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Promoting human rights and democracy through the media since 1993

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TO: CHAIRPERSON: PORTFOLIO COMMITTEE OF JUSTICE AND CORRECTIONAL SERVICES
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**PROMOTION OF ACCESS TO INFORMATION AMENDMENT DRAFT BILL:
WRITTEN SUBMISSION BY MEDIA MONITORING AFRICA**

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CONTENTS

INTRODUCTION 3

OVERVIEW OF MEDIA MONITORING AFRICA 5

RELEVANCE OF THE ACHPR GUIDELINES ON ACCESS TO INFORMATION IN ELECTIONS 6

DUTY TO RECORD, PRESERVE AND MAKE REASONABLY ACCESSIBLE 7

DEFINITION OF POLITICAL PARTY 8

DEFINITION OF DONATION 9

DISCLOSURE THRESHOLD AND DONATIONS FROM JURISTIC PERSONS..... 10

REQUIREMENTS FOR COMPLIANT DISCLOSURE 11

POLITICAL ADVERTISING 12

WHISTLE-BLOWER PROTECTIONS 13

CONSEQUENCES FOR NON-COMPLIANCE 14

NEED FOR HOLISTIC UPDATE AND MODERNISATION OF PAIA 15

CONCLUDING REMARKS 16

INTRODUCTION

1. Media Monitoring Africa (MMA) provides this submission to the Portfolio Committee on Justice and Correctional Services (Portfolio Committee) on the Promotion of Access to Information Amendment Draft Bill (the Bill). MMA welcomes the opportunity to provide this submission, and to work towards securing openness, accountability and transparency in the electoral process in line with the vision contained in the Constitution of the Republic of South Africa, 1996 (the Constitution), including in sections 1 and 19 thereof. As the Constitutional Court noted in *My Vote Counts NPC v Minister of Justice and Correctional Services and Another*:¹

“The right to vote derives its fundamentality from the central role voting plays in the establishment, functionality and vibrancy of a constitutional democracy. It is a pre-requisite for the very existence of the Legislature and the Executive at all levels of the State. And the proper exercise of that right is so critical to the coming into being of our political arms of the State and the effective and efficient functioning of the entire State machinery that the need for transparency and accountability from those seeking public office is self-evidently more pronounced. **The future of the nation largely stands or falls on how elections are conducted, who gets elected into public office, how and why they get voted in. Only when transparency and accountability occupy centre stage before, during and after the elections may hope for a better tomorrow be realistically entertained.**

This case is after all about establishing a principle-based system that will objectively facilitate the meaningful exercise of the right to vote, regard being had to its veritable significance. The system’s inbuilt capacity to sift the corrupt from the ethically upright is an indispensable requirement. **For this reason, any information that completes the picture of a political party or an independent candidate in relation to who they really are or could be influenced by, in what way and to what extent, is essential for the proper exercise of the voter’s “will” on which our government is constitutionally required to be based. An environment must thus be created for the public to know more than what is said in manifestos or during campaign trails.** As will become apparent below, what is implicitly envisioned by section 19 [of the Constitution] is an informed exercise of the right to vote.”

¹ [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) (*My Vote Counts* decision) at paras 32-33. Emphasis added.

2. It is clear from the *My Vote Counts* decision that the public's ability to make informed political decisions is central to the democratic process. Aligned to this is the ability of the media, civil society organisations and watchdogs to access relevant information made available through the Promotion of Access to Information Act 2 of 2000 (PAIA), distil that information and share it with the broader public and the electorate. Without this ability, the purpose and objectives of PAIA, as well as sections 1 and 19 of the Constitution, would be severely undermined. This is the underlying rationale for the submissions below.

3. This submission is structured as follows:
 - 3.1. **First**, an overview of MMA.

 - 3.2. **Second**, the relevance of the Guidelines on Access to Information in Elections, as developed by the African Commission on Human and Peoples' Rights (ACHPR).

 - 3.3. **Third**, the duty to record, preserve and make the relevant records reasonably accessible.

 - 3.4. **Fourth**, the definition of "political party".

 - 3.5. **Fifth**, the definition of "donation".

 - 3.6. **Sixth**, the disclosure threshold and donations from juristic persons.

 - 3.7. **Seventh**, the requirements for compliant disclosures, including itemised disclosures.

