PEOPLE'S LEGAL CENTRE NPC

To: Mr Mosa Steve Chabane
Chairperson: Portfolio Committee on Home Affairs
And to: Ms Shahidabibi Shaikh
Chairperson: Select Committee on Security and Justice
Per: Mr Eddy Mathonsi
Email: electoralmattersbill@parliament.gov.za

26 January 2024

Dear Mr Chabane and Ms Shaikh

Written Submissions on the Electoral Matters Amendment Bill [B 42—2023]

1 These comments are submitted by the People's Legal Centre NPC, a civil society organisation whose objectives include increasing access to justice and supporting, enhancing and deepening democratic participation at all levels of society, including those of community, organisation, party and state.

2 These submissions are endorsed by #UniteBehind, a civil society organisation mobilising for a just and equal South Africa where everyone shares in the country's wealth. #UniteBehind's campaigns focus on fixing the state and aim to end state capture and improve governance. #UniteBehind mobilises, motivates, and litigates to combat corruption.

3 The integrity of our electoral system and the continuing fight against corruption are concerns common to both organisations.

4 Our comments deal primarily with the proposed amendments to the Political Party Funding Act and will focus on the following main themes and provisions:

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4.1 The nature of independent candidates (ICs) and independent representatives (IRs) within the party system;

4.2 The amendment of section 10;

4.3 The amendment of regulation-making powers - section 24;

4.4 Miscellaneous matters.

5 The primary rights at issue in our submissions are, first, the rights to campaign for a political cause and to vote, second, transparency, encapsulated mainly in the right to to have access to information and, third, equal protection and benefit of the law. These rights must be balanced in a manner that respects the unique position of independent candidates and the injunction to err on the side of enfranchisement,[1] while keeping in view the need for parties and independents to be treated as equally as their different positions allow.

6 In our submissions, transparency is crucial in respect of ICs, IRs and political parties. In fact, we consider that disclosure thresholds should be removed entirely and that all donations should be disclosed.[2]

7 Nevertheless, the bill's treatment of independents reverberates far wider than simply disclosure obligations and donation prohibitions. Therefore, where we take issue in these submissions with the manner in which independents are to be regulated, we do so only out of concern for the right to campaign and equal benefit of the law, and not to argue against transparency.

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[1] *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) at [17]

[2] This issue is not directly addressed in the bill or in our submissions. Our comments on the proposed amendment of section 24 touch on this subject. We align with My Vote Counts on the position that disclosure thresholds should be removed entirely and all donations disclosed.

8 In all, we consider the introduction of independents into national and provincial elections to be an opportunity for South Africans to redefine their relationship with elected representatives. This opportunity should be fostered as much as possible, instead of being circumscribed more than the constitutional issues at play demand.

The nature of an independent candidate

9 The proposed amendments fail adequately to grapple with the nature of ICs and IRs, within the context of our party-based system. This is evident, first, from the definitions of ICs, IRs and political parties; second, from certain funding and reporting obligations; and, third, from the permissible and impermissible uses of funding from certain sources. These aspects are addressed in turn.

10 The thrust of the proposed amendments seems to be that Parliament considers an independent to be a single person running an election campaign entirely on their own. This approach fails to recognise a number of practical considerations:

10.1 Unlike a party, an independent does not have perpetual existence. The bill does not account for this difference, which results in a failure to differentiate between registration and nomination - two legally, conceptually and temporally distinct concepts.

10.2 No independent candidate can hope to be elected without the support of large groups of people, including campaign staff and supporters. The fact that this support does not come from 'party members' in the strict sense of the term, cannot equalise the differential treatment of independent candidates under the proposed amendments.

10.3 While political parties were allowed organically to evolve over decades into their present legal form - most often a special type of voluntary association - the bill

seeks to prescribe to independents the format which their campaigns must take: a single natural person.

10.4 In contrast, the freedom to use different forms of juristic person - such as non-profit company, trust, voluntary association, etc. - for campaigning purposes will provide greater organisational freedom for independent candidates, and could improve financial controls (in comparison with only the natural-person option).

11 The bill's objectives can be achieved without the proposed level of prescriptivism, more so considering that:

11.1 The current regime is entirely new and untested and will potentially remain in place for only one election; and

11.2 The Constitutional Court's jurisprudence compels electoral regimes to err on the side of enfranchisement, rather than its converse.[3]

12 The Constitutional Court has commented that "section 19 of the Constitution does not spell out how members of a political party should exercise the right to participate in the activities of their party. For good reason this is left to political parties themselves to regulate."[4]

13 The same should hold true for independent candidates as far as possible, in the context of section 19(1)(c) - the right to campaign for a political cause.

