



## **MEDIA COMMENTS ON DRAFT POLITICAL PARTY FUNDING BILL, 2017**

*South African National Editors' Forum and amaBhungane Centre for Investigative Journalism*

### **INTRODUCTION**

1. This submission is made by the South African National Editors' Forum ("Sanef") in collaboration with the amaBhungane Centre for Investigative Journalism ("amaBhungane").
2. Sanef, launched in 2006, is a non-profit organisation whose members are editors, senior journalists and journalism trainers from all areas of the South African media. We are committed to championing South Africa's hard-won freedom of expression and promoting quality, ethics and diversity in the South African media.
3. Sanef aims to be a representative and credible voice of journalism in society, to facilitate diversity in newsrooms and reporting, and to enable a culture of real debate and promote free and independent journalism of the highest standard. Sanef stands in defence of media freedom. We campaign for legislation to enable the media to do their job, and against commercial and legislative pressures that restrict media.
4. AmaBhungane is an independent, non-profit company founded in 2009 to develop investigative journalism so as to promote a free, capable and worthy media and open, accountable and just democracy. This submission is made under our advocacy mandate, which is to help secure the information rights that investigative journalists need to do their work.
5. As amaBhungane practises investigative journalism, we are ideally placed to identify legal, policy and practical threats to the information flows that are the lifeblood of our field. We have worked on information rights matters of direct benefit to investigative journalists and the public at large since 2010.
6. The media, in particular investigative journalists, have played a crucial role in making information related to the private funding of political parties available to the public and to highlight instances of the undue influence of money in politics. However, such publication has been the exception rather than the rule because of the opaque nature to date of party funding in South Africa.
7. A 2014 study by the *Money, Politics and Transparency Project*<sup>1</sup> across 54 countries has indicated that the success of party funding legislation lies in making credible political finance information

<sup>1</sup> Money, Politics, and Transparency Project (2014) *The Money, Politics, and Transparency Campaign Finance Indicators*:

easily and timeously available and the extent to which the public, media and civil society are able to use it to help ensure accountability.

8. We therefore welcome the steps taken by the ad hoc committee to enact legislation for regular and proactive public disclosures.
9. We submit these proposals in the interests of strengthening the legislation, to allow for the free flow of information necessary for the media and investigative journalists to inform the public. We see this as vital to supporting the constitutional right to information, and enabling the ability of civil society and oversight bodies – Parliament and the Independent Electoral Commission (“IEC”) – to monitor compliance and exert accountability.
10. The submission is limited to comments on the adequacy of the public transparency provisions contained in the draft Bill. We address issues relating to:
  - a. Public Disclosure of Contributions to the Multi-Party Democracy Fund
  - b. Public Disclosure of Direct Funding of Political Parties
  - c. Circumvention and Related Parties
  - d. Party Business Ventures to be Restricted or Disclosed

#### **A. PUBLIC DISCLOSURE OF CONTRIBUTIONS TO THE MULTI-PARTY DEMOCRACY FUND**

11. The Bill at cl 3(5) provides for private persons who contribute to the IEC-controlled Multi-Party Democracy Fund to stay anonymous or for the size of their donation to be secret, at their request.
12. While the provision of a fund administered by the IEC puts some distance between political parties and donors, some risk of undue influence remains.
13. Example 1: A company tenders for a contract in a province. It secretly informs the leader of the provincial ruling party, who is also the premier, that it intends making a large anonymous contribution to the Fund should it win the contract. The premier pressures his or her officials to award the contract to that company. The fact that other parties also benefit under the prescribed formula is regarded by the participants as an inconvenience, but does not undo the corrupt nature of the transaction.
14. Example 2: A foreign government wants to influence the outcome of the South African elections at national level, in support of the then ruling party. It comes to an arrangement with a number of private persons, secretly acting as its agents, to make large contributions to the Fund. Though all

parties benefit, the ruling party benefits the most under the prescribed formula. This ruling party gains an edge in the elections.

15. The temptation to use the Fund to “launder” improper contributions as in the examples above will increase to the extent that a party is electorally dominant and gets bigger allocations under the prescribed formula. It must be noted that this is a factor beyond the control of the present legislature and that this Bill must stand the test of time even in circumstances where the electoral division may be very different to now.
16. We therefore propose that the fund should be subject to the same robust transparency provisions as direct donations, such as that all donations above a certain threshold must be disclosed.
17. Note that we propose quarterly rather than annual disclosure; a matter we shall elaborate on in paragraph 3 when we address the direct funding of political parties.

