

**Submission**

to the

**NCOP Select Committee on Security and Justice**

on the

**Promotion of Access to Information Amendment Bill [B 20-2019]**

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## 1. Introduction

- 1.1. The Centre for Applied Legal Studies ('CALs') is a civil society organisation based at the School of Law at the University of the Witwatersrand. CALs is also a law clinic, registered with the Legal Practice Council. As such, CALs connects the worlds of both academia and social justice. CALs' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights.
- 1.2. CALs operates across a range of programmes including: rule of law, business and human rights, environmental justice, basic services, and gender.
- 1.3. CALs' Rule of Law Programme aims to advance certain civil and political rights, such as the right to protest, the right to freedom of expression, the rights of the arrested and detained, and the right of access to information. As part of efforts to advance the right to access to information, the programme is part of the Access to Information Network, which was established in 2008. This is a group of civil society and media organisations which *inter alia* aims to ensure that civil society remains heard in the on-going implementation of the Promotion of Access to Information Act<sup>1</sup> and in doing so, releases an annual Shadow Report reflecting on member organisations experiences in their use of PAIA and its effectiveness. In addition to this rights-based work,

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<sup>1</sup> 2 of 2000. (Hereafter "PAIA").

the Programme aims to protect and promote the systems and institutions of South Africa's constitutional democracy. This includes working to strengthen Chapter Nine institutions, supporting the transformation of the judiciary, and engaging with Parliament.

1.4. CALS has historically engaged in numerous rule of law issues through its submissions to Parliament. Some of CALS' submissions include submissions on South Africa's Compliance with the Covenant for Economic, Social and Cultural Rights;<sup>2</sup> the Independent Policing Investigative Directorate Amendment Bill;<sup>3</sup> and Submissions to OISD on Single Human Rights Body.<sup>4</sup> The rest of the Rule of Law Programme's submissions can be accessed from our website.<sup>5</sup>

1.5. In light of the above CALS asserts that it is well placed to comment on the substance of the proposed amendment bill.

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<sup>2</sup> <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/resources/CALS%20report%20to%20the%20Committee%20on%20ICESCR%20re%20South%20African%20compliance%20with%20the%20Covenant.pdf>

<sup>3</sup> <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/resources/CALS%20Submissions%20on%20the%20IPID%20Amendment%20Bill%20June%202018.pdf>.

<sup>4</sup> <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/resources/CALS%20submissions%20to%20OISD%20re%20Single%20Human%20Rights%20Body%20-%2030%20June%202017.pdf>.

<sup>5</sup> <https://www.wits.ac.za/cals/our-programmes/rule-of-law/>.

## 2. Reflections on the proposed amendment

2.1. CALS would like to take this opportunity to thank NCOP Select Committee on Security and Justice for making the call for submissions to the above Amendment Bill, focusing on whether the proposed bill remedies the constitutional inadequacies of PAIA. Namely, by failing to provide for the recordal, preservation and reasonable disclosure of information on the private funding of political parties and independent candidates as identified in the judgment of the Constitutional Court in *My Vote Counts NPC v Minister of Justice and Correctional Services and Another*.<sup>6</sup>

### *The need for Transparency*

2.2. CALS to a greater degree welcomes efforts taken by Parliament to remedy the legislative defects because of the importance of transparency since of the role that political parties play in South Africa as the Constitutional Court held “[p]olitical parties receive public resources because they are the vehicles for facilitating and entrenching democracy. This entails a corollary: that the private funds they receive necessarily also have a distinctly public purpose, the enhancement and entrenchment of democracy, as well as a public effect on whether democracy is indeed enhanced and entrenched. The flow of funds to political parties, public or private, is inextricably tied to their pivotal role in our country’s democratic functioning. There is a further corollary: given

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<sup>6</sup> [2018] ZACC 17. (Hereafter “My Vote Counts 2”).

parties' emphatically public role, any notion of privacy attaching to their private funding must be significantly attenuated".<sup>7</sup>

2.3. This is in line with an earlier decision of the Constitutional Court in *Doctors for Life v Speaker of the National Assembly and Others*<sup>8</sup> in which the court stated, "the Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years."<sup>9</sup>

#### *Issues with PAIA processes*

2.4. The Bill is meant to address the Constitutional Court's judgment by inserting a new section 52A "Recording, preservation and disclosure of records on the private funding of political parties" in the principal Act, to regulate the recordal, preservation and availability of information in respect of private funding to political parties and independent candidates and to provide for matters connected therewith".

