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promoting liberal constitutional democracy

16 October 2017

Mr Vincent Smith
Chair – Ad Hoc Committee on the Funding of Political Parties
Parliament of South Africa
Parliament Street
Cape Town City Centre
Cape Town
8000

Dear Sir,

Please receive the Helen Suzman Foundation's submission to the Committee following the call dated 19 September 2017 for comment.

Yours sincerely,
Francis Antonie
Director

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Trustees: Ken Andrew • Cecily Carmona • Jane Evans • Paul Galatis • Daniel Jowell • Temba Nolutshungu • Kalim Rajab • Gary Ralfe • Rosemary Smuts • Richard Steyn • David Unterhalter • Phila Zulu

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Helen Suzman Foundation

Submission: Draft Political Party Funding Bill 2017

1. This document is a response to the call for submissions by the Ad Hoc Committee on Political Party Financing's call for public comment on the Draft Political Party Funding Bill, 2017.

2. The Helen Suzman Foundation

The Helen Suzman Foundation (HSF) is a non-governmental, non-profit organisation which promotes liberal constitutional democracy. Established in 1993, the HSF has consistently advocated good governance, transparency and accountability. It is in keeping with these principles and the Foundation's mandate that we make this submission in response to the Ad Hoc Committee's invitation.

Our submission on the Draft Bill focuses on five main areas; provincial and municipal party funding, the proposed Multi-Party Democracy Fund, the laws surrounding mandatory disclosure of private funding, the fines in place for contravention of the act and the legal language in the Draft Bill. These areas look at topics that are raised by the draft legislation as well as those that the Committee has not included.

3. Provincial Funding

Alongside advances in private transparency and accountability, every effort must be taken to ensure that these values are applied to public funding. Most of the public funds flow through the provinces, with little regulatory scrutiny. The current system lacks both proportionality and transparency.

In its submission to this Committee on 1 September 2017, National Treasury raised concerns around the execution of the mandate, under Section 116 (2) (c) of the Constitution, for provincial legislatures to provide funding to political parties.

- 3.1. The first of these is the lack of transparency in provincial funding. While National Treasury was able to estimate total amounts spent, there was little information available on how the amounts were allocated between parties. A clear distinction should be made in budget and accounts between allocations (a) directly to political parties and (b) how much is allocated to allowances to permit Members of Provincial Legislatures (MPLs) to carry out their duties. There is currently no national reporting requirement for disclosure.
- 3.2. The second of these is the proportion of public funds that is allocated by provincial legislatures as opposed to the National Assembly. In 2015/16 (the latest year for which audited accounts are available), over R 588 million appears to have been allocated by provincial legislatures, compared to the R 498 million allocated by the National Assembly (including the allocation to the Represented Political Parties Fund). R927 583 was allocated per Member of Parliament (MP) while R1 369 460 was allocated, on average, for each of the 430 Members of Provincial Legislatures (MPLs). There is no clear reason why both the total and proportional allocations to political parties at provincial level should be greater than it is at national level. The allocation per MPL is higher in five out of the nine provinces than the allocation per MP.
- 3.3. The third concern surrounding provincial funding is the disproportionate allocations between provinces. The sums allocated to political party funding by each individual province are vastly different and do not seem to be correlated to population or legislature size. The Free State allocates R1 986 200 per MP (with a total allocation of R59 586 000) while the much more populous Kwa-Zulu Natal allocates only R30 million, or R375 000 per MPL. These discrepancies need attention.

Attached as an Appendix is a detailed statistical analysis of the fiscal situation in 2015/16.

- 3.4. Fourthly, although the existing Public Funding of Represented Political Parties Act No. 103 of 1997 contains no provisions which permit provincial legislatures to adopt their own legislation on this topic, most provinces¹ nevertheless adopted legislation between 2007 and 2010, providing for the funding of political parties participating in their provincial legislatures. This goes beyond the powers conferred by section 116(2) of the Constitution, which provides for the making of rules and orders of a provincial legislature to provide for financial and administrative assistance to parties represented in the legislature. This empowers a provincial legislature to establish the administrative framework for disbursing such funds, but does not empower legislation which raises or appropriates funds for this purpose. Only the National Assembly is empowered to do this through the Public Funding of Represented Political Parties Act.
- 3.5. The principles regarding the legislative capacity of provinces is set out in section 104 of the Constitution and provides that provincial legislatures are empowered to enact legislation in functional areas specified in certain annexures to the Constitution, if they are expressly empowered to do so by national legislation, or if the Constitution envisages the enactment of such legislation. In a Constitutional Court judgment², it was held that any empowerment by national legislation for provincial legislation to be enacted, has to be express and that if the Constitution envisages any legislation to be enacted by provinces, this has to be stated clearly. The judgment states that “Our constitutional scheme does not permit legislative powers of the provincial legislatures to be implied.” As a consequence, it is clear that the legislation passed on this subject by various provinces is completely outside of what they are empowered to do and that the legislation is accordingly invalid.