*Drafting suggestion*

3. (1) A Multi-Party Democracy Fund is hereby established for the purpose of providing for private sources of funding for political parties that participate in national or provincial legislatures.

...

(3) Subject to subsection (4), the Commission must credit the account contemplated in subsection (2) with—

(a) money received from any private source whether from inside or outside the Republic;

...

(5) Any contributor contemplated in subsection (3)(a) who contributes below a prescribed threshold may request the Commission not to disclose their identity or the amount of the contribution.

(6) The Commission must publish all contributions other than details of contributions envisaged in subsection (5) on a quarterly basis in the prescribed form and manner.

(7) The Commission must also publish all such contributions during an election year one month before an election, should it fall on a date other than a quarterly publication.

## **B. PUBLIC DISCLOSURE OF DIRECT FUNDING OF POLITICAL PARTIES**

### ***Donations in kind***

18. The Bill defines “donation in kind” at cl 8, with the effect that such donations are also subject to the transparency provisions of the Bill. However, the definition excludes “personal services provided on a voluntary basis”, meaning that an individual donation of skills will never have to be disclosed regardless of value.

19. Some services ordinarily rendered at a fee – such as accounting, management consulting, legal or public relations advice – may amount to a very substantial benefit if provided voluntarily. Such a benefit should be disclosed if it exceeds the threshold for the disclosure of other donations, as the risk of undue influence is no different whether a donation is in cash or in kind.

*Drafting suggestion*

8. For the purposes of this Chapter—

...

**'donation in kind'**—

...

(b) does not include personal services provided on an voluntary basis except where the cumulative value of such services provided by any person over a twelve-month period exceeds the prescribed threshold referred to in section (10);

***Frequency of disclosure***

20. The Bill provides at cl 10(2) that the IEC must publicly disclose donations reported to it by parties on an annual basis, except before elections, when it will be quarterly.
21. Quite simply, annual is too long and does not satisfy the requirement for the timeous disclosure of information.
22. The recent judgment in the *My Vote Counts NPC v President of the Republic of South Africa and Others*<sup>2</sup> identifies the need for regular and proactive public disclosures. We submit that given our context, the current revelations around state capture and the vulnerability of undue influence being exerted in public procurement processes, shorter intervals between public disclosures are necessary.
23. We propose that the correct interval for proactive disclosure by the IEC is quarterly. We must emphasise, however, that the suggested interval should apply to proactive disclosures only and should not abrogate any person's right to apply under the Promotion of Access to Information Act, 2000 ("PAIA"), for information about a donation to a political party using the ordinary timeframes of PAIA. In this regard, we note that the Court in the matter above held that Parliament must amend PAIA to include access to party funding information.
24. We envisage, therefore, that proactive disclosures under the Bill should be quarterly, and that any person should be able to access the same information at any other time using PAIA.

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<sup>2</sup> Full judgment available at <<http://www.saflii.org/za/cases/ZAWCHC/2017/105.html>>

25. Note that we also propose that parties should disclose all donations to the IEC; not only donations above the threshold. The IEC, however, will publish only the donations above the threshold. This is a small change, but necessary to prevent attempts by parties to “split” donations to stay under the disclosure threshold. See also “Circumvention and Related Parties” below.

*Drafting suggestion*

10. (1) A political party must disclose all donations received [above the prescribed threshold,] to the Commission, in the prescribed form and manner.
- (2) The Commission must publish the donations disclosed to it in terms of subsection (1) and above the prescribe threshold on [an annual] a quarterly basis in the prescribed form and manner.
- (3) [Despite subsection (2), the] The Commission must also publish [the] all such donations during an election year one month before an election, should it fall on a date other than a quarterly publication [disclosed to it during an election year on the following basis:
  - (a) one month before an election; and
  - (b) twelve months prior to the date contemplated in paragraph (a), on a quarterly basis].

