



**COUNCIL**  
FOR THE ADVANCEMENT OF THE  
**SOUTH AFRICAN**  
**CONSTITUTION**

Hon. MS Chabane MP  
Chairperson  
Portfolio Committee on Home Affairs  
National Assembly

Hon. S Shaikh MP  
Chairperson  
Select Committee on Security and Justice  
National Council of Provinces

**Per email:** [electoralmattersbill@parliament.gov.za](mailto:electoralmattersbill@parliament.gov.za)

Dear Chairpersons

## **SUBMISSION ON THE ELECTORAL MATTERS AMENDMENT BILL B 42 OF 2023**

### **Introduction**

1. The Council for the Advancement of the South African Constitution ('**CASAC**') is pleased to make this submission on the Electoral Matters Amendment Bill ('**the Bill**') pursuant to the Call for Written Submissions issued on 13 December 2023.
2. CASAC makes this submission having reviewed the Bill and the existing legislation it seeks to amend.
3. Before we proceed to deal with the text of the Bill clause by clause, we make the following general observations:
  - 3.1. While the Bill makes some consequential amendments following the enactment of the Electoral Amendment Act 1 of 2023 ahead of the 2024 national and provincial elections, some of the proposed amendments contained in the Bill are far-reaching, not necessary at this stage and should be left for the next Parliament to deal with and to allow for meaningful public participation.
  - 3.2. Some of the proposed amendments are cosmetic and ineffectual without any enforcement mechanisms.
  - 3.3. We will highlight these proposed amendments in the submission as we deal with the text of the Bill.

4. We now address the provisions of the Bill, clause by clause.

### **Submissions**

5. *Clause 3*

- 5.1. Clause 3(d) would amend the definition of Multi-Party Democracy Fund section 1 of the Political Party Funding Act 6 of 2018 ('PPFA') to change the fund's name to 'Multi-Party and Independents Democracy Fund'.
- 5.2. CASAC submits that this amendment is unnecessary.
- 5.3. Multi-party democracy is a founding value of the Republic in terms of section 1(d) of the Constitution. It envisages a system of government where the space for democratic contestation is not closed to anyone.
- 5.4. The purpose of the fund is to advance multi-party democracy by pooling funds from private sources and disbursing it to represented political parties (and soon independents). The name therefore reflects this purpose and the addition of 'Independents' is unnecessary in this context.
- 5.5. In addition, it is unclear what the phrase 'Independents Democracy Fund' could possibly mean.
- 5.6. CASAC therefore submits that this amendment should be rejected, and the name of the fund should remain the same.
- 5.7. This will also necessitate the rejection of the proposed amendments in clause 5 of the Bill and other subsequent provisions that incorporate this amendment.

6. *Clause 9*

- 6.1. Clause 9 would amend section 7 of the PPFA by inserting a new section 7(3) to, among other things, prescribe the use of money allocated from the Funds.
- 6.2. Section 7(3)(d) would provide in relevant part that 'any money received from the Fund may not be used for personal use or to cover any costs related to any litigation against the political party or independent representatives' (our emphasis).
- 6.3. CASAC submits that the inclusion of political parties in section 7(3)(d) is inappropriate and should be removed.
- 6.4. While the provision seeks to proscribe the use of money allocated from the Fund for personal use by independent representatives, the inclusion of political parties widens the scope of the proscription and bars the use of money to cover litigation costs for political parties.

- 6.5. Section 7(2)(d) already proscribes the use of this money to 'defray legal costs relating to *internal political party disputes*' (our emphasis).
- 6.6. CASAC submits that internal political party disputes are the equivalent of personal litigation by independent representatives as contemplated in section 7(3)(d).
- 6.7. The inclusion of political parties in section 7(3)(d) would have the effect of imposing a complete bar on the use of funds for **all** litigation including external litigation by political parties. This would be unreasonable and prejudicial against political parties.
- 6.8. In light of the provisions of section 7(2)(d) of the PPFA, CASAC submits that the reference to political parties in the proposed section 7(3)(d) should be removed.