¹ Eastern Cape (later repealed), Free State, Gauteng, Limpopo, Mpumalanga, Northern Cape, Kwazulu Natal and North West (later repealed). The Western Cape does not seem to have adopted such legislation.

² Per Ngcobo CJ, in the matter between the Premier: Limpopo Province and the Speaker of the Limpopo Provincial Legislature, decided on 11 August 2011

4. Funding of political parties by municipal councils

The Memorandum of the Draft Bill mentions at 2.23 that the Bill “prohibits municipal councils from funding political parties and independent candidates.” However this is not evident in the text of the Bill. It must be clarified to ensure that municipal councils and local authorities are explicitly prohibited from funding these entities.

5. The Multi-Party Democracy Fund

Section 3 of the Draft Bill establishes a Multi-Party Democracy Fund (MPDF) with the “purpose of providing for private sources of funding for political parties that participate in national or provincial legislatures”. The fund is regulated and allocated in exactly the same way as the Represented Political Parties Fund (RPPF), under sections 5-7 of the Draft Bill. We believe that it is unnecessary to establish the MPDF as the RPPF in section 2(2) (b) of the Public Funding of Represented Political Parties Act 103 of 1997 allows for private donations. In order to avoid unnecessary complexity and administrative costs, the MPDF should not be established and private funds should rather be allocated through the existing mechanism of the RPPF.

6. Disclosure threshold

Section 10 of the Draft Bill prescribes that a “political party must disclose all donations received above the prescribed threshold”. The threshold has been left to the Committee to determine. Because of the lack of available information on this topic, it is difficult to suggest a particular threshold. It is therefore crucial that the threshold is an amount that is reached via consensus with all represented political parties. A failure to do this is likely to encourage evasion.

7. Maximum permissible fines that may be imposed for contravention

It is quite possible that donations of very large sums may become contentious within the framework of the envisaged Act. It follows logically that penalties following the contravention of specific sections have to be commensurate with the sums involved. However, the fines proposed in the Draft Bill would be appropriate only if donations in small amounts are involved. If large amounts are involved, the proposed level of fines present no deterrent at all and draws into question the basic purpose of the Draft Bill. The maximum fines therefore need to be increased in a very substantial way and some guidance needs to be provided in the Draft Bill to link the magnitude of the funds involved in an illegal act with the level of the fine.

8. Suggested changes to the Draft Bill

The following are suggested amendments to Draft Bill.

Section 6. Allocation and payment of money to represented political party

6(3)(a) It is suggested that the words “ .. taking into account a weighted scale of representation for an allocation .. ” should be deleted.

The text of 6(3)(a) in the Draft Bill leads to a confusion of the two allocation methods (ie. equitable and proportional). If the proposed change is made, 6(3)(a) would then provide for an equitable allocation and 6(3)(b) for a proportional allocation.

Section 8. Interpretation for purposes of the Chapter entitled *Direct Funding of Political Parties*

The Draft Bill states that a “ ‘donation in kind’ (a) includes - (ii) any money paid on behalf of the political party for any expenses incurred directly or indirectly;”

This definition should be amended to read as follows:

“ ‘donation in kind’–

(a) includes –

(ii) any money paid on behalf of the political party for any reason, whether directly or indirectly.”

If this change is not made, the concept of “expenses”, as it appears in the Draft Bill, unnecessarily limits the scope of the definition of “donation in kind”, as it implies a spending of money on actual expenses for goods and services. It is quite conceivable that a donation in kind could be made without any link to a payment for expenses and this is not covered in the Draft Bill’s formulation.

Section 9. Prohibited donations

9(1) The following two points need to be added as prohibited donations:

- donations from anonymous sources or sources in respect of which sufficient details are not provided to identify them (where at least names and addresses of donors are required to be provided); and
- donations in cash above a certain level.

Section 10. Disclosure of donations to political party

10(1) The following words should be added at the end of the sub-clause: “, providing sufficient details to identify the donor (which include at least the names and addresses of the donor).”

The sub-clause would then read: “A political party must disclose all donations received above the prescribed threshold, to the Commission, in the prescribed form and manner, providing sufficient details to identify the donor (which include at least the names and addresses of donors)”.

