



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Comments on the Draft Political Party Funding Bill, 2017

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

16 October 2017

1. Introduction

The South African Human Rights Commission (SAHRC / Commission) welcomes the publication of the draft Political Party Funding Bill (Bill) by the ad hoc Committee on the Funding of Political Parties (Committee) for public comment.

The Bill provides an opportunity for the SAHRC and other stakeholders to actively engage the draft legislation with a view to recommending measures to improve legislative frameworks in South Africa and ultimately strengthen human rights promotion and protection. The SAHRC recognises the essential role that civil society has played in advocating for the development of the Bill, and the lengthy process that has been undertaken to bring the Bill into fruition.

The ultimate objective of the SAHRC is to fulfil its responsibilities and mandate to promote, monitor, fulfil and protect human rights in terms of the Constitution of the Republic of South Africa, 1996 (Constitution), the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act), the Promotion of Access to Information Act, 2 of 2000 (PAIA), and other applicable national legislation, and regional and international instruments. In particular, the SAHRC must ensure the development of a culture of human rights embedded in a society characterised by the right of all people in South Africa to request information from public and private bodies with the view to promoting transparency, accountability and effective governance across all such bodies.

The Commission has additional powers and functions prescribed under the PAIA, under which it is empowered to promote the realisation of the right to access information, report to

Parliament on the implementation of the legislation and propose recommendations to address any challenges related thereto.¹

As a national human rights institution (NHRI) the SAHRC is additionally guided by the *Principles Relating to the Status of National Institutions* (the Paris Principles).² The Paris Principles direct NHRIs in their duties and responsibilities and include the examination of 'legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;'

It is within the aforementioned constitutional, statutory and international mandate, that the SAHRC presents its comments on the Bill to the Committee.

2. SAHRC's activities related to Political Party Funding

Through the execution of its mandate, the SAHRC has engaged in measures to create an environment of accountability and transparency in governance. The SAHRC has implemented the specific mandate of promoting the right of access to information and monitor compliance in terms of the PAIA. This pertains to all information that is held by the state, and any other person where that information is required to exercise or protect any rights.³

While the Bill itself may be considered distinct from the PAIA, there are significant linkages between the public's right of access to information under the PAIA, and what the Bill prescribes as obligations for political parties that participate in national and provincial legislatures. The courts have recently ruled more categorically around the linkages in relation to private funding of political parties.

Political party funding has been the subject of a most prolonged legal battle, led more recently by Cape Town-based organisation *My Vote Counts*. Due to a lack of regulation pertaining to private funding of political parties in South Africa, a number of attempts have been made to compel political parties to disclose their private donors. In 2004, the Institute for Democracy

¹ Section 83 (3) of PAIA deals with the additional functions of the Commission, providing that the Human Rights Commission may-

(a) make recommendations for-

(i) the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively; and
(ii) procedures in terms of which public and private bodies make information electronically available.

² Adopted by United Nations General Assembly Resolution 48/134 in 1993.

³ Constitution of the Republic of South Africa, 1996. At section 32 (1)

in South Africa (IDASA) was the first to initiate such proceedings⁴, and the four main political parties of the time, the African National Congress (ANC), the Democratic Party (now the DA), the then New National Party (NNP) and the Inkatha Freedom Party (IFP) were respondents to the case. The respondents raised concern about losing donors whose donation was conditional on their anonymity, specifically requesting that their donations not be subjected to the public domain.

This was especially important for opposition parties who claimed that their donors feared losing government business opportunities and relationships if they were found to be funding opposition parties. To what extent can a considered legislative intervention balance the right to cast an informed vote whilst still providing the necessary framework for political parties to gain the support and resources necessary to compete for public office? This balancing act is one of the main challenges facing the efficacy of the Bill.

