

MEDIA COMMENTS ON POLITICAL PARTY FUNDING BILL, 2017

South Africa National Editors' Forum and amaBhungane Centre for Investigative Journalism

INTRODUCTION

1. This submission is made by the South African National Editors' Forum ("Sanef") in collaboration with the amaBhungane Centre for Investigative Journalism ("amaBhungane").
2. Sanef, launched in 1996, is a non-profit organisation whose members are editors, senior journalists and journalism trainers from all areas of the South African media. We are committed to championing South Africa's hard-won freedom of expression and promoting quality, ethics and diversity in the South African media. Sanef aims to be a representative and credible voice of journalism in society, to facilitate diversity in newsrooms and reporting, and to enable a culture of real debate and promote free and independent journalism of the highest standard. Sanef stands in defence of media freedom. We campaign for legislation to enable the media to do their job, and against commercial and legislative pressures that restrict media.
3. AmaBhungane is an independent, non-profit company founded in 2009 to develop investigative journalism so as to promote a free, capable and worthy media and open, accountable and 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.
4. Sanef and amaBhungane made submissions to the National Assembly Ad Hoc Committee on Political Party Funding in 2017. The National Assembly Committee has made important progress in developing legislation to ensure regular and proactive public disclosures.
5. There are nevertheless gaps which unless resolved may negate the very intentions of the Party Political Funding Bill of 2017 ("the Bill"). The National Council of Provinces ("NCOP") Ad Hoc Committee has an important opportunity to strengthen the legislation by closing the gaps.
6. We therefore make these submissions to the NCOP to ensure the final legislation adequately gives effect to the constitutional right to information and enable civil society and oversight bodies – Parliament and the Independent Electoral Commission ("IEC") – to monitor compliance and exert accountability.
7. Our submission is informed by the work of the media, in particular investigative journalists, who 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.
8. The submission is limited to comments on public transparency provisions contained in the draft Bill. We address issues relating to:
 - a. Public Disclosure of Contributions to the Multi-Party Democracy Fund

- b. Public Disclosure of Donations in Kind
- c. Party Business Ventures to be Restricted or Disclosed
- d. Circumvention and Related Parties

A. PUBLIC DISCLOSURE OF CONTRIBUTIONS TO THE MULTI-PARTY DEMOCRACY FUND

9. The Bill at cl 3(5) provides for private persons who contribute to the IEC-controlled Multi-Party Democracy Fund to stay anonymous or for the size of their donation to be secret, at their request.
10. While the provision of a fund administered by the IEC puts some distance between political parties and donors, some risk of undue influence remains.
11. Example 1: A company tenders for a contract in a province. It secretly informs the leader of the provincial ruling party, who is also the premier, that it intends making a large anonymous contribution to the Fund should it win the contract. The premier pressures his or her officials to award the contract to that company. The fact that other parties also benefit under the prescribed formula is regarded by the participants as an inconvenience but does not undo the corrupt nature of the transaction.
12. Example 2: A foreign government wants to influence the outcome of the South African elections at national level, in support of the then ruling party. It comes to an arrangement with a number of private persons, secretly acting as its agents, to make large contributions to the Fund. Though all parties benefit, the ruling party benefits the most under the prescribed formula. This ruling party gains an edge in the elections.
13. The temptation to use the Fund to “launder” improper contributions as in the examples above will increase to the extent that a party is electorally dominant and gets bigger allocations under the prescribed formula. It must be noted that this is a factor beyond the control of the present legislature and that this Bill must stand the test of time even in circumstances where the electoral division may be very different to now.
14. We therefore propose that the fund should be subject to the same robust transparency provisions as direct donations, such as that all donations above a certain threshold must be disclosed.

Drafting suggestion

3.

(5) Any contributor contemplated in subsection (3)(a) who contributes below a prescribed threshold may request the Commission not to disclose their identity or the amount of the contribution.

(6) The Commission must publish all contributions other than details of contributions envisaged in subsection (5) on a quarterly basis in the prescribed form and manner.

(7) The Commission must also publish all such contributions during an election year one month before an election, should it fall on a date other than a quarterly publication.

B. PUBLIC DISCLOSURE OF DONATIONS IN KIND

15. The Bill includes a definition of “donation in kind”. The definition excludes ‘*services rendered personally by a volunteer*’. Some services ordinarily rendered at a fee – such as accounting, management consulting, legal or public relations advice – may amount to a very substantial benefit if provided voluntarily.
16. The unintended consequence of the exclusion in the definition would be to render undeclarable a donation that would otherwise be above the declaration limit. We believe that such a benefit should be disclosed if it is above the threshold, as the risk of undue influence is no different whether a donation is in cash or in kind.