Definitions

14 The proposed definition of 'independent candidate' is the first problem. It appears to be unenforceable for vagueness:

[3] *August* above
[4] *Ramakatsa v Magashule* 2012 JDR 2203 (CC) at [73]

"'independent candidate' includes any person nominated to contest or intending to contest an election for the National Assembly, provincial legislatures and municipal councils, who is not a member of or is not nominated by a political party;" (emphasis added)

15 While nomination represents a definite point in time, whereafter the candidate would clearly be hit by this definition and the accompanying obligations, it is unclear how the *intention* contemplated by this definition can be used as a jurisdictional fact. A similar reliance on intention (which could be impossible to prove without clear evidence as to the relevant person's state of mind) is repeated in the proposed section 10. We return to this below.

16 The bill further intends to insert the same definition into the Electoral Commission Act and the Electronic Communications Act, thereby entrenching this vagueness into the tapestry of our law..

17 The Electoral Commission has already complained about its lack of 'teeth' under the Act.[5] These vague new threshold requirements continue this theme and will likely exacerbate the Commission's problems with enforcement.

18 We submit that there should be a process for independents akin to the registration process for parties. The point of nomination is inappropriate, since this point could be mere weeks before the election (and is analogous with the submission of lists of candidates by parties). Registration, in contrast, is a distinct concept:

18.1 It can take place at any time and not only within a small window immediately before the election;

[5] https://mg.co.za/politics/2023-09-26-political-party-funding-act-needs-teeth-says-iec/

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18.2 It entitles parties to certain benefits (such as tax exemptions and beneficial broadcasting rights); and

18.3 It subjects them to certain obligations (such as disclosure under the PPFA).

19 It is undeniable that independents should be treated similarly, but this may be practically impossible with a definition as vague as this one and without a separate and formal registration process.

Prohibited and allowed donations

20 The donations prohibited under section 8 present a further instance where the difference between independents and parties receive inadequate treatment, and where the bill's treatment of independents will likely result in unequal benefit under the law:

20.1 Donations from foreign entities can be used by political parties for training or skills development of members of the party. Considering the numbers of members that the major parties have, this could be millions of people, which translates into a much wider scope for foreign funding.

20.2 Independents, on the other hand, can only use such donations for the training or skills development of the candidate themselves, which can only ever be one person.

21 This distinction loses sight of the fact that no independent can campaign alone. Just as political parties have members, so independent candidates have supporters, campaign members, staff, etc.

22 The bill's limitation of the right to campaign in this context must be balanced against the risks presented by the private funding of independents. While we agree with full disclosure, this limitation analysis must be cognisant of the fact that no independent

candidate is likely ever to form a government or exercise the type of control over the levers of state power that parties do.

Reporting obligations

23 The proposed section 12A places independents (candidates and representatives) in a disadvantageous position as compared with parties.

23.1 All receipts and accruals of registered political parties are exempt from normal tax.[6] There is no similar proposed exemption in respect of independent candidates and representatives, despite this amendment being the opportune moment to introduce such an exemption.

23.2 The requirement that an independent should register a bank account in their own name [proposed section 12A(4)] means that other types of tax exemption (such as those available to a public benefit organisation[7]) are also not available. It does not appear that a similar exemption for ICs and IRs will be included in the relevant tax statutes any time soon.

24 The definition of "political party", on the other hand, seems to leave the door open for parties' funds to be raised by any entity, and not solely by the party itself.[8]

Proposed alternative regime

25 Instead of the vague threshold requirements in the definition, we propose a regime along the following lines:

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[6] Income Tax Act, section 10(1) There shall be exempt from normal tax:
(cE) the receipts and accruals of any political party registered in terms of section 15 of the Electoral Commission Act, 1996 (Act 51 of 1996);

[7] Section 10(1)(cN) provides a similar - though more narrowly circumscribed - exemption for public benefit organisations.

[8] "'political party' includes any entity that accepts donations principally to support or oppose any registered political party or its candidates, in an election as defined in section 1 of the Electoral Act, 1998 (Act 73 of 1998);"

25.1 Any person intending to contest an upcoming election as an independent candidate may register their intention to do so with the Commission at any time after the preceding election for the same legislature or council.

25.2 This registration process could entail informing the Commission of:

25.2.1 The vehicle through which the campaign will be conducted and the details of the bank account associated with that entity;

25.2.2 The relationship between the entity and the candidate (if a separate juristic person is used), perhaps encapsulated in a founding document or memorandum of agreement.

