Portfolio Committees to share its research with members.

The HSRC is grateful for this opportunity to make a submission in response to the Ad Hoc Committee's invitation.

### **3. Background**

Parliament has established the Ad Hoc Committee on the Funding of Political Parties (the Ad Hoc Committee) 'to enquire into the funding of political parties represented in national and provincial legislatures in South Africa. To this end, the Committee must consider the model of public and private funding for political parties. In addition, consideration will be given to the desirability and possible means of regulating all forms of private funding (including investment entities owned by political parties). The Committee may also introduce amendments to existing legislation.'

The Party Funding Committee has called for public comment on two primary issues –

'How the Public Funding of Represented Political Parties Act, No.103 of 1997 may be strengthened to allow for greater transparency in the manner in which political parties are funded so as to ensure their effective functioning'.



The 'model of public and private funding for political parties, and the desirability and possible means of regulating all forms of private funding as well as investment entities owned by political parties', which is said to be '[o]f particular interest'.

In essence, then, the current Review includes the Public Funding of Represented Political Parties Act, 1997, and the regulation of private funding.

#### 4. Summary of key issues

- Money is necessary for healthy political parties and a thriving multiparty democracy.
- Public and private sources of funding are legitimate, but pose risks to the fairness and credibility of our constitutional democracy.
- Enhanced transparency is essential for improved accountability of private and public actors.
- Comprehensive regulation is necessary in order to enhance public trust in political parties and confidence in the ability of our democracy to achieve the Constitution's vision of a better life for all its citizens.
- Effective implementation is essential to ensure the realisation of good intentions and honest efforts.

#### 5. Discussion

*The Money, Politics and Transparency (MPT) research report 2015*

While South African political parties receive funding from the state and are obliged to account for their expenditure of these funds, there are no restrictions on private donations to parties. Political parties do not have to disclose their sources of private funds, nor are they subject to limits on donations or spending caps. South Africa is not alone in this regard. A recent *Money, Politics and Transparency (MPT)* global research



report<sup>1</sup> comparing political finance in more than 50 countries, including several in Africa, found that about half of political parties failed to regulate cash donations.

MPT is a joint initiative between the Sunlight Foundation, Global Integrity and the Electoral Integrity Project, that collaborated with a global network of in-country researchers and reformers to develop information resources, such as in-depth research, analysis and global principles, on political finance. DGSD participated as South Africa country expert researchers. The MPT research report is a result of consensus reached within the reform community on a set of global principles to guide fair, accountable and transparent political finance systems.

Annually, millions of rands from public sources and from private donors flow into the coffers of South Africa's larger parties. We recognise that money is essential to democracy. Democratic politics is expensive, and parties need money to reach their electorates and constituents, and to inform public policy. However, abuse of money in politics increases corruption, cronyism and policy capture. Regulatory deficits render politics opaque, obscuring the influence of private interests on public policy choices. Weaknesses in the existing public funding regulatory framework and its implementation, and significant funding from undisclosed private donors, raise the question of the extent to which ordinary citizens really shape politics and public policy. The voice of the poor is drowned out by the undue influence exercise by the wealthy.

The MPT report also found that political financing reforms around the world have usually resulted from pressures emanating from political scandals, or supportive judicial decisions and interpretations, and declining levels of public trust in political parties. In this context, South Africa is ripe for reform, as these conditions are both present and compelling, with numerous political funding scandals affecting both governing and opposition parties. Several public opinion surveys show a clear decline in trust in South African political parties.

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<sup>1</sup> View the 2015 Money, Politics and Transparency report, analysis and dataset at [www.moneypoliticstransparency.org](http://www.moneypoliticstransparency.org)



### *How to make 'My Vote Count'?*

A recent Constitutional Court case brought by My Vote Counts (MVC) to compel Parliament to pass promised<sup>2</sup> legislation to regulate private funding of political parties was unsuccessful.<sup>3</sup> However, a substantial minority judgment held that MVC's arguments were persuasive, finding that information about private sources of political party funding was required for the informed exercise of the right to vote. Furthermore, numerous public opinion surveys show a clear decline in trust in South African political parties over time. Political parties are among the least trusted institutions, eclipsing even the police, an institution widely regarded by South Africans as corrupt, inefficient and ineffective (South African Social Attitudes Survey; Reconciliation Barometer; Afrobarometer).