 - 3.8. **Eighth**, the need to address political advertising.

 - 3.9. **Ninth**, whistle-blower protections.

 - 3.10. **Tenth**, the consequences for non-compliance.

 - 3.11. **Lastly**, the constitutional imperative for a holistic update and modernisation of PAIA.

4. This is dealt with in turn below. MMA remains available to provide any additional assistance to the Portfolio Committee in giving effect to these submissions, including assisting with proposed textual insertions or amendments to the Bill in line with the research that has been undertaken in drafting these submissions.

OVERVIEW OF MEDIA MONITORING AFRICA

5. MMA is a not-for-profit entity that has been monitoring the media since 1993. We aim to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are, media ethics, media quality and media freedom.
6. In the last 25 years, we have conducted over 200 different media monitoring projects – all of which relate to key human rights issues, and at the same time to issues of media quality. MMA continues to challenge media on a range of issues, always with the overt objective of promoting human rights and democracy through the media. In this time, MMA has consistently sought to deepen democracy and hold media accountable through engagement in policy and law-making processes.
7. MMA has made submissions relating to public broadcasting, online content regulation, cybercrimes, data protection and various other matters relevant to the exercise of freedom of expression and other information rights, both on- and offline. In this regard, MMA has presented on a number of occasions to the National Assembly and the National Council of Provinces. In addition, MMA has made submissions to broadcasters, the Press Council, the South African Human Rights Commission and ICASA. MMA has also provided submissions to the ACHPR regarding the Guidelines on Access to Information in Elections.
8. MMA has also worked with the Independent Electoral Commission during the 2019 General Election to develop strategies to address disinformation during the elections, develop a repository of political advertisements, and in respect of training and awareness-raising regarding various aspects of the elections.
9. For more about MMA and our work, please visit: www.mediamonitoringafrika.org.

RELEVANCE OF THE ACHPR GUIDELINES ON ACCESS TO INFORMATION IN ELECTIONS

10. The ACHPR Guidelines on Access to Information in Election² reflect regional standards and best practices regarding access to information, specifically within the context of elections. This is therefore directly relevant to the amendments proposed through the Bill, given the relevance to both access to information and political processes. As explained in the preface: “It is the responsibility of States Parties to create an atmosphere that fosters access to information and to ensure ‘adequate disclosure and dissemination of information’ in a manner that offers ‘the necessary facilities and eliminates existing obstacles to its attainment’”.
11. Furthermore, the ACHPR Guidelines on Access to Information in Elections emphasise that for elections to be free, fair and credible, it is imperative that the electorate must have access to information at all stages of the electoral process. As explained: “Without access to accurate, credible and reliable information about a broad range of issues prior, during and after elections, it is impossible for citizens to meaningfully exercise the right to vote”. Disclosures should therefore not be treated as once-off occasions that only occur immediately prior to an election taking place, but rather as continuous and ongoing.
12. The ACHPR Guidelines on Access to Information in Elections give effect to the right to information contained in article 9 of the African Charter on Human and Peoples’ Rights (African Charter), which imposes binding obligations on South Africa as a State Party to the treaty. As explained, in line with article 1 of the African Charter – which requires States Parties to adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined in the African Charter – States Parties are therefore required to “ensure that all stakeholders in the electoral process fulfil the responsibility of proactively disclosing information about the electoral process”.
13. Throughout this submission, we draw attention to the relevant articles of the ACHPR Guidelines on Access to Information in Elections, where the provisions in the Bill fall short of the standards set under regional best practice. We are concerned that while the Bill seeks to give effect to the *My Vote Counts* decision, it does so in the narrowest possible way, without due regard to the spirit and purport of the decision and the need for appropriate disclosure.

² Accessible here:

https://www.chr.up.ac.za/images/researchunits/dgdr/news/files/2018_access_to_information_final_EN.pdf.

14. We therefore urge the Portfolio Committee to widen the scope of the Bill to ensure that the underlying objectives of the Bill – to ensure meaningful access to information regarding political parties and electoral processes – are realised in a holistic and effective manner.

DUTY TO RECORD, PRESERVE AND MAKE REASONABLY ACCESSIBLE

15. In terms of paragraph 1.2 of the order of the *My Vote Counts* decision, the Constitutional Court declared that information on private funding of political parties and independent candidates “must be recorded, preserved and made reasonably accessible”. Furthermore, in terms of article 11 of the ACHPR Guidelines on Access to Information in Elections:

“All relevant electoral stakeholders are obliged to create, keep, organise, maintain and manage information about the electoral process in machine-readable formats and in a manner that facilitates the right of access to information. This requires that electoral stakeholders keep and record information for a reasonable period of time on electoral cycle activities, and arrange this information in a manner that allows prompt and easy identification and also safeguards the integrity of its content.”

16. Moreover, also of relevance is article 3 of the ACHPR Guidelines on Access to Information in Elections, which provides for proactive disclosures in the following terms:

“The presumption is that all information held by relevant electoral stakeholders is subject to full disclosure. Accordingly, relevant electoral stakeholders are obliged to publish key information of public interest about their structure, functions, powers, decision making processes, decisions, revenue and expenditure in relation to the electoral process.”

17. Section 52B(1)(a) of the Bill requires the accounting officer of a political party to “create and keep” the records set out in the subsequent sub-sections. We submit that this provision is insufficient to appropriately meet the standards set by the Constitutional Court and the ACHPR. In particular, we submit as follows:

- 17.1. The precise wording used in the *My Vote Counts* decision is for the information to be recorded, preserved and made reasonably accessible. The Constitutional Court provided guidance and interpretation on this duty, and has therefore given content to what this duty entails. This does not entirely align with the Bill’s current formulation to “create and keep” the relevant

records, and fails to explain the departure from the wording used by the Constitutional Court in its order. We would therefore urge the Portfolio Committee to align section 52B(1)(a) of the Bill with the *My Vote Counts* decision to require accounting officers of political parties to “record, preserve and make reasonably accessible” the information in question.

- 17.2. Further to the above, the section 52B of the Bill fails to include the requirement to make the information “reasonably accessible”. This is concerning, as the accessibility – and the reasonableness of the access provided – is central to the amendment contained in the Bill. Moreover, the standard of reasonableness set in the *My Vote Counts* decision in respect of accessibility is an objective enquiry, and therefore requires political parties to meet an objective standard. This, too, is self-evidently important, but has failed to be incorporated in the amendment contained in the Bill.
 - 17.3. In addition to the records referred to in section 52B(1)(a) of the Bill, there is also other information that is relevant and in the public interest, that would serve to inform the electorate and create context to the decisions on donations that are made. This additional information, in line with article 3 of the ACHPR Guidelines on Access to Information in Elections, includes information regarding the structure, functions, powers, decision-making processes and decisions taken by the political parties or independent candidates, to the extent applicable, in respect of electoral processes. This information serves to provide the necessary context to the funding decisions made by the political parties or independent candidates, and avoids the information being considered in a vacuum without the relevant frameworks within which to contextualise it.
18. The importance of aligning the wording of the Bill with the guidance from the Constitutional Court cannot be gainsaid. This will ensure that political parties meet the standard set by the Constitutional Court appropriately, and behave in a reasonable manner. Added to this, bringing the Bill in line with the ACHPR Guidelines on Access to Information in Elections will ensure that the Bill meets the threshold of regional best practice, and serve to better facilitate the right of access to information.

DEFINITION OF POLITICAL PARTY

19. The definition of “political party” in the Bill does not align with the definition in the Political Party Funding Act 6 of 2018 (PPFA). In this regard, the PPFA provides only for an “entity that accepts donations principally to support or oppose any registered political party or its candidates, in an election as defined in section 1 of the [Electoral

Act No. 73 of 1998]”. The Bill goes further in its definition of political party to include a party with representation in the national or provincial legislatures, as well as an independent candidate.

20. We welcome the wider definition of political party to ensure that disclosures are made by all appropriate entities and persons. However, we are concerned that the definition in the Bill, as it currently reads, may give rise to confusion. In this regard, we submit that:
 - 20.1. The PPFA should be amended to bring the definition of “political party” in line with the broader definition contained in the Bill.
 - 20.2. The use of the word “and” in sub-section (b) of the definition should be amended to “or”, so as not to give the misleading impression that these are cumulative requirements for what constitutes a political party.
 - 20.3. There is need to provide clarity regarding the point at which the obligation arises. In this regard, the definition should expressly indicate that the duty arises from the point at which the first donation or other funding is received or expended.
21. By providing clarity in the definition of “political party”, this will also serve to clarify the scope of the Bill and give certainty as to whom the duties contained in this provision apply. As indicated, this provision should retain its breadth to ensure that the right of access to information, as contemplated through this amendment, is effectively realised.