**C. CIRCUMVENTION AND RELATED PARTIES**

26. The Bill provides for the disclosure of donations to political parties above the prescribed threshold. We argued above that contributions to the Multi-Party Democracy Fund should also be subject to a threshold above which disclosure is mandatory.
27. Where thresholds are set, there is a risk of parties or donors circumventing the rules via fronting or splitting arrangements.
28. CI 11(2) currently contains a prohibition on circumventing “any of the provisions of this Chapter”. The reference is to Chapter 3, which deals with the direct funding of political parties.
29. This prohibition does not go far enough. Not only circumvention in relation to direct donations should be prohibited, but also in relation to the rest of the Bill (in particular should our recommendation of mandatory disclosure of contributions to the Multi-Party Democracy Fund above a prescribed threshold be accepted).
30. Moreover, given the severity of the risk that the disclosure provisions will be circumvented, there should be explicit provisions relating to the following, at a minimum:

- a. Contributions/donations from the same source or substantially related sources<sup>3</sup> within any 12-month period must be regarded as a single contribution/donation. "Substantially related sources" may be defined as:
    - i. A company and its subsidiary;
    - ii. A natural person and a juristic person of which the former is a shareholder, a beneficial owner, a trustee, a director or a partner;
    - iii. Husbands and wives; and
    - iv. Parents/guardians and minor children/wards.
  - b. When a contribution/donation is made via a third party, the original source of the contribution/donation must be declared to the IEC or the party which receives it, and the IEC or the party must declare the original source for the purposes of disclosure. Failing to do so must be a contravention under this Act.
  - c. Splitting a contribution/donation between different persons or into different twelve-month reporting periods with the intention of circumventing disclosure must be a contravention under this Act.
  - d. Any other intentional circumvention of the disclosure provisions a contravention of this Act.
31. Note also our related recommendation in the previous section that political parties should be required to disclose all donations, even below the threshold, to the IEC, after which the IEC will disclose only donations above the threshold. This will give the IEC the opportunity to monitor compliance with the requirement that donations from the same or substantially related sources are counted together.

#### **D.PARTY BUSINESS VENTURES TO BE RESTRICTED OR DISCLOSED**

32. The Bill appears to be silent on dividends or returns that political parties may receive by dint of an ownership stake in a company or any other form of investment.
33. The intention may be for dividends to be treated as donations, in which case they would be subject to disclosure if above the prescribed threshold. However, it appears that as soon as a party is entitled to benefits by dint of equity it holds or any other investment, it is no longer a donation and will not have to be disclosed.

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<sup>3</sup> The definition of 'substantially related sources', is drawn from an earlier written submission made to the Committee by the Council for the Advancement of the South African Constitution (CASAC). We have made slight amendments to this definition in our submission.

34. The Committee will be aware of prior scandals over party investment vehicles doing business with the state, and the corrosive effect that such relationships have had on our democracy. We would go so far as to say that this has been the single most pressing public concern relating to party funding over the course of a decade or more.
35. Under the circumstances, the Bill should deal explicitly with the phenomenon of party investments, whether equity-based or not, as demonstrated by the examples below:
36. Example 1: A provincial ruling party beneficially but secretly owns shares in an IT company. The provincial government issues a lucrative tender for IT services. The provincial ruling party pressures officials to award the contract to the IT company. When the IT company next pays dividends, the party benefits handsomely – a benefit it does not have to disclose.
37. Example 2: The national ruling party plans a policy change that is likely to shake confidence in the banking sector for a while. Before announcing the policy, it invests in financial instruments shorting banking stocks. Once the policy is announced, banking stocks plummet and the short positions are closed out. The party benefits handsomely and does not have to disclose the return on its “investment”.
38. Compelling arguments could be made for a complete ban on party business ventures and any form of speculative investment, equity-based or not, given parties’ power to influence investment outcomes.
39. However, should the Committee not choose this option we recommend that, at a minimum, all dividend and other investment income should be disclosed above the same donation threshold that applies to direct donations, and in sufficient detail to reveal any underlying conflict of interest.
40. We also recommend that the audited financial statements and auditors’ opinion referred to in cl 14(4) and submitted to the IEC, be made public annually by the IEC. This will be an important transparency measure not only in itself, but also to engender public confidence that parties’ have fully met their disclosure obligations.

## **CONCLUSION**

41. We thank the Committee for the opportunity to make written submissions on a matter of significant importance to our constitutional democracy, and media freedom in South Africa.
42. Sanef and amaBhungane would welcome the opportunity to make oral presentations to the Committee on this submission.

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