### *Which reforms best suit South Africa?*

The MPT report found no single approach or policy instrument to be ideal. Instead, it recommended a mix of policy options that complemented a country's particular socio-political context. It emphasised the need for state capacity to enforce its chosen system, and perhaps most importantly, warned that reforms could have unanticipated negative effects on the broader body politic.

Proponents of reform in South Africa have long called for greater transparency through disclosure laws to oblige political parties to publicly list the details of their private donors, and the larger amounts they receive. Would transparency suffice in the fight for more accountable, transparent and inclusive politics?

A Brazilian case is instructive for South African policymakers. Analysts of Brazilian politics conclude that even disclosed donations continue to undermine public trust. While disclosure laws have allowed intense scrutiny of corporate donations, greater transparency has inadvertently increased citizen dissatisfaction. Brazen financial ties

<sup>2</sup> The African National Congress gave this undertaking to the court in *Institute for Democracy in South Africa and Others v African National Congress and Others* (9828/03) [2005] ZAWCHC 30; 2005 (5) SA 39 (C) [2005] 3 All SA 45 (C) (20 April 2005).

<sup>3</sup> *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (30 September 2015).



between Brazilian politicians and the private sector and a series of scandals called into question politicians' commitment to the public interest. In September 2015, Brazil's Supreme Federal Court responded with a landmark judgment banning corporate funding in politics when it declared null and void a clause in the country's electoral act that allowed corporate donations to political parties and candidates. The court found that corporate donations were unconstitutional because they undermined the rights of citizens to elect their government.<sup>4</sup>

#### *Unintended consequences of barring private funding*

Removing the root of the problem in its entirety is tempting. Nonetheless, an outright ban on private donations could have unintended and even perverse effects on party politics.

Currently, the governing party and the official opposition parties receive the vast bulk of private donations, with much smaller amounts going to other opposition parties. A ban could therefore encourage a more equitable environment for smaller parties by ensuring the largest parties had less to spend on campaign activities and advertising. However, a ban could also undermine the growth of more competitive electoral politics, commonly identified as a key weakness in South Africa's democracy. The larger opposition parties that do attract some private funds and are able to wage competitive campaigns would see such a ban diminish their ability to penetrate new constituencies and grow their support, while the smallest political parties would remain largely unaffected.

In a dominant party system like South Africa, where one party repeatedly secures the vast majority of votes, larger opposition parties arguably require access to private donations to enable them to reach new voters with a coherent and convincing message. Removing the revenue stream that allows them to effectively challenge the incumbent may inadvertently entrench dominance in a political environment where greater accountability and competition are sorely needed. A ban could reduce the

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<sup>4</sup> See 'In Blow to Big Money, Brazil Bans Corporate Donations to Parties, Election Campaigns', *The Wire* 21 September 2015. Available at <http://thewire.in/2015/09/21/in-blow-to-big-money-brazil-bans-corporate-donations-to-parties-election-campaigns-11187/>. Accessed 23 September 2015.



financial dominance of larger parties in electoral contests, but could also encourage parties to explore other illicit avenues to access campaign resources, such as the use of state resources for electoral gain – an activity found to be prevalent in 94% of the countries studied in the MPT report. The ANC already stands accused of significant targeting of state resources, including spending on public infrastructure, budgets and state goods to support its 2014 general election campaign, creating an undue advantage.

While a ban could reduce opportunities for improper influence by private interests, there is no guarantee that it would completely erase the risk. In fact, bans tend to make determined donors more creative and devious in their efforts to influence people in powerful positions, which, in turn, make oversight and monitoring far more complex. The Open Society Foundation's Money and Politics Project found that foreign regulatory oversight had caused listed South African companies to end official donations. However, growing political party receipts suggest that donations continue via individual directors, unlisted companies<sup>5</sup> and other avenues.