DEFINITION OF DONATION

22. Neither PAIA nor the Bill contains a definition of the terms “donation” and “donation in kind”. These definitions, as contained in the PPFA, are critical to the framework of political funding disclosures, specifically in clarifying the definition to include, for example, money lent to the political party, money paid on behalf of the political party and sponsorships provided to the political party.
23. Given the importance of the definition of “donation”, as well as “donation in kind”, in clarifying the scope of the disclosures required, these definitions should be inserted into the Bill as well to ensure that the Bill is in alignment with the PPFA.

DISCLOSURE THRESHOLD AND DONATIONS FROM JURISTIC PERSONS

24. Section 52B(1)(a)(i) of the Bill provides for a disclosure threshold of R100 000 per financial year, in order for the identity and amounts of money donated to be disclosed. This is in alignment with section 9(1)(a) of the PPFA, read with regulation 9 of the Regulations on Political Party Funding, 2017 (2017 Regulations).
25. However, the provision in the Bill does not contain the additional safeguards provided for in regulations 8 and 9 of the draft Regulations regarding Represented Political Party Funding (Draft Regulations). This includes the following safeguards:
 - 25.1. Regulation 8(1) and 9(1) of the Draft Regulations provide the format in which the records should be disclosed to the Independent Electoral Commission, through the inclusions of Forms PPR4 and PPR6 set out in the Draft Regulations. These forms serve as a safeguard that the relevant information is provided through the disclosure. We submit that the disclosure contemplated in the Bill should similarly prescribe that the disclosures are appropriately and comprehensively made.
 - 25.2. Regulation 8(3) of the Draft Regulations provides that the accounting officer must ensure that all donations received from the same person in any financial year, which in aggregate exceed the disclosure threshold, are disclosed, notwithstanding that the individual amounts may on their own be less than the disclosure threshold.
 - 25.3. Regulation 9(1) of the Draft Regulations provides that every juristic person or entity that makes donations to political parties, which in aggregate exceed the disclosure threshold in any financial year, shall disclose the donations.
26. The failure in the Bill to include these safeguards renders the Bill open to obfuscation. MMA urges the Portfolio Committee to update the Bill to bring the provisions regarding the disclosure threshold in line with the PPFA and the Draft Regulations to address this concern.
27. Of particular importance, the Bill should address the need for political parties to make disclosure in circumstances where the same person or entity makes multiple donations that in aggregate exceed the threshold. Additionally, the Bill should further address the need for juristic persons or entities that make donations in excess of the disclosure threshold to facilitate the right of access to information, including through responsiveness to PAIA requests without the requester being required to establish a material interest.

REQUIREMENTS FOR COMPLIANT DISCLOSURE

28. The effectiveness of the amendments put forward in the Bill are largely dependent on the completeness, accessibility and readability of the disclosures. In this regard, without clarity or specificity provided in the Bill, there is a significant risk that political parties will be in a position to obviate their obligations through the manner in which the disclosures are made. MMA is concerned that, as this provision is currently framed, it will not enable the public to meaningfully discern the import and implications of the disclosures made. In this regard, we submit the following:

28.1. In addition to the broad categories of information contemplated, the PPFA and Draft Regulations also contemplate specific disclosures on information. This includes audited financial statements (section 12(5) of the PPFA), all funding and income received (regulation 12 of the Draft Regulations), and all financial assistance (regulation 15 of the Draft Regulations). We submit that section 52B(1)(a) of the Bill should be amended to expressly include detailed information regarding these categories of information, to ensure that the Bill aligns with the PPFA and the Draft Regulations.

28.2. Section 52B(1)(a)(iii) of the Bill should be amended to read “any money paid *by or on behalf of* the political party for any expenses incurred directly or indirectly by that political party”.

