

Comments on the Draft Political Party Funding Bill
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1. Comments applicable to several sections in the Bill

The first comment is about the use of the term ‘political party’: on page 13 it is not defined but given an imprecise connotation commencing with the word ‘includes’, implying that it does not specify what is excluded. It refers to ‘any entity that accepts donations to support or oppose any registered party or its candidates in an election’. This formulation is tautological, because it defines political parties in terms of a registered political party. Any entity that supports or opposes a registered party can include several institutions or bodies that are not parties themselves, for example Cosatu, which supports the ANC and opposes other parties. An alternative we suggest is: ‘political party’ is an entity registered as a political party with the Electoral Commission (IEC). [Participation in elections is in our view not a compulsory criterion, because donations for extra-parliamentary parties that cooperate with registered parties or which might participate in future in elections should also be regulated].

The suggestion only concentrates on political parties as entities but loopholes exist that should also be addressed. They include trusts associated with a party, businesses associated with a party, or NGOs and foundations associated with a party – all of them can be convenient proxies for parties. German foundations are good examples of such entities linked directly to German political parties. Party Action Committees (PACs) in the USA are directly associated with party candidates. ‘Friends of XY’ entities are similar formations in South Africa. Many examples exist of parties aligned to investment companies and other private sector entities. In addition to a definition of ‘political parties’ a definition of ‘entities financially associated with political parties’ should also be considered and should be used in combination with ‘political parties’.

Another term used often in the Bill and related to ‘political party’ is ‘a member of a political party’. Noting that parties can have 500 000 or 800 000 members or even more, it will be impossible for a party to regulate the behavior of all the members or account for them in terms of private donations. A more manageable formulation (instead of ‘member’) would be ‘an elected public representative, party official or appointed employee of a political party’. Such a formulation will achieve the objective to regulate private donations given to a person who is directly accountable to his/her party and for whom the party must take direct responsibility.

The responsibility of the Electoral Commission (IEC) in the Bill deserve also consideration. It is acknowledged that the IEC is already for many years managing the Public Funding of

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Represented Political Parties Act (PFPRPA), and therefore it is quite logical to propose that it should continue performing the same functions with regard to the two Funds. Its enforcement responsibilities under Chapter 5, however, in respect of private donations have the potential to negatively impact on the IEC's credibility as an independent body, and its integrity. The IEC's responsibilities should remain primarily focused on elections. On the other hand, this Bill's focus is primarily on political parties but not necessarily in the context of elections. For the IEC to take steps that can directly impact on the internal matters of political parties, and in particular the very sensitive matter of financing, has too much potential for the IEC to become embroiled in party issues; to be accused of being biased towards certain and not other parties. Its responsibility to issue directives (S.16), to suspend payment of money to parties (S.17) or to recover money from parties (S.18) has the potential to compromise the IEC's integrity. It would be better if the decision-making aspects of these responsibilities / powers are ascribed to the Electoral Court. Once a court order is made the IEC can then implement it, but it should not be the IEC that takes the decision. In principle, it is better that a directive, payment suspension or recovery of funds is a judicial order and not an administrative decision (by the IEC).

2. Comments on specific sections in the Bill

Chapter 1, Definitions: the following concepts should also be defined (even if a definition from another legislation is used here): organ of state, state-owned enterprises, foreign government agency and foreign government. The definition of 'this Act' is not a definition of the Act itself. Inclusion of regulations in the definition as part and parcel of the Act is incorrect, because regulations are subsidiary executive 'legislation' and not original legislation.

Chapter 2, Funds:

S.2(1): 'parliamentary' should be included in the formulation '...by providing for the parliamentary funding ...'. Such a formulation would clarify the fact that it is not funding by the Executive or the IEC, but jointly by all the parties in Parliament. It would emphasise the non-partisan nature of this Fund.

S.2(3)(a): add 'for this Fund' in the formulation 'money appropriated for this Fund by this Act'. Otherwise, 'an Act of Parliament' can create the impression that other legislation can also contribute towards this fund.