A key concern therefore is whether, realistically, a regulatory ban can be effectively implemented and what mechanisms are available to detect any illegal donations.

#### *Mixture of regulations for greater transparency and fairness*

A more appropriate route of regulation of private donations cannot occur in isolation from other remedial efforts. To compensate for bans, and to ensure political parties can cover escalating campaign costs (like advertising), public funding reform should focus on reassessing the current parliamentary allocation of funds. Currently, 90% of allocated election funds are provided according to each party's share of seats, while the remaining 10% is equitably allocated between all parties. This disproportionately benefits larger parties and undermines healthy competition. There is also a need to increase public funding, albeit within limits because of the many demands on public coffers. This would certainly be consistent with global trends. The MPT report found

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<sup>5</sup> G Pienaar (2014). 'The State of Party Funding in South Africa: Policy Paper'. Money and Politics Project, Open Society Foundation for South Africa, April 2014. Copy attached.





inequitable public funding to be widespread, but also found increased public subsidies to be among the most popular recent reforms.

South Africa may prefer a mix of regulatory policies for greater transparency through private donor disclosure laws, with a limit on campaign spending and an expansion of public funds. Disclosure permits additional funds to be made available beyond the cash-strapped public purse, but importantly, assists the detection of undue influence of donations by enabling monitoring of how the actions of political parties might benefit particular donors. Capping campaign expenditure on advertising and related activities to level the playing field has proved effective in the United Kingdom, according to the MPT report.

#### *Tighter regulations to curb abuse*

Any restrictions on contributions or spending must extend beyond political parties to their individual members, effectively closing loopholes for individuals to receive donations or spend to the benefit of their parties. Tighter regulations to curb the abuse of state resources will certainly be required. Information pertaining to larger donations and related spending must be made publicly available in a timely manner, in order to meaningfully uphold the constitutional right of access to information. Finally, oversight bodies must be non-partisan, merit-based and independent, as well as effective. The Electoral Commission, for example, performed well in MPT's comparative study, but it acknowledged that it lacks the resources to properly scrutinise political parties' annual reports on their use of public funds.

Proponents of reforms should moderate their expectations. While these measures should help to create a more transparent and equitable political environment, the MPT research found little evidence to suggest a direct and immediate causal link between reforms and heightened public satisfaction or confidence, or in greater electoral participation. The full benefits of clean politics tend to show themselves only some time after reforms have taken place.



## 6. Specific proposals

**Public funding:** Currently, public funding is allocated to political parties represented in the national and provincial legislatures from three primary sources. Firstly, from the Public Fund established in terms of the Public Funding Act; secondly, from Parliament for purposes of operating constituency offices and related public participation and representative activities; and thirdly, from provincial legislatures for similar purposes. This latter source of funding is clearly unconstitutional and unlawful and should be halted without further undue delay.<sup>6</sup> It may be partly or wholly replaced in terms of an amendment to the Public Funding Act.

**Increase in public funding:** Any increase in public funding to political parties should be contingent on adequate and appropriate regulation of private funding.

**Local government:** The funding of represented political parties in the local government sphere should not be excluded from the current Review. Even though the Public Funding Act applies only to political parties represented in national and provincial legislatures, we note that the Committee's terms of reference (ToRs) include the possibility may also introduce amendments to existing legislation. We understand the ToRs to include also the introduction of new legislation, for example, to regulate private funding. Local government is a significant sphere of government as it is at the forefront of service delivery to the people who live within their boundaries. The Auditor-General regularly reports that local governments experience many of the same influences and conflicts of interest as those that affect other spheres of government. It is artificial and indeed remiss to exclude from this Review many of the same political parties who are represented in other spheres of government. To do so would undermine any stated intention or effort to enhance the regulation, and transparency and accountability, of political parties.