No appeal was lodged in the IDASA case after the Western Cape High Court found that political parties were private entities and therefore did not need to disclose their sources of funding. It is noteworthy that the High Court acknowledged that, in principle, such information should be required to be disclosed by legislation, but not through recourse to the courts. The issue was subsequently taken up by My Vote Counts (MVC) in the Constitutional Court case of *My Vote Counts NPC v President of the Republic of South Africa and Others*. MVC's submissions hinged on the intersection between the right to vote and the right of access to information, provided for by the Constitution under Section 19(3) and Section 32 respectively.⁵

MVC launched an application to the Constitutional Court in terms of Section 167 of the Constitution, seeking an order to compel Parliament to enact legislation (in terms of the constitutional obligation to give effect to the right of access to information) to regulate the disclosure of private funding information. This legislation, they argued, was required to supplement PAIA.⁶

The main thrust of the application was that the right of access to information under Section 32(1) of the Constitution entitles citizens to have access to the private funding information of political parties, reasonably required for the effective exercise of the right to vote in elections and to make political choices, which are rights enshrined in Sections 19(1) and (3) of the Constitution, respectively.⁷ The constitutional imperative for providing access to such

⁴ *Institute for Democracy in South Africa and Others v African National Congress and Others* [2005] 3 All SA 45 (C)

⁵ *My Vote Counts NPC v President of the Republic of South Africa and Others* (2017) ZAWCHC 105

⁶ *Idem* at paragraph 4

⁷ *Ibid supra* [note 5] at paragraph 2

information, MVC submitted, is further strengthened by Section 7(2) and Section 1(d) of the Constitution, as transparency in the funding of political parties is required for the effective prevention and detection of corruption.⁸ It is also reinforced by a number of international agreements which have been ratified by South Africa.⁹ MVC therefore did not seek to challenge the constitutionality of PAIA, but instead argued that Parliament had failed to fully fulfil its obligation in terms of Section 32(2) of the Constitution to enact legislation to give effect to the right of access to information, by failing to regulate disclosure of private funding of political parties.

The majority of the court held that the principle of subsidiarity required MVC's argument to take the form of a "frontal challenge" on the constitutional validity of PAIA in an application before the High Court of South Africa, under Section 172(1) of the Constitution.¹⁰ The majority further held that it could not order Parliament to legislate without breaching the separation of powers doctrine. While the merits of the case were accordingly not considered by the majority, the minority per Cameron J both considered and supported them, with a subsequent application lodged and set before the Western Cape High Court, Cape Town.

In *My Vote Counts NPC v President of the Republic of South Africa and Others*¹¹ the High Court agreed with the judgment of the minority in the Constitutional Court, and relied heavily on the latter's reasoning in ultimately declaring the PAIA inconsistent with the Constitution and invalid insofar as it does not allow for the disclosure of information related to the private funding of political parties.

With PAIA being the subject of amendment emanating from the High Court's decision, and notwithstanding the role of the Independent Electoral Commission (IEC) as the primary custodian of the Bill, the mandate of the SAHRC in relation to its current functions under the PAIA will invariably be affected. This is particularly so in light of the establishment of the Information Regulator, the functions of which are inextricably linked to those of the SAHRC subject to the ongoing handover process currently in progress.

These factors serve to emphasise the vested procedural and substantive interests held by the SAHRC in the current Bill. Accordingly, the SAHRC sets out its concerns with the Bill hereunder.

⁸ Idem at paragraph 3

⁹ Idem

¹⁰ *My Vote Counts NPC v Speaker of the National Assembly and Others* (2015) ZACC 31 at paragraph 122

¹¹ *My Vote Counts NPC v President of the Republic of South Africa and Others* (2017) ZAWCHC 105

3. SAHRC concerns on the Bill

Of significant interest for the purposes of these submissions is the extent to which information related to political party funding has bearing on democratic tenets of accountability and transparency in relation to an individual's right to cast an informed vote.