28.3. Section 52B(2) of the Bill currently provides for the disclosures to be made on the social media accounts of the political parties. While we welcome this development, we submit that the social media accounts alone are insufficient and will not provide for effective access given the restrictions on accessing social media platforms. As such, we submit that this provision be expanded to include, in addition to the social media accounts, that the disclosures also be required to be published on the websites and at the registered offices of the political parties.

28.4. Section 52B should further make it mandatory for every political party to compile a PAIA manual setting out the disclosures that the political party is required to make in terms of this provision and the *My Vote Counts* decision. This PAIA manual should set out the specific information being made accessible, the contact details of the persons to whom such requests should be made, and the process to be followed in order to facilitate ease and effectiveness of access.

- 28.5. It should further be required that, in addition to the records being kept in a continuous and systematic manner, the records are also maintained in a machine-readable and searchable format, to ensure that any persons accessing the information are readily able to process such information through technological means to distil the relevant information for which they may be searching.
29. Importantly, it is imperative that the Bill requires detailed and itemised disclosures. For example, section 52B(1)(a)(iii) of the Bill will be rendered largely meaningless if the disclosures are grouped together, without being itemised or indicating the identities of the persons responsible for the payments. Section 52B(1)(a) of the Bill should therefore be amended to provide for detailed and itemised disclosures, as individual line items reflecting the identities of the persons responsible for the payment, the purpose of the payment and the amounts paid. Further in this regard, we would urge the Portfolio Committee to stipulate, as part of the Bill, the categories of payment to assist with the analysis, comparison and standardisation of the disclosures.

POLITICAL ADVERTISING

30. Linked to the above, and in line with MMA's submissions to the Independent Electoral Commission on the Draft Regulations, MMA submits that the Bill should be amended to include specific provision for disclosures regarding political advertising, including political advertising online, to increase transparency. On the current, somewhat vague, formulation, there is currently no express obligation to make disclosures regarding political advertising, despite this being a key element for transparency and accountability in the conduct of political parties.
31. As MMA has noted in our submission to the Independent Electoral Commission on the Draft Regulations, the issue of disclosures regarding political advertising is one which various countries around the world are grappling with, given the importance that this has for transparency, accountability and credibility. This information is patently relevant to voters in the exercise of their political rights. We submit that the Code of Practice on Disinformation, published by the European Commission, offers useful guidance in this regard.³

³ European Commission, 'Code of Practice on Disinformation', 28 September 2018, accessible at <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>.

32. As such, MMA submits as follows:
- 32.1. Political parties should be required to keep a record of all political advertisements, regardless of the form or medium used, including the actual identity of the sponsor with relevant details such as the name and address, the amounts spent, to whom the payments were made, and how users were targeted.
- 32.2. In line with the initiative conducted by MMA and the Independent Electoral Commission during the 2019 General Election,⁴ MMA submits that public access to the political advertisements – including all iterations of those advertisements – is crucial for transparency. In particular, it enables the public to identify paid-for content, and to discern between real and manipulated political advertising. The African National Congress and the Democratic Alliance were among the political parties that uploaded political advertisements to the online repository. We would therefore urge the Portfolio Committee to include this requirement for disclosure, given the increasing role that political advertising online – and the manipulation thereof in certain circumstances – can have on the credibility of elections.
- 32.3. A suggested definition of “political advertising” should be inserted, to include “any advertisement and or paid for content, advocating for or against the election of a party or candidate or outcome, that is published directly or indirectly as part of an election or campaign”.
33. In line with section 14(2)(a) of the PPFA, the Portfolio Committee may also consider inserting a further provision setting out disclosures to be made from other categories of stakeholders. Such information would be intended to serve a dual purpose of being relevant in itself, as well as serving as a way to test the veracity of the information being provided by political parties.

WHISTLE-BLOWER PROTECTIONS

34. Neither the Bill nor the PPFA contemplates the need for appropriate whistle-blower protections. This is of particular relevance where persons disclose wrongdoing about the electoral or political processes, where such disclosures are in the public interest. For instance, article 11 of the ACHPR Guidelines on Access to Information in Elections provides as follows:

⁴ The political advertising repository is accessible at <https://padre.org.za/>.

“Whistleblowing protection

Persons who, in good faith and in the public interest, disclose information about wrongdoing in the electoral process by a relevant electoral stakeholder or its employees, shall be protected from administrative, social, legal and employment-related sanctions or other sanctions of a similar nature.”