**Donations to individuals:** Similar considerations apply in respect of individuals, whether or not they are members of political parties. A failure to regulate their ability

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<sup>6</sup> G Pienaar (2014). 'Foundations and Options for Party-funding Reform in South Africa'; and 'The State of Party Funding in South Africa: Policy Brief'. Money and Politics Project, Open Society Foundation for South Africa, April 2014. Copies attached.



to receive and retain donations, will weaken the entire regulatory framework. Restrictions on contributions must extend beyond political parties to include their individual members, closing existing loopholes for individuals to receive illicit and anonymous donations.

**Transparency:** In principle, far greater transparency is essential, in relation to both public and private funding to political parties. For example, there should be an obligation on all political parties to report accurately, timeously and publicly on the amount of donations received from all sources. The source or identity of donors of amounts below an agreed threshold may be kept confidential, but the total value of donations received and the category of their origin, are matters of legitimate public interest. There should also be an obligation on both the donor and recipient to accurately publicly disclose and report larger donations that exceed an agreed threshold. Donations should in all circumstances be understood to include donations in cash or in kind.

**Anonymous donations:** Given the current state of political contestation in South Africa, a total ban on anonymous donations is impractical and unreasonable. Our democracy is still immature, and violence and threats of violence seem to be on the rise. Ongoing difficulties in combating maladministration and corruption in the allocation of public resources and public contracts indicate clearly that there is substance to fears that disclosure could negatively affect public standing and access to legitimate commercial opportunities. It is therefore necessary to allow anonymous private donations. However, in order to try to manage their potential for undue influence, such donations should be subject to a cap, beyond which disclosure is required.

**Threshold for disclosure:** It is difficult to determine a particular threshold, as a range of factors are relevant in different circumstances, and any threshold is therefore potentially arbitrary. For example, a relatively modest donation may be regarded as sufficient inducement to a particular individual in one situation, but not to another in a different situation. The purpose of disclosure is to prevent undue influence on decision-makers. The potential for undue influence can be minimised, if not eliminated, by some degree of transparency. However, as we have seen above,



transparency can have negative consequences, and may stifle legitimate rights to association and speech, and necessary private financial support. Some research is probably necessary in order to enable public participation to arrive at a threshold that has some basis in fact and that has broad support.

An additional requirement should be that donations from related sources and over a period of time (for example, one year) are calculated cumulatively so as to prevent the subterfuges of fronting or 'splitting'.

**Expenditure caps:** Appropriate consideration should be given to both the representative and consultative roles and responsibilities of political parties. For this reason, many countries place a cap on expenditure on election campaign-related expenditure so that parties are required to retain a reasonable proportion of their funds to enable ongoing and meaningful contact and engagement with constituents and the broader electorate between periodic election campaigns. Acknowledged difficulties in enabling broad public participation in Parliament's deliberations makes it even more important for political parties to be able to discuss policy and legislative proposals with their constituents, and to enable their voices to be heard when laws are debated and accountability is exercised in the legislature.

**Regulation and Oversight:** The MPT research confirmed that regulation, reporting and oversight serve no meaningful purpose unless they are undertaken thoroughly and are accompanied by transparent reporting. South African political parties are currently not required to account in detail on their use of public funds, and the IEC currently lacks the capacity to exercise adequate scrutiny and oversight. The regulation of lawful uses of public funding need to be tightened up, loopholes closed, and detailed reporting responsibilities clarified and strengthened.

In addition, the IEC needs to be appropriately capacitated to exercise its oversight responsibilities. This can be achieved through enhancing internal capacity, or the provision of resources to secure external private sector capacity. However, it is suggested that, in the case of *public funding*, it is not inappropriate to ask the Auditor-General to provide the necessary assistance to the IEC.



In the case of *private funding*, the IEC should not be given regulatory and oversight responsibilities that may have a negative impact on current largely positive perceptions of its impartiality and effectiveness. As a result, it is recommended that oversight in respect of private funding should be exercised by another, separate, authority – perhaps the Democracy Fund proposed below.

