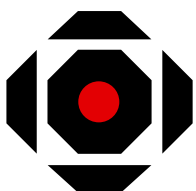


ADVISORY

Strengthening the Political Party Funding Act to Manage Corruption Risks and Improve Transparency in South Africa



NACAC
National
Anti-Corruption
Advisory Council



1. EXECUTIVE SUMMARY

The National Anti-Corruption Advisory Council (NACAC) has undertaken a review of the Political Party Funding Act ("PPFA") and proposes amendments aimed at strengthening transparency and reducing vulnerabilities for corruption and undue influence in the context of party funding. Corruption risks are inherently intertwined with political party funding, presenting a significant challenge to the integrity of democratic processes. When financial contributions from individuals, corporations, or interest groups flow into political parties, the potential for undue influence and favouritism in policy decisions and government contracts may arise. Donors may expect favourable treatment in return for their contributions, creating an environment where policy choices prioritize private interests over the public good.

This dynamic not only erodes the principles of transparency and accountability but also undermines the level playing field essential for a fair and equitable democratic system. Unregulated or opaque party funding can facilitate hidden agreements, quid pro quo arrangements, and the emergence of shadow networks seeking to manipulate the political agenda for personal gain. As such, robust regulations, comprehensive disclosure mechanisms, and rigorous enforcement are pivotal to mitigating corruption risks associated with political party funding and safeguarding the fundamental principles of democratic governance. Based on these considerations, the NACAC makes the following recommendations in order to strengthen the political party funding environment in South Africa:

- 1.1.** The PPFA should not include the Corrupt Donation Crime, recommended by the State Capture Commission, as a separate offense. Instead, it should reference section 13 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 ("PRECCA"), which already criminalizes corrupt donations.
- 1.2.** Any amendments to the current thresholds for disclosure and caps on donations should be postponed until sufficient evidence is available to make informed decisions regarding more appropriate thresholds and caps.
- 1.3.** Natural persons who donate amounts above the section 9(1)(a) threshold should be required to disclose their donation

directly to the Independent Electoral Commission ("IEC").

- 1.4.** Natural persons and juristic entities should be prohibited from circumventing the section 8(2) cap by making multiple donations through related juristic entities.
- 1.5.** Strengthen section 10 of the PPFA by requiring that all private monetary donations to political parties be deposited directly into the bank account specifically created for donations in section 12(1)(a).
- 1.6.** Subject donations made to internal party races to the same disclosure thresholds, and prescribed maximum caps, as those which the PPFA applies to party political funding.
- 1.7.** Mandate disclosure of sources of investment income for political parties' investment vehicles, subject to the prohibited sources of income imposed on political parties themselves in section 8(1).
- 1.8.** Regulate donations received by independent candidates and establish guidelines for how independent candidates receive money from public funds established in sections 2 and 3.
- 1.9.** Lastly, the NACAC recommends that the Political Party Funding Unit ("PPFU") within the Independent Electoral Commission ("IEC") be adequately resourced and staffed to effectively conduct oversight, monitoring of donations, and investigate complaints.

The regulation of political party funding is crucial for transparency and accountability in democratic systems. It prevents corruption and state capture and promotes integrity in politics. South Africa's PPFA has positive elements, but to combat corruption effectively, gaps must be addressed, and the law must be strengthened. By strengthening the PPFA, South Africa can enhance its multi-party democracy, improve transparency, and inspire public trust in modern politics.

2. INTRODUCTION

Money and politics have long been intertwined, forming a complex relationship that can have profound consequences for the democratic process. The influence of money in politics extends to political party funding, where the financial support from wealthy individuals and corporations can shape the outcomes of elections and policy decisions. Unchecked financial contributions to political campaigns and parties can enable powerful interest groups and individuals to unduly influence and shape the political landscape in their favour, leading to a distortion of policies that prioritise private interests over the needs of the broader population. To safeguard democratic processes and limit the undue influence of moneyed interests – South Africa passed a crucial piece of legislation in 2019, the Political Party Funding Act ("PPFA"), which regulates party funding and places obligations on both political parties and donors to disclose their donations. Whilst there is scope for improvement and strengthening to ensure greater effectiveness of this legislation, the PPFA is a positive step forward in building a political establishment that is transparent and accountable to the public.