## 7. *Clause 19*

- 7.1. Clause 19(c) would insert a new section 13(3) into the PPFA.
- 7.2. It provides that where a vacancy occurs or in the case of the resignation of a member of a represented political party or the resignation of an independent representative to whom money was allocated from the funds, the political party or independent representative must close its books and repay any unspent money within 21 days of the vacancy occurring.
- 7.3. CASAC submits that this amendment is impractical in respect of political parties.
- 7.4. A resignation by a member of a political party or a vacancy in a seat previously held by that political party can easily be filled by that political party, unlike an independent candidate who cannot be replaced.
- 7.5. Requiring political parties to close their books and repay allocated money every time a member resigns, or a vacancy occurs is burdensome and does not appear to serve any purpose.
- 7.6. CASAC submits that the new section 13(3) of the PPFA should apply only to independent representatives.

## 8. *Clause 20*

- 8.1. Clause 20 would amend section 14 of the PPFA to include 'independent candidates'.
- 8.2. The clause inexplicably excludes independent representatives, placing them outside of the Electoral Commission's investigative jurisdiction.

8.3. CASAC submits that independent representatives should be included in the provisions of this clause.

8.4. The drafting of the clause is only one instance of the inconsistent use of 'independent candidate/s' and 'independent representative/s', both of which are defined terms, throughout the Bill. The Bill should be examined to ensure consistency.

9. *Clause 24*

9.1. This clause creates new criminal offences relating to the making of donations by amending section 19 of the PPFA.

9.2. Section 19(3) would criminalise the use of party funding as a means of influence on state resources, including the awarding of tenders, licenses or other consents.

9.3. It is unclear how this new offence differs in substance from the existing crime of bribery.

9.4. Section 19(4) would criminalise the making of a donation to a member of a political party in order to circumvent the provisions of Chapter 3 of the PPFA.

9.5. Section 19(5) would further criminalise the receipt of a donation by a member of a political party as a means of circumventing the provisions of Chapter 3 of the PPFA, and the appropriation by a member of such a donation for own purposes.

9.6. While these offences are to be welcomed, the provisions of clause 24 appear wholly ineffectual without an enforcement mechanism. The Bill does not specify how donations are to be monitored and by whom.

9.7. CASAC submits that the Bill should instead seek to streamline and standardise the manner in which political parties receive donations, empower the Electoral Commission to monitor parties' bank accounts, empower the Electoral Commission to refer any suspected breaches of the PPFA to the National Prosecuting Authority and allow for the sharing of financial information about political parties' bank accounts held by the Financial Intelligence Centre with the Electoral Commission.

9.8. These are just some of the ways the provisions can be given effect. Mere criminalisation without any enforcement will not meaningfully address the mischief sought to be remedied.

10. *Clause 26*

10.1. This is one of the provisions CASAC believes are unnecessary at this stage and should be deferred for the next Parliament to run a thorough public participation process.