3.1. Political party funding and access to information

Any legislative intervention purporting to regulate political party funding must uphold the country's democracy and electoral system as envisaged in the Constitution. Principles of transparency and accountability are crucial to securing public trust and reducing perceptions of undue influence in the government's dealings with the private sector, executive decisions, and policy-making.¹²

The right of access to information underscores the public's right to an open and transparent government. In *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly*¹³, the Constitutional Court referred to the imperative of creating an active, informed and engaged citizenry since the public can only hold their elected representatives accountable if they are sufficiently informed of the relative merits of issues.¹⁴ Consequently, information related to the private funding of political parties is essential to the decision to elect public officials, and in exercising the right to cast an informed vote.

The Constitutional Court noted in *Ramakatsa and Others v Magashule and Others*¹⁵ that in South Africa's system of democracy, *political parties occupy the centre stage and play a vital part in facilitating the exercise of political rights*. This position is affirmed by section 1 of the Constitution, which proclaims that "[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness" are values on which our state is founded.¹⁶

¹² South African Money and Politics Project (MAPP); Open Society Foundation for South Africa with Wallace Global Fund. *Money and Politics in South Africa: Meeting our Next Democratic Challenge*. 2011 Policy Paper.

¹³ 2012 (6) SA 588 (CC)

¹⁴ At paragraph 64

¹⁵ 2013 (2) BCLR 202 (CC)

¹⁶ *Idem* at paragraph 65

Further, the cases of *August and Another v Electoral Commission and Others*¹⁷, *New National Party of South Africa v Government of the Republic of South Africa and Others*¹⁸, and *Richter v Minister of Home Affairs and Others*¹⁹, all held that:

...the right to vote imposes an obligation upon the State not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised.

The SAHRC notes the concern raised by opposition parties that under the current regime, any limitations under the PAIA in terms of accessing information is justified in that it protects the rights of donors to privacy and to express their political support in secret; it protects the ability of smaller parties to secure private funding anonymously in order to ensure a level electoral playing field with the ruling party; political parties are spared the onerous task of compiling and preserving records; and disclosure of funding would have the impact of funders withdrawing donations to opposition parties for fear of reprisals by the ruling party thus impacting on their right to freedom of association.²⁰

However, the SAHRC further notes the calls by civil society for the enactment of legislation to regulate funding of political parties in South Africa, which currently 'remains almost entirely unregulated, providing ample opportunity for unethical and dishonest donors to peddle influence in policy formulation and to meddle in domestic politics, enabling corrupt relationships to develop and undermining public confidence in both political parties and domestic politics more generally.'²¹ The Constitutional Court's minority judgment in the *MVC* case highlighted how donations to political parties are made in anticipating that the party will advance a particular social interest, policy or viewpoint. In turn, these political parties depend on contributors for the very resources that allow them to conduct their democratic activities.²² Moreover, the subsequent High Court judgment in *MVC* held that the privacy interests of both political parties and their private donors are attenuated due to the 'distinctly public purpose' of political parties.²³

The commitment to increase transparency, scrutiny and enhance participation is welcomed. The recent exposure of unethical relationships and influence in domestic public affairs by

¹⁷ [1999] ZACC 3; 1999 (3) SA 1 CC at para 17

¹⁸ [1999] ZACC 5; 1999 (3) SA 191 CC at para 11

¹⁹ 2009 (3) SA 615 CC at para 54

²⁰ *Ibid supra* [note 6] at paragraph 65

²¹ Council for the Advancement of the South African Constitution. *Submission on Public Funding of Represented Political Parties Act and Regulation of Private Funding of Parties*. 2017

