AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM COMMENTS ON PROMOTION OF ACCESS TO INFORMATION AMENDMENT DRAFT BILL, 2019

1. Introduction

1.1. This submission is made by the amaBhungane Centre for Investigative Journalism ("amaBhungane").

1.2. AmaBhungane is an independent, non-profit company founded in 2009 to develop investigative journalism so as to promote a free, capable media and open, accountable, 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.

1.3. 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.

1.4. 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

1.5. We therefore welcome the steps taken by Parliament and the portfolio committee on justice and correctional services to give effect to the Constitutional Court order in *My Vote Counts NPC v Minister of Justice and Correctional Services* for private funding of political parties and independent candidates to be held, recorded, preserved and reasonably accessible.

1.6. 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, media and oversight bodies such as Parliament to monitor compliance and exert accountability.

1.7. We address the following areas in our submission:

(i) Prescribed threshold for disclosure;
(ii) Closing loopholes on related party donations and party investment vehicles;
(iii) Duty to create and hold records;
(iv) Period of preservation;
(v) Form and Regularity of Disclosure;
(vi) General application of disclosure to other private bodies under PAIA; and
(vii) Designated official to handle PAIA requests.

1.8. We trust our submission will be of use to the Committee in its consideration of the Bill. We are available to discuss this submission further in public hearings on the Bill.

2. **Prescribed threshold for disclosure**

2.1. The Bill prescribes (at the proposed cl 52B (a)(i)) of the principal Act) a duty to disclose the identity of the donor and amount of any donation above R100 000 as defined in the Political Party Funding Act 2018 (PPFA).

2.2. We do not understand why the Bill refers to a specific amount, as the PPFA at s 9(1)(a) leaves the threshold amount to regulation. As regulations may be amended from time to time, this could lead to the amounts in the PPFA and PAIA diverging.

2.3. That said, we believe that the R100 000 threshold contained in the PPFA regulations is too high.

2.4. Should the Committee agree with us that the R100 000 threshold is too high, then the Bill should leave the threshold amount to PAIA regulations.

2.5. If the Committee disagrees with us and feels that the PAIA threshold should be the same as the PPFA threshold, the Bill should not specify an amount but simply refer to the *amount prescribed in section 9(1)(a) of the Political Party Funding Act, 2018.*

3. Closing loopholes on related party donations and party investment vehicles

3.1. To avoid circumvention of the intention behind disclosure, we recommend that the Bill must state that donations from substantially related sources within a financial year be counted for the purposes of disclosure as a single donation. A definition of substantially related sources should be contained in the Bill, and could include:

3.1.1. A company and its subsidiary;

3.1.2. A natural person and a juristic person of which the former is a shareholder, a beneficial owner, a trustee, a director or a partner;

3.1.3. A husband and a wife; and

3.1.4. A parent or guardian and a minor child or ward.

3.2. We would also strongly urge that funding from party investment vehicles should be included as sources of funding to be disclosed above the threshold, by supplementing the list (at 52B(1)(a)) of moneys to be recorded and disclosed with the following:

3.2.1. Any dividend, return or transfer of whatsoever nature from a juristic person in which the political party has a beneficial ownership stake.

4. Duty to create and hold records

4.1. The Bill as it is currently drafted only places an obligation on political parties and independent candidates to create and hold records above the threshold of R100 000 per annum.

4.2. The Constitutional Court in its judgment places a discretion on Parliament to consider what an appropriate threshold for the creation and holding of records should be, if at all.

4.3. The Constitutional Court held that: "*No information on the private funding of political parties or independent candidates may be unheld or unrecorded or destroyed at the discretion of the holder, therefore undisclosable. This must not however be understood to be a definitive pronouncement on whether it would be justifiable for Parliament to include or exclude the recordal and disclosure of some information on say R10 contributions or the cleaning of offices or premises for free by one or more people. ……That said, whether they should be required to record and disclose any and every help, is a matter best left to Parliament to reflect and decide on" [para 30]*

4.4. We would therefore suggest Parliament place a general obligation on political parties and independent candidates to create and hold any and all records, irrespective of their value, to effectively meet their constitutional obligations under PAIA.