Regulations (included after the written submission):

1. The HSF wishes to register its concern with the way in which the Committee has handled the issue of the proportional/ equitable split and the disclosure threshold. The Foundation contends that the public interest would have been far best served by the public commenting on recommendations rather than a decision being taken after the period for public comment is closed.
2. The HSF is concerned by the language in section 4 of the draft regulations. It does not make it clear whether this refers to how the money should be allocated or to whom it should be allocated. Which leaves the question of whether it will be allocated directly to Provincial legislatures open. This must be remedied to make it clear.

Appendix:

Political Party Funding VIII - National and Provincial Spending

Helen Suzman Foundation Brief (available at: <http://hsf.org.za/resource-centre/hsf-briefs/political-party-funding-viii-national-and-provincial-spending>)

As Parliament's Ad Hoc Committee on the Funding of Political Parties continues its work, it is crucial to scrutinise all forms of public funding. This brief looks at the allocation of funds by provincial legislatures and the problems that it currently poses.

Introduction

Much of the scrutiny surrounding political party funding focuses on the portion of funding controlled by the National Assembly. But the majority, around 55%, of the public funding for political parties is allocated by provincial legislatures. Section 116 (2)(c) of the Constitution stipulates that provincial legislatures must provide financial assistance

to each represented political party in order for them to be able to function effectively. Unlike the money allocated at national level, which is allocated both equitably to all represented parties and in proportion to each party's share of representatives, provincial funding is entirely proportional to representation in the legislature.

Problems exist with provincial funding for three main reasons. The first of these is incomplete information, which limits the transparency of many of these transfers. The second is the lack of a regulatory framework resulting in a highly uneven distribution of funding across provinces. While the third is the disproportionate amount of funding channeled through provincial legislatures in comparison to the National Assembly.

Analysis

In their submission to Parliament's Ad Hoc Committee on Political Party Funding, National Treasury complained that they struggle to access information relating to provincial expenditure on political party funding. While they were able to access total amounts spent, there was little information available on how it was allocated and for what parties used the allocations for. It is also not clear how much is allocated directly to political parties, and how much is allocated to allowances to permit Members of Provincial Legislatures (MPLs) to carry out their duties as public servants. There is currently no national reporting requirement for disclosure. Accordingly, there is a degree of uncertainty in some of the provincial estimates set out below.

The most recent audited expenditures are for the 2015/16 financial year. Table 1 sets out the national allocations to the Represented Political Parties Fund (RPPF) and to Parliament to cover the expenses of MPs in the performance of the functions.

Table 1 - National Allocation 2015/16

	RPPF	Parliament	Total
Funding	127 394 146	371 033 000	498 427 146

Per MP	318 485	927 583	1 246 068
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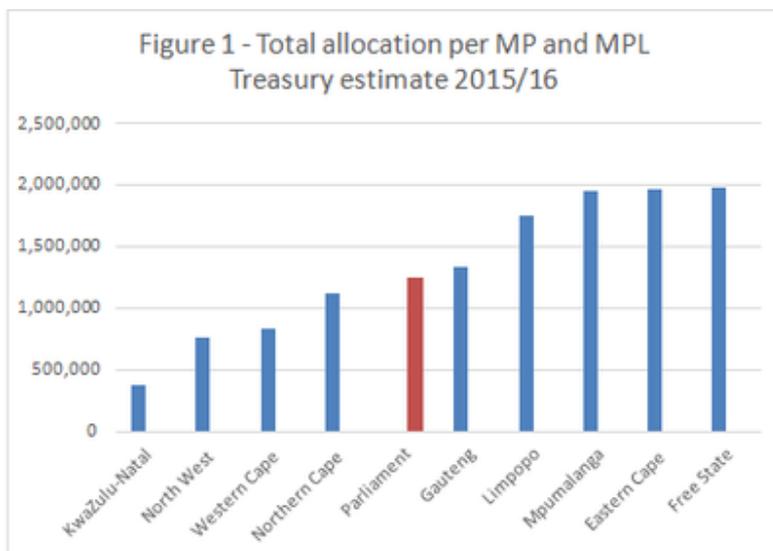
Table 2 sets out provincial allocations in the same financial year. The number of Members of Provincial Legislatures are reported, along with the National Treasury's estimate of expenditures in their presentation to the Parliament Ad Hoc Committee on Political Party Funding on 1 September 2017. From these estimates, an allocation per MPL is calculated. The right hand column of Table 2 sets out the 2015/16 estimates of expenditure from provincial budgets. In some provinces they are identical to the Treasury estimates. In others, they are higher. The discrepancies are an indicator of the information problem.