²² *Loc cit. supra* (note 10) at paragraph 42

²³ *My Vote Counts NPC v President of the Republic of South Africa and Others* (2017) ZAWCHC 105 at paragraph 67

private international firms, *Bell Pottinger* and *KPMG* provide an example of the need for transparency.²⁴ While the SAHRC supports the call for greater transparency of political party funding in strengthening our democracy, the SAHRC also wishes to draw the Committee's attention to the challenges experienced by the institution in attempting to execute its mandate under the PAIA. For example, while the PAIA provides for voluntary disclosure of information (by public and private bodies), the procedure that ordinary citizens must use to request information on an ad hoc basis is often arduous and frustrating.²⁵ The SAHRC thus encourages emphasis on proactive disclosure of information regarding funding received by political parties from private sources. This would entail expressly recording the type of information to be made automatically available and could additionally entail the amendment of PAIA to make proactive disclosure compulsory in this regard. Such proactive disclosure is already accommodated in Sections 15 and 52 of the PAIA (for public and private bodies, respectively), and express disclosure of information by political parties could be included in these provisions of the PAIA. However, in order to make use of these provisions, the PAIA will need to be amended to the extent that all political parties do not fall within the definition of 'public' or 'private' bodies, respectively.²⁶ Creating compulsory proactive disclosure through the PAIA, by way of appropriate amendment of this Act, will allow for disclosure of more than funding information and extend to other information which should be automatically available in respect of political parties. Required amendments of the PAIA would serve to support the purpose of the Bill, and need not replace it. Such an approach is consistent with African Union Model Law on Access to Information and on the AU Guidelines on Elections and Access to Information.

The SAHRC further wishes to point out the interaction of the Bill with current legislation, and the need to acknowledge the role and expertise of the Commission and the Information Regulator in matters pertaining to access to information. In particular, the Bill should avoid the fragmentation of the powers of the Information Regulator by creating an enforcement mechanism through the IEC or the courts to assert the right to access information. The creation of another enforcement mechanism potentially creates parallel regimes for the enforcement of access to information rights. The Bill's failure to mention section 32 of the Constitution or the PAIA or POPIA in its preamble is conspicuous. In addition, the Bill fails to address its interaction, once operationalised, with PAIA or POPIA. The suitability of PAIA to

²⁴ Abedian, I. The KPMG Failure – Ethical test for SA business and company directors. <https://www.dailymaverick.co.za/article/2017-09-11-op-ed-the-kpmg-failure-ethical-test-for-sa-business-and-company-directors/#.Wdx6LGiCzIU> Date Accessed: 09/10/17

²⁵ SAHRC. The Promotion of Access to Information Act (PAIA): Annual Report 2015-2017. September 2017.

²⁶ For a discussion of why PAIA is unconstitutional to the extent that political parties do not comfortably fit into either definition, see *My Vote Counts NPC v President of the Republic of South Africa and Others* (2017) ZAWCHC 105 at paragraphs 49 to 54, and the minority judgment of Cameron J in *My Vote Counts NPC v Speaker of the National Assembly and Others* (2015) ZACC 31 at paragraphs 109-116.

regulate the disclosure of funding information, as well as the Act's ability to accommodate the Information Regulator's role in enforcing the right of access to information regarding the private funding of political parties, should be clarified. The Bill may also necessitate the amendment of other legislation such as the Companies Act, in order to allow for corporate political spending.

To support the enforceability of the proposed Bill, strong oversight institutions are needed. Consequently, it is imperative that the independence of the IEC to monitor disclosure by political parties is guaranteed, and that the appointment of IEC Commissioners as per section 6 of the Electoral Commission Act, 1996 is subject to public scrutiny, thus adequately reflecting South Africa's political diversity. As discussed immediately above, cognisance must be given to the potential overlap of mandate with the Information Regulator, and provision made to that effect.

It is submitted that the Bill needs to be reflective of the above tenets in its quest to create an environment of openness, transparency and accountability.

3.2. Alignment with international and regional frameworks

South Africa is party to a number of regional and international conventions directed at entrenching political accountability and anti-corruption, further strengthening South Africa's constitutional commitment to transparency and accountability in politics. In terms of section 231 of the Constitution, Parliament is required to establish the necessary legislative framework to regulate political party funding as provided for in international (and regional) conventions.²⁷

The United Nations Convention Against Corruption, ratified by South Africa in 2005, places a duty on its signatories to consider the adoption of legislative or administrative measures to enhance transparency in the funding of political parties, and to promote the public's

²⁷ 1. The negotiating and signing of all international agreements is the responsibility of the executive.
2. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
3. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
4. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
5. The republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

participation and effective access to information through legislative and administrative means in order to protect the values of democracy and the rule of law.²⁸ Article 10 of the African Union Convention on Corruption (AU Convention), ratified by South Africa in 2003, advocates for states' adoption of legislative measures to 'proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and incorporate the principle of transparency into funding of political parties.' Article 12 (2) of the AU Convention provides for signatories to 'create an enabling environment for civil society and the media to hold governments to the highest levels of transparency and accountability.'

