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Legislation relevant to the non-profit sector

Prepared by:

Ricardo Wyngaard

for the:

NON-PROFIT CONSORTIUM

January 2007

Contact Information:

1st Floor, Horizon House
15 Pepper Street
Cape Town, 8001
South Africa
Tel: +27 21 422 3413
Fax: +27 21 422 3329
E-mail: info@npc.org.za

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1. Introduction

Various new laws have been enacted since our democratic dispensation which affects the non-profit sector. Some of these laws are directly aimed at the non-profit sector whilst others affect the sector indirectly. This document is aimed at identifying some of the most important legislation that came into operation since 1990 which directly and indirectly relates to or affects non-profit organisations (NPOs). The NPC has endeavoured to be all-inclusive in compiling this list, but cannot guarantee that this is an exhaustive list of all the laws affecting the non-profit sector that were passed since 1990. The document is not aimed at dealing with legislation that is sector-specific, i.e., education or sports.

The purpose of this document is three-fold:

1. It is important for those involved with NPOs to be aware of and understand how these laws will affect their organisation. This should accordingly serve as a helpful guideline for those involved with organisations to be aware of such legislation.
2. Section 3 of the Nonprofit Organisations Act, No. 71 of 1997 (*the NPO Act*) provides that *within the limits prescribed by law, every organ of state must determine and co-ordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of nonprofit organisations to perform their functions*. It is anticipated that this will serve as a tool that will guide further policy development in line with this obligation.
3. To encourage synergy within the legal system that will promote and support the creation of an enabling environment for the non-profit sector.

Note: This document makes reference to *non-profit organisations* being voluntary associations, non-profit trusts and section 21 companies and *registered non-profit organisations* being the aforementioned that are registered in terms of the provisions of the NPO Act.

2. Entity Establishment/Registration

2.1 Nonprofit Organisations Act, 71 of 1997

Objectives of the legislation

Section 2 of the Act provides that the objects are *to encourage and support nonprofit organisations in their contribution to meeting the diverse needs of the population of the Republic by—*

- (a) *creating an environment in which nonprofit organisations can flourish;*
- (b) *establishing an administrative and regulatory framework within which nonprofit organisations can conduct their affairs;*
- (c) *encouraging nonprofit organisations to maintain adequate standards of governance, transparency and accountability and to improve those standards;*
- (d) *creating an environment within which the public may have access to information concerning registered nonprofit organisations; and*
- (e) *promoting a spirit of co-operation and shared responsibility within government, donors and amongst other interested persons in their dealings with nonprofit organisations*

Relevance of legislation to sector

This is one of the most relevant pieces of legislation for the non-profit sector as it is directed towards creating an enabling environment for NPOs and providing a registration facility for NPOs.

Duties imposed on sector

Organisations have to report and comply with regulatory duties once registered in terms of the Act.

The more significant part of the Act relates to the duty that it imposes on all organs of state:

3. State's responsibility to nonprofit organisations.—*Within the limits prescribed by law, every organ of state must determine and co-ordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of nonprofit organisations to perform their functions.*

NB: In 2006 the Department of Social Development released the results of an impact assessment that was conducted on the NPO Act. Important recommendations are contained within the report.

2.2 **Communal Property Associations Act, No. 28 Of 1996:**

Objectives of the legislation

After a community has successfully proved their claim against land in terms of the Land Restitution Act they will have an option to establish a communal property association (CPA) to hold and manage the property for their benefit. The legislation is aimed at enabling communities to form juristic persons, to be known as CPAs in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution.

Relevance of legislation to sector

In addition to the CPA, this Act allows the Minister of Land Affairs to register a “*similar entity*” which is identified as a trust, association of persons or company registered in terms of section 21 of the Companies Act, 1973 (Act No. 61 of 1973). This entity may serve the same function as the CPA, but can be made subject to qualifications or conditions as the Minister may determine.

This means that a non-profit entity can be utilised as a legal vehicle to acquire, hold and manage property in common for the benefit of a community. An NPO can therefore be governed in terms of the provisions of the CPA Act if it is registered as a similar entity in terms of that Act.

Duties imposed on sector

The legislation lists specific duties on similar entities that are registered under the Act.

NB: Section 21 companies are required upon dissolution to transfer all its remaining assets, after the satisfaction of all its liabilities, to another association or institution with similar objectives. This may defeat the purpose for which CPAs are registered, as the aim would be to keep such property for the benefit of the members and not to have it transferred to another association upon dissolution.

Section 21 companies may however be established with the main object of promoting communal or group interests. The property of the section 21 company can therefore be applied towards the promotion of this object before dissolving the company.

2.3 Co-operatives Act, No. 14 of 2005

Objectives of the legislation

The Purpose of the Co-operatives Act is set out in section 2 thereof and reads is to:

- Promote the development of sustainable co-operatives.
- Promote equity and greater participation by black persons, women, persons with disability and youth.
- Facilitate the provision of support programmes that target emerging co-operative.
- Promote development support programmes by all the agencies of national departments.
- Ensure the design and implementation of the co-operative support measures across all spheres of government.