It goes without saying that money is crucial for funding politics and for facilitating the proper functioning of democratic processes. Political parties face significant expenses and must contend with the escalating costs associated

with modern politics. Moreover, the act of donating to political parties by individuals, interest groups, and corporations should not automatically be viewed as inherently malicious, however, it does warrant scrutiny and regulation to prevent undue influence. In a landmark and controversial judgement by the United States Supreme Court¹, donations to political parties are viewed as a necessary First Amendment Right to express political beliefs within a democratic system. The dissenting opinions in the Citizens United case, however, raised compelling concerns about the potential for corruption and undue influence resulting from the Court's decision, and argued that the majority's ruling would enable corporations to wield disproportionate power in elections, and thereby undermine the democratic process. The dissenting justices voiced concerns that an influx of corporate money into elections could lead to quid pro quo arrangements, where politicians might feel beholden to corporate donors who fund their campaigns. This, they contended, could erode public trust in the political system and give rise to a perception that policy decisions were being influenced by special interests, rather than the will of the people. They argued that the government had a legitimate interest in protecting the integrity of the electoral process, even if it required some restrictions on corporate spending.

¹ Citizens United v. Federal Election Commission (FEC) is a landmark case within the United States Supreme Court's jurisprudence, addressing the intersection of campaign finance regulations and the First Amendment rights of corporations and unions to engage in political spending. At its core, the central question in Citizens United v. FEC was whether specific provisions of the Bipartisan Campaign Reform Act (BCRA) of 2002, particularly those restricting corporate and union financing of electioneering communications, infringed upon the First Amendment rights of these entities. In a landmark decision in 2010, the Supreme Court ruled 5-4 in favor of Citizens United, striking down key provisions of the BCRA. The Court's majority opinion held that limiting corporate and union spending on political communication was a violation of the First Amendment's protection of free speech.

The Citizens United decision had significant implications for campaign finance and American politics. It led to the creation of "super PACs" (Political Action Committees) and other entities that could raise and spend unlimited amounts of money to support or oppose political candidates and issues. This decision also removed many restrictions on corporate and union political spending, allowing them to spend funds independently on advertising and other forms of political communication.

Critics of the decision argue that it has led to an influx of money from wealthy individuals, corporations, and unions into the political process, potentially distorting the democratic process and giving undue influence to those with the resources to spend heavily on campaigns. Proponents, on the other hand, emphasize the importance of protecting free speech rights, arguing that restrictions on political spending infringe on the ability of individuals and groups to express their views and engage in the political process.

Unfortunately, the majority ruling on the Citizens United matter ushered in a new era where the floodgates of corporate and union political spending were swung wide open, fundamentally altering the landscape of campaign finance and raising profound questions about the balance between free speech rights and the potential for corruption in the American electoral system.

Similarly, in both the developed and developing worlds, the influence of private interests on matters of policy and procurement has become an urgent and complex issue. In South Africa's case, this is not an emerging predicament but rather a longstanding one. In a recent publication titled *The Unaccountables*², the authors shed light on a multitude of local and international companies that generously bank-rolled the National Party during apartheid. In exchange for financial contributions, the National Party granted access to power and guided policy outcomes and state contracts in a favorable direction to those who donated to them.

This pattern unfortunately, continued into democratic South Africa. Owing to the lack of legislation and oversight during the initial twenty-five years of South Africa's democratic era, the practice of donating to political parties with an expectation of receiving a state tender, or wielding influence in the policy and

regulatory landscape, became commonplace. This was particularly evident in the reports that emanated from the Judicial Commission of Inquiry into Allegations of State Capture ("the State Capture Commission") which exposed evidence that political parties in South Africa, on some occasions, become beholden to their donors, rather than accountable to the electorate.