35. It is clear from the inclusion of whistle-blower protections by the ACHPR that this is considered an applicable regional standard for States Parties, in line with the African Charter and other relevant instruments.
36. We submit that this is an important provision that should be included in the Bill, as it offers protection against retribution where a person exposes wrongdoing that has the potential to undermine the credibility and fairness of an electoral process. As such, we would suggest that a similar provision be included in the Bill, with express cross-reference to the Protected Disclosures Act 26 of 2000, to make this a clear protection within the access to information framework.

CONSEQUENCES FOR NON-COMPLIANCE

37. MMA submits that section 52B of the Bill should provide for consequences for non-compliance with the Bill. In particular, in line with section 90 of PAIA, section 52B of the Bill should further address the following:
 - 37.1. The Bill should render it a specific offence for any person, with the intent to deny a right of access to information, to destroy, damage, alter, conceal or falsify a record that is required to be recorded, preserved and made reasonably accessible to the public.
 - 37.2. In accordance with section 90(1) of PAIA, it should be made clear in the context of section 52B of the Bill that non-compliance with this provision is subject to sanction, as may be deemed appropriate by the Portfolio Committee.
 - 37.3. Additionally, given the constitutional imperative with which the amendments contained in the Bill are founded, provision should be made for administrative penalties where the disclosures are either not made or are deficient. In this regard, the Information Regulator may play the role of receiving complaints and administering appropriate penalties, given the powers and functions that the Information Regulator already has in terms of PAIA (as amended through the Protection of Personal Information Act 4 of 2013).

38. Providing for specific consequences for non-compliance will serve to ensure that the records of funding, including donations, income and expenditure, are appropriately recorded, preserved and made reasonably accessible, as per the guidance of the Constitutional Court in the *My Vote Counts* decision. In this regard, providing for penalties for non-compliance will ensure that accounting officers and other functionaries of political parties treat this obligation with the appropriate level of seriousness, and comply with requests in a systematic and expeditious manner.

NEED FOR HOLISTIC UPDATE AND MODERNISATION OF PAIA

39. While MMA welcomes the Portfolio Committee's work in respect of the Bill, we submit that this is only one component of the update needed for PAIA. In the nearly two decades that have passed since the promulgation of PAIA in 2000, the reality that has transpired is that the mechanisms created in the legislation are in many ways inimical to the realisation of the right of access to information.
40. As has been shown through various litigation, PAIA is time-consuming, expensive and permits both public and private bodies to exploit the legislation to delay access, and thereby risk the information having become outdated and irrelevant by the time it is ultimately disclosed. Furthermore, the narrow public interest override is non-compliant with the ACHPR Model Law on Access to Information in Africa,⁵ and does not appropriately address the range of public interest considerations that should be taken into account in line with the Constitution.
41. Added to this, PAIA is technologically outdated. It does not contemplate, for example, access to online information, databases and the exigencies of electronic information. This shortcoming in PAIA is in urgent need of being updated and modernised in line with technological advancements, given the current ways in which information is created, stored and made accessible.
42. MMA would like to use this opportunity to formally offer our support and assistance in updating PAIA in line with the current digital era, regional best practice and global developments. Given our experience in respect of access to information, constitutional rights and technology, MMA would be well-placed to provide capacity to the Portfolio Committee and the Department of Justice and Constitutional Development in drafting an update for consideration, in order to ensure that South Africa once again assumes its place as the world-leader on the right of access to information.

⁵ Accessible here: http://www.achpr.org/files/news/2013/04/d84/model_law.pdf.

CONCLUDING REMARKS

43. MMA appreciates the opportunity to provide these submissions to the Portfolio Committee. It is imperative to remember that the Bill serves an important and much-needed role in exercising oversight over political parties and enabling the public to make informed political choices. The submissions above are aimed at ensuring that access to relevant information regarding political party funding is made readily available to the public, including to members of the media and other watchdogs in fulfilling their duty to inform the public, in accordance with sections 16, 19 and 32 of the Constitution.

44. We note that we are available and willing to provide any additional assistance going forward, including to provide suggested textual insertions or amendments to the Bill in line with the submissions above, in order to assist the Portfolio Committee in the expeditious finalisation this process.

MEDIA MONITORING AFRICA
Johannesburg, 26 August 2019