SUBMISSION ON DRAFT POLITICAL PARTY FUNDING BILL, 2017

16 October 2017

EXECUTIVE SUMMARY

CASAC welcomes the Draft Party Political Funding Bill, which represents a significant step in the right direction in filling a major gap in the accountability and transparency governance of South Africa, and in enhancing multi-party democracy. Moreover, there is much to be admired about the legislative reform process adopted by the Ad Hoc Committee and its advisors. However, there are a number of important issues that deserve further attention, including:

Foreign Donations:

Save for the prohibition on donations from foreign governments, CASAC does not support a ban on foreign donors donating directly to a political party, so long as that donation originates from a lawful source.

Donations from all foreign sources, including governments, to the Multi-party Democracy Fund should be permitted.

The Party-to-party collaboration which operates at an international level should be encouraged. Political parties do not, and should not, operate in a domestic bubble. Indeed, during this era of increasing nationalism and apparent introversion, political parties should be encouraged to maintain and deepen their transnational relations.

The Proportionality-Equitable Formula:

We submit that the Bill still falls substantially short of rectifying the problems that arise from the distribution of monies from both Funds. Whilst the exact formula to be used for the distribution of funds from the RPPF could be set out in the Regulations, the formula for allocations from the Multi-party Democracy Fund ("MPDF") should be defined in the new Act and should not be the same as the formula used for allocations from the RPPF.

CASAC submits that the appropriate formula for the distribution of funds under the MPDF is 50% on the basis of proportionality and 50% on the basis of equity.

Definition of Donor:

In CASAC's original submission, we advocated that a "donor" be defined to include certain natural and juristic persons who are substantially related to the primary donor, and may be regarded as related parties. There is no definition of "donor" in the Bill.

Dual Disclosure:

We regret that our earlier submission on this point was not properly considered by the Ad Hoc Committee. We have developed our argument in this second submission, including drawing attention to how dual disclosure operates in some other jurisdictions. Drawing from these examples, we make the following suggestion for the South African context: all donors, regardless of their whether they are an individual or corporate donor, must disclose all donations that they make above the agreed threshold to the Electoral Commission in order for

the Commission to scrutinise whether the donations that donors are reporting correspond to those being reported by political parties. However, there should be no obligation on donors to make public disclosure.

Upper Limits:

We believe that there should be an upper limit on the amount of money a political party can receive from a single donor during a twelve month reporting period. When this limit is exceeded, a party may not accept donations of any amount from that source until the next financial year. Whilst we suggest that this upper limit should apply to all donors, it is especially necessary from foreign donors to curtail the possibility of undue international interference. This upper limit should be specific to each party in relation to the total amount of private donations that they received during the previous financial year.

Investment Vehicles:

The regulation of investment vehicles owned by political parties was included in the original mandate of this Committee and formed a substantial part of the Committee's discussions to date. However, this has not been adequately addressed in the Bill. In line with our original submission as well as the discussions of the Committee, we propose that a specific provision be inserted into the Bill for the purpose of regulating such entities, including the following:

- Political parties must disclose all details of any financial interests that they hold in another entity;
- Entities which are wholly or partly owned by a political party may not contract with any organ of state.

We also make submissions on various technical matters, including penalties, in kind donations, the Regulations and the consequences that flow from the recent judgment of the High Court in the 'My Vote Counts' case.

We are grateful for the opportunity to make this further submission and would be glad to present our views to the ad hoc committee during the next round of public hearings.

I: INTRODUCTION

1. The Council for the Advancement of the South African Constitution ("CASAC") welcomes the Draft Political Party Funding Bill, 2017 ("the Bill') and wishes to express its appreciation to the Ad-hoc Committee for allowing us the opportunity to make this further submission.

2. We believe that the Bill signifies a significant step forward in realising the primary objective of this process, namely to create a transparent and accountable multi-party democracy.

3. Whilst the Bill meets this most vital reformative need of requiring political parties to disclose the details of all aspects of their funding, we respectfully submit that there are other important aspects which need further attention.