Relevance of legislation to sector

There are different kinds of co-operatives, including: housing, worker, social, agricultural, financial and consumer co-operatives. The social co-operative is defined as a “*non-profit co-operative which engages in the provision of social services to its members, such as care for the elderly, children and the sick.*”

Duties imposed on sector

Registration can only take place if the co-operative complies with the following co-operative principles laid down section 3 of the Act:

- Membership of that co-operative is open to persons who can use the services of that co-operative and who are able to accept the responsibilities of membership.
- In the case of a primary co-operative, each member has only one vote.
- To the extent feasible, members provide the capital required by that co-operative.
- The return paid on member capital is limited to the maximum percentage fixed in accordance with the constitution of that co-operative.
- At least five per cent of the surplus is set aside as a reserve in a reserve fund and is not divisible amongst its members.
- It provides education and training to its members and employees.

Registration

- At least five persons must apply.
- Constitution with required clauses.
- List of founder members.
- List of Directors.
- Payment of a prescribed fee.

NB: Some important aspects of the Act include:

- The constitution of the co-operative must contain certain specific clauses.
- Amendments to the constitution must comply with requirements contained in the Act.
- Keeping of records & minutes of meetings and accounting records.
- Specific regulation of annual meetings.
- Co-operatives must do an annual audit. The financial statements must be approved by the members of the cooperatives.
- The co-operative can apply for exemption from the auditing requirements, but must comply with certain requirements.
- Provides for the amalgamation, division, conversion (of companies to co-operatives) and transfer of co-operatives.
- Must provide for a reserve fund.
- No limits on number of members.

It is further important to note that although the Co-operatives Act provides for a non-profit co-operative, the NPO Act does not make provision for non-profit co-operatives to become registered NPOs, neither does the Income Tax Act make provision for co-operatives to become approved Public Benefit Organisations.

2.4 Labour Relations Act, No. 66 of 1995 (Trade Unions and Employer Organisations)

Objectives of the legislation

The Labour Relations Act is aimed at governing the employment relationship between the employer and employee. It makes provision for the registration (*not establishment*) of trade unions (TU) and employer organisations (EO).

Relevance of legislation to sector

This is relevant to the sector as both TUs and EOs must, in terms of the LRA, be *associations not for gain* before it can be registered in terms of the LRA. So, a NPO in the form of an association not for gain must first come into existence before a TU/EO can become registered.

Duties imposed on sector

The LRA lists specific requirements to be complied with for the registration of TUs and EOs

NB: Important aspects to take into account:

1. Although a non-profit entity must first exist before a trade union can be registered, the LRA does not seem to make provision for a non-profit trust to become a registered TU/EO. The language used in the LRA does not allow for such interpretation, as it firstly requires a TU/EO to be an *association not for gain*. A trust is not an association, but a legal institution, *sui generis*. Secondly, section 97 of the LRA provides that a certificate of registration for a TU/EO is sufficient proof that such registered trade union or registered employers' organisation is a body corporate. According to common law, a trust is not a body corporate, but a legal institution, *sui generis*.
2. The LRA does not provide for the *establishment* of a TU/EO (as an association not for gain) but only for its *registration* as a TU/EO.
Trade unions and employer organisations are therefore established as associations not for gain either in terms of the Companies Act or common law, but are dissolved in terms of the LRA.

2.5 Electoral Commission Act, No. 51 of 1996

Objectives of the legislation

The Electoral Commission Act makes provision for the establishment and composition of an Electoral Commission to manage elections for national, provincial and local legislative bodies and referenda. It also deals with the registration of political parties with the Commission.

Relevance of legislation to sector

Political parties are constituted as NPOs and this act makes provision for the registration (not establishment) of political parties. Political parties can be established in the form of either a voluntary association, a non-profit trust or a section 21 company. The registration of political parties takes place in terms of section 15(6) of the Electoral Commission Act of 1996 and is further regulated in terms of the Regulations for the Registration of Political

Parties of April 1998. In terms of section 2(1) of the Regulations, a party submitting an application for registration must provide the following:

- Copy of its Constitution
- Deed of Foundation (50 signatures of South African citizens eligible to vote vouching that they know of the existence of this party)
- Two sets of logos in colour attached to a prescribed form provided by the IEC
- Payment of a registration fee
- A proof of advertisement for intended application published in the Government Gazette

Effect of registration:

A registered political party is entitled (1) to be represented on a party liaison committee contemplated in the Regulations on Party Liaison Committees, (2) have free access to any voters' roll compiled and maintained by the Electoral Commission and (3) entitled to protection by the Commission of its name, distinguishing mark, symbol and abbreviation, if any, of the name of the party.

3. Funding for non-profit organisations

3.1 Development Bank of Southern Africa Act, No. 13 Of 1997

Objectives of the legislation:

The Act provides for the reconstitution of the Development Bank of Southern Africa as a development finance institution with the primary purpose of promoting economic development and growth, human resource development and institutional capacity building by mobilising financial and other resources from the national or international private and public sectors for sustainable development projects and programmes.

The relevant objects of the Bank are the support of development projects and programmes in the region by facilitating the participation of the private sector and community organisations in development projects and programmes.

For this purpose the Bank has set up the Development Fund (a section 21 company) that was incorporated in December 2001 to address sustainable capacity building at municipal level, and to support municipalities in enhancing service delivery and local economic development.

Relevance of legislation to sector

The Act presents the non-profit sector with opportunities to access funding for development projects. DBSA plays a triple role of financier, advisor and partner, by mobilising finance and expertise for development projects. Most of these projects provide communities with access to affordable basic services such as water and sanitation, transport, electricity and communication. Although it prioritises infrastructure backlogs, the Bank also funds projects that support social, institutional and economic infrastructure development.