Drafting suggestion

The definition for donations in kind should be amended in the definitions section as follows: -

‘donation in kind’—

...

- (b) does not include personal services provided on a voluntary basis except where the cumulative value of such services provided by any person over a twelve-month period exceeds the prescribed threshold referred to in section 9(1)a;

C. CIRCUMVENTION AND RELATED PARTIES

17. Cl 10(3) currently contains a prohibition on circumventing “any of the provisions of this Chapter”. The reference is to Chapter 3, which deals with the direct funding of political parties.
18. This prohibition does not go far enough. Not only circumvention in relation to direct donations should be prohibited, but also in relation to the rest of the Bill (in particular should our recommendation of mandatory disclosure of contributions to the Multi-Party Democracy Fund above a prescribed threshold be accepted).
19. Moreover, given the severity of the risk that the disclosure provisions will be circumvented, there should be explicit provisions relating to the following, at a minimum:
- a. Contributions/donations from the same source or substantially related sources within any 12-month period must be regarded as a single contribution/donation. “Substantially related sources” may be defined as:
 - i. A company and its subsidiary;
 - ii. A natural person and a juristic person of which the former is a shareholder, a beneficial owner, a trustee, a director or a partner;

- iii. Husbands and wives; and
 - iv. Parents/guardians and minor children/wards.
- b. When a contribution/donation is made via a third party, the original source of the contribution/donation must be declared to the IEC or the party which receives it, and the IEC or the party must declare the original source for the purposes of disclosure. Failing to do so must be an offence.
 - c. Splitting a contribution/donation between different persons or into different twelve-month reporting periods with the intention of circumventing disclosure must be an offence.
 - d. Any other intentional circumvention of the disclosure provisions must be an offence.
20. Note that we also propose that parties should disclose all donations to the IEC; not only donations above the threshold. The IEC, however, will publish only the donations above the threshold. This is a small change, but necessary to prevent attempts by parties to “split” donations to stay under the disclosure threshold. In other words, the IEC will be in possession of the necessary information to check on attempts to circumvent.

Drafting suggestion

Disclosure of donations to political party

9. (1) A political party must disclose to the Commission all donations received—
- [(a) above the prescribed threshold; and]
 - [(b)] in the prescribed form and manner.
- (2) ...
- (3) The Commission must publish the donations disclosed to it in terms of subsections (1) and (2) that are above the prescribed threshold—
- (a) on a quarterly basis; and
 - (b) in the prescribed form and manner.
- ...

D. PARTY BUSINESS VENTURES TO BE RESTRICTED OR DISCLOSED

21. A crucial matter not addressed in the current Bill is the dividends or returns that political parties may receive by dint of an ownership stake in a company or any other form of investment. We would go so far as to say that this has been the single most pressing public concern relating to party funding over the course of a decade or more.
22. The Committee will be aware of prior scandals over party investment vehicles doing business with the state, and the corrosive effect that such relationships have had on our democracy.
23. The intention behind the current draft of the Bill may be for dividends to be treated as donations, in which case they would be subject to disclosure if above the prescribed threshold. However, it

appears that as soon as a party is entitled to benefits by dint of equity it holds or any other investment, it is no longer a donation and will not have to be disclosed.

24. Under the circumstances, the Bill should deal explicitly with the phenomenon of party investments, whether equity-based or not, as demonstrated by the examples below:
25. Example 1: A provincial ruling party beneficially but secretly owns shares in an IT company. The provincial government issues a lucrative tender for IT services. The provincial ruling party pressures officials to award the contract to the IT company. When the IT company next pays dividends, the party benefits handsomely – a benefit it does not have to disclose.
26. Example 2: The national ruling party plans a policy change that is likely to shake confidence in the banking sector for a while. Before announcing the policy, it invests in financial instruments shorting banking stocks. Once the policy is announced, banking stocks plummet and the short positions are closed out. The party benefits handsomely and does not have to disclose the return on its “investment”.
27. Compelling arguments could be made for a complete ban on party business ventures and any form of speculative investment, equity-based or not, given parties’ power to influence investment outcomes.
28. However, should the Committee not choose this option we recommend that, at a minimum, all dividend and other investment income should be disclosed above the same donation threshold that applies to direct donations, and in sufficient detail to reveal any underlying conflict of interest.
29. We also recommend that the audited financial statements and auditors’ opinion referred to in cl 12(4) and submitted to the IEC, be made public annually by the IEC. This will be an important transparency measure not only in itself, but also to engender public confidence that parties’ have fully met their disclosure obligations.

CONCLUSION

30. We thank the Committee for the opportunity to make submissions on a matter of crucial importance to our constitutional democracy and accountability journalism in South Africa.