II: SUBSTANTIVE MATTERS RELATING TO THE BILL

Foreign Donors

4. Political parties both in South Africa and abroad have often relied substantially on donations from foreign sources. The provisions in the Bill which regulate the issue of donations from foreign entities represent a considerable shift from the previous regime in which foreign donors were able to donate freely to political parties.

5. However, we are of the opinion that several of these proposed measures are inappropriate in South Africa's economic and developmental context.

Foreign donations to the Multi-party Democracy Fund

6. Donations from all foreign sources to the Multi-party Democracy Fund should be permitted. The purpose of this Fund it to enrich the capacity of all parties to perform to the benefit of our multi-party system of governance. Such donations are not made directly to any party, cannot be subject to conditions from the donor and, whilst such donors can retain their anonymity with respect to public disclosure, their identity will be known to the Electoral Commission. We therefore see no reason to restrict the

sources of donations to the Multi-party Democracy Fund so long as they arise from a lawful source.

7. We do not believe that the fact that a foreign donor donates to the Multi-party Democracy Fund will lead to undue interference by foreign interests into South African politics. In fact it encourages the opposite effect – instead of a foreign donor donating directly to a political party, who may adopt a particular political stance, such funds would be used to strengthen South Africa's democracy as a whole in a non-discriminate manner.

Foreign donations made directly to specific political parties

8. Save for the prohibition on donations from foreign governments, CASAC does not support a ban on foreign donors donating directly to a political party, so long as that donation originates from a lawful source.

9. Whilst permitting donations by foreign entities may provide an opportunity for such entities to seek to influence our politics, this is no less true in respect of South African donors. Any entity that donates to a political party may do so with a hope of encouraging that party to adopt certain policies. The defence to this influence-seeking is not to prohibit donors from donating to parties, but to require that these donations be disclosed, so that the public can assess whether political parties are adopting policies that support causes which may be beneficial to their donors instead of the public at large.

10. Middle income economies such as South Africa's do still rely heavily on funds flowing in from more developed countries. South Africa should welcome efforts made by an entity in a foreign country to enhance the financial capacity of our democratic institutions. Our research shows that most of the countries that place a ban on direct foreign donations are wealthy states that are able to fund their own politics. Conversely, a ban on foreign donations by less developed states is less common. Please refer to Annexure 1 attached for this summary.

11. Whilst an exception, permitting foreign funding, does exist in Section 9(3) of the Bill, these categories are overly broad and there is likely to be be uncertainty as to what

purposes fit into them. It will also be extremely difficult to determine the purpose for which a foreign donor made a donation, and almost impossible to track whether the party is using that money for the envisaged purpose, as all donations will go into the same account of the party concerned.

International party-to-party support and support from international organisations

12. Our experience shows the importance of party-to-party collaboration which operates at an international level. Political parties do not, and should not, operate in a domestic bubble. Indeed, during this era of increasing nationalism and apparent introversion, political parties should be encouraged to maintain and deepen their transnational relations.

13. In addition, there are various international organisations and funds which exist to provide support to political parties in other parts of the world. For example there are the German Stiftungs which operate on the basis of political and ideological alignment. The Heinrich Boll Stiftung, for instance, will, on behalf of the Green Party of Germany seek out similar, like-minded parties around the world to support and partner with. Over the years, many if not all of the German Stiftungs have forged significant relationships with parties across the South African political spectrum, to mutual benefit. Similarly, the Westminster Foundation for Democracy in the UK organises its funding support for political parties around the world on behalf of British political parties, including South Africa.

14. Both of these sources of party support should be encouraged, and the legislation should permit this support to continue.

The Formulas to be used for the Allocation of Money from the Funds

15. We commend the restructuring of Section 5 of the Public Funding of Represented Political Parties Act, 1997 ("PFRPPA") as it appears in Section 6 of the Bill. The effect of this will put an end to the anomalies created by the Regulations under the PFRPPA whereby allocations from the proportional allocation of the public funds took into account seats held by political parties in both the national and provincial

legislatures, whilst distributions from the equitable allocation only considered seats held in provincial legislatures. This meant that some parties represented in the provincial legislatures but not the National Assembly received significantly more funds than parties who held seats in the National Assembly but not the provincial legislatures. The situation envisaged by Section 6 of the Bill is that distributions from both the proportional and equitable allocations from the Represented Political Parties Fund ("RPPF") will consider all seats that parties hold in both the national and provincial legislatures.