3.2 Lotteries Act, No. 57 of 1997

Objectives of the legislation:

This Act regulates lotteries and sports pools and establishes a National Lotteries Board (NLB). The Act further makes provision for a National Lottery Distribution Trust Fund.

Relevance of legislation to sector:

The non-profit sector can make application to the NLB for the allocation of funding for specific defined categories. NPOs can also run their own lotteries in terms of the provisions of the Act.

Section 26 of the Act makes provision for certain percentages of the money from the NLB to be paid to the National Lottery Distribution Trust Fund, and allocated to categories of projects of a non-profit nature. NPOs can apply for funding by directing applications to the National Lotteries Board which will direct it to the different distribution agencies appointed by the Minister of Trade and Industry for consideration.

Duties imposed on sector

The Act imposes a number of standard conditions that NPOs must comply with in order to access funding.

NB: The application form issued by the NLB requires NPOs to submit three years' of audited financial statements when applying for funding. This requirement has been inserted on the application form and is not a requirement in terms of the Act.

NPOs registered with the Directorate for NPOs are not required to prepare audited financial statements, but may prepare financial statements that are certified by an accounting officer. This means that a registered NPO may not necessarily be qualified to access funding at the National Lotteries Board.

There is therefore a need to realign the requirements of the NLB with that of the NPO Act.

3.3 **National Research Foundation Act, No. 23 Of 1998**

Objectives of the legislation

The legislation is aimed at promoting research, both basic and applied, and extending and transferring of knowledge in the various fields of science and technology and indigenous technology; and to provide for the establishment of a National Research Foundation.

The relevant object of the Foundation is to support and promote research through funding.

Relevance of legislation to sector

The relevant functions of the Foundation include obtaining and allocating funds for research and promoting and supporting research by the awarding of contracts, grants, scholarships or bursaries to persons or research institutions. This provides a means for research institutions to obtain funding to do research.

3.4 **National Development Agency Act, No. 108 of 1998**

Objectives of the legislation

The objective of the Act is to establish a National Development Agency that is aimed at promoting an appropriate and sustainable partnership between the Government and civil society organisations to eradicate poverty and its causes.

Relevance of legislation to sector

The Act is one of the few pieces of legislation that is only targeted at civil society. The establishment of the National Development Agency creates an important state-funded agency for the non-profit sector. The main aim of the NDA is to contribute towards the eradication of poverty and its causes by granting funds to civil society organisations for the purposes of carrying out projects or programmes aimed at meeting development needs of poor communities and strengthening the institutional capacity of other civil society organisations involved in direct service provision to poor communities.

Duties imposed on sector

No specific duties are imposed upon the sector, but the Act provides for an opportunity through which NPOs can obtain funding

NB: There are a few issues that possibly need further refinement or alignment, namely:

- i. Section 4 of the Act requires all organisations that have received a grant from the NDA to submit audited financial statements in respect of that grant. The NPO Act only requires certification by an accounting officer when NPOs are registered in terms of the NPO Act.
- ii. The NDA must create and maintain a database on civil society organisations, including, but not limited to, the scope and subject matter of their work and their geographical distribution, and share the information in that database with relevant organs of state and other stakeholders. This is a similar duty that is imposed upon the Directorate for NPOs within the NPO Act. The legislature should avoid the duplication of *essentially* the same function.
- iii. The Act does not include a procedure whereby NPOs can appeal against decisions taken by the NDA. The Act should create the space for such appeals to be made.
- iv. The act should make provision to compel the NDA to respond to applications for support within a specified time period.

3.5 South African Social Security Agency Act, No. 9 of 2004

Objectives of the legislation

The Act makes provision for the South African Social Security Agency which is to act, eventually, as the sole agent that will ensure the efficient and effective management, administration and payment of social assistance.

Relevance of legislation to sector

The Act may relate to NPOs insofar that the Agency may with the concurrence of the Minister of Social Development enter into an agreement with any person (including an NPO) to ensure effective payments to beneficiaries, and such an agreement must include provisions to ensure:

- *the effective, efficient and economical use of funds designated for payment to beneficiaries of social security;*
- *the promotion and protection of the human dignity of applicants for and beneficiaries of social security;*
- *the protection of confidential information held by the Agency other than as is contemplated in section 16;*
- *honest, impartial, fair and equitable service delivery;*
- *mechanisms to regulate community participation and consultation; and*
- *financial penalties for non-compliance with the provisions of the agreement.*

4. Taxation Laws

4.1 Income Tax Act No. 58 of 1962– as amended

The Taxation Laws Amendment Act, No. 30 of 2000 introduced the reform of the tax laws relating to NPOs and introduced the concept of public benefit organisations. Further amendments were made in subsequent years.

Objectives of the legislation

The Income Tax Act is relevant to NPOs mainly at the following levels:

(a) *Income tax exemption*: Section 10 deals with various kinds of organisations that can qualify for income tax exemption. The most relevant section to the non-profit sector is section 10 (1) (cN) which allows public benefit organisations (PBOs) to obtain income tax exemption. The requirements for PBOs are listed in sections 10 & 30 of the Act. PBOs may however be tax when they exceed the trading limitations imposed under section 10 (1) (cN) of the Income Tax Act. Political parties are also exempted from income tax in terms of section 10 of the Act upon compliance with certain conditions.

(b) *Donor deductible status*: This is covered for under section 18A of the Act which lays down further requirements that must be complied with.