Table 2 - Provincial Allocations 2015/16

Provinces	MPLs	Allocations Treasury presentation	Allocation per MPL	Facilities for MPLs and party support Provincial budgets
KwaZulu-Natal	80	30 000 000	375 000	30 000 000
North West	33	25 092 000	760 364	31 168 000
Western Cape	42	34 854 000	829 857	40 155 000
Northern Cape	30	33 782 000	1 126 067	39 162 000

Gauteng	73	97 911 000	1 341 247	97 911 000
Limpopo	49	85 613 000	1 747 204	93 743 000
Mpumalanga	30	58 493 000	1 949 767	58 493 000
Eastern Cape	63	123 652 000	1 962 730	136 004 000
Free State	30	59 586 000	1 986 200	62 232 000
Total	430	548 983 000	1 276 705	588 868 000

Figure 1 graphs the information in Tables 1 and 2. It is based on the total national and provincial allocations. It shows the discrepancies between provinces clearly.



The allocation per MPL is higher than the allocation per MP in five provinces.

Table 3 presents our best estimates of allocations directly to political parties.

Table 3**Transfers directly to parties - 2015/16**

Province	Transfer	Part or all of Treasury estimate	Part or all of facilities and party support provincial budgets	Transfer per
North West	11 050 000	Part	Part	334 848
KwaZulu-Natal	30 000 000	All	All	375 000
Western Cape	34 854 000	All	Part	829 857
Gauteng	67 251 000	Part	Part	921 247
Northern Cape	27 786 000	Part	Part	926 200
Eastern Cape	98 272 000	Part	Part	1 559 873
Limpopo	85 613 000	All	Part	1 747 204
Mpumalanga	58 493 000	All	All	1 949 767
Free State	59 586 000	All	Part	1 986 200
Total	472 905 000			1 099 779

Figure 2 compares allocation directly to parties per MPL by province with allocation per MP to the RPPF.

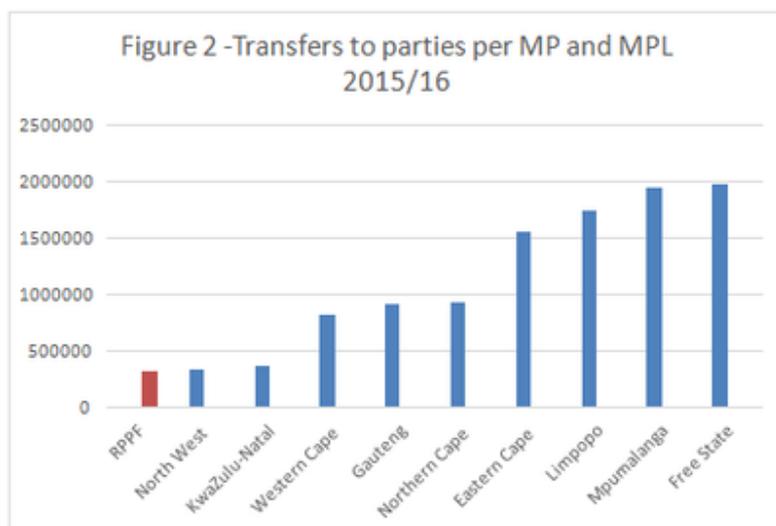


Figure 2 shows that allocations directly to parties per MPL in all provinces are higher than the allocation per MP through the RPPF. This accords with the National Treasury's submission to the Parliamentary Committee on 1 September, which pointed to the imbalance between national and provincial allocations, with provincial governments spending a larger overall amount on party funding. The National Treasury representative argued that any increase in national funding should be accompanied by a decrease in provincial expenditures.

The second issue is the lack of uniformity between provinces. The largest total allocated per MPL was greatest in the Free State at R 1 986 200, and the smallest allocation per MPL was in KwaZulu-Natal, which spent only R 375 000.

Conclusion

Provincial funding is allocated to political parties according to the Constitutional requirement in section 116 (2)(c). But the lack of appropriate regulation has led to imbalances, both between the national and provincial level, as well as between the

provinces themselves. Additionally, reporting does not distinguish adequately between (a) transfers to political parties (b) allowances for expenses by MPLs in performance of their functions, for which financial claims can be made and or (c) provision in kind to MPLs. The current position is unsatisfactory and the Parliamentary Ad Hoc Committee should give attention to the ways in which it can be improved.