

**SUBMISSION TO THE ELECTORAL COMMISSION ON THE DRAFT REGULATIONS FOR THE POLITICAL PARTY FUNDING ACT**

**1 August, 2019**

**Introduction**

1. The Council for the Advancement of the South African Constitution (“CASAC”) is pleased to accept the invitation from the Electoral Commission (“IEC”) for public comment on the IEC’s Draft Regulations for the implementation of the Political Party Funding Act 6 of 2018 (“the Act”).
2. CASAC played an integral role in the public participation process that led to the adoption of the Act and have applauded both the Act and the Presidential Regulations which viewed together have created a legislative framework that will set South Africa apart as having one of the world’s most transparent, accountable and legitimate regulatory regimes governing the funding of political parties.
3. We are in substantial agreement with the underlying purpose of the IEC’s Draft Regulations but feel that some provisions can be improved to create greater clarity and certainty, to better give effect to the purposes of the Act and to enhance the mechanisms of disclosure to ensure they are compatible with modern needs.

**Submissions on specific regulations**

*Regulation 4(1) regarding the IEC’s right to return unlawful donations*

1. The wording “shall have the right” suggests that the IEC has the discretion to return funds unlawfully contributed to the Multi-Party Democracy Fund (“MPDF”). The Regulations should be clearer on the manner that the IEC should deal with such cases if they arise.

1. If money happens for whatever reason to be paid erroneously but in good faith by any of the entities listed in Regulation 4(1)(b-d), the IEC should be obliged to return the money to the contributor. If the IEC has reason to believe that the money in question is the proceeds of unlawful activities as mentioned in Regulation 4(1)(a), or is otherwise illegitimate or illegal, the IEC should be obliged to preserve the money and refer the matter to the relevant authority such as the National Prosecuting Authority (NPA), the Hawks or the Electoral Court, as the case may be.

*Regulation 4(3) read with Regulation 4(5) regarding the right of a contributor to the MPDF to remain anonymous*

1. It should be recalled that one of the primary rationales for the establishment of the MPDF was that donors who did not wish to reveal their identity may still continue to make political donations to the MPDF, given that they will no longer be able to donate directly to political parties on an anonymous basis if the value of their donations exceeds the prescribed threshold.
2. It is our submission in this regard that the only determination which the IEC should be required to make is whether a contribution to the MPDF arises from a legal source as determined by the Act. If the contribution is from a permitted source, the reasons for the contributor’s wish to retain their anonymity should be of no interest to the IEC – the contributor’s right to do so being fundamental to the establishment of the MPDF itself. Factors such as “the reasons for the request” and/or “an assessment of the political exposure of the Contributor” as described in Regulation 4(3) should not need to be considered by the IEC.
3. Of course, a contributor to the MPDF should always be required to reveal their identity to the *IEC* so that the IEC can satisfy itself that the contribution does not fall into any of the categories of donors prohibited by the Act. However, if the contributor is legally entitled to contribute to the MPDF and wishes to retain their anonymity *vis-à-vis* the public at large, they should have an absolute right to do so.
4. Failing this, at the very least the would-be contributor to the MPDF should be able to process their request to remain anonymous prior to making payment, or be entitled to have the contribution returned should their request for anonymity subsequently be denied.

*Regulation 8 regarding the frequency of reporting by political parties to the IEC*

1. One must be weary of not overburdening political parties with administrative requirements. We believe that requiring political parties to report to the IEC on a quarterly basis, as opposed to the monthly requirement proposed by Draft Regulation 8, would also be satisfactory and in keeping with the purport of the Act which requires quarterly disclosure. Requiring monthly reporting may be over-burdensome especially on smaller represented political parties who may lack the capacity to fulfil this obligation.

*Regulation 9 regarding disclosure requirements of juristic persons*

1. Whilst the “dual disclosure” provision requiring reporting of donations by the donor is a key accountability measure, it would be unreasonable to assume knowledge of the provision on behalf of such juristic persons. Who therefore would suggest that a mechanism be worked into the Regulation that requires political parties that receive a donation from a juristic person above the threshold to inform such a juristic person of their obligation to complete PPR6.

*Regulation 10 concerning the manner of publication by the IEC*

1. In addition to the requirement of publishing records of donations received by political parties in the Gazette, we believe that this should be coupled with an obligation on the IEC to provide such information online on its website. This is vitally important, given that online platforms are the primary sources of comparable information in the modern era. Several countries that require transparency in the funding of political parties have created easy-to-access online databases detailing the donations reported.[[1]](#footnote-1)

*Schedule 1 concerning the capacity of the IEC to impose penalties*

1. The wording of Schedule 1 in the Draft Regulations may lead to some uncertainty as to which body has the capacity to impose the penalties prescribed in the Schedule. The wording should be clear that where imprisonment is sought as an appropriate penalty; the IEC should refer the conduct in question to the Electoral Court if it is satisfied that a *prima facie* case exists. Where an administrative fine is regarded as the suitable penalty for the conduct in question, the IEC should similarly be able to institute proceedings in its own capacity before the Electoral Court in the form of an application. This can be done using a mechanism substantially similar to that present in Section 95(1) of the Electoral Act, which states:

*“Subject to this Act and any other law, the chief electoral officer may institute civil proceedings before a court, including the Electoral Court, to enforce a provision of this Act or the Code.”*

1. The IEC should not possess the power to impose the sanctions prescribed in Schedule 1 on its own accord.

1. See for example, Australia’s “Transparency Register” <https://www.aec.gov.au/Parties\_and\_Representatives/financial\_disclosure/transparency-register/, the UK Electoral Commission’s database on donations and loans to political parties <http://search.electoralcommission.org.uk>, the New Zealand Electoral Commission’s database <https://elections.nz/democracy-in-nz/political-parties-in-new-zealand/donations-exceeding-30000/>. [↑](#footnote-ref-1)