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<sup>7</sup> *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 at para 37. (Hereafter "My Vote Counts 2").

<sup>8</sup> 2006 (6) SA 416 (CC).

<sup>9</sup> *Ibid* at para 231

- 2.5. Our concern with this section is that the amendment is that it only envisages disclosure of records on the private funding of political parties through the PAIA processes.
- 2.6. CALS is of the view that there should be an additional requirement for all political parties to make available, on their websites or other forms of publications, the names of their donors and the funds that such donors have contributed. This would ensure that information is readily available for the public to make informed decisions when participating in our democratic processes.
- 2.7. The Bill provides that for political parties to record all private funding section 52A provides that “[t]he head of a political party must— (a) create and keep records of— (i) any donation exceeding the prescribed threshold that has been made to that political party in any given financial year; and (ii) the identity of the persons or entities who made such donations; (b) make the records available on a quarterly basis, as prescribed; and (c) keep the records for a period of at least five years after the records concerned have been created.” Therefore, it would not be difficult for the political parties to disseminate this information to the general public.
- 2.8. We appreciate that the Political Party Funding Act<sup>10</sup> gives the Electoral Commission (“Commission”) oversight powers to monitor compliance by political parties with aforementioned Act by being able to evaluate the

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<sup>10</sup> 6 of 2018.

information and documentation provided by political parties in terms of the Act. Schedule 2 of the Draft Regulations<sup>11</sup> states that the Commission may upload information pertaining to political party funding on its website but makes no mention of how political parties having the duty to make such information available online.

2.9. Section 9 of the Act states that rights under the Promotion of Access to Information Act are applicable to political party funding. Thus, it seems that the recourse that ordinary people might have to obtaining political funding information other than through the Commission would be through PAIA.

2.10. CALS is of the view that the PAIA process is particularly lengthy in our work where we have tried to assist clients to obtain information through PAIA we have had to wait months before receiving information on whether requests for information has been granted or not. After receiving confirmation that requests have been granted one still has to access the documents from the regional offices, which can take an additional several months. Our clients would inevitably be left frustrated that their efforts and attempts to enforce their constitutional rights to access to information cannot be realised.

2.11. Apart from the lengthy period it takes to obtain, the PAIA process also costs money. Over and above the amount of money that one must pay when submitting the application, one must also have money to travel to the relevant information holder's offices unless they are able to arrange an electronic

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<sup>11</sup> Political Party Funding Act 6 of 2018 Regulations Regarding Represented Political Party Funding No. 42273.



payment to the cashier for the request fee and scan proof of payment, which not all people will have access to.

2.12. The Access to Information Network 2018 Shadow report<sup>12</sup> noted the poor compliance with statutory timeframes that are imposed by PAIA thus where possible information should be readily available to the public.

#### *The Threshold for Disclosure*

2.13. Furthermore, CALS is of the opinion that there should not be a threshold for disclosure, currently under the Act political parties are expected to disclose funds exceeding R100 000, 00.<sup>13</sup> There is a risk of this system being manipulated as one donor may make a number of donations less than the prescribed amount to escape disclosure.<sup>14</sup>

#### *Recommendations*

2.14. While CALS' welcomes the Bill, it calls on the NCOP committee to take cognizance of the fact that PAIA processes are flawed and that information pertaining to political party funding should be made available to the public outside of these processes in favour of accountability and transparency. The manner of disclosure should be online, on the political party's website.

2.15. The NCOP committee should consider doing away with the threshold for disclosure.

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<sup>12</sup> <https://cer.org.za/wp-content/uploads/2019/09/ATI-Network-Shadow-Report-2018.pdf>.

<sup>13</sup> Section 9 read together with item 9 of Schedule 2 of the Act.

<sup>14</sup> The Citizen Newspaper "Civil society wants parties to disclose donations of under R100K"  
<https://citizen.co.za/news/south-africa/parliament/2180493/civil-society-wants-parties-to-disclose-donations-of-under-r100k/>