(c) *Capital Gains Tax*: Schedule Eight to the Act provides for capital gains tax to be levied on certain deemed transactions/events. Special provision is made for public benefit organisations under these provisions.

(d) *Donations Tax*: The Act levies donations tax on all donations made to persons or organisations. It lists a number of exemptions, which include donations made to public benefit organisations.

Relevance of legislation to sector

The Taxation Laws Amendment Act, No. 30 of 2000 dealt predominantly with the non-profit sector as it allows NPOs to access benefits after complying with specific conditions.

Duties imposed on sector

The sector has to comply with a number of obligations in order to access the benefits.

NB: - The Non-Profit Consortium has produced a Research Paper that deals with the important issues in the Income Tax Act that would require further advocacy efforts in relation to NPOs.

4.2 Value Added Tax Act, No. 89 of 1991

Objectives of the legislation

This Act makes provision for the imposition of value-added tax which is a tax indirectly levied by vendors on the supply of goods and services.

Relevance of legislation to sector

The Act makes special provision for welfare organisations and associations not for gain. Associations not for gain are treated in the same way as other commercial entities if it generate taxable supplies, but the following special provisions will apply:¹

- *No output tax is payable on any “unconditional gifts” received. For example, where a club member donates money to cover the costs of a new kit and footballs to be used by the club’s soccer side;*
- *The association may be registered on the payments basis of accounting for VAT on supplies. This assists those associations using simple accounting systems;*

¹ Vat 414, Value Added Tax Guide for Associations Not for Gain and Welfare Organisations - SARS

- *Certain goods which are forwarded free of charge to an association not for gain are exempt from VAT on importation if used exclusively for educational, religious or welfare purposes or for medical or scientific research;*
- *Different activities of associations not for gain can be regarded as separate persons for VAT purposes. This can be used to reduce the impact of VAT;*
- *The sale of any donated goods or services, or other manufactured goods where donated goods and services constitute at least 80% of the value thereof are exempt from VAT; and*
- *Certain subsidies or grants received from National or Provincial Government (public authority) will be zero-rated.*

In addition to the special concessions described under associations not for gain, welfare organisations also enjoy the following advantages:²

- *Even where no charge is made for supplies, the organisation may still register for VAT and obtain input tax relief on its purchases.*
- *Subsidies or grants received from the Government (or local authorities) will be zero-rated if it relates to the carrying on of welfare activities.*

Duties imposed on sector

The Act requires NPOs that carries on an enterprise in which the total value of all taxable supplies made by that person exceeds or will exceed R300 000 in a twelve-month period, to register as a vendor for VAT purposes. Such organizations will thereafter have to comply with the requirements of the Act.

4.3 Transfer Duty Act, No. 9 of 1949

Objectives of the legislation

This Act makes provision for the imposition of transfer duty upon the transfer for immovable property.

Relevance of legislation to sector

The legislation provides for certain exemptions to the payment of transfer duty. Section 9 (1)(c) of the makes PBOs eligible for exemption from paying transfer duty if the property will be used for the purposes of one or more public benefit activities.

Duties imposed on sector

This benefit is not automatic but granted per transaction and will be considered after having received the approval letter issued by the Commissioner for the South African Revenue and details that confirm that the assets will be used to conduct public benefit activities. The public benefit organisation will therefore have to apply for this benefit and ensure that the property is used to conduct its public benefit activities.

4.4 Local Government: Municipal Property Rates Act, No. 6 of 2004

Objectives of the legislation:

This Act is aimed at regulating the power of a municipality to impose rates on property and to make provision for municipalities to implement a transparent and fair system of exemptions, reductions and rebates through their rating policies.

Relevance of legislation to sector:

Prior to this legislation no unified system existed in terms of which rates were imposed on property. Certain NPOs were either exempted or allowed to pay reduced property rates.

² Same as above.

This act now introduced a consistent means of regulating the imposition of rates on property. It also makes provision for the reduction of rates with reference to certain public benefit organisations.

Section 8 of the Act provides that a municipality may in terms of the criteria set out in its rates policy levy different rates for different categories of rateable property, which may include properties owned by public benefit organisations and used for any specific public benefit activities listed in Part 1 of the Ninth Schedule to the Income Tax Act.

The Act also requires municipalities to follow a process of community participation before adopting its rates policy. After having advertised the availability of its draft rates policy the local community (*which include NGOs dealing with local government affairs*), can submit comments and representations to the municipality concerned within a specified period.

5. Legislation promoting dialogue and interaction

5.1 National Economic Development and Labour Council Act, No. 35 of 1994.

Objectives of the legislation

The Act makes provision for the establishment of a national economic, development and labour council. The council consists of four chambers namely; public finance and monetary policy; trade and industry; labour market; and development chambers.

Relevance of legislation to sector

The council consists of members representing; organised business, organised labour, organised community and development interests and the state. The members representing organised business and labour are appointed by the Minister of Labour in consultation with those sectors, whereas the members representing organised community are appointed by the “Minister without Portfolio” in the Office of the President from persons nominated by the organisations of community and development interest identified by that Minister.