Within this context, then Deputy Chief Justice Raymond Zondo recommended that the Political Party Funding Act be amended to criminalize the making of donations to political parties with an expectation to grant procurement tenders or contracts as a reward for donations made. To this end, this advisory serves as guidance on whether:

- i. The Political Party Funding Act No 6 of 2019 should be amended to "criminalize the making of donations to political parties in the expectation of or with a view to grant procurement tenders or contracts as a reward for recognition of such grants being made", ("Corrupt Donation Crime") as suggested by then Deputy Chief Justice, Raymond Zondo in the State Capture Commission Report; and
- ii. The PPFA could be otherwise amended to better cohere with Pillar One of the National Anti-Corruption Strategy ("NACS")



² Michael Marchant, Mamello Mosiana, Ra'Essa Pather, and Hennie Van Vuuren. 2022. *The Unaccountables*. Jacana Media.

The regulation of political party funding is crucial for transparency and accountability in democratic systems. It prevents corruption and state capture and promotes integrity in politics. South Africa's PPFA has positive elements, but to combat corruption effectively, gaps must be addressed, and the law must be strengthened. By strengthening the PPFA, South Africa can enhance its multi-party democracy, improve transparency, and inspire public trust in modern politics.

3. STATE CAPTURE COMMISSION RECOMMENDATION

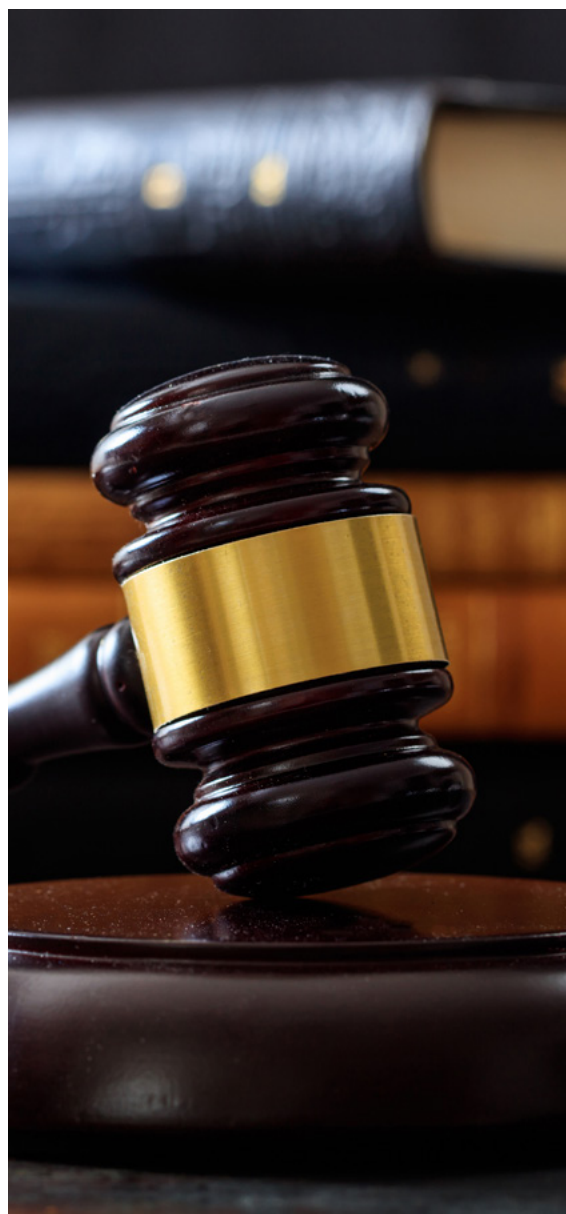
The recommendation relating to the Corrupt Donation Crime arises within the context of testimony and evidence relating to companies who donated to political parties, with an expectation of receiving state contracts. Justice Zondo lamented, that within this specific context, South Africa is facing an “existential threat to our democracy” in relation to the quid pro quo arrangements between moneyed interests and political parties.

The NACAC engaged in extensive discussions, sought external expertise and consulted with stakeholder regarding the recommendation to amend the PPFA to provide for the Corrupt Donations Crime. To this end, we respectfully contend that the proposed criminalization of donations to political parties made with ulterior motives, specifically to influence tender awards, may be redundant. In essence, it duplicates existing laws already in place, such as the Prevention and Combatting of Corrupt Activities Act (“PRECCA”).

Section 13 of PRECCA prohibits the direct or indirect provision or acceptance of any “gratification” intended to induce the awarding of tenders to specific individuals. Our understanding is that this provision adequately encompasses donations to political parties.