4.5. The effect of this will be to avoid a gap being created should the disclosure threshold change, while ensuring that a requestor is still able to effectively exercise their rights and make a reasonable request for records. This will also allow for requests for information even below the prescribed threshold where the ordinary means of PAIA would apply, without the non-existent record making such a request unfeasible.

5. Period of preservation

5.1. The proposed cl 52 B(3) provides that political parties and independent candidates should keep records for at least 5 years. The rationale for the 5 year period is not explained in the Bills memorandum.

5.2. We would recommend that records are held for a period of 7 years to be consistent with the record retention requirement of the Companies Act Companies Act, No 71 of 2008.[1]

6. Form and Regularity of Disclosure

6.1. The PPFA provides for disclosure via the Commission on quarterly basis. The Bill adopts a similar time period at cl 52B(1)(b), but extends this to include disclosure two months prior to an election or referendum at cl 52B(2).

6.2. For the Bill to be consistent with the intentions and purposes of PAIA, the records should be made available on request from the requestor whenever such a request is made. It's worth considering that the Constitutional Court held that *" (a right is) opened to be exercised whenever so desired, regardless of whatever logistical constraints might exist."*

6.3. The right of access is given certainty via the creation of timeframes by when access should be provided. We recommend that that a reasonable term of access be no more than thirty days in line with the disclosure convention contained in PAIA. This should be specified in the Bill.

6.4. Our proposal should not be read as exclusionary to the provision of electronic disclosure from official party channels quarterly, and two months prior to an election. Rather, we submit that the Bill should allow for on-

[1] See Section 24 of the Companies Act of 2008 as amended

request applications for information at any time *in addition* to the quarterly disclosures and two months prior to an election.

7. **General application of disclosure to other private bodies under PAIA**

7.1. The Constitutional Court allows a wide degree of discretion to Parliament to consider how to interpret the judgment. Importantly the Court tasks Parliament to apply a rights based approach: *"But that still begs the question which Parliament might wish to reflect on. And this is a possible need for a rights-sensitive approaching to holding and disclosing information. Who should hold and disclose which information? Must it necessarily or ideally be held by the one who first received it and about whom enlightenment might be required? Is the state best placed [10]"*

7.2. It is not implausible for Parliament to consider give effect to the public's right to information by extending the disclosure requirement to private entities creating a dual disclosure principle. Indeed the PPFA contains a dual disclosure requirement for both political parties and donors to political parties.

7.3. In other words the same obligation to keep and disclose the same records (above the prescribed threshold) should be applied to private bodies. Such an amendment would be consistent with the scheme of PAIA, which allows requests for information to both public and private entities.

8. Designated official to handle PAIA requests

8.1. The Bill makes the accounting officer as defined in the proposed cl 52A (a)(b), the designated person to ensure records are recorded, preserved and disclosed. For example:

8.1.1. Cl 52 B (1) "The accounting officer of a political must create and keep records of –"…

8.1.2. Cl 52 B(2)"the accounting officer of a political party must ensure that the records referred to in subsection (1) are update and made available on social media platforms of the political party concerned".

8.2. PAIA, on the other hand, generally places obligations on the Information Officer, who is entitled to delegate.

8.3. We urge the committee to apply its mind on whether to harmonise the proposed section with the general scheme of PAIA in this regard.

9. Additional Comments:

9.1. Chapter 2 of PAIA provides for the application of other legislation providing for access:

Nothing in this Act prevents the giving of access to…

"a record of a private body in terms of legislation referred to in Part 2 of the Schedule"

9.2. Political Parties through the PPFA should be included in this Schedule.

9.3. We further submit that Parliament should exercise the necessary oversight to ensure that the section 50 manuals required by private bodies, including political parties, under PAIA are amended to reflect these changes, once this Bill is signed into law.

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