These organisations must represent a significant community interest on a national basis, have a direct interest in reconstruction and development; and are constituted democratically

The relevant duties of the council are to strive to promote the goals of economic growth, participation in economic decision-making and social equity, seek to reach consensus and conclude agreements on matters pertaining to social and economic policy and to encourage and promote the formulation of co-ordinated policy on social and economic matters

5.2 Advisory Board on Social Development Act, No. 3 of 2001

Objectives of the legislation:

The legislation is aimed at providing a national advisory structure in the social development sector with the aim of building and consolidating partnership between government and civil society. This Act defines social development *as the process of planned institutional or structural change to maintain a balance between human needs and social policies and programmes including empowering individuals and communities to become self-reliant.*

It provides for the establishment a body to be known as the Advisory Board on Social Development and to provide for the objectives, duties and composition of the Board.

Relevance of legislation to sector:

Although this legislation is only restricted to the social development sector it still provides a very significant tool for building partnership between government and civil society. On paper, this Act is a good example for other sectors and the effectiveness thereof must be monitored.

Objectives of Board

3. *The objectives of the Board are—*

(a) to advise the Minister on—

- (i) measures to promote the transformation and continuous improvement of social development services;*
- (ii) measures to promote social development initiatives;*
- (iii) measures to include local government in the provision of integrated service delivery at local government level;*
- (iv) proposals for new legislative frameworks for the social development sector and amendments to existing legislation; and*
- (v) the introduction of local and international best practices in social development services;*

(b) to act as a consultative forum for the Minister to discuss social development matters, including—

- (i) improving the quality of provincial and national social development;*
- (ii) the introduction of new policy and successful policy implementation in the government and non-governmental environment;*
- (iii) facilitating consultation between stakeholders and government regarding the implementation of social development;*
- (iv) ensuring effective review of formulation, implementation and evaluation of social development policies, programmes and legislation, as informed by the needs and priorities of society;*
- (v) inputs from the social development sector to international forums and protocols.*

Duties imposed on sector

Although there are no specific duties imposed on the sector the Act does impose duties on the board once it has been established.

Duties of Board

4. *(1) The Board, in order to achieve its objectives, must—*

- (a) respond to, and advise the Minister on, social development issues identified by, or referred to, the Board;*
- (b) identify, promote, monitor and evaluate policy, legislation and programmes with regard to social development and its impact on the quality of life of the people and the delivery of services to people;*
- (c) facilitate dialogue between government and civil society on social development issues;*
- (d) promote stakeholder participation in social development, particularly consumer and grassroots sector participation;*
- (e) submit a report—*
 - (i) on the activities of the Board to the Minister at least once a year, which report must also be tabled in Parliament; and*
 - (ii) whenever requested by the Minister;*
- (f) make formal reports available to the public to ensure the commitment of the Board to transparency and accountability;*
- (g) keep abreast of international developments in social development policy.*

(2) *The Board must establish clear lines of communication, including formal meetings, with structures that it interacts with, including the parliamentary committees on Social Development of the National Assembly and the National Council of Provinces.*

(3) *Any advice or recommendation to the Minister must include the minority views of one or more members of the Board.*

(4) *Nothing in this section precludes the Board from considering any matter pertaining to social development policy.*

NB: It is not clear if the board is in operation and how effective it is operating. The implementation of the Act needs to be monitored to ensure the potential of the Act is maximised. This may even call for an evaluation of the board in the appropriate time.

5.3 **Local Government: Municipal Structures Act, No. 32 of 2000**

Objectives of the legislation

The relevant objectives of this Act include; *providing for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities and to provide for community participation.*

Relevance of legislation to sector

The Act provides for a mechanism that allows communities (including in the form of NPOs) to participate in governance at local government level. The definition of a local community includes any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality.

Duties imposed on sector

Section 5 of the Act sets out the rights and duties of a local community which includes; contributing to the decision-making processes of the municipality, submitting written or oral recommendations, representations and complaints to the municipal council.

The local community also has the duty to observe the mechanisms, processes and procedures of the municipality, to respect the municipal rights of other members of the local community and to comply with by-laws of the municipality applicable to them.

The Act makes provision for specific areas that requires community participation. These include the preparation of an integrated development plan, the establishment, implementation and review of performance management systems and the municipal budget.

5.4 **National Advisory Council on Innovation Act, 55 of 1997**

Objectives of the legislation

This Act provides for the establishment of a National Advisory Council on Innovation (NACI), the determination of its composition and objects and functions; and the regulation of its financial and staff matters.

The objective of the NACI is to advise the Minister of Arts, Culture, Science and Technology on the role and contribution of science, mathematics, innovation and technology, including indigenous technologies, in promoting and achieving national

objectives, namely to improve and sustain the quality of life of all South Africans, develop human resources for science and technology, build the economy, and strengthen the country's competitiveness in the international sphere.

Relevance of legislation to sector

The Act provides for a definition of the non-profit sector which reads *all private persons who and institutions which act without gain*. This term is included in the Act's definition of sectors which include *the government sector, higher education sector, business sector and non-profit sector*.

The functions of the NACI include:

- a. advising the Minister on strategies for the promotion of technology innovation, development, acquisition, transfer and implementation *in all sectors*, and
- b. the funding of the science, and technology system in respect of its contribution to innovation, including the funding of research and development *in all sectors*

These sectors would by definition also include the non-profit sector.

The Act also requires that the NACI be broadly representative of all sectors and will be constituted in a manner that will ensure a spread of expertise and experience including research and development in all sectors.

6 General Compliance

6.1 Promotion of Access to Information Act

Objectives of the legislation

This Act is aimed at giving effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights. The Act fosters a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information.

Relevance of legislation to sector

The provisions of the Act are applicable to all *private bodies*, which includes all former or existing juristic persons. This would include all forms of NPOs.

There are two points of relevance:

The non-profit sector can *firstly*, make use of the legislation in order to access certain information held by the state or other private bodies. The Guide on how to use the Act, as published by the Human Rights Commission, sets out the process on how NPOs can make use of the provisions of the Act to obtain certain information.

Secondly, the provisions of the act with regards access to records private bodies are also applicable to NPOs. So if someone requires the records for the protection of any rights and complies with the procedural and substantive requirements of the Act, the NPO must provide such access.

6.2 Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000

Objectives of the legislation

The Act is aimed at giving effect to the letter and spirit of the Constitution, in particular to the equal enjoyment of all rights and freedoms by every person, the promotion of equality and the prevention of unfair discrimination and protection of human dignity.

Relevance of legislation to sector

This Act is applicable to the state and all persons. Persons as described in the Act include juristic persons and non-juristic entities and would accordingly include all NPOs. The legislation prohibits unfair discrimination by persons on a number of grounds. NPOs will have to ensure that they do not have any practices or policies that will result or promote unfair discrimination.

Duties imposed on sector

The Act lists a number of specific prohibitions in relation to unfair discrimination based upon the specific listed grounds. Section 26 also requires all NGOs and CBOs to promote equality in their relationships with other bodies and in their public activities and (for certain organisations) to prepare equality plans as may be prescribed.

Social commitment by all persons to promote equality

27. (1) Pursuant to section 26, all persons, non-governmental organisations, community-based organisations and traditional institutions must promote equality in their relationships with other bodies and in their public activities.

(2) The Minister must develop regulations in relation to this Act and other Ministers may develop regulations in relation to other Acts which require companies, closed corporations, partnerships, clubs, sports organisations, corporate entities and associations, where appropriate, in a manner proportional to their size, resources and influence, to prepare equality plans or abide by prescribed codes of practice or report to a body or institution on measures to promote equality.

Section 29 of the Act also has an illustrative list of some unfair practices in certain sectors. The following is one of the practices on the list:

Clubs, sport and associations

10. (a) Unfairly refusing to consider a person's application for membership of the association or club on any of the prohibited grounds.

(b) Unfairly denying a member access to or limiting a member's access to any benefit provided by the association or club.

(c) Failure to promote diversity in selection of representative teams.

6.3 Financial Intelligence Centre Act, No. 38 of 2001

Objectives of the legislation

This Act is aimed at combating money-laundering activities and to impose certain duties

Relevance of legislation to sector

The Act places obligations on certain institutions referred to as *accountable institutions* to verify the identity of their clients, keep records of such clients for a specified period, provide the Financial Intelligence Centre with access to such records and to report certain incidents.

The Act may in particular be relevant to non-profit trusts as the Act regards *A board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act, 1988 (Act 57 of 1988)* as an accountable institution.

NB: Trustees will have to be vigilant in complying with these requirements as the act also impose stringent sanctions in the event of non-compliance.

6.4 **Prevention of Organised Crime Act, 1998 (Act 121 of 1998),**

Objectives of the legislation

The Act is aimed at introducing measures to combat organised crime, money laundering and criminal gang activities, to prohibit certain activities relating to racketeering activities and to provide for the prohibition of money laundering.

Relevance of legislation to sector

This is a law of general application and applies to the non-profit sector. It is especially important for NPOs that receive gifts and donations from people or companies. When someone knows or ought reasonably to have known that property is or forms part of the proceeds of any unlawful activities and enter into any agreement or transaction with anyone in connection with that property, such person shall be guilty of an offence.

A number of other offences are created in terms of the Act which also allows for the confiscation of certain property used for criminal activity.

6.5 **Prevention and Combatting of Corrupt Activities Act, No. 12 of 2004**

Objectives of the legislation

The Act, among others, aims to provide for the strengthening of measures to prevent and combat corruption and corrupt activities; the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts; and to place a duty on certain persons holding a position of authority to report certain corrupt transactions.

Relevance of legislation to sector

It is stated in the preamble of the Act that *the prevention and combatting of corruption and related corrupt activities is a responsibility of all States requiring mutual cooperation, with the support and involvement of individuals and groups outside the public sector, such as organs of civil society and non-governmental and community-based organizations. if their efforts in this area are to be efficient and effective.*

The legislation is relevant to the sector as organisations have to be aware of the offences listed in the act and it can cooperate with the state in preventing and combating corrupt activities.

Duties imposed on sector

The Act prohibits everyone from getting involved in corrupt activities as defined in the Act. A general offence for corruption is created which is applicable to everyone. This offence would naturally be applicable to the non-profit sector.

In addition to the general offence of corruption, a number of specific corrupt activities relating to specific persons and matters are listed in the Act. Although these activities relate to specific persons it apply to all persons who are involved in such corrupt activities. These include offences relating to contracts and tenders.

The Act also imposes a duty to report corrupt transactions in cases where a person in authority or someone knows, ought to reasonable have known or suspected such activities to have taken place. The definition of *person in authority* includes the directors of a section 21 company or the CEOs (equivalent officers) of a voluntary association or trust.

6.6 Local Government: Municipal Management Finance Act, No. 56 of 2003

Objectives of the legislation

The object of the Act is to secure sound and sustainable management of the financial affairs of municipalities and municipal entities by establishing norms and standards and other requirements.

Relevance of legislation to sector

The act becomes relevant to the sector *firstly* when municipalities are transferring funds to NPOs and *secondly* when NPOs operate as municipal entities as provided under the Local Government: Municipal Systems Act. *Thirdly*, the Act also sets out a number of conditions for the entering into of public private partnerships.

Duties imposed on sector

Section 67 (1) of the Act requires that certain requirements must be met before money can be transferred to NPOs from municipalities, these include that the organisation:

- (a) has the capacity and has agreed-
 - (i) to comply with any agreement with the municipality,
 - (ii) for the period of the agreement to comply with all reporting, financial management and auditing requirements as may be stipulated in the agreement,
 - (iii) to report at least monthly to the accounting officer on actual expenditure against such transfer; and
 - (iv) to submit its audited financial statements for its financial year to the accounting officer promptly;
- (b) implements effective, efficient and transparent financial management and internal control systems to guard against fraud, theft and financial mismanagement, and
- (c) has in respect of previous similar transfers complied with all the requirements of this section. *There are some exceptions to this rule which are also set out in the Act.*

NB: This Act also requires audited financial statements, without making provision for accounts certified by accounting officers. This requirement appears to be linked to the specific agreement and NPOs that are part of PPP agreements should make provision for the payment of audit fees when negotiating the terms of the agreement.

7. NPOs as Employers

There are a number of laws that affect NPOs having employees. These laws apply to all employers and do not provide any exclusion for NPOs as employers. Neither NPOs nor their employees are afforded any special benefits in terms of these laws. This part will only set the main relevant features of these laws. No further recommendations are being made.

7.1 Income Tax Act, No. 58 of 1962

Objectives of the legislation

The Fourth Schedule to the Income Act deals with the payment of employees' tax. This part of the Act is aimed at ensuring that deductions are made from the remuneration of all employees and paid over to the South African Revenue Services.

Relevance of legislation to sector

NPOs with employees have to register with the South African Revenue Services and they will have to make the required monthly deductions and submit the prescribed reports.

7.2 Labour Relations Act, No. 66 of 1995

Objectives of the legislation

The Labour Relations Act is aimed at governing the employment relationship between the employer and employee.

Relevance of legislation to sector

NPOs with employees are required to respect the rights of employees as entrenched in the LRA. The important rights of employees include; freedom of association, participation in forming a trade union, to join a trade union and not be unfairly dismissed.

Duties imposed on sector

NPOs with employees must abide by the duties imposed upon them in relation to their employees.

7.3 Basic Conditions of Employment Act, No. 75 of 1997

Objectives of the legislation

This Act makes provision for basic conditions for employees. It governs therefore basic conditions relating to working time, leave and keeping records of specified particulars.

Relevance of legislation to sector

NPOs must respect the basic rights of their employees afforded to them in terms of the legislation.

Duties imposed on sector

NPOs have to comply with these basic conditions and ensure that appropriate systems are in place that will ensure compliance.

7.4 Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993

Objectives of the legislation

The act provides for the compensation of certain occupational injuries and diseases.

Relevance of legislation to sector

The act creates a system that provides a form of insurance for employers if their employees are injured at the workplace. The provisions of the Act also bind NPOs.

Duties imposed on sector

NPOs have to register in terms of the Act, pay an annual levy and submit annual returns. to ensure that occupational injuries and diseases are covered in terms of the provisions of the Act. All workplace injuries have to be reported in the prescribe manner.

7.5 Employment Equity Act, No. 58 of 1998

Objectives of the legislation

This Act is aimed at achieving equity in the workplace by promoting equal opportunity and fair treatment in employment through *firstly*, the elimination of unfair discrimination and *secondly*, the implementation of affirmative action measures to redress the disadvantages in employment experienced by designated groups. The latter is being done in order to ensure their equitable representation in all occupational categories and levels in the workforce.

Relevance of legislation to sector

Employers may not unfairly discriminate, directly or indirectly, against an employee in any of its employment practices or policies on specific grounds listed in the act (e.g. race, gender, religion, HIV/AIDS).

Employers are also required to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

Duties imposed on sector

Employers will have to scrutinise their policies and practices to eliminate any direct or indirect discriminatory practices and take steps to eliminate such.

7.6 Skills Development Levy Act, No. 9 of 1999

Objectives of the legislation

The act must be read in conjunction with the Skills Development Act which is dealt with under paragraph 7.7. The Skills Development Levies Act provides for the imposition of a levy to which both employee and employer contribute.

Relevance of legislation to sector

NPOs must deduct one percent of the remuneration of their employees and contribute a further one percent towards the skills development levy. Special provision is made for certain public benefit organisations to be exempted from this requirement. Only public benefit organisations carrying on certain activities are exempted from deducting and paying over the skills development levy.

NB: Only certain PBO are exempted from the payment of the skills development levy. The reason for this is not clear and may require further lobbying that will enable other public benefit organisations to also be exempted.

7.7 Skills Development Act, No. 97 of 1998

Objectives of the legislation

The main objective of the Act is to provide a framework to devise and implement strategies to develop and improve the skills of the South African workforce. This is done in conjunction with other laws like the South African Qualifications Authority Act, 1995 and the Skills Development Levies Act.

