SUBMISSION ON

DRAFT POLITICAL PARTY FUNDING BILL, 2017

Introduction

1. The South African History Archive (SAHA) is pleased to make this submission in response to the call, issued by the Ad Hoc Parliamentary Committee on the Funding of Political Parties, for public comment on the Draft Political Party Funding Bill.

2. Established in 1988, SAHA is an independent human rights archive committed to documenting and promoting greater awareness of historical and, since 1994, contemporary struggles for justice. As well as servicing a traditional academic and research community (both domestically and internationally), the organisation positions notions of accessible archive and records as central components of the human rights and governance culture, discourse and practice. In this regard, SAHA promotes awareness, and tests the parameters, of South Africa's access to information legislation, and ensures its archive is made available to communities and constituencies that ordinarily would not access these materials.

3. In 2001, SAHA established its Freedom of Information Programme (FOIP), and since then has been at the forefront of efforts to test the parameters of the Promotion of Access to Information Act, 2000 (PAIA). Through FOIP, SAHA assists individuals, communities, NGO's, activists and researchers with requests for information as well as submitting its own requests. In total SAHA has submitted over 2000 access to information requests to a range of public and private bodies.

4. In a previous submission to the committee SAHA proposed that there were several reasons for ensuring transparency in the context of party funding. We are happy to see the Bill includes transparency provisions.

5. Given our expertise lies primarily in archiving and access to information with an aim to supporting struggles for justice, we will primarily comment on the transparency provisions in the draft Bill. Our submissions on the Bill are addressed under three headings and relate to general comments, comments on specific provisions within the Bill and notes on what appears to be typographical errors.

General Comments

6. With respect to the two funds created by the Bill, the Represented Political Party Fund (RPPF) and the Multi-Party Democracy Fund (MPDF):

6.1. As it stands, while the sources, from which the monies within the two funds derive differ, the funds are distributed, and otherwise managed in the same way (see section 7). It would appear, should there be no need to distinguish between the ways in which the funds are distributed and otherwise managed, that there is no need for two separate funds. (Given that the differences in income would be reflected in financial reporting in any event.)

6.2. We would propose however that the committee consider, whether a multi-party democracy would not be better served by ensuring that duly registered parties that are not represented in either of the houses of Parliament, are also provided with some funding out of the MPDF. This would necessitate the keeping of both funds, as well as provision being made, in section 6, for disbursement to such parties.

6.3. To the extent that the proposal in 5.2 is accepted we note that this would require amendment of the provisions in section 14(3) to allow for parties that are registered but unrepresented in Parliament to retain funds allocated out of the MPDF.

7. In relation to transparency provisions within the Bill:

7.1. It is generally accepted that to ensure access to information and with it a level of transparency, three broad record-related duties need to exist: a duty to record information, a duty to keep records of information and a duty to disclose records of information. (This is also reflected in other legislation, such as the Electoral Act, 1998, the Companies Act, 2008 and the National Credit Act, 2005 – to name just a few.)

7.2. The Bill as it stands neglects to make provision for record-keeping duties and provides very little guidance in terms of the manner in which information should be made accessible.

7.3. We propose that this can be addressed through the inclusion of a general section (similar to sections 21A in the Municipal Systems Act, 2000 and 75 in the Municipal Finance Management Act, 2003) that provides general record-keeping and disclosure duties.

7.4. We propose wording to the following effect:

"All records that must be created in terms of any provision in this Bill, or, in order to ensure compliance with any provision in this Bill -

(a) Must be stored in a manner that will ensure it is preserved, it's integrity is ensured and it is accessible;[1]

(b) Must be stored as provided for in subsection (a) for a period of seven years, or any longer period of time specified in any other applicable public regulation;[2] *and*

(c) If required to be made publicly accessible or to be published, must be made accessible on the website of the body that has a duty make the record(s) publicly accessible or to publish the record(s) and must be made accessible, at least electronically, at every office of that body."

8. In relation to the applicability of the Bill:

8.1. We note that the Bill only applies in relation to parties represented in Parliament, and therefore to parties contesting elections at the national and provincial level.

8.2. We note that the same arguments for regulation at the national and provincial level apply at the local (municipal) level. There is therefore is a need to extend the provisions of the Bill to parties and independent candidates that are contesting elections at a local (municipal) level.

[1] This speaks to meeting archival standards in terms of records being stored in more than one place, electronically and in fire and water-proof cabinets, in a manner that ensures it cannot be tampered with or altered and in accordance with a filing plan that will ensure it can be located and accessed.

[2] This is in line with record-keeping duties in other legislation dealing with records of financial transactions. See for example section 24(1)(b) of the Companies Act, 2008.

8.3. We note that while there may be some concerns around the disbursement of funds from the RPPF to candidates at the local level, due to the scope of section 236 of the Constitution, no similar concerns exist with respect to provisions relating to (a) disbursement of funds from the MPDF and (b) transparency provisions.

8.4. We propose that at a minimum the Bill should extend the application of transparency provisions to parties and independent candidates at local (municipal) level.

8.5. The Bill should further set firm timeframes for the amendment of all other provisions to ensure these too are made applicable at local (municipal) level within a reasonable timeframe.

Comments on specific provisions

9. In our previous submission to this committee several reasons for ensuring transparency in the context of party funding were put forward. We suggested that one reason in particular related to the need, identified by South Africa's Constitutional Court, to counterbalance inequality of access to politicians that is created by funding relationships.

9.1. Given that this counter-balancing has been expressly recognised as an aspect of the right to vote, we propose that it is necessary within the Preamble to give recognition to constitutional obligations, as provided for in sections 19 and 7(2) of the Constitution.

9.2. We propose wording to the following effect:

> *"AND WHEREAS section 19(3) of the Constitution, in the Bill of Rights in Chapter 2 of the Constitution, in providing for every citizen's right to free and fair elections requires transparency in the funding of political parties;*
>
> *AND WHEREAS section 7(2) of the Constitution requires of Parliament to take steps to ensure the promotion and fulfilment of rights in the Bill of Rights;"*

10. In relation to sections 2(3)(b) and 3(3)(b):

10.1. Both clauses provide for the crediting of these accounts with money recovered in terms of section 18. We propose that it be made clear within these clauses (or within section 18) in which circumstances funds should go to which account.

10.2. We propose that monies recovered that came from, were destined for, or that should have been destined for the MPDF be credited to that account. Whereas monies recovered that came from the RPPF be credited to that account.

10.3. A less desirable solution might be to have every amount recovered credited in equal parts to the two funds.

11. In relation to sections 2(3)(c) and 3(3)(c):

11.1. Both clauses provide for the crediting of these accounts with interest earned on money deposited or invested in terms of section 4(1).

11.2. We propose that the wording be clarified to ensure interest earned from money that was deposited or invested out of the RPPF be credited to the RPPF, and interest earned on money deposited or invested out of the MPDF be credited to the MPDF.
11.3. We note that this can be achieved by adding the words:
11.3.1 "out of the Represented Political Party Fund" to section 2(3)(c), after the clause "money invested" but before the clause "in terms of"; and
11.3.2 "out of the Multi-Party Democracy Fund" to section 3(3)(c), after the clause "deposited or invested" but before the clause "in terms of".

12. In relation to section 3(5):

12.1. The section very broadly makes provision for the withholding of information, both about the identity of the person as well as the amount of a contribution made to the MPDF by a contributor.
12.2. We note that, while provision for a level of secrecy plays a role in the protection of certain other rights, it simultaneously infringes, at least, upon the rights to vote and the right of access to information.
12.3. In our view the extent of the limitations placed on these latter rights, by this section as it is currently worded, is not justifiable and we propose the limitation be narrowed.
12.4. We propose that it only be possible to elect for non-disclosure of either identity or the amount contributed, not both.
12.5. *It may be necessary to consider, given reporting obligations in terms of financial legislation such as the Public Finance Management Act, 1999, whether an undertaking not to disclose the amount of a contribution will be legally possible*.

13. In relation to section 7(1)(f):

13.1. We note the wording of this sub-section is very vague.
13.2. We are unclear as to what this provision would actually entitle parties to use the funds for. At a broad level it appears to be attempting to shift a constitutional duty on organs of state to act transparently and engage with their constituencies to political parties. This appears inappropriate and unconstitutional and does not appear a legitimate use of such funds.
13.3. We are also concerned that this vagueness will not stand up to constitutional scrutiny.
13.4. We propose that this subsection be removed.

14. In relation to section 8, the definition for "foreign person" may be too narrow, it might deem certain kinds of juristic persons that would ordinarily be regarded "local" as "foreign" – for instance the Closed Corporations that do still exist and that are registered as such in South Africa.

15. In relation to section 8, the definition for "political party" may be too broad, it might deem organisations that campaign for or against certain parties directly or indirectly (for example as consultancies) that *have no intention of contesting elections*, to be political parties.

16. In relation to section 10:

16.1 Section 10 only references a threshold leaving it to the President to set the threshold (see section 23).

16.1.1 We propose that Parliament has a duty to address the policy issues related to the threshold within the Bill, and therefore that the section should provide some minimum requirements for the threshold. In particular we propose that the threshold amount should be determined in consultation with experts and should be in line with international best practice.

16.1.2 We further propose that the section should note that the determination of whether or not the threshold is met, should be made with reference to all donations of whatever nature made by that person and related persons (such as immediate family or subsidiary companies) over the previous 12 month period, which should be a rolling 12 month period. This would avoid a situation where a person or other entity avoids compliance with disclosure requirements by making multiple donations, or by donating through relations.

16.2 Section 10 provides only for reporting on donations that exceed the threshold. In this respect we propose:

16.2.1 While detail about donations should only be publicly disclosed in relation to donations that meet the threshold, there should be some level of reporting *to the Commission* on donations that do not meet the threshold; in order to enable the Commission to determine whether the threshold has been met.

16.2.2 Provision should therefore be made for the Commission to report on anonymised, collated data related to donations not meeting the threshold. In other words to allow for the Commission to report on the types of businesses / professions that made smaller donations and the range of donation amounts as well as the total figure of all donations that did not meet the threshold.

17 In order to ensure the data gathered is accurate, useful and easily comparable we propose that the Bill should be specific as to minimum categories of information the prescribed form should require.

17.1 We propose that the minimum requirements should include include detail about the names and occupation / business of the donor, the date of the donation agreement and date of the donation, the value and nature of the donation and any and all conditions attached to the donation.

17.2 We propose this could be achieved by adding a new subsection between the current section 10 subsection (1) and section 10 subsection (2). The new subsection could contain wording to the following effect:

"The form for the disclosure of donations to a political party prescribed for the purposes of subsection (1) must at least require the political party concerned provide-
(a) The full names of the donor;

(b) Details of any and all other names by which the donor is known;
(c) Detail of the principal occupation or business of the donor;
(d) The date of the conclusion of the donation agreement;
(e) The date on which the donation was made or will be made;
(f) The full value of the donation;
(g) Detail of the nature of the donation; and
(h) Detail of any and all conditions attached to the donation."

18. In relation to section 13:

18.1 We propose there is a need to ensure there is a check on whether compliance provisions are actually complied with.
18.2 We therefore propose that whether or not disclosure provisions are being complied with should be audited by the independent auditor.
18.3 We propose this can be achieved by adding a new a sub-section between the current sections 13(2)(i) and 13(2)(ii). The new subsection could contain wording to the following effect:

"money received directly by the party has been accurately reported on to the Commission; and"

19. In relation to section 14:

19.1 In the third and fourth line, we propose the phase "to the Commission" be replaced with the phrase "back into the fund out of which the allocation was made".

20. In relation to section 16(1):

20.1 We note that the Bill only confers the power to issue a direction, but makes no requirement to do so.
20.2 Fair administrative justice would require that a political party be given an opportunity to make representations before the imposition of a sanction.
20.3 We therefore propose that the issuance of a directive should be mandatory.
20.4 We further propose that this can be achieved through the replacement of the word "may" with the word "must" or the word "shall".