Nonetheless, it could be beneficial to incorporate the relevant PRECCA provisions within the PPFA and require that the Independent Electoral Commission (“IEC”) report criminally suspicious activity to the relevant public body for investigation – and to require further that the relevant public body keep the IEC informed

of the progress and the outcome of the investigation. This wording is borrowed from section 3(1)(b)(1A) of the Public Audit Amendments Act No 5 of 2015.



4. IMPROVING TRANSPARENCY IN POLITICAL PARTY FUNDING

The remainder of this advisory proposes amendments that are aimed at promoting transparency and accountability in South Africa, in line with Pillar One of the NACS. In this regard, Pillar One of the NACS notes that activities must be undertaken to increase transparency in political party funding. Under this umbrella, the NACAC recommends the following:

4.1. Pausing amendments to the current thresholds and caps

It is imperative to pause any amendments to the PPFA regarding the current thresholds for disclosure and funding caps, until comprehensive research has been conducted to enable informed, objective, and evidence-based decisions. Recent developments in the political landscape by political parties indicate a desire to raise the disclosure threshold above R100,000 and potentially increase or remove the funding cap altogether.

We advise that, despite the challenges of political party fundraising in the present climate, what is truly needed is more transparency and accountability, not less. Diluting the transparency requirements of the PPFA would signify a regression, rather than progress, in fortifying our constitutional order and multi-party democracy.

It is essential to allow the PPFA sufficient time to establish a robust and nuanced track record, so that any future amendments can be grounded in solid evidence. With this in mind, we strongly urge the President and Cabinet to allow for an extended period of assessment regarding the effectiveness of this legislation before considering any changes to the existing thresholds and caps.

4.2. Natural persons must disclose donations above the threshold

Section 9(1)(a) of the PPFA stipulates that political parties must disclose all

donations exceeding R100,000 to the IEC, while section 9(2) inexplicably requires only juristic persons, not natural persons, to disclose directly to the IEC when they donate above the threshold. In principle, this would allow political parties to withhold information from the IEC regarding private donations from natural persons.

To address this concern, we recommend that natural persons also be mandated to disclose donations exceeding the R100,000 threshold directly to the IEC. This would ensure greater transparency and enable more effective oversight of political party funding.

4.3. Donations from interrelated entities

Section 8(2) of the PPFA requires that a political party “may not accept a donation from a person or entity in excess of the prescribed amount within a financial year.” This, in principle, allows natural persons, and juristic persons, to donate amounts in excess of section 8(2)’s maximum prescribed amounts by donating through separate, but related, juristic entities.

To guard against this, we advise that section 8(2) of the PPFA be amended so that:

- a. A natural person who has already donated in their own name to a political party, cannot donate again through a juristic entity that they control to the same political party, if this means that the cumulative donation exceeds the section 8(2) threshold; and
- b. Two or more juristic entities, with the same controlling shareholding, cannot donate in excess of the section 8(2) threshold.

4.4. Donations received on behalf of a political party

Section 10 of the PPFA imposes restrictions on the delivery and receipt of donations in relation to political parties as follows:

- a) Subsection (1) states donations should only be delivered for party political purposes.
- b) Subsection (2) limits the receipt of donations to members of political parties, on behalf of the party; and,
- c) Subsection (3) prohibits any person from circumventing these provisions.

As such, Section 10 of the PPFA works to mitigate the risk that individual members of political parties' pocket donations intended for the party, with corrupting results. However, we advise that Section 10 be strengthened to require that all private monetary donations be deposited directly into the bank account which section 12(1) (a) of the PPFA creates specifically for the receipt of private donations. This ensures that funds intended as monetary donations to political parties are used as such.

For non-monetary donations, section 10 should retain the requirement that they only be received by party members on behalf of the party and strictly for party purposes, and that these donations should be monetised and recorded accordingly.

4.5. The PPFA and political party investment vehicles

While the PPFA requires investment vehicles affiliated to political parties to disclose donations above the prescribed thresholds in terms of section 9(2) and prevents them from donating in excess of section 8(2)'s caps, it does not provide for transparency regarding the sources of an investment vehicle's income. This leaves voters in the dark regarding influences that may inform a party's policy, and /or its actions in government, via the commercial interests of their investment vehicles. As such, we advise that the PPFA require that a political party's investment vehicle disclose

the sources of its income, investments, and dividends to the IEC, who in turn must disclose to the public, if the investment vehicle decides to donate to the political party. We suggest further that investment vehicles set up for the purposes of funding political parties be subject to the same prohibited sources of income that political parties themselves face in section 8(1) of the PPFA.