Relevance of legislation to sector

The Act makes provision for the establishment of a National Skills Authority (NSF) which has the function of advising the Minister of Labour on a national skills development policy and strategy and the implementation thereof. The NSF consists of various representatives from different sectors. At least five of the at least 27 members are nominated by NEDLAC and appointed by the Minister to represent organisations of community and development interests, which must include:

- a. a woman who represents the interests of women;
- b. a person who represents the interests of the youth; and
- c. a disabled person who represents the interests of people with disabilities;

NPOs as employers may also be part of learnerships and establish skills programmes as provided for under the Act and access grants and subsidies for such purpose.

Duties imposed on sector

The Act encourages employers the use of the workplace as an active learning environment, to provide employees with the opportunities to acquire new skills, to

provide opportunities for new entrants to the labour market to gain work experience and to employ persons who find it difficult to be employed.

7.8 Unemployment Insurance Contributions Act, No. 4 of 2002

Objectives of the legislation

The act makes provision for the deduction and payment of an unemployment insurance levy.

Relevance of legislation to sector

NPOs, like other organisations, have to comply with the provisions of the act. No provision is made for exemptions for NPOs.

Duties imposed on sector

NPOs that are employers have to deduct and pay over contributions for the benefit of the Unemployment Insurance Fund.

8 Legislation prior to 1990

8.1 National Welfare Act, No. 100 of 1978

Objectives of the legislation

The Act provides for the establishment of the South African Welfare Council and of regional welfare boards and the registration of welfare organisations.

Relevance of legislation to sector

The Act is relevant to the non-profit sector at various levels.

Firstly it provides for the establishment of the South African Welfare Council. The Council's function includes advising the Government in relation to the rendering of social welfare services by welfare and other organisations.

Secondly, the Act provides for the establishment of regional welfare boards by the Minister. The functions of these boards include the encouragement, promotion and coordination of the rendering of social welfare services by welfare organisations in its region and to stimulate the development of such services. The boards are also responsible for the regulation and registration of welfare organisations.

Thirdly, welfare organisations are governed in terms of the provisions of the Act.

Duties imposed on sector

Although no specific duties are being imposed on the non-profit sector, the Act recognises the role of the sector on issues concerning social welfare.

NB: It is uncertain whether a South African Welfare Council is operational and functional. No regional welfare boards are seemingly in operation.

8.2 Trust Property Control Act, No. 57 of 1988

Objectives of the legislation

This Act makes provision for the registration and regulation of trusts.

Relevance of legislation to sector

Non-profit trusts are established and regulated in terms of this legislation. The non-profit trust is one of three basic legal entities available when setting up NPOs. The provisions of this Act accordingly govern the non-profit trust.

Duties imposed on sector

Legislative duties are being imposed upon trustees when a trust is registered in terms of the provisions of the Act.

NB: Trusts are being registered with the different offices of the Master of the High Court in an uncoordinated manner and no single register exists for such non-profit trusts. The sector may benefit from having a single registry for non-profit trusts. The identification of trusts can be incorporated into the application process.

8.3 Companies Act, No. 61 of 1973

Objectives of the legislation

The act makes provision for the establishment and regulation of companies.

Relevance of legislation to sector

The Act provides for the establishment of a non-profit company. Section 21 of the Act provides for a company without share capital. Section 19 of the Act provides that the non-profit company is deemed to be a public company which means that it will have to comply with much of the same regulatory requirements as a commercial public company.

The Act also makes provision for a company or other association of persons, incorporated (or unincorporated) outside the Republic of South Africa, to be incorporated under section 21 provided that it complies with the requirements of section 21.

Duties imposed on sector

The directors and members of a section 21 company must comply with much of the same regulatory requirements as a commercial company when setting up and operating a non-profit company.

NB: The Act is in the process of being reviewed.

8.4 Heraldry Act, No. 18 of 1962

Objectives of the legislation

The Act makes provision for the for the registration and protection of coats of arms, badges, other emblems, names and uniforms which can be done at the Bureau of Heraldry which is based in Pretoria. The Act also lists a number of offences for violations of the coats, arms, badges and other emblems.

Relevance of legislation to sector

This Act provides for a facility where an NPO can apply to have its name reserved for its exclusive use. NPOs must submit an application form as prescribed under the Act and pay the prescribed fee in order to retain the proposed name for its exclusive use.

Duties imposed on sector

Not to use the same name, uniforms, arms and badges that have been approved in terms of the Act.

NB: It may be advisable to have protected names of registered NPOs reflected on the NPO Directorate's register.

8.5 Friendly Societies Act, No. 25 of 1956

Objectives of the legislation

The Act is aimed at providing for the registration, incorporation, regulation and dissolution of friendly societies. The Act sets out the various objects for which friendly societies may be established.

Relevance of legislation to sector

Although friendly societies are primarily established to operate for the benefit of their members, this does not seem to be in contradiction with the objectives as contained in section 21 of the Companies Act.

A non-profit trust is seemingly not able to register as a friendly society as section 49 of the Act provides that the Trust Property Control Act, No. 57 of 1988 shall not apply to a society registered under the Act. This implies that a registered society cannot have its operating entity as a trust.

Duties imposed on sector

Once a friendly society becomes registered it must comply with the provisions of the Act. Some of these requirements include, having a registered office and a principal officer, a founding document stating specific clauses and submit prescribed documentation with the registrar. These clauses include reference to societies that may have a share capital.

NB: Section 38A makes provision for the conversion of a friendly society into a company. This may create a problem if it is a NPO that wants to convert to a profit-making entity. The Act does not seem to prohibit this. Although it is not allowed under the Companies Act, these provisions in the Companies Act would not apply to voluntary association.