S.3(1): No explanation is given of what the Multi-Party Democracy Fund is; what its purpose should be; that it will be a second source of funds to supplement the Represented Political Party Fund but that the same principles of allocation will apply; that it provides an opportunity for private funders who want to promote multiparty democracy but who don't want to distinguish between political parties, and more detail. An additional option should be considered for private donations to this Fund, which can be earmarked for specific parties and not for the Fund in general, because some funders might have an objection to their donations being shared by parties they don't want to support.

S.5(1): it is suggested that that the IEC's CEO should manage the Funds not as part of the IEC but on behalf of Parliament on an agency basis to emphasise the fact that it is funds appropriated

by Parliament to the parties. Therefore, the suggestion is that at the end of the section 'on behalf of Parliament' is added.

S.6(1), 6(4), 7(2)(d) and others: Reference to the 'prescribed formula' or 'purpose' should be qualified by 'as specified by regulation', especially keeping S.23 in mind.

S.6(4): The formulation is not in line with S.6(3). S. 6(3) identified two criteria for allocation of funds to parties (similar to those in the current PFPRPA) while S.6(4) refers only to the second of the two criteria. The latter should therefore be reformulated.

S. 7(1): this section is very important, because it defines the use of the funds. It describes it as for 'any purpose compatible with its functioning as a political party in a modern democracy', excluding those listed in S. 7(2). It is not correct to presume that there is universal consensus about the functions of a political party in a modern democracy. The spectrum is very broad, ranging from parties acting as social movements, parties focused only on single issues and difficult to distinguish from NGOs, to parties of individual personalities or parties providing services to their members like insurance or retirement financing. The list in S.7(1) is not exhaustive but uses the term 'including', implying that other functions can be included if they conform with what is done in modern democracies. No explicit reference is made to use of the funds for election purposes, including media advertisements not allocated by the ICASA formula but paid by political parties. [Note, S.7(1)(g) is not a purpose of a political party in a modern democracy.]

S.7(2)(a): no reference is made to elected party officials or appointed party employees. Are they excluded from these restrictions? It is clear that the persons listed in this section are already remunerated by public funds and it will therefore amount to double funding by public funds. Does the same sentiment apply to party persons directly remunerated by parties from their own funds?

S.7(2)(d): 'any other prescribed purpose' is too vague for such an important aspect of this Bill. It will depend on the response to: who will determine this category (d) of proscriptions?

Chapter 3 – the heading should be changed to: PRIVATE DONATIONS TO POLITICAL PARTIES. This chapter does not deal with the two Funds and is about private donations, including donations in kind which don't have to be only financial in nature.

S.8 '*donation*' (a): use of the word 'and' suggests two types of donations: a donation in kind and a donation made to a member – the latter does not look like a type or kind of donation; what does it imply?

'*donation in kind*' (a)(i): 'any money donated (lent = it must be paid back) to the political party other than money lent on commercial terms; or

How will (a)(iii) be monitored or managed in terms of S.10 (Disclosure), especially to implement the qualification of 'above the prescribed threshold' [S.10(1)].

'*foreign person*': consideration should be given to adding another category, namely a new (d) 'a political party registered with the South African IEC'. The implication of it will be that donations

by political parties in foreign countries to South African parties should also not be allowed. Party-to-party relations is a well-established practice. If foreign governments are prohibited from making donations [S.9(1)(a)], it would still be possible for the governing parties to make these donations on their behalf. If the rationale in this Bill is that all forms of foreign financial involvement with South African political entities have to be curtailed, then party-to-party donations should be included. Only if a very specific rationale exists to make a distinction between governments and parties (which will be difficult to justify), can parties be excluded.

'political party': this has been discussed earlier already

S.9 'prohibited donations': use of 'political parties' should be considered in view of the earlier comment suggesting also 'entities financially associated with political parties' - the introductory sentence should be amended to: 'Political parties and entities financially associated with political parties may not accept ...'.

S.9(3): the term 'foreign entity' is not defined in the Bill. 'Foreign persons' is defined and should be used here. The question is whether this clause intends to refer also to foreign governments and agencies [S.9(1)(a)], because currently and in the past this type of support was typically given by German foundations and similar foreign government agencies and not by companies or trusts.