4.6. The PPFA and internal party races

The PPFA is not clear about whether internal leadership contests fall within its scope. However, these contests can attract significant money flows to individual members and political parties, who may later find themselves in influential government positions. As such, we recommend that donations made to internal party races be subject to the same disclosure thresholds, and prescribed maximum caps, as those which the PPFA applies to party political funding.

4.7. The PPFA and independent candidates

Currently, one of the most obvious gaps in the PPFA pertains to independent candidates, whose involvement in general elections is now outlined in the Electoral Amendment Act 1 of 2023. It is imperative that the PPFA undergoes the necessary amendments to effectively govern donations made to independent candidates. These amendments should ensure fairness and non-discrimination in their application.



4.8. Strengthening the IEC

The effectiveness of any party funding legislation hinges on the extent to which political parties comply with it. Therefore, robust monitoring and evaluation mechanisms, along with the enforcement of punitive measures, are crucial to ensure compliance with party funding regulations. This enforcement is particularly significant in combating corruption and promoting the success of such legislation. The PPFA established the Political Party Funding Unit ("PPFU") within the IEC to oversee compliance with the PPFA. Yet, the PPFU

is a small group with limited resources, which may hinder its capacity to effectively monitor and enforce compliance with the PPFA.

To address these challenges, we advise that the PPFU be adequately resourced and staffed in order to conduct their work efficiently and effectively. This oversight body plays a vital role in monitoring and investigating non-compliance cases identified through their monitoring programmes and complaints filed with the IEC.

5. SUMMARY OF RECOMMENDATIONS

The NACAC advises that the following be taken into consideration in relation to the PPFA:

5.1. The PPFA should not include the Corrupt Donation Crime, recommended by the State Capture Commission, as a separate offense. Instead, it should reference section 13 of PRECCA, which already criminalizes corrupt donations.

5.2. Any amendments to the current thresholds for disclosure and caps on donations should be postponed until sufficient evidence is available to make informed decisions regarding more appropriate thresholds and caps.

5.3. Natural persons who donate amounts above the section 9(1)(a) threshold should be required to disclose their donation directly to the Independent Electoral Commission (IEC).

5.4. Prohibit natural persons and juristic entities from circumventing the section 8(2) cap by making multiple donations through related juristic entities.

5.5. Strengthen section 10 of the PPFA by requiring that all private monetary

donations to political parties be deposited directly into the bank account specifically created for donations in section 12(1)(a).

5.6. Subject donations made to internal party races to the same disclosure thresholds, and prescribed maximum caps, as those which the PPFA applies to party political funding.

5.7. Mandate disclosure of sources of investment income for political parties' investment vehicles, subject to the prohibited sources of income imposed on political parties themselves in section 8(1).

5.8. Regulate donations received by independent candidates and establish guidelines for how independent candidates receive money from public funds established in sections 2 and 3.

5.9. Lastly, the NACAC recommends that the PPFU within the IEC be adequately resourced and staffed to effectively conduct oversight, monitoring of donations, and investigate complaints.

6. CONCLUSION

The regulation of political party funding plays a vital role in promoting transparency and accountability within democratic systems. It serves as a critical safeguard to reduce vulnerabilities to corruption and state capture and promotes integrity in the political landscape. The implementation of the PPFA in South Africa has been a positive step forward, as it introduces necessary measures such as disclosure requirements and donation limitations. However, in order to effectively curb corruption and enhance accountability, it is imperative to address the existing gaps and strengthen the legislation. Continuous evaluation of the PPFA's impact and evidence-based amendments are essential to ensure its efficacy. By fortifying the regulation, South Africa can reinforce its multi-party democracy, foster a culture of transparency, and instil public confidence in the fairness and integrity of its political processes.

7. ACKNOWLEDGEMENTS

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- Human Sciences Research Council
- Inclusive Society Institute
- My Vote Counts
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