16. However we submit that the Bill still falls substantially short of rectifying the problems that arise from the distribution of monies from both Funds.

17. Whilst the exact formula to be used for the distribution of funds from the RPPF could be set out in the Regulations, the formula for allocations from the Multi-party Democracy Fund ("MPDF") should be defined in the new Act and should not be the same as the formula used for allocations from the RPPF.

18. The rationale for the MPDF is separate to the RPPF and the formula for the allocation of these funds should take cognisance of that. The MPDF is designed to receive and distribute funds that are not earmarked for any particular political party or cause, but are rather intended to strengthen all parties and, as a result, South Africa's democracy in general. Whilst we do not mean to suggest that no element of proportionality should form part of the formula for the MPDF, a strong element of equity is required and this should be prescribed in the primary legislation. Bearing in mind the rationale for the MPDF, which is expressed in its name, the substantial advantages that the bigger parties receive and have received from the current formula in terms of the RPPF, as well as the concurrent need to strengthen the role of the smaller parties to provide viable political competition, we suggest that the appropriate formula for the distribution of funds under the MPDF is 50% on the basis of proportionality and 50% on the basis of equity.

19. With regards to the formula to be used for allocations from the RPPF, a commitment by the Ad-hoc Committee that a more just formula will appear in the Regulations to cover allocations from both Funds is inadequate protection against the concerns raised

here. Accordingly, we submit that guiding criteria should be established in the Act to govern the formula decided upon in the Regulations. Currently, the Bill merely requires that the formula be "in part" proportional and "in part" equitable. There are several variations of the formula which could fall foul of Section 236 of the Constitution. We suggest that Section 6(3) of the Bill should include a guiding principle that the chosen weighting of proportionality and equity must be one that "enhances multi-party democracy" and allows for smaller parties to compete and expand in the political 'market'.

The Purposes for Which the Funds May Be Used

20. Section 7(1) of the Bill provides a non-exhaustive list of the purposes for which political parties may spend monies allocated to them from the Funds. The list is extremely broad. Save for the specific exclusions in Section 7(2), virtually any legitimate activity can fall under the purposes listed in Section 7(1).

21. With regards to these purposes we make two submissions:

    21.1 The purposes for which allocations from the MPDF may be spent should differ from the RPPF. The rationale for this distinction is based on the source of the money received by the respective funds. Whilst money received by the MPDF will be from private donors, the RPPF deals with public money. It therefore makes sense that the spending of public money be more circumscribed than private money;

    21.2 The purposes listed in Section 7(1) are overbroad, especially in relation to the use of public funds. It may be appropriate to earmark a proportion of the public funds to certain specific activities at certain times. For example, whilst it may be appropriate to allow parties to use some of the funds for campaigning purposes in the year running up to an election, at other periods it may be necessary to require the funds to be used for specific capacity building purposes such as policy development, research, education and promoting the active participation of citizens in political activities.

The Definition of Donations in Kind

22. Instead of distinguishing between a personal and non-personal service, the distinction should rather be made between a service that would ordinarily be within that service provider's ordinary course of business and one that would not.

23. If a person provides a voluntary service to a political party, such as handing out pamphlets or some other non-professional activity, it should not be necessary to disclose this service, both from a practical basis and due to the fact that it's value cannot easily be quantified. However, if a person provides a voluntary service or a service done at a reduced cost which that person would ordinarily charge for, that service should be disclosed as an in-kind donation if its value exceeds the prescribed threshold regardless of whether that person provides that service in a personal or corporate capacity.

24. In addition, political parties should be required to disclose any loan that they grant or receive, notwithstanding the terms and value of such a loan.