25.3 From the date of registration, the IC is treated equally with registered parties for all purposes (including campaigning, taxation, disclosure, and other rights and obligations).

25.4 It would likely be prudent to include powers for the Commission to inform any person who publicly campaigns of the provisions of the PPFA, and perhaps to require registration if the Commission becomes aware or reasonably suspects that such a person elicits or accepts donations.

26 In order to interfere with the right to campaign as little as possible, the option to register should only become an obligation at the point where donations are elicited or accepted.

Intra-party campaign funding and section 10

27 It is not clear why section 10 faces repeal. Considered together with Parliament's continued failure to explicitly regulate donations to party members' campaigns for intra-party election, this section's replacement is alarming.

28 The existing section 10 could be construed to prohibit all donations to intra-party campaigns. While we do not consider that an outright ban on such donations would be wise, wholesale deregulation (as proposed by the amendment) is also unlikely to pass constitutional muster.[9]

29 Quite apart from this continued failure to deal with intra-party donations, the new section 10 qualifies the reach of these prohibitions to such an extent as to make them entirely unenforceable, and potentially to offend international law.

30 The proposed section 10(1) states that:

"No person or entity may make a donation to a political party or, a member of a political party, in the expectation that the party or member concerned will influence the awarding of a tender, licence, approval, consent or permission, or the relaxation of a condition or restriction in relation thereto, in the said person or entity's favour." (emphasis added)

31 There are three main problems with this section.

31.1 First, the same conduct is already prohibited in the Prevention and Combating of Corrupt Activities Act (PRECCA). However, while PRECCA imposes sanctions of up to life imprisonment for contravention of section 13, the proposed section 19 would visit contravention of section 10(1) with only a five-year sentence. We agree with the HSRC's recommendation that the relevant sections from PRECCA should simply be incorporated into the PPFA by reference.[10]

31.2 Second, the UN Convention Against Corruption requires the State to criminalise both the giving *and the receiving* of bribes of this type. The section's focus only

[9] See *Amabhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* 2023 (2) SA 1 (CC) for analogous reasoning.
[10] https://hsrc.ac.za/news/latest-news/the-hsrc-responds-to-a-call-to-strengthen-the-political-party-funding-act/

on the donor does not comply with this requirement. Incorporating PRECCA by reference would cure this problem too.

31.3 Third, the entire section is qualified by the final phrase: "in the said person's favour." This requirement would be extraordinarily easy to circumvent. Corrupt transactions hardly ever occur between only two parties in a linear and bilateral quid pro quo process. In most modern cases, payments and gratifications are removed from the recipient of the favour by a series of middlemen, companies, brokers and other palm-greasers. This qualification removes any hope of successful sanction or prosecution.

32 The phrase "in the expectation" will also present problems with proof and enforcement, being once more concerned with the mindset of the donor.

33 Instead of relying on proof of state of mind, many of the Act's existing and new weaknesses could be addressed by requiring disclosures of the beneficial ownership of donating entities, as the HSRC has also recommended.[11] In this way, the relevant authorities would be able to draw the links between donors and entities contracting with the state without having to rely on the say-so or subjective states of mind of the parties.

34 The remaining two subsections strain under similar difficulties. The existing section 10 prohibits donations to members of political parties "other than for party political purposes." This prohibition is appropriately wide, even if its intention is somewhat inscrutable.

35 The proposed subsections (2) and (3) limit the prohibition to instances where the donation is made to a member instead of the party in order to circumvent disclosure requirements or the prohibition of certain donations. This will again require proof of mindset, which is a difficult standard to meet.

[11] See fn 8 above

Amendment of regulation-making powers - section 24

36 The regulations contemplated in section 24 are aimed at prescribing the following:

36.1 The formula for allocations from the Funds - section 6(2)

36.2 The purposes for which allocations from Funds may not be used - section 7(2)

36.3 The maximum donation from a person or entity within a financial year ("**the maximum donation limit**") - section 8(2)

36.4 The limit on total donations received within a financial year ("**the total donations limit**") - section 8(5)

36.5 The threshold donation amount that triggers disclosure obligations ("**the disclosure threshold"**) - section 9(1)(a)

37 The proposed amendments to section 24 would have the following impacts:

37.1 Instead of requiring a National Assembly resolution before making regulations, the President would only need to consult the relevant Portfolio Committee and the Minister. In other words, regulations will be made under greater executive discretion than before.