S.9(3)(a): 'member of political party' should be amended to the proposed formulation of 'an elected public representative, party official or appointed employee of a political party'. The same comment applies to the heading 'Prohibition on donation to member of political party' and S.11(1).

Disclosure of donations to political party: [An alternative is: Disclosure of donations by a political party]

This is arguably one of the most important parts of the Bill. It has the potential to address part of the recent Western Cape High Court judgement (*My Vote Counts NPC v The President of the Republic of South Africa and others*, 27 September 2017) regarding party funding (but not for independent ward candidates). The first question is whether the proposed 'prescribed threshold' [S.10(1)] will be compatible with this judgement and a possible Constitutional Court confirmation of the judgement.

Similarly, S.10(2) instructs the IEC to publish the disclosed donations in a prescribed form and prepare a financial statement for auditors [S.13(2)(d)]. It is not clear how public disclosure and the PAIA-related public access to this information are accommodated in these clauses. The most direct approach would be for the IEC to submit an annual report to Parliament similar to the one currently done in respect of the PFPRPA, not only for the two Funds, but also for private donations, after all the auditing has been completed. (It would mean that, except for independent candidates, most of the judicial order in the *My Vote Counts* judgement can already be addressed in this Bill and not necessarily in an amended PAIA.)

S.10(3)(b): it is very difficult to understand the meaning of this formulation. Most election dates are not announced a year in advance but closer to the election, and the election date can be

anywhere within a period of 90 days before or 90 days after the parliamentary term has expired. The window-period of six months makes any prediction of the date before its announcement very difficult. Therefore (a) is feasible but (b) is unclear. What is absent in this clause, is also a post-election financial report; in other words, to determine how donations have been used in the election.

S.11: 11(1) is very unclear, because why does it want to prohibit any donation to a member of a political party? Does it try to prohibit that individuals receive private donations meant for political parties but instead fraudulently taken by them for personal use? If so, it does not belong in this Act, because it does not deal in essence with a party and its funding but with individual dishonesty and fraud. 11(2) is not applicable only to S.11 or Chapter 3 but to the entire Bill, and therefore does not belong here.

Chapter 4

Amend the heading: *Represented political party to account for money paid to them by Funds and private donations*

S.13(3)(c): this clause raise the question why a distinction has to be made between donations above and below a prescribed threshold – see also S.10(1). If parties have to disclose only donations above the threshold but then still have to submit information about donations below the threshold to the IEC for auditing purposes, the outcome of which cannot be kept secret, it should in the end result that all donations have to be disclosed. Why then introduce such a distinction, when its constitutionality (in terms of the My Vote Counts judgement) might be challenged? (S.21(1)(b) does not refer to a threshold.)

S.13(4): what does the IEC do with the auditor's opinion and audited financial statements? It was earlier suggested in relation to S.10 that the IEC should submit an annual report to Parliament. (It is acknowledged that S.21 already does entail some of these aspects.) The IEC cannot be the end-destination of this process, because then it will become an integral IEC function while we argue that the IEC should undertake this responsibility only on an agency basis for Parliament. (In similar vein, we have earlier argued that the decision-making aspects of the enforcement functions should be done by the Electoral Court and not by the IEC.)

S.13(5): suggested addition: 'The Auditor-General may at any time (within a maximum period of five years) audit ...'. Otherwise, private sector auditors (appointed by a party) will be the only entities involved in the auditing of private donations for an unspecified period.

Unspent money at the end of the financial year:

S.14(2): proposed amended formulation – 'Any money carried forward from the two Funds is limited ...'. It cannot apply to the parties' accounts of private donations directly given to them.

S.14(3)(b): it should not be indented under (ii) but be aligned with (a)

Chapter 5, Enforcement

As a general point, we have earlier raised the concern that the IEC's responsibilities set out in this chapter have the potential to compromise its independence and integrity, and therefore the decision-making aspects of the responsibilities that are judicial in nature should be ascribed to the Electoral Court. (It implies that S.20(2) has to be changed then.)

S.15(4): the reference to income or expenditure of a political party raises a potentially complex issue. Most of this Bill concentrates on the income sources (i.e. the two Funds and private donations) in order to enable better disclosure and accountability of who funds parties. The use of these income funds are circumscribed [S.7 and 9(3)], though most of the uses of private donations are left open-ended. The question then is: is an investigation of party *expenditure* in terms of S.15(4) only limited to S.7 and S.9(3) items or does it amount to investigative rights about all expenditures? (S.21(1)(a) provides some indication.) Equally so, what should be included in the parties' financial statements submitted for auditing [S.13(3)]: all income and expenditure or only specific accounts? How will S.8 ('donation in kind' includes (iii) the provision of assets, services and facilities) and S.9(3) be accommodated in the reports?

S.20(1): the question is whether 'any person' can request a review or take an IEC decision on appeal. S.20 of the Electoral Commission Act does not specify who can do it, and therefore procedural judicial rules should preferably be applied and not this Bill.

Chapter 6, General Provisions:

S.21(4): this is another example of how the IEC's responsibilities become confused. In addition to its conventional reporting function to Parliament (in terms of the Electoral Commission Act and the PFPRPA), another reporting function is now added, but in a combined form. S.5 of the Electoral Commission Act identifies the IEC's powers, duties and functions almost exclusively in election-related terms. It does not provide a category for the powers, duties and functions envisaged in this Bill. In this regard, it provides more reason to argue that the IEC's role in relation to political party private funding (donations) should be reconsidered; that it can only act as an agent of Parliament and only implement the judicial orders decided upon by the Electoral Court. (Even these might still require an amendment of the Electoral Commission Act.)

Regulations - S.23:

S. 23(1): rephrase it – 'The President, acting on a resolution of the National Assembly, must, by proclamation in the *Gazette*, make [remove comma] regulations in respect of matters contemplated in this Act to be prescribed.' [Note, there is not a S.7(2)(e).] The implication is that S.23(2) will then automatically fall away; that all regulations are done in the President's name (and not the Commission's) and that it avoids potential contestation between the IEC and political parties. It also ensures that all regulations are supported by the parties in the National Assembly. S.23(3) can continue and the IEC can still manage the public comments.

Repeal and transitional provisions – S.24:

S.24(2)(c) – suggested addition: ‘all regulations made under that Act are deemed to be regulations under this Act insofar as they are compatible with this Act’.

3. Concluding points
 - a. The definition of ‘represented political parties’ and S.236 of the Constitution refer only to political parties represented in national and provincial legislatures and not in local councils. It is therefore understandable that this Bill is informed by these sources and therefore also excludes funding of parties in local government sphere. The My Vote Counts judgement, however, includes independent ward candidates, and therefore in the near future locally represented political parties will have to be treated in a similar fashion. (For this reason it might be necessary to reconsider the Bill’s title to refer specifically to national and provincial represented parties, with the implication that locally represented parties can later be addressed in a different manner.)
 - b. This Bill provides for reporting of financial statements by the IEC to Parliament (S.21) and it can be regarded as one means of disclosure. Another means possible is to follow the example of disclosure of personal interests by members of Parliament and the Executive in registers. The important point is that sufficient information equal to those provided in a register, must be included in the IEC’s report to reduce the need of a register also.
 - c. In most countries where party funding is publicly disclosed, it is specifically focused on campaign funding during elections. In this Bill, almost no specific attention is paid to this aspect.
 - d. With respect to the two Funds, their allocation is based on past electoral achievements and not on their current levels of support. At the same time it gives an advantage to incumbent parties in relation to new, emerging parties that have not yet contested an election (i.e the predicament of the UDM in 1999, COPE in 2009 and the EFF in 2014). It therefore privileges the status quo against new developments. It might be a possibility to consider allocations from the Multi-Party Democracy Fund for new, unrepresented parties, because in its proposed form the two Funds create a double-prejudice against the new parties.
 - e. We have suggested that the IEC’s independence and integrity should be protected by not expecting it to perform decision-making and enforcing functions regarding private donations. Therefore the possibility has been suggested that the IEC could be responsible for implementing the Electoral Court’s judicial orders. Another scenario is that a completely separate entity is established to fulfil these functions so that the IEC is entirely separated from the donations matters and concentrate on electoral matters.