These principles are affirmed in the International Covenant on Civil and Political Rights, 1966, and the Open Government Partnership, both of which South Africa is a signatory. The development of the AU Model Law on Access to Information in Africa,²⁹ may further assist in the development of legislation that is aligned to regional and international best practice, while taking into account unique country contexts.

4. Global best practice

Current political finance norms are influenced by international discourse, with significant strides being made toward standardization.³⁰ There are key learnings to be taken from challenges faced by other jurisdictions which have attempted to regulate political party funding.

While international evidence shows that there is no universal prescription ensuring the effectiveness of political party finance regimes, regulations on party funding play an important role in strengthening democracy, curbing opportunities for corruption and undue influence, and enhancing transparency and accountability.³¹

Organisations such as Transparency International; Institute for Democracy and Democratic Assistance; and the National Democratic Institute have highlighted that any "best practice" of political party financing should endeavour to:

- improve transparency and accountability;
- encourage grass-roots funding while limiting or banning legal entities' donations;

²⁸ Op cit. supra (note 11) at pp 8

²⁹ Prepared by the African Commission on Human and Peoples' Rights

³⁰ Falguera, E. Jones, S. Ohman, (Eds) M. Funding of Political Parties and Election Campaigns: A Handbook on Political Finance. 2014. International Institute for Democracy and Electoral Assistance. At pp. 88

³¹ Martini, M. Political Party Accountability: Intra-Party Democracy, Funding and Minimum Standards for Candidates. 2013. Transparency International. At pp. 3

- provide public funding as a partial substitute, but impose strict sanctions in case of noncompliance;
- limit parties' and candidates' expenditures;
- ban or regulate advertisement;
- regulate loans and entities related to political parties;
- and establish an independent and autonomous oversight institution, among others.³²

Disclosure and reporting requirements in respect of donations to candidates and political parties increase transparency and accountability. It follows, then, that effective disclosure mechanisms depend on the existence of an independent oversight agency and on the right of the people to know being exercised. It is also fundamental that such information is presented in a timely manner and is accessible to the public.³³

Best practice experiences demonstrate how information should be presented to an independent oversight institution regularly in a 'standardised, readable and searchable format in order to enhance transparency and accountability'. Germany and the UK are considered by the Group of States against Corruption (GRECO) as having comprehensive reporting requirements with regard to political parties' annual accounts; allowing for oversight functions to pick up on any suspicious activities.³⁴

In the UK, annual returns on income and expenditure are not yet standardised, which makes it difficult to compare reports across years and across political parties. Moreover, both Germany and the UK do not publish annual statements in a timely manner. There is therefore a need to tighten the regulation to strengthen the timeframe for publication of the reports as failure to do so runs the risk that the reports will be available only 1,5 or 2 years after they were submitted. An alternative option would involve – in addition to publishing comprehensive audited accounts once a year –making less complex reports available to the public every six months.³⁵

One of the lesser known jurisdictions which have attempted to regulate political party funding is Latvia; the Political Financing Law of which envisages timely disclosure procedures for both declarations of election-related revenues and expenditures and political parties' annual accounts.³⁶ An illustration of this is the Corruption Prevention and Combating Bureau which is

³² *idem*

³³ *Op Cit. supra* (note 29) at pp. 4

³⁴ *Idem*

³⁵ *idem*

³⁶ *Idem* at pp. 5

obliged to publish the declarations no later than ten days after their receipt. In addition, all the information is available online on a searchable and up-to-date database which provides information on recipient, sources and value of the donations. Databases on membership dues paid to parties and annual reports are also available online, making them more easily accessible to the public.³⁷

5. A clause by clause analysis

5.1. Definitions clause

Recognising South Africa's three spheres of government, the SAHRC recommends that the definition of the term 'represented political party' be expanded from political parties represented at national and provincial legislatures, to include those participating in municipal councils.