37.2 Only the section-8 regulations - the maximum donation limit and the total donation limit - will be subject to the three factors listed in section 24(1)(b).

37.3 Prescribing the disclosure threshold [section 9(1)(a)] will not be subject to these factors, contrary to what the memorandum on the objects of the bill says.[12] Thus,

[12] Paragraph 3.24 of the Memorandum includes the object to "to set out the factors that the President must take into account when making regulations for the matters contemplated in section 8(2) and (5) and section 9(1)(a)" (emphasis added)

the President will apparently enjoy an untrammelled discretion in prescribing this threshold.

37.4 The factors in section 24(1)(b), in turn, appear to be concerned primarily with decreases in the value of money and the costs of running a party, and not at all with the impetus behind the PPFA - transparency and the right to have access to information (section 32 of the Constitution).

38 These proposed amendments must, regrettably, be considered in light of public pronouncements by some of the larger parties, to the effect that the PPFA's disclosure obligations hamper their fundraising efforts and the explicit intention on the part of certain parties to lower the disclosure threshold.[13] The above list of factors appears to be tailored to deal with these concerns, with scant attention to the very purpose of the Act's disclosure requirements.

39 We recommend that:

39.1 the list of factors in section 24(1)(b) should include:

39.1.1 the prevalence of public-sector corruption; and

39.1.2 the importance of transparency for the exercise of constitutional rights, including the rights in section 19(3) of the Constitution; and

39.2 the President should be required to consult with the Commission before making regulations affecting disclosure thresholds or limits, or donation limits.

[13] https://hsrc.ac.za/news/latest-news/the-hsrc-responds-to-a-call-to-strengthen-the-political-party-funding-act/ https://www.groundup.org.za/article/changes-to-party-funding-law-what-does-mean-how-does-it-affect-you/ https://mg.co.za/politics/2023-09-26-political-party-funding-act-needs-teeth-says-iec/

40 In view of the constitutional issues at play - and the inescapable fact that the foxes are guarding the henhouse - a decision that weakens disclosure requirements should be heavily regulated and policed, and supported by clear, testable reasons.

Miscellaneous oversights

41 The following provisions appear to contain unintended errors or omissions, or, if intentional, require explanation.

Section 7(2)(c) compared with section 7(3)(c)

42 These provisions seem to say that:

42.1 parties may use money received from the Fund to acquire a right or interest in immovable property, so long as the property is used solely for party political purposes; but

42.2 IRs may not use these funds at all to acquire a right or interest in immovable property.

43 This amounts to unequal benefit under the law. If this is not an oversight, the differential treatment must be explained.

Section 7(2)(d) compared with section 7(3)(d)

44 Section 7(2)(d) prohibits a political party from using money received from the Fund "to defray legal costs relating to internal political party disputes." The corollary would be that these funds may be used to defray legal costs relating to litigation between the party and other persons.

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45 The equivalent provision for IRs is found in the proposed subsection (3)(d), which provides that money from the Fund may not be used "to cover costs related to any litigation against the political party or independent representative." (emphasis added)

46 Two issues emerge:

46.1 It is unclear why political parties are included in a provision which applies only to IRs.

46.2 Assuming this reference to political parties to be an error, it is not clear why political parties can use these funds for litigation against third parties, while IRs are prohibited from using the funds for litigation of the same type.

47 The limits on permissible uses of the funds should apply equally to parties and IRs, as far as context allows.

Section 13(3)(c)

48 Section 13 deals with IRs, but subsection (3)(c) contains a reference to "independent candidate." This seems to be an oversight.

Section 14(1) and (4)

49 Both these sections refer to compliance only by political parties and independent candidates, but not independent representatives. This seems to be an oversight.

Section 19(3) read with section 10(1)

50 Section 19(3) appears to criminalise the conduct proscribed in the proposed section 10(1).

51 The proposed section 10(1), in turn, refers only to political parties and not to ICs and IRs. The inclusion of ICs and IRs in section 19(3) therefore appears to be inconsistent.

Conclusion

52 We thank the Committees for the opportunity to make these written submissions.

53 We request an opportunity to make oral submissions to the Committees. Since we understand that oral submissions may be called for on short notice (owing to the Committee's tight schedule), one or more of the following persons will make oral submissions, depending on availability:

53.1 Mr Andries Vermeulen (director of the People's Legal Centre);
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53.3 Mr Joseph Mayson (director of #UniteBehind).
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54 We hope to hear from your office soon.

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AJ Vermeulen