Penal provisions

25. The importance of effective, clear and reasonable penalties cannot be overstated for the effective functioning of the legislation. With regards to the penal provisions in the Bill, we make the following suggestions:

    25.1 No compliance notice should be issued in the case of fraudulent conduct or criminal activity;

    25.2 We do not support the imposition of political penalties, such as the cancellation of the registration of a political party, as mentioned in Section 16(2)(d) of the Bill, as we believe that the potential exists that this could be used for ulterior motives;

    25.3 If the provision in Section 16(2)(d) is included in the final Act, we believe that this provision should be subject to separate requirements from the other penalties, including a requirement of "exceptional circumstances" or "gross violation(s)". Furthermore, if such a penalty exists, only a court should be able to order the

cancellation of the registration of a political party, as is required for the imposition of this penalty in terms of Section 96(2) of the Electoral Act. The mere opportunity of a party to take the matter on review is insufficient, especially seeing that smaller parties may not be able to afford to take a matter on review;

25.4 Section 19 of the Bill, read with Schedule 1, provides for the imposition of administrative penalties. We do not agree that the maximum amount of such fines should be fixed as envisaged in Schedule 1. Instead, they should be assessed in relation to the financial capacity of each party. Certain amounts envisaged in Schedule 1 could be a mere "slap on the wrists" for a large party, but cripple a smaller party – even though the offence may be the same. For example, instead of specifying an amount, one should rather specify the penalty as a percentage of the money that a political party received from the Funds during the last financial year.

25.5 Sections 96, 97 and 98 of the Electoral Act (1998) stipulate penalties for the contravention of Part 1 the Electoral Act. Regard should be had to these penalties, and how they may inform the penalties stipulated under the proposed Political Party Funding Act. There is also a need to synchronise the penal provisions in the Electoral Act with the proposed legislation.

The Definition of "Donor"

26. In CASAC's original submission, we advocated that a "donor" be defined to include certain natural and juristic persons who are substantially related to the primary donor, and may be regarded as related parties. There is no definition of "donor" in the Bill.

27. The 'mischief' that we are seeking to avoid through this definition is this: if, for example, a holding company and its subsidiary were to each donate an amount just below the threshold which combined would be above the threshold, they would be able to avoid disclosure. Furthermore, if, as we propose below, an upper limit is set on the amount a single donor can donate to a specific party during a financial year, this requirement would also be able to be circumvented by channelling donations through related parties. It is important to avoid such loopholes in the legislation.

28. We therefore propose that the threshold amount be assessed in terms of any donations made by "substantially the same donor" which may include:

    - A holding company and its majority owned subsidiary;
    - An individual person(s) and a company in which the former is a substantial shareholder;
    - An individual person and a partnership in which the former owns a majority share in the partnership;
    - Any donor and a trust in which that donor is a trustee;
    - The family of any donor, including the spouse(s) of the primary donor and relatives in the first and second degree.

Dual Disclosure

29. In our original submission, we argued that there should be a concomitant obligation on donors to report and disclose their donations made directly to a political party. Unfortunately, this submission received little attention during the Committee's deliberations.

30. The rationale for this "dual disclosure" obligation is to serve as a double accountability measure, to ensure that the donations that political parties are reporting coincide with those which donors are reporting. Without this measure, there may be an opportunity for parties to hide some of the donations which they receive. In our earlier submission, we compiled a comparative study of relevant laws in other jurisdictions. In that document, we included a list of countries that place some obligation on the donor to disclose the donations which they have made. We attach this document here as Annexure 2 for the Committee's convenience.

31. In Annexure 3 to this submission, we provide some specific examples of how such provisions operate in other jurisdictions around the world. Drawing from these examples, we make the following suggestion for the South African context: all donors, regardless of their whether they are an individual or corporate donor, must disclose all donations that they make above the agreed threshold to the Electoral Commission in order for the Commission to scrutinise whether the donations that

donors are reporting correspond to those being reported by political parties. However, there should be no obligation on donors to make public disclosure. It should be the responsibility of the political party and the Electoral Commission to inform donors of this obligation.

32. We therefore appeal to the Committee to consider this proposal as a vital accountability measure during this phase of its deliberations.

Upper Limits

33. We believe that there should be an upper limit on the amount of money a political party can receive from a single donor during a twelve month period. When this limit is exceeded, a party may not accept donations of any amount from that source until the next financial year. Whilst we suggest that this upper limit should apply to all donors, it is especially necessary from foreign donors to curtail the possibility of undue international interference. This upper limit should be specific to each party in relation to the total amount of private donations that they received during the previous financial year.

Investment Vehicles

34. The regulation of investment vehicles owned by political parties was included in the original mandate of this Committee and formed a substantial part of the Committee's discussions to date. However, this has not been adequately addressed in the Bill. In line with our original submission as well as the discussions of the Committee, we propose that a specific provision be inserted into the Bill for the purpose of regulating such entities, including the following:

- Political parties must disclose all details of any financial interests that they hold in another entity;
- Entities which are wholly or partly owned by a political party may not contract with any organ of state;
- Any donations made to such entities should be treated as a donation to a political party and thus subject to the requirements of the Act.

Forfeiture of Unspent Monies

35. The effect of Section 14(2) of the Bill, which echoes Section 9 of the PFRPPA, is that political parties may have to forfeit a percentage of any unspent money which they received from the Funds during a financial year. We do not believe that there is any harm in political parties saving and then keeping some of the money which they receive on the basis of 'rollovers', rather than encourage/require 'fiscal dumping' to occur. Thus we submit that this provision should be retracted, subject to two provisos: a) any unspent money which parties received during a particular period remains subject to any spending requirements that those funds were subject to during that period and, b), the amount of money which a political party can carry over should be limited to 25% of the funds that they received during that financial year.

Section 22(2) of the Bill Read with the Financial Management of Parliament and Provincial Legislatures Act (2009)

36. Section 22(2) of the Bill requires the accounting officers of *legislatures* to account for monies paid to political parties in terms of Sections 57 and 116 of the Constitution. There should be an additional requirement on political parties to account for their expenditure of such funds, so as to assess whether political parties spent this money in accordance with the constitutionally prescribed purpose of "enabling the party and its leader to perform their functions in the legislature."

37. Whilst it would be preferable for to be incorporated this obligation in the Financial Management of Parliament and Provincial Legislatures Act, it is important for the Committee to take note of it and to recommend to the National Assembly that such action be taken. This constitutes a vital element of ensuring an effective and comprehensive legislative regime regulating the broad area of funding to political parties.

III: THE REGULATIONS

38. Some of the more technical, and arguably more important, aspects of the proposals considered by the Committee have not been included in the Bill – instead such matters

have been left to be determined in the Regulations. In the event that the Regulations are deficient or not enacted timeously the new legislation, and the work of the Ad-Hoc Committee, will be rendered nugatory.

39. Regard should be had to the judgment of the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa*.[1] In this case, the Court invalidated a decision by the President to bring a specific piece of legislation into force as the "appropriate regulatory infrastructure" envisaged to coexist with the legislation had not yet been put in place.[2] Due to the absurdities that would be created by enacting the legislation with the regulatory lacuna, the decision to bring the Act into force was deemed to be irrational and thus inconsistent with the rule of law.[3]

40. If the Bill were to be enacted in its current form without the Regulations, the following provisions necessary for the effective functioning of the new Act will be lacking:

    - The formula for the distributions of money out of the MPDF and RPPF;
    - The intervals at which money would be paid from the Funds;
    - The purposes for which the funds may and may not be used by political parties;
    - The threshold amount for disclosure of direct donations;
    - The manner and form of disclosure;
    - The exact periods when disclosure is required; and
    - The duties of the Accounting Officer.

41. In the absence of these provisions the entire legislative regime would be ineffective. We therefore propose replacing the word "may" in Section 23(1) with an obligation that the Regulations must be enacted within three months of this Act and no later than 31 March 2018 – so as to be in force at the start of the new financial year on 1 April 2018.

[1] 2000 (2) SA 374 (CC).
[2] Para [87].
[3] Para [88].

42. In addition, this submission mentions several matters which the Bill has left to be decided by the Regulations which we submit would be better provided for in the principal legislation.

IV: TECHNICAL MATTERS RELATING TO THE BILL

43. We would additionally like to make the following suggestions in respect of the Draft Bill:

43.1 Section 2(3)(a) of the Bill should clarify which Act(s) of Parliament may allocate money to this Fund. There are several Acts of Parliament which allocate funds both to political parties as well as the Electoral Commission. These include, amongst others, the PFRPPA (or its successor), the Financial Management of Parliament and Provincial Legislatures Act (2009) and the Division of Revenue Act.

43.2 Section 3(5) should be specific as to the type of confidentiality a contributor to the MPDF could request. Whilst such a donor may request that the details of the donation not be disclosed to the public, they may not request that such details not be disclosed to the Commission. The Commission requires this information to, *inter alia,* determine whether the donation came from a legal source.

43.3 In Section 4(2), the word “approval” should be replaced with the word “concurrence”;

43.4 Section 6(6) of the Bill should clarify what happens to any money that was paid out of the Funds which is remaining in the account of political parties after they lose representation in a national or provincial legislature. We submit that they should be able to keep any remaining funds.

43.5 In Section 7(2)(d), the word “prescribed” should be changed to “proscribed”;

43.6 In Section 8(b), the word “an” should be replaced with “a”;

43.7 We would suggest that, for the sake of clarity, “elections” in Section 10(3) should be defined as “national and provincial elections”.

IV: THE EFFECT OF THE RECENT DECISION OF THE WESTERN CAPE HIGH COURT IN MY VOTE COUNTS

44. On the 27th of September 2017, the Western Cape High Court passed judgment in the matter of *My Vote Counts NPC v President of the Republic of South Africa and others*.[4] The key findings of the Court were as follows:

44.1 Access to information regarding the private funding of political parties is reasonably required for the effective exercise of the right to vote;[5]

44.2 This conclusion was supported by the founding values of accountability, responsiveness and openness in Section 1(d) of the Constitution, as well as the duty on the state in Section 7(2) to respect, protect and promote the rights in the Bill of Rights;[6]

44.3 The majority decision of the Constitutional Court in *My Vote Counts*[7] led to the 'frontal challenge' to the constitutional validity of the Promotion of Access to Information Act of 2000 ("PAIA") in the High Court, in that PAIA currently does not make provision for the access to information regarding the private funding of political parties;

44.4 The Court therefore found that PAIA should facilitate the right of access to information about the private funding of political parties. It held that such information "is reasonably required for the effective exercise of the right to vote in such elections and to make political choices, in terms of sections 19(1), 19(3), 32 and 7(2) of the Constitution[8]"

44.5 The court found that PAIA in unconstitutional in so far as it does not provide for the recordal and disclosure of private funding information of political parties,[9]

44.6 The Court suspended the declaration of the invalidity of PAIA for a period of 18 months to allow Parliament to take the appropriate steps to remedy this defect.[10]

[4] Case number 13372/2016
[5] Para [42}.
[6] Para [42].
[7] *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC).
[8] Para [75]
[9] Para [69];
[10] Para [74].

45. This judgment deals with distinct aspects regarding access to information of the private funding of political parties and independent ward candidates at a local government level. It does not therefore have an impact on the work of the Ad Hoc Committee. We submit that this judgment does not reframe this debate, but instead creates an additional burden on Parliament to remedy PAIA. The two processes, of passing this Bill and amending PAIA, are separate and must be dealt with as such by Parliament. The one does not substitute for the other – both legislative processes must be completed.

46. The impact of the amendment of PAIA will be such that it will provide for access to information that will also cover the local government level, and in particular independent ward candidates. For a fully comprehensive legislative regime, both pieces of legislation are required.

VI: CONCLUSION

47. We would like to applaud the Ad-hoc Committee and its technical team for their work on this important task to date. This Bill represents a significant measure that will enhance the quality of our democracy and serve to benefit all South Africans.

48. CASAC would like to request the opportunity to make further oral submissions on the matters dealt with in this submission.

Cape Town
16 October 2017