In providing recommendations to that effect, the SAHRC notes the effect of section 236 of the Constitution in requiring regulation of funding pertaining specifically to political parties participating in national and provincial legislatures. This, however, should not preclude the inclusion of political parties represented at local government level as they are equally subject to principles of transparency and accountability.

5.2. Clause 3

The SAHRC welcomes the inclusion of the section providing for the establishment Multi-Party Democracy Fund (MPDF) for the purpose of providing for private sources of funding for political parties participating in national and provincial legislature. The section provides for the IEC to administer, through the MPDF, the private donations to represented political parties.

While the SAHRC welcomes restrictions on money received from foreign governments, the SAHRC recommends further definition to the term "*foreign government agency*".

The SAHRC notes with concern the inclusion of subsection 5, which provides:

Any contributor contemplated in subsection (3) (a) may request the Commission not to disclose their identity or the amount of the contribution.

³⁷ Idem

A provision which allows information relating to private donations of any value to remain confidential on the request of donors appears to be inconsistent with the decision in the *MVC* case and the overall objective of transparency of funding for political parties.³⁸

The SAHRC proposes that information of the sort provided for in section 3(5) be subject to public scrutiny, providing particular clarity of the circumstances under which such a request may be granted, and that the section be amended accordingly to reflect this, or removed altogether.

5.3. Clause 8

Section 8 provides a fresh set of definitions which are germane to the chapter dealing with the direct funding of political parties.

The definitions of *donation* and *donation in kind* appear to duplicate each other, with one providing a more detailed definition of the other. While the definitions deal with different elements, there is still significant overlap between their intended meanings. It is therefore proposed that the two definitions be combined.

Moreover, part (b) of the definition for *donation in kind* currently contains the phrase *does not include personal services provided on an voluntary basis*. This is an error in grammar that must be corrected.

Providing the definition for what does not constitute a *foreign person*, the section states:

- (a) a citizen or permanent resident of the Republic;
- (b) any company registered in terms of the Companies Act, 2008 (Act No. 71 of 2008); or
- (c) any trust registered in terms of laws of the Republic regulating trusts.

Part (b) rightly provides for companies registered in terms of the Companies Act. Part (c) of the definition should equally and for greater certainty, provide for trusts registered in terms of the Trust Property Control Act³⁹ and related regulations. The provision would then read: ...*any trust registered in terms of the Trust Property Control Act and related regulations*.

³⁸ The disclosure of information pertaining to the funding of political parties was held to be an important feature to exercising the right to cast an informed vote.

³⁹ (Act 57 of 1988)

There are numerous uses of the term *political party* before it is finally defined in section 8, including variations of the term in the section 1 definitions. The term would be better included in section 1.

Notwithstanding, the definition itself is generic in nature and not specific to the Act or chapter,⁴⁰ as currently worded, the definition does not appear to justify the term's inclusion into the section.

5.4. Clause 9

The section deals with prohibitions in relation to donations made to political parties, with section 1 providing:

Political parties may not accept a donation from any of the following sources:

- (a) Foreign governments or foreign government agencies;*
- (b) subject to subsection (3), foreign persons or entities;*
- (c) organs of state;*
- (d) state-owned enterprises; or*
- (e) the National Lottery as defined in section 1 of the Lotteries Act, 1997 (Act No. 57 of 1997).*

Subsection 3 then provides:

Nothing in subsection (1) (b) prevents a political party or a member of a political party from accepting a donation from a foreign entity for the purpose of—

- (a) training or skills development of a member of a political party; or*
- (b) policy development of a political party.*

Subsection 1(b) is of particular significance in light of the subsection 3; the latter appearing to create sufficient scope and legal justification to circumvent the former.

Of concern to the SAHRC is that while political parties are prohibited from accepting donations from foreign persons or entities, they can, under subsection 3, circumvent that prohibition on the very broadly listed grounds provided.⁴¹ There is no accompanying audit process

⁴⁰ Botha, C. *Statutory Interpretation*. Fifth edition. 2012. Juta. Pp. 119

⁴¹ (a) training or skills development of a member of a political party; or
(b) policy development of a political party.

(administered by the IEC), no standard of proof required from the donor, or of the political party prior to accepting the funds; requiring them to demonstrate how the donation is to be used.

The SAHRC submits that subsection 3 creates a dangerous loophole which renders the prohibition on foreign donor funding token, at best. The mischief (foreign donor funding and corresponding agendas in domestic politics) intended to be regulated by the section will remain unmitigated. Accordingly, it is proposed that the section be substantially reworked, and specific definition provided as to what constitutes the exceptions provided in subsection 9(3).

5.5. Clause 10

The section deals with the disclosure of donations to political parties. The SAHRC supports the inclusion of more frequent disclosures of funding in the lead up to elections. The periods for disclosures should be set separately for election years and non-election years, with a change in frequency for the periods directly before provincial and national elections.⁴² The increase in donations at this time obliges more frequent disclosures on the part of the political parties to better inform the public's decisions.

Moreover, there is growing trend to circumvent disclosure obligations once the threshold has been met. It is proposed that, regardless of the threshold amount set, all donations per donor and per year must be specified to avoid legal loopholes where a donor could for example, make multiple smaller donations just below the limit.

5.6. Clause 11

The section prohibits donations to members of political parties, providing that no donations may be made to a member of a political party for party political purposes nor may a member receive any donation except on behalf of the party.

Section 11 draws parallels with section 9. Much like section 9, and in contempt of the assertion in section 11 (2)⁴³ it can be circumvented on the grounds listed under section 9 (3). This further confirms the problematic nature of section 9 (3). Accordingly, the SAHRC proposes the need to revisit section 9 to give effect to the purports of section 11.⁴⁴

6. Conclusion

⁴² My Vote Counts. Submission to the Ad Hoc Committee on the Funding of Political Parties. 2017. Pp 5

⁴³ No person may circumvent subsection (1) or any of the provisions of this Chapter.

⁴⁴ Jones, S. Van der Staak, S. How to fix UK political party finance. 2015. Open Democracy. <https://www.opendemocracy.net/samuel-jones/how-to-take-big-money-out-of-uk-politics> Date Accessed: 10/10/17

It must be underlined that the enactment of legislation does not, in itself, address the challenge of facilitating the public's right of access to information as such legislation limits its scope to the funding of political parties. Notwithstanding the enactment of the PAIA, South Africans still struggle to exercise their rights in respect of information requests to private and public bodies alike. In the circumstances, the current focus provides South Africa a valuable opportunity to consider the broader principles of transparency, and accountability in the context of rights such as access to information and responsibilities of business to uphold human rights.

With a ruling on PAIA's unconstitutionality (insofar as it does not allow for the disclosure of information related to the private funding of political parties) awaiting confirmation by the Constitutional Court; this is a significant opportunity for the legislature to, through an improved version of the current draft Bill, give effect to the public's right to open and transparent governance. It is therefore essential that due consideration is given to making the Bill enforceable, and accessible. Considering the Bill through this lens takes into account the need for access to justice for the public, public awareness, reducing a proliferation of enforcement mechanisms on the core right to access information, and the need to reduce opaqueness inherent in the existing landscape which has manifested in the concerns around political party funding as but one issue hampering transparency and the right to make an informed vote.

The SAHRC extends its gratitude to the Committee for the opportunity to provide comment on the draft legislation and avails itself for further engagement on the Bill.

ENDS