21. In relation to section 22(2):

21.1 We propose that the Commission should be required to disclose the information disclosed to it under section 22(2) within a month of receipt, making it available at its head and branch offices and on its website.[3]

[3] This is in line with disclosure provisions in other legislation that requires proactive disclosure. See for example the Electoral Commission Act, 1996 and the Municipal Finance Management Act, 2003.

22. In relation to enforcement provisions in Chapter 5:

22.1 There is no distinction between ordinary regulatory inspections and inspection or enforcement action that needs to be taken pursuant to a complaint or carried out in accordance with an investigation being conducted pursuant to a complaint received by the Commission. We therefore propose that:

22.1.1 There be a clear distinction between these types of inspection, and that the powers bestowed in relation to each be commensurate with the type of inspection.

22.2 We note that the Commission is only required to issue a directive before suspending payment to a political party (see section 17(1)), but is not required to do so before imposing any other sanction it is empowered to hand down (see sections 18 and 19); including imposing an administrative fine or instituting civil proceedings to reclaim moneys or set off liability against future payments from the Funds. We propose that:

22.2.1 Administrative justice would require that a political party be given an opportunity to make representations before the imposition of such other sanctions as well.

22.2.2 Therefore, the Commission ought to be required to issue directives in in relation to all other sanctions as well.

22.3 There is no guidance with respect to whether the Commission could impose a cumulative sanction (example, issue a fine and suspend payment). We propose that the Committee should consider whether the Bill should not provide some direction in this regard.

22.4 There is no clear indication whether the Commission is empowered to make regulations in which it sets out procedures for investigations and provides more clarity regarding enforcement action. We propose that the Committee should consider whether the Bill should not make clear provision for this.

23. In relation to Schedule 1:

23.1 We propose that the 3 year periods provided for in the last three rows of the table be a rolling three year period. We propose therefore that:

23.1.1 The words “a rolling” be added in each row, after the phrase “provision within” but before the number “3”; and

23.1.2 The word “years” be replaced with the phrase “years period”.

Typographical errors

24. In relation to section 5(1), in the second line, the word “is” should be inserted after the clause “Funds and” but before the clause “responsible for”.

25. In relation to section 6(4), in the third line, the clause “last held” should be inserted after the clause “results of the” but before the word “election”.

26. In relation to section 8, under the definition for "donation" part (b)(ii), in the first line, the word "a" should be inserted after the clause "provided to" but before the clause "political party".

27. In relation to section 10:

27.1 Section 10(3) refers to publication of the "donations" this should read "forms".
27.2 Section 10(3)(b) the word "for" should be inserted ahead of the phrase "twelve months".

28. In relation to section 13(1)(a), in the first line, the word "monetary" should be inserted after the phrase "deposit all" but before the phrase "donations received".

29. In relation to section 15(2)(c)(ii), in the third line, the reference to "paragraph (a)(ii)" should be a reference only to "paragraph (a)".

30. In relation to section 21(1)(a)(iv), in the second line" "Fund" should read "Funds".

31. In relation to section 23:

31.1 In section 23(1), in the second line, there is a reference to section "7(2)(e)" there is no section 7(2)(e); we assume that this was supposed to be a reference to section 7(2)(d).
31.2 In sub-section there are two sub-section (1)s and two subsection (2)s the latter two should be subsections (3) and (4).
31.3 Within what is currently the second subsection (1) (what should be sub-section (3)), in the first line, the statement "in terms of subsection (1)" should read "in terms of subsection (2)".

32. The content of what is currently the second subsection (2) (what should be subsection (4) repeats provisions in subsections (1) and (2) and therefore appears superfluous.

Conclusion

33. SAHA thanks the Committee for its consideration of our submissions. Should the Committee require further written or oral submissions on these issues, SAHA would be happy to assist. Please contact Toerien van Wyk on the details below.

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