**Democracy Fund:** A Democracy Fund should be established for the receipt and disbursement of certain private donations. The Fund should exercise oversight in this regard and must report publicly and at least annually on all amounts received and disbursed, or returned.

This Fund can serve several related and additional purposes. Firstly, a private donor may not wish to make a donation to any one particular political party, and may prefer to support open and competitive democracy in general. This is in the general public interest and should be encouraged. A donor may wish to make a donation to a political party but may not wish to make it directly to that party, or the donation may be for a particular purpose, such as to support ongoing public consultation processes between elections, or for a particular election campaign. In these circumstances, a donor may ‘ earmark ’ a donation to that party or for that purpose when transferring the donation to the Fund. However, any donation earmarked for a particular party should be disclosed. In other circumstances, a donor may decide whether any donation is made anonymously to the Fund or may be disclosed.

Secondly, private donations from authorised sources in excess of the agreed threshold for disclosure can retain their anonymous status if they are made, not to any political party, but to this Fund. If a donation to the Fund is made by an unauthorised donor, it should be returned or, if that is impossible or impractical (for example, if the donor cannot be identified or traced), the Fund should transfer that donation to the National Revenue Fund. Thirdly, the Fund should also receive, scrutinise and report publicly on regular reports from political parties concerning their receipt, management and use of private donations. This reporting obligation will not require parties to disclose the source of donations received that fall below the agreed disclosure threshold.



The allocation of general funds (i.e. those not earmarked for a particular political party) from this Fund to political parties should be on the basis of a formula that is clearly not in conflict with s.236 of the Constitution. It is suggested that such a formula would entail the allocation of funds on the basis of 50% proportionately and 50% equitably. In this way, the Fund could provide financial support in an even-handed manner.

**Foreign donations:** Donations from foreign governments or their foreign or South African representatives, agents or surrogates (third parties), should be banned entirely. Donations from foreign or transnational corporations may be acceptable, provided that they have a subsidiary operating lawfully in South Africa, and that such donations may be made only to the Democracy Fund and should be disclosed.

**Private and private corporate donations:** Donations from individuals and private corporations should be permitted, provided that their source must be disclosed if their value exceeds the agreed disclosure threshold. However, donations to any political party from any person or corporate entity, surrogate or related party (third party) should be impermissible if that person or entity has any business dealings with the state. A reasonable 'cooling off' period is also necessary. A cooling off period would entail that any donations from such a source would be impermissible if it is promised or made at any time during a year before any business relationship with the state is anticipated or after it is concluded. For example, anticipation of a business relationship could include any response to a public call for expressions of interest, or through registration on a supplier database, or through signature of any memorandum of intention to contract. Similarly, for example, termination or conclusion of a business relationship would include receipt of a sign-off letter or final payment from the state.

**Public corporate funding:** Any donation from a foreign or South African state-owned entity, company or enterprise or related party should be impermissible.

**Party investment vehicles:** Political party investment arms or vehicles (such as Chancellor House and the Progressive Business Forum) should be prohibited from receiving any funding from public or state sources, or engaging in any business relationship with the state or related public entities.



**Allocation formula for public funding:** The current proportion for the allocation of public funding (90% proportional: 10% equitable) has long been a source of great dissatisfaction among represented and aspirant political parties. It has a chilling effect on political vitality and dynamism and arguably contradicts the spirit, if not the letter, of s.236 of the Constitution that contains no prioritisation of either equitable or proportional allocation of public funding for political parties.

The current formula for the allocation of public funding to political parties should be reassessed and revised to reflect a fairer distribution of public funding. Guides to fairness include the text of s.236 of the Constitution –

*‘Funding for political parties*

“To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.”

as well as of s.1(d) of the Constitution, which identifies South Africa’s ‘founding values’ as including –

“Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

It is suggested that the current formula undermines the spirit of these provisions that aim to ensure inter alia accountability and responsiveness.

**Transparent process:** We propose that all written submissions and presentations to the Ad Hoc Committee should be disclosed on Parliament’s website.