10.2. Clause 26 amends section 24 of the PPFA.

- 10.3. The proposed amendment of section 24(1)(a) of the PPFA would remove the requirement that the National Assembly resolve to instruct the President to issue regulations:
  - 10.3.1. prescribing the formula for the allocation of funds to represented political parties and independent candidates in terms of section 6(2) of the PPFA;
  - 10.3.2. prescribing what such funds may be used for by political parties in terms of section 7(2)(e) of the PPFA or independent representatives in terms of the proposed section 7(3);
  - 10.3.3. prescribing the annual upper limit for donations in terms of section 8(2) of the PPFA;
  - 10.3.4. prescribing the limit on donations from foreign entities in terms of section 8(5) of the PPFA; and
  - 10.3.5. prescribing the minimum threshold amount for the disclosure of donations in terms of section 9(1)(a) of the PPFA.
- 10.4. Clause 26 would replace this vital parliamentary oversight with a watered down 'after consultation' requirement which would have the effect of vesting unfettered discretion in the hands of the President.
- 10.5. Under the provisions of the clause, the President would have an unfettered discretion:
  - 10.5.1. to determine the minimum disclosure threshold, with the risk that he might make it so high as to effectively exempt most donations from disclosure;
  - 10.5.2. to determine the upper limit for donations, with the risk that he may make it so high as to render the purpose of imposing a limit superfluous; and
  - 10.5.3. to determine the limit on donations from foreign entities, with the risk that he may make it so low as to deprive opposition political parties who receive in-kind donations from foreign entities of those donations, or so high as to enable foreign interference in the electoral process.
- 10.6. CASAC submits that these are real, and not imagined, risks and should not be given the chance to even materialise.
- 10.7. This provision is a regressive step for executive accountability and should be rejected. Parliament should retain its power to determine when the regulations should be amended, and the different thresholds adjusted.

- 10.8. Clause 26 is also not a consequential amendment arising from the inclusion of independent candidates in the electoral system.
  - 10.9. CASAC submits that it is therefore inappropriate to include clause 26 in this Bill, whose process has been truncated in light of the looming election. The public should have an opportunity to meaningfully participate in any process that seeks to introduce such a wide-ranging amendment, and this current process is simply inadequate.
  - 10.10. CASAC also urges the rejection of the proposed section 24(5) which would render the current regulations contained in Schedule 2 of the PPFA transitional which would introduce unnecessary uncertainty into the regulation of the private funding of political parties and independent representatives.
11. *Schedule 2: Regulations on Political Party Funding, 2017*
    - 11.1. *Regulation 2*
      - 11.1.1. CASAC notes the proposed amendment to regulation 2 of Schedule 2, in order to raise the proportional allocation to 90 percent and reduce the equitable allocation to 10 percent of the funding available for represented parties and independent representatives.
      - 11.1.2. The Memorandum on the objects of the Bill does not explain the rationale behind this proposed change to the formula for the allocation of money from the Funds. It is also not clear why this amendment is sought at this stage, given that it is not a consequential amendment.
      - 11.1.3. This amendment will have substantial negative consequences for smaller parties and independent representatives, who generally struggle to raise money from private donations and thus rely on equitable allocations to fund their political activities.
      - 11.1.4. CASAC submits that the existing division of funding allocations should be retained and that the proposed amendment should be rejected.
    - 11.2. *Regulations 7 and 9*
      - 11.2.1. For the reasons set out in our submissions on clause 26, CASAC likewise submits that the proposed amendments to regulations 7 and 9 of Schedule 2 should be rejected.
      - 11.2.2. In addition to the concerns raised in our paragraph 10 above, the provisions of regulations 7 and 9 are irreconcilable with the provisions of clause 26 and since regulations may not contradict

their enabling legislation, they would be invalid and *ultra vires* the PPFA once amended.<sup>1</sup>

- 11.2.3. The proposed amendments to the regulations also make no mention of the consultation the President is required to have with the Portfolio Committee on Home Affairs and the Minister of Home Affairs, which is introduced by clause 26.
- 11.2.4. All these defects underline the case for rejecting both clause 26 and the amendments to the regulations.

## **Conclusion**

1. Subject to the submissions made herein, CASAC supports the Bill in so far as it enables independent candidates to participate in the upcoming elections and provides for and regulates their funding.
2. CASAC would appreciate the opportunity to make oral submissions in support of its submissions.

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<sup>1</sup> The provisions of clause 26 are cast in permissive terms (“the President ... *may*”) whereas the proposed amendments to regulation 7 (“the President may”) and regulation 9 (“the President must”) are cast in both permissive and peremptory terms. This makes it difficult to interpret them harmoniously.

Yours sincerely,



**Lawson Naidoo**

**Executive Secretary**



**Dan Mafora**

**Senior Researcher**

**COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION**