



social development

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Social Development
REPUBLIC OF SOUTH AFRICA

POLICY FRAMEWORK ON NONPROFIT ORGANISATIONS LAW

**PROPOSED AMENDMENTS TO THE
NONPROFIT ORGANISATIONS ACT, ACT 71 OF 1997**

A DISCUSSION DOCUMENT

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Nonprofit Organisations Directorate**

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DEFINITIONS AND ABBREVIATIONS

Civil Society Organisations:	Is the collective term used to describe all types of nonprofit organisations. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organisations such as registered charities, development non-governmental organisations, community groups, women's organisations, faith-based organisations, professional associations, trade unions, self-help groups, social movements, business associations, coalitions and advocacy groups.
Codes of Good Practices:	Is a set of <u>rules</u> outlining the responsibilities of or proper practices for an individual, party or organisation. These include "Principles, values, standards, or rules of behavior that guide the decisions, procedures and systems of an organisation in a way that it contributes to the welfare of its key stakeholders, and that it respects the rights of all constituents affected by its operations."
Common Law	Is a kind of legal system where there are principles and rules of action and derives its authority from community customs and traditions. Common law is not just made by <u>legislation</u> . Instead, it is also made by courts through amongst others the <u>precedent</u> of earlier courts to help them make decisions.
Community based organisation (CBO):	Are non-profit agencies created by communities to address local needs. They are governed by volunteer governing bodies and staffed by volunteers and/or paid personnel. Some CBOs are also supported by volunteers. Many CBOs receive funding from a variety of sources, including grants, donations, fees, and fundraising, but government is the primary source of funding for most agencies.
Governance:	Establishment of policies, and continuous monitoring of their proper implementation, by the members of the governing body of an organisation. It includes the mechanisms required to balance the powers of the members (with the associated accountability), and their primary duty of enhancing the prosperity and viability of the organisation.
Governing Body:	The group of an NPO's constituency representatives who are elected or invited to voluntarily serve as the constituted leadership of an NPO. The governing body can be given the title of, among others: Board, Board of Directors, Trustees, Council or Steering Committee.
Legal Framework:	Powers and limitations that arise from legislation and interpretation of laws, and which impel or restrain individual or organisational activities.
Non-governmental organisation (NGO):	Private sector, voluntary (usually non-profit and non-sectarian) organisation that contributes to, or participates in, cooperation projects, education, training or other humanitarian, progressive, or watchdog activities. In the context of South Africa these ordinarily are distinguished from the community based organisations by virtue of their organisational nature and formalisation (NGOs are more formalized, and well established as opposed to informal CBOs).

Nonprofit company (NPC):	Is a company incorporated for a public benefit or for a public good and, whose income and property are not distributable to its incorporators, members, directors, officers or persons related to any of them except as reasonable (i) remuneration for goods or services rendered, (ii) payment of, or reimbursement for, expenses incurred to advance a stated object of the company; and (b) as a payment of an amount due and payable by the company in terms of a <i>bona fide</i> agreement between the company and that person or another; (c) as a payment in respect of any rights of that person, to the extent that such rights are administered by the company in order to advance a stated object of the company; or (d) in respect of any legal obligation binding on the company.
Nonprofit organisation (NPO):	Is trust, a company or other association of persons established for a public purpose and the income and property of which are not distributable to its members or office bearers except as reasonable compensation for services rendered.
Office Bearers:	A person designated to hold a position of authority and responsibility within an NPO. This can either be a director, trustee or person holding executive position, either as a full-time staff, part-time staff or as a volunteer.
Regulatory Framework:	A system of regulations and the means to enforce them, usually established by a government to regulate a specific activity. In the case of NPOs, this refers to all regulations that have an influence on the NPOs.
Self-regulation:	This can be understood as a response by the NPO sector itself to dealing with internal NGO challenges ranging from the question of the financial and broader sustainability of the NGO sector, to questions about good governance and the professionalisation of NPOs. NPO self-regulation can be understood at the structural level as emerging from the same structural shifts that gave rise to corporate self-regulation.
Statute Law:	The body of law consisting of written laws adopted by a legislative body. Statute law is often contrasted with case law, which originates from decisions of the appellate courts; and with constitutional law, based on a country's written constitution.
Trust :	Is an arrangement, set out in a written document called the trust deed, in terms of which an owner (founder) hands over property and/or funds to a group of people called trustees who administer the assets for the benefit of other people (beneficiaries) for a stated objective.
Voluntary Association (VA):	A voluntary association (VA) is created under common law by an agreement between three or more people to form an organisation to work together to achieve a common non-profit objective. This written agreement or founding document is called the constitution.

EXECUTIVE SUMMARY

The Department of Social Development (DSD) is administering the Nonprofit Organisations Act of 1997 (Act 71 of 1997) that provides a registration facility for organisations to register as nonprofit organisations as part of the legal framework to regulate the nonprofit sector.

The South African current legal framework on nonprofit organisations is rooted in the fundamental human rights culture of our Constitution. The right to freedom of religion, belief and opinion; of expression and; of association as contained in the Bills of Rights is essential for the civil society formations. The NPO Act is the entry point on the legal framework to regulate the nonprofit sector.

The nonprofit sector, also commonly referred as the third sector after the private and government sectors, is characterised by different organisations of different sizes, shapes and scope of operation across all development and social formations. It has been established that the nonprofit organisations operate both in the formal and informal sectors of the country's economy and that those in the informal sector are poorly resourced and less formally structured.

Many challenges have since emerged in the implementation process of the NPO Act. Various stakeholders have been discussing a number of pertinent issues that relate to the legal framework of nonprofit organisations. Some of these discussions include the Ministerial Provincial Dialogues that were concluded during the months of June-July 2012 in all the nine provinces that result into the National Summit of the 15-17 August 2012. These discussions and issues raised necessitated the need to review the NPO Act in its current form.

This policy paper sets out the framework and guidelines for the foundation on the drafting of a new nonprofit organisations' legal framework that will regulate the nonprofit sector in South Africa. This Policy Discussion document set forth objectives that ensure that the new regulatory framework is reflective of the country's adherence to the principles of a constitutional democracy that is committed to a free and open society within the socio-economic contexts of South Africa.

The new regulatory framework will aspire to promote transparency and accountability within the nonprofit sector without placing onerous requirements on organisations. A risk-based approach in managing the compliance requirements for organisations will be implemented without compromising the required standards of governance for nonprofit organisations. The current '*one-size fit all*' approach is inappropriate for the diverse nature of the South African nonprofit sector.

There is a need to encourage self-regulation among organisations to further increase the levels of accountability and transparency within the nonprofit sector. It will therefore be imperative to strike a balance between the mandatory regulatory provisions and the self-regulation requirements so as to preserve the soundness and integrity of the nonprofit sector.

A new institutional arrangement for the regulatory authority in the form of the South African Nonprofit Organisations Regulatory Authority (SANPORA) is therefore proposed that will meet the world class standards for such a function to ensure government provide an effect regulatory NPO oversight role.

The SANPORA will be mandated to encourage the formation of nonprofit organisations and their accountability through an efficient and effective registration facility. This will ensure greater transparency and public confidence in the nonprofit sector. This mandate will be met through an efficient registration function for nonprofit organisations, education and awareness raising, dissemination of information on nonprofit organisations and enforcement of the law. The SANPORA will have the power to sanction violations peculiar to nonprofit organisations. On regular basis, SANPORA will provide analytical information on the nonprofit organisations to ensure enhancement of their public profiles and standing in the public's eye.

An important addition to the new regulatory framework proposed is the South African Nonprofit Organisations Tribunal (SANPOTRI) which will be an independent body from SANPORA. It will play a mediatory role between SANPORA and the nonprofit organisations.

One of the critical approaches of the envisaged regulatory authority will be to continue to engender high standards of leadership and good governance within the nonprofit sector towards encouraging and building capacity for self-regulation within the sector. Well informed self-regulation measures by nonprofit organisations should therefore be encouraged so as to complement the prudent legal framework for nonprofit organisations.

An important element that will be embarked upon concurrently with the review of the legislation will be the establishment of the necessary institutional framework for the regulatory function. This will involve, as a first step, the transformation of the NPO Directorate into an efficient, sustainable and service oriented regulatory authority. A fundamental transformation of the systems, processes and organisational orientation will be necessary. Steps will be taken to ensure that the institutional framework envisaged in this policy framework is fully operational when the law comes into effect.

The functions of the NPO Directorate can easily be transformed into the envisaged SANPORA in a new organisational form of a government component as envisaged in Section 10 of the Public Service Amendment Act 30 of 2007. This new organisational form within public service provide for a specialised direct public service on a large scale through a focussed and fully ring-fenced entity that still remains and reports to the responsible Minister. This will allow greater flexibility to deliver an efficient regulatory oversight services to nonprofit organisations with appropriate government accountability arrangements within the same Budget Vote of the Department of Social Development. A feasibility study that will culminate in a business case on the motivation for such a government component (SANPORA) will be conducted to satisfy the requirements of the Public Service Act.

1. INTRODUCTION

The nonprofit sector is characterised by a wide variety of organisations of different sizes and shapes across the political, economic and social spectra of society. These organisations range from faith and community based organisations, welfare (charities), other social and sport clubs, to traditional organisations and a host of other development and social forms of organisations working tirelessly on the social fabric of society. The nonprofit sector is also commonly referred as the third sector after the private and government sectors.

There is no doubt that nonprofit organisations have profoundly influenced the emergence, shape and nature of our modern South African democratic society. South Africa is a highly unequal society where there are gross disparities of income and wealth. In an endeavour to address these disparities nonprofit organisations represent an important mechanism for encouraging philanthropy and promoting greater equity and implementing empowerment programmes.

In recognising this important role that nonprofit organisations play, South African government enacted the Nonprofit Organisations Act 71 of 1997 (NPO Act), as part of the legal framework to create an enabling environment for the nonprofit sector. This legislation was conceived as part of the project to transform society and was a result of a lengthy process of legislative reform initiated by civil society and negotiated with government. The NPO Act mandates the Department of Social Development to create an administrative and regulatory framework within which nonprofit organisations can conduct their affairs by providing a voluntary registration facility.

Many challenges have since emerged in the implementation process of the NPO Act. Various stakeholders have been discussing a number of pertinent issues that relate to the legal framework of nonprofit organisations. Some of these discussions include the Ministerial Provincial Dialogues that were concluded during the months of June-July 2012 in all the nine provinces that result into the National Summit of August 2012. These discussions and issues raised necessitated the need to review the NPO Act in its current form.

This policy paper sets out the framework and guidelines for the foundation on the drafting of a new nonprofit organisations' legal framework that will regulate the nonprofit sector in South Africa, based in contemporary issues affecting the nonprofit sector and other international best practices adapted for the South African context.

Although the intention is to engage in a comprehensive review of the NPO Act, it is not the aim of government to simply write unreasonably stringent measures that will hamper the growth of the nonprofit sector. The objective of this review is to ensure that the new regulatory framework is appropriate to the legal and socio-economy contexts of South Africa as a constitutional democracy and an open society. Where current legislation meets these objectives, it should be retained as part of the legal framework.

For these reasons, this policy document intends to make the case for reform, set out a clear purpose and scope for the review of the current legal framework

on nonprofit organisations in South Africa It then apply that defined purpose and scope to identify and describe the principal areas of the new nonprofit organisations legal framework based on the current contextual realities of South African nonprofit sector. The issues raised in this discussion document should be carefully considered and be subjected to a public debate and scrutiny.

2. THE PURPOSE

The general purpose is to provide a policy framework on regulating nonprofit organisations. The aim is to enhance the existing enabling environment for the nonprofit organisations to flourish and protect the sector from abuse as well as minimise undue disruptions to many of its positive contributions.

This policy framework provides for the basis to review and enhance the legal framework on nonprofit organisations, based on the principles reflected in the South African Constitution and the provisions of the existing statutes affecting the nonprofit sector. This legal framework reform will involve an overall review of the NPO Act with due considerations given to existing statutes and common law associated with the establishment of the relevant entities within the NPO sector.

3. THE SCOPE

The scope of this policy framework is to identify the fundamental rules governing the procedures on the formation of nonprofit organisations, governance, reporting requirements and the enforcement mechanisms on the regulatory framework. The scope will also include a review that will consider the relationship between the existing NPO Act and other statutory law measures for the protection of the interests of beneficiaries, the donor community, employees, and other stakeholders.

There is a need to balance civil, administrative and criminal sanctions particularly when considering administrative and enforcement mechanisms within the regulatory framework. This is important given that the existing NPO Act invokes criminal penalties only, when civil or administrative remedies could be more appropriate in some instances. The review will also address the institutional requirements to ensure simplicity; effectiveness and consistent enforcement by clarifying the roles and responsibilities of different agencies and other role-players within the legal framework for nonprofit organisations.

It will be imperative for voluntary associations, nonprofit companies and nonprofit trusts to be subjected to the same rules regarding formation, governance and reporting requirements in order to circumvent any legal loopholes that will undermine the principles of public beneficitation and disclosure. This will further create greater equality within the nonprofit sector and will also promote public confidence in the sector.

This review will be broadly consultative to allay fears on the part of the nonprofit sector of unnecessary reforms that would create uncertainties within the sector. Careful consideration will be given to developments within the nonprofit sector

and other international best practice with the possibilities of adapting these to the South African context.

4. SITUATIONAL ANALYSIS ON THE NONPROFIT SECTOR

South African nonprofit sector is characterised by a wide variety of organisations of different structure and sizes across the socio-political and economic spectra of society. These organisations range from faith and community based organisations, charities (welfare), to traditional organisations like social and sport clubs and a host of other development and social forms of organisations working tirelessly on the social fabric of society. The collective description of these types of organisation is commonly referred as civil society organisation (CSO), nongovernmental organisation (NGO), community based organisation (CBO) and faith based organisations (FBO). The diversity of the nonprofit sector reflects the complexities of present-day South African society.

4.1 The significant role of NPOs in South Africa

Nonprofit organisations in South African contribute significantly to the socio-political and economic development of the country as they often play an intermediary role within society and have the ability to provide particular goods and services where markets have failed or where government falls short. These services and activities range from providing direct services to poor individuals and communities, advocacy, research and policy analysis to support work such as capacity building, technical assistance and funding to communities.

The existence of nonprofit organisations personifies the rights to freedoms of association; expression and assembly as articulated in the Constitution (Bill of Rights) by enabling individuals to participate in community groups. The South African Constitution is the cornerstone of our democracy. It enshrines citizens' rights in the country and affirms the democratic values of human dignity, equality and freedom. These rights are not only applicable to natural persons, but also to juristic persons and as such have fundamental implications on the legal framework for nonprofit organisations.

The Reconstruction and Development Programme White Paper acknowledges the important role played by the nonprofit organisations and articulates the keystone of the current policy debates on the role of nonprofit organisations, and it stated that *'...These social movements and CBOs are a major asset in the effort to democratise and develop our society. Attention must be given to enhancing the capacity of such formations to adapt to partially changed roles. Attention must also be given to extending social movement and CBO structure into areas and sectors where they are weak or non-existent... Numerous non-profit non-governmental organisations (NGOs) are also developing in South Africa and many of these NGOs play an important capacity-building role in regard to CBOs and the development process. NGOs are also engaged in service delivery, mobilisation, advocacy, planning, lobbying and financing.*

*Thus NGOs have an important future role in the democratisation of our society. However, NGOs must also adopt transparent processes, and operate in a manner that responds, with accountability and democracy, to the communities they serve”.*¹

Recently government’s Ten Year Review Report has further emphasised this important role of the nonprofit organisations in building social fabric of communities in that stable community organisations facilitate an environment for increasing service delivery as well as improving market performance and economic growth².

There is indeed a growing body of evidence that market economies flourish best where there is pluralism, social stability, public trust of institutions and respect for the rule of law. The nonprofit sector encourages all these factors, thus providing significant support for the growth and sustenance of the market economy in South Africa. The legal framework for nonprofit organisations precisely intends to enhance the ability of nonprofit organisations to contribute to the above factors. It permits individuals and groups to come together to fill the gaps created by market failures.

4.2 Composition and Size of the nonprofit sector

Over a period of time, South Africa has witnessed an increasing number of organisations that sought registration under the NPO Act. The number of registered nonprofit organisations has grown from 76 757 by the end of March 2011 to almost 85 248 by end of March 2012, representing a growth of more than 11% per annual.

More than 80% of total number of registered NPOs can be classified as voluntary associations. Social services organisations constitute the highest ratio at 34% of registered nonprofit organisations, followed by community development and housing at 21% and health and education with 11%, respectively.

In terms of its contribution to the fiscal of the country, in 2007 the total income of the nonprofit organisations was estimated to be R12, 5 billion to which the South African government contributed a substantial amount in the form of subsidies and other forms of grants, followed by the private sector through its corporate social investment programmes³. Other forms of funding sources were derived from investments, membership fees and sales for services and goods and other forms of philanthropic giving.

Research indicates that nonprofit organisations operate both in the formal and informal sector of the country’s economy. The formal sector being more advanced, sophisticated, skilled labour based economy and the informal being the marginalized, unskilled labour based economy. The better resourced and organised nonprofit organisations that operate in the

¹ *Reconstruction and Development White Paper, 1994, pg.75.*

² Policy Co-ordination and Advisory Services (PCAS) (2003). *Towards A Ten Year Review- Synthesis Report on Implementation of Government Programmes. Discussion Document.* Government Communication (GCIS) on behalf of The Presidency. October 2003.

³ Renee Bonochis article on *BoE gives advice NGOs can bank on.* Business Day, Monday, March 5 2007.

formal economy sector are usually referred to as NGOs and have all the attributes associated with this economy. Other nonprofit organisations that operate in the informal sector are poorly resourced and less formally structured. These NPOs are community based organisations and have similar characteristics of the informal sector.

5. THE HISTORICAL EVOLUTION OF THE NPO ACT

This overview provides a historical perspective on the evolution of South African nonprofit sector and its legal framework. It identifies important historical factors that had influenced the development of the current legal and regulatory framework on nonprofit organisations.

5.1 The Apartheid era and the resistance period

The historical role of civil society organisations in South Africa is well documented particularly that of the nonprofit sector as it emerged from our country's divisive history. The nonprofit sector materises from this political divide of apartheid where some organisations actively supported the apartheid state and all its apparatus and other organisations tacitly supported the state also through their silence. There were also those organisations that were actively involved and were part of the resistance movement. The nonprofit sector is therefore reflective of this historical racial division of both colonialism and apartheid and the consequent isolation and disadvantage of communities.

It was during the apartheid resistance era, especially during the 1970-1980s, South Africa witness both the proliferation and the flourishing of the nonprofit sector. Most organisations, both NGOs and CBOs, were financial supported from both local and international funding agencies. These organisations sought to mobilise communities that reflected a spontaneous but coherent cooperation among students, youth, women, workers and political organisations with a two pronged objective of undermining apartheid while working for change as part of the development agenda.

There were also however, those organisations created by the apartheid government that sought to undermine the struggle and maintain the status quo⁴. These organisations were the ones that benefit in the main from the legal framework. The nonprofit sector is therefore not heterogeneous in nature as it is very diverse reflecting both the historical patterns of our country including the racial demographics in terms of geographical locations.

5.2 The dawn of democracy

With the beginning of the political transition during the 1990s, most nonprofit organisations began to re-assess their organisations' mission and activities in light with the expected changes of the political environment and a potential transition to democracy. It was during this period that nonprofit organisations initiated a number of capacity building projects to be '*ready for governing*' and exploring alternative roles in supporting a new political dispensation. Many

⁴ Camay, P. & Gordon A.J (2004) *Evolving Democratic Governance in South Africa*. Johannesburg. CORE. South Africa.

foreign governments and other international donor agencies financial support this new direction of civil society with the hope that a new democratic government will continue this trend.

However, with the new democracy came the reality that there are insufficient resources available to satisfy everyone immediately, therefore difficult decisions ought to be made regarding trade-offs amongst various constituencies. It was during this era that the broader nonprofit sector experienced a '*brain drain*' and was somehow weakened as a competent cadre of leadership joined the new government. Furthermore, most international funding agencies withdrew from the country or redirected the funding elsewhere.

Despite this contradictory role and nature of civil society, the new government maintained its commitment to the course of the sector and recognised the central role of the nonprofit sector through the policy choices that were taken in providing an environment in which the sector could still flourish. This resulted into the establishment of a more user-friendly administrative and regulatory framework within which the nonprofit sector could conduct its affairs.

The legal environment for the nonprofit sector has therefore fundamentally changed since the new democratic dispensation. Major apartheid era deficiencies in the legal framework for nonprofit organisations have since diminished. The mandatory registration for fundraising purposes and the limited tax benefits that few organisations accessed and the failure to recognise the legal existence of voluntary associations whose objectives in many instances were declared unlawful have since disappeared with apartheid.

5.3 Constitutional democracy implications

The creation of an enabling legal framework for nonprofit organisations that was identified as a priority in the early nineties and various other initiatives to promote reform have yielded satisfactory results to the extent that the current legal framework is rooted in the fundamental human rights culture embedded in the country's Constitution. The rights to freedom of religion, belief and opinion; of expression and; of association as contained in the Bills of Rights are essential for the formation of nonprofit organisations. This means that everyone has the right to associate with other people and form organisations and express themselves in whatever way they choose provided that this is done in compliance with existing laws and it does not infringe onto other people's rights.

Based on these fundamental principles of the Bills of Rights, the current legal framework on nonprofit organisations serves mainly three purposes. Firstly, it enables organisations to establish themselves as legal structures. Secondly, it regulates the way in which such legal structures operate. Part of this includes the registration of an organisation with the Nonprofit Organisations Directorate in the Department of Social Development. Thirdly, it provides tax and other incentives for the sector to financially and otherwise sustain itself. This compares fairly well with international best practices and accepted norms and standards for regulating the nonprofit sector.

In the main, nonprofit organisations can pursue three different options to become a legal entity within the current legal framework, namely: - Voluntary Associations; Trusts and incorporated nonprofit companies. The Nonprofit Organisations Act 71 of 1997 (NPO Act) is perceived to be the entry point in the regulatory framework for nonprofit organisations to derive benefits from the enabling environment as it provides a registration facility for all these nonprofit entities⁵.

These benefits include, but are not limited to, the tax exemption provisions as provided for in the Taxation amendment laws and exemption from paying skills levies as stipulated in the Skills Development Levies Act, 1999 (Act 9 of 1999). Furthermore, the National Development Agencies (NDA) Act and the Lotteries Act were enacted to establish government institutions for funding of nonprofit organisations.

5.4 The processes leading up to the Nonprofit Organisations Act

The NPO Act was promulgated on the 3rd December 1997 and the first organisation under this Act was registered on the 1st September 1998. The objectives of the Act is to create an enabling environment that would allow nonprofit organisations to maintain adequate standards of governance, transparency and public accountability, while at the same time enjoying a wide degree of freedom and autonomy. The NPO Act resulted from a lengthy process of policy and legislative reform negotiated between government and civil society organisations.

Fundamentally, the NPO Act repealed much of the provisions of the Fundraising Act that constrained the activities of organisations. The initiative of the enabling environment for civil society organisations goes back to 1992 when a group of prominent people from the nonprofit and business sectors, undertook a study of several policy areas affecting NPOs in South Africa which led to a draft *Discussion Document towards a Nonprofit Organisations Bill*⁶.

This discussion document culminated from the NGO Week of December 1996 that discussed the enabling environment for the nonprofit sector. The gaps and challenges identified by the NGO sector in the mid-1990s formed the basis for a series of discussions and attempts to formulate policy principles regarding the nonprofit sector and the environment within which it operated.

Following this NGO Week, a workshop with regional and international representatives of NGO coalitions from other African countries and elsewhere was then held where the following four principles emerged to inform the notion of an enabling environment:

- A legal framework on nonprofit organisations should promote the independence of civil society, not control it;
- The regulatory framework on nonprofit organisations should allow government intervention only when absolutely necessary;

⁵In terms of section 1(x) of the NPO Act, a nonprofit organisation is defined as a trust, company or other association of persons- (a) established for a public purpose; and (b) the income and property of which are not distributable to its members or office bearers except as reasonable compensation for service rendered.

⁶ Development Resource Centre. 1992. *Independent Study into an Enabling Environment for NGOs. A participatory experience in public policy formulation*. Johannesburg.

- The laws on nonprofit organisations should promote accountability of organisations without placing on them undue burdens; and
- The law should be simple and user-friendly.

It is clear from this approach that the majority of people in the nonprofit sector interpreted the concept of an enabling environment back then- and arguable today as well- as giving organisations as much freedom to operate as possible, with minimal government interventions and ensuring some accountability to their constituencies. The purpose was to remove the remaining restrictive apartheid laws rather than for the government to control the nonprofit sector. It is for these reasons that the Nonprofit Organisations Act repealed Fundraising Act of 1978 to made it defunct and emphasis rather the importance of creating an enabling environment for organisations.

In the period after 1994, the nonprofit sector enjoyed an increasing level of freedom and self-determination following the removal of restrictive environment of the apartheid years. In this post-1994 period, the nonprofit sector has been afforded the opportunity by government to engage with and influence national and provincial policies, and to shape the way service delivery has been implemented.

6. THE RATIONALE AND BASIS FOR THE REVIEW

In January 2005, the Department of Social Development concluded the study on *'An Impact Assessment of the Nonprofit Organisations Act 71 of 1997'* which identified a number of challenges within the current regulatory framework on nonprofit organisations and it made specific recommendations⁷. A subsequent study in 2010 of nonprofit governance re-iterated the need for the review of the NPO Act⁸.

Some of the challenges emerging from these studies relate to the difficulties of monitoring an increasing number of NPOs, while attempting to ensure that public funds are well accounted for and public confidence is inspired to further support the nonprofit sector. Other challenges relate to the role of the NPO Directorate, as the regulator, to manage an efficient regulatory framework that promotes accountability and transparency and enhances standards of good governance within the NPO sector.

These challenges and other identified factors below further amplify the need for the current legal framework on nonprofit organisations to be reviewed.

6.1 *'One size fits all' approach*

Research indicates that there is a clear problem with a *'one size fits all'* approach inherent in the legal framework for nonprofit organisation as the lack of recognition given to different categories of nonprofit organisations affect them in different ways.

⁷ Department of Social Development. 2005. *An Impact Assessment of the NPO Act, No 71 of 1997*. Pretoria. Republic of South Africa. www.dsd.gov.za/npo

⁸ Department of Social Development. 2009. *Developing Good Governance Practices*. Pretoria. Republic of South Africa. www.dsd.gov.za/npo

Larger and better resourced nonprofit organisations are more likely to benefit maximally from the enabling environment because they have the capacity to comply with the regulatory requirements. Small emergent community based organisations on the other hand, are often unable to meet the minimum standards as they found them to be onerous and not necessarily within their current capacity to comply with. This point is somewhat reflected in the low levels of compliance rate of community based organisations to submit annual reports as per the requirements of the current Nonprofit Organisations Act.

A general lack of management was identified as a likely cause of the smaller emerging community based organisations' inability to comply. There will therefore be a need for the regulatory framework to differentiate between the different categories of NPOs and to align standards and the regulation regiment accordingly.

For larger organisations that have registered as nonprofit companies or Trusts, the nonprofit organisations registration is viewed as an additional burden, which sets in place lower- or inconsistent- standards than those to which they currently comply. Nonprofit companies and Trusts that have also registered under the NPO Act must concurrently comply under their respective laws as well as the NPO Act. Furthermore, in some instances, an organisation may often have to comply with three different regulatory bodies that require different kinds of information, as is the case where the organisation is also registered as a public benefit organisation (PBO) under the taxation law. Organisations then have to amend their founding documents and reporting requirements accordingly.

In effect, the current regulatory environment may lead to inevitable variances in the perceived status of NPOs, and over time, undermine the status accorded to these legal entities. In addition, the lack of integration between the different regulatory authorities leads to unnecessary duplication of government resources.

6.2 *Nonprofit sector governance practices*

The current legislation on nonprofit organisations does not necessarily contain clear regulations regarding organisations' governance, including the duties and liabilities of office bearers. The procedures for resolving poor performance of office bearers, for example, is an internal organisational matter that is largely left to internal policies of the organisations and common law. The Courts are often used to arbitrate and intervene in serious cases of bad governance or when office bearers do not fulfil their fiduciary responsibilities as there is no other avenue to deal with these matters.

Furthermore, there are different requirements for minimum number of people that can constitute the governance structure of an organisation. For voluntary associations, there is no limit to the number of people who would assume the fiduciary responsibility of the organisation. There is thus, a

need for not only describing the minimum number of office bearers in the governance structure, but to also have an extensive statutory scheme covering the duties and obligations of office bearers and their accountability in cases of violations.

It will be an important part of the review on the current NPO Act to ensure that nonprofit organisations are more transparent by improving public accountability on the governance of the organisations. Office bearers must be held more accountable for their actions and their activities should be as transparent as it can be practicable. Significant emphasis must be placed on the need for disclosure and access to information.

6.3 *The inherent constraints of the NPO Directorate*

The implementation function of the current NPO Act is the responsibility of a Directorate within Department of Social Development that does not have the requisite capacity to discharge this function effectively, despite it being given a statutory mandate to regulate the nonprofit sector. This is severely hampering its effectiveness on the nonprofit sector.

Since the enactment of the NPO Act, the Directorate has witnessed an increased number of organisations that apply for nonprofit organisations status, yet personnel capacity has remained constant and not matching this demand. This has a ripple effect on the Directorate's ability to monitor the compliance of registered NPOs. The limited financial resources made available to the Directorate put constraints on the extent of the impact of the NPO Act on the nonprofit sector.

In order to improve on the regulatory function, the Directorate needs to increase its current capacity by almost 42% to meet this increasing demand for registering NPOs and the accompanying monitoring function. It is apparent that the likelihood of achieving this within the Department of Social Development's current institutional arrangement is very limited.

Furthermore, the Directorate does not have sanction powers to enforce the provisions of the NPO Act. Where an organisation fails to report as provided for in the NPO Act, the organisation is served with a month's notice to comply. If the organisation still fails to submit the necessary reports or submit false information, its registration status is cancelled. There are no specific mechanisms available to the Directorate for holding governing bodies liable in cases of misuse or misappropriation of funds. Fraud and misappropriation of funds are governed by ordinary principles of criminal law.

6.4 *Enforcement and recourse*

The most significant deficiency in the current legislation is that it does not provide effective mechanisms for the enforcement of even those duties and obligations prescribed under the present Act. The result is that the office bearers and management of organisations are effectively immune

from legal control, except perhaps in regard to the more outrageous criminal offences.

The lack of enforcement and recourse is attributed to the high dependence on the judiciary system for punitive actions on misconducts. However, the litigation process is too often protracted and time consuming and sometimes even inaccessible due to the high costs involved. These would be contributing factors in diminishing the practical effectiveness of civil and criminal sanctions and remedies contained in the law.

Even so, there is no provision in the current legislation to appoint inspectors or to institute civil litigation if need be on the behalf of a nonprofit organisation. The increasing fragmentation of enforcement responsibility opens up the possibility of unequal regulation and regulatory arbitrage between different enforcement agencies. There is therefore a need to adequately resource a function of the regulator to investigate complaints made against a nonprofit organisation and or its office bearers with the intention to pursue administrative legal remedies and other punitive measures with the court being used as the ultimate arbitrator. These factors should be reviewed extensively with a view to balancing access to the nonprofit organisation's information to promote greater public trust on the one hand, with the enforcement of rights and the avoidance of excessive or frivolous litigation on the other.

7. GENERAL PRINCIPLES

Principles are often inter-related and as such must be holistically considered in their applications. One principle cannot be applied in the absence, or at the expenses of the other principles. This policy framework is underpinned by a set of key principles and any new development on the legal framework should adhere broadly to these principles as explained below.

7.1 *Protecting the fundamental Freedoms*

Freedom of expression, association and assembly as contained in the Bills of Rights (Chapter 2) of the South African Constitution accords these rights to person or any group to establish an organisation without any hindrance and other burdens. The new legal framework on the nonprofit organisation should therefore be made easier and inexpensive for all persons (natural and legal) to establish a nonprofit organisation and to have it legally recognised.

The nonprofit sector is a vital means of harnessing voluntary resources in the provision of assistance to that in need and it fulfils a range of positive social, cultural, religious, and educational and other public benefits purposes. Importantly, the focus of nonprofit sector on development factors, amongst others, gives expression to the fundamental human rights such as the right to dignity, health, education and others. To be

able to do these, the principle of freedom of association, should inform the regulatory framework on the nonprofit organisations.

The registration of organisations to effect nonprofit legal entities status should be subjected to an administrative review process that will ensure fairness and transparency. A register of registered nonprofit organisations must be available to the public to further enhance public confidence. Termination of registration status of a nonprofit organisation must follow acceptable due processes where the organisation is afforded an opportunity to correct and rectify its actions. The cancellation of an NPO's status should also be subjected to administrative review process by an independent body.

The primary policy objectives of the new regulatory framework on the nonprofit sector must thus emphasise the need to balance oversight with possible threats to freedom of association as a civic liberty right. This would be done by strengthening and supporting the nonprofit sector, build its capacity and protect it from abuse with minimum disruption to its many positive contributions, In this way, the new regulatory framework on the nonprofit sector would therefore preserve and encourage the dynamism of the sector while mitigating the vulnerability of the sector to abuse.

7.2 *Integrity and Good Governance*

The new legal framework must require certain minimum provisions necessary for the operation and governance of an organisation and these must be laid down in a governing/ founding document of a nonprofit organisation. A nonprofit organisation must also have the discretion to change its governance structure and operations within the limits of the law.

The new legal framework must provide for office bearers of nonprofit organisations to have a duty to exercise loyalty to the organisation, and to execute their responsibilities with care and diligence. Office bearers and other persons involved in a nonprofit organisation must avoid any actual or potential conflict between their personal/business interest and the interest of the organisation. No earnings/profits or assets must be distributed to persons involved in the nonprofit organisation nor should the assets/earnings of the nonprofit organisation be used for any personal benefits, directly or indirectly by any person involved in the nonprofit organisation.

Although basic standards of conduct should be required of all organisations, organisations must be permitted and encouraged to set higher standards through self-regulation mechanisms. Nonprofit organisations must strive to abide by norms of good governance to improve their own transparency and accountability capabilities. Efforts and measures to reduce the risk of fraud and corruption must be encouraged at all times.

7.3 *Accountability and Transparency*

One of the most significant regulatory needs is to ensure transparency and accountability on the part of nonprofit organisations. Transparency maintains public trust in individual organisations as well as in the sector as a whole. The regulatory framework must therefore encourage nonprofit organisations to produce regular reports that are readily available to the public.

The reporting requirements should, however, be made simple to complete and must also be uniformly applicable to all other regulatory bodies. The reports should at least contain the nonprofit organisation's financial and operational activities and be submitted on an annual basis. Reporting requirements must ensure that nonprofit organisations are actually using fundraised money for the purpose claimed. Any nonprofit organisation with significant public benefit activities and/or support should be required to publish or otherwise make available a report of its general finances and activities to the broader public.

The relevant regulatory authority that supervises and monitors registered nonprofit organisations should have at least the right to examine books, records and activities of nonprofit organisations. To further ensure compliance, all reporting nonprofit organisations must be subjected to random and selective audit by the supervisory organ. In addition to sanctions to which nonprofit organisations are equally subject to with other legal entities, it is appropriate to have special sanctions for violations peculiar to nonprofit organisations.

8. ISSUES FOR CONSIDERATION

It should be noted that it is not only a responsibility of the state to create an enabling environment for nonprofit organisations to flourish. The private sector, the donor community and other stakeholders including the nonprofit sector itself, also have an important role to play to create an enabling environment for nonprofit organisations.

Government's commitment in creating an enabling legal environment for a healthy and vibrant nonprofit sector requires respect to the rule of law and commitment to basic democratic processes. A well-designed legal framework for nonprofit organisations requires reasonable balances between the privileges nonprofit organisations are accorded and the responsibilities they are expected to exercise.

It will therefore be imperative for the regulatory framework to identify the fundamental rules governing the procedures for the formation of nonprofit organisations and their public benefit focus; their governance, and officer bearers; reporting requirements and the enforcement and administration in the context of encouraging nonprofit organisations to continue their own efforts of building a credible self-regulatory dispensation.

The issues discussed below will be incorporated into the new regulatory framework for nonprofit organisations incorporating the general principles as discussed above. Where the current legislation has made provisions for such issues, these will be retained in the new dispensation.

8.1 Forming a nonprofit organisation

The right to form an organisation is a fundamental human right that is enshrined in the Constitution of the Republic of South Africa. The rights to freedom of religion, belief and opinion; of expression and of association as contained in the Bill of Rights (Constitution) are essential for the formation of nonprofit organisations. This means that everyone has the right to associate with other people and form organisations and to express themselves in whatever way they choose provided that this is done within the law.

Based on these fundamental principles of the Constitution, the current legal framework for nonprofit organisations serves to provide a registration facility for organisations to incorporate and acquire formal '*legal personality*'. This '*legal personality*' status of organisations protects the principals of such an organisation from personal liabilities pertaining to the affairs of the organisation and allows them to enter into contracts, incur debt, sue and be sued, and to engage in other transactions in the name of the organisation without putting their personal assets at risk.

The current legal framework provides an organisation such *legal personality* and it encourages the formation of organisations of different sizes in society. This is important, since nonprofit organisations in South Africa play a critical role in societal change and stability that is vital for our functioning democracy. Individuals should be accorded the protection of personal liability if they want to form a nonprofit organisation for public benefit purposes.

The mandatory provisions within the legislation that organisations should comply with must therefore be retained and in addition, optional and voluntary requirements should be allowed in the event where the legislation is inadequate. There will also be a need to establish the minimum number of office bearers required to constitute the governance structure of nonprofit organisations. This minimum number of office bearers' requirement must be consistent with existing provisions of other legislations affecting the nonprofit sector.

It is the intention of the review of the current legislation to simplify registration requirements so that ordinary persons can form and register a nonprofit organisation. Key to this intention will be the establishment of the minimum number of office bearers required for constituting the governance structure of the nonprofit organisation. In attempting to simplify formation procedures, the new legislation should take cognisance of the fact that one other key function of registering an organisation, as a nonprofit organisation, is to permit other regulators within government, including the

taxation services, to have sufficient information to enable them to perform their tasks.

It is therefore proposed that the process of registering a nonprofit organisation should be automated as far as possible and, in many instances; formation should be done entirely through electronic filing. In order to create a simple and easier registration process, only the essential information should be required. The process of updating this information should be as simple as possible to reduce the burden on the organisation, and also to ensure that stakeholders, particularly donors and funders, have sufficient information about the organisation to assess the risk of working with the organisation.

The regulation of foreign organisations that have established a presence in South Africa requires special consideration. A simple process that allows foreign organisations to be registered and maintained in South Africa must be developed, while providing for recourse in cases of misconduct and winding up, particularly with respect to liabilities for debts, the duties and fiduciary responsibilities of the foreign office bearers and inter group transactions. Foreign nonprofit organisations must equally be subjected to the same requirements and obligations as that of any registered nonprofit organisation. However, registration for foreign nonprofit organisations must be compulsory considering the risk of money laundering and financing of terrorist activities.

Finally, it is important to recognise that nonprofit organisations vary in size, scope and income levels. These attributes provide an adequate basis for differentiation. Therefore, a risk-based and proportionate approach will be appropriate when dealing with nonprofit organisations where their assets, services, beneficiaries or reputation are at risk of serious abuse or damage.

8.2 Risk-based approach for monitoring compliance

The nonprofit sector is diverse and organisations take different legal forms. Uniform compliance standards will therefore be difficult to implement as there can be no *'one-size-fits-all'* approach to regulating the nonprofit sector given its diversity. Different types of nonprofit organisations present different regulatory challenges. These factors underscore the importance of implementing a risk-based approach in regulating the nonprofit sector that is appropriate to the organisation's risk profile.

The risk profile should be commensurate with the size and income levels of the organisations. The larger the size and the higher the income levels of the organisation are, the more vulnerable and at risk the organisation can be deemed to be. Specific risk assessment tools will have to be developed to ascertain the levels of risk and to determine the proportionate information required of the organisation to submit, as part of the compliance requirements of the regulatory framework. This information should be made available to the public to further strengthen public trust and confidence in the nonprofit sector.

The risk assessment tools may use different criteria such as whether the organisation is involved in raising and distributing funds, the amount of money involved, the geographical localities of its activities, and the track record of any partner or beneficiary organisations and their officers. This risk and proportionate framework will guide the compliance work which should be able to explain the regulatory compliance work when dealing with nonprofit organisations whose assets, services, beneficiaries or reputation are at risk of serious abuse or damage.

Any sanction action that will be taken against a nonprofit organisation must be evidence-based and proportionate, and should be fair and reasonable. Due consideration will be given to the issues, the risk involved to the nonprofit organisation and its beneficiaries including the capacity of the organisation to comply.

This risk-based and proportionate approach will allow the regulator to better prioritise resource allocation in terms of the risk levels of nonprofit organisations. This approach is based on international best practices as it ensures that appropriate action is taken and there is accountability, consistency and transparency in the process.

8.3 *Engendering standards of good governance*

There are common threads that sustain the nonprofit sector despite the diversity and heterogeneous nature of this sector. One of such thread is the desire to ensure excellence in the sector, through improved governance processes that strengthen transparency and accountability. The nonprofit sector has acknowledged that the leadership of an organisation have a responsibility to foster an organisational culture and practice that is consistent with the prevailing values and mission of the organisation as well as with generally acceptable sound practices. The ethical behaviour of any leadership of an organisation is a critical aspect of its ability to retain and inspire public trust.

Nonprofit organisations are increasingly realising the importance of good governance as an organisational imperative. The nonprofit organisations regulatory framework should therefore continue to engender these standards of leadership and good governance within the nonprofit sector.

Good governance is a make-up of sound principles and practices that are essential to the effectiveness, success and long-term sustainability of nonprofit organisations. The governing body or board of any organisation needs to be guided by a set of key good governance principles. The following principles, all informed by the principle of equality, provide a framework for governance bodies or boards of organisations to focus on good governance.

- Every nonprofit organisation must be led and controlled by an effective governing body which collectively ensures that the organisation meets its objectives and uphold its values.
- The members of the governing body must collectively be responsible and accountable for ensuring and monitoring that the organisation is performing well and complies with all its obligations.
- The governing body must have clear responsibilities and functions, and should compose and organise itself to discharge them effectively.
- The governing body must periodically review its own performance and the overall effectiveness of the organisation, and take any necessary steps to ensure that both continue to work well.
- The governing body and individual members must act accordingly to high ethical standards, and ensure that conflicts of interest are properly dealt with.
- The governing body must be open, responsive and accountable to its users, beneficiaries, members, partners and others with an interest in its work.
- The governing body must give everyone in the organisation an opportunity to input into the affairs of the organisation, i.e. in the form of leadership change and content contribution.
- The governing body must strive at all times to promote higher standards of good governance and acceptable practices.

These principles are pragmatic enough to be implemented by a variety of organisations and are also flexible to allow each organisation's governing body and management to adapt them to the dictate of organisation's mission and scope.

The office bearers of a nonprofit organisation bear the ultimate responsibility for the effective and efficient management of the organisation through its governing body. It is the duty of the office bearers to maintain high standards of governance in accordance with the organisation's founding document and other related policies.

Based on the essential governance principles, the legal framework must entail a set of rules that will govern the rights and obligations of the office bearers as the responsible people for the governance of the nonprofit organisation. These set of rules should also include the scope of liability of the office bearers for acts of the organisation, their responsibility to the organisation, their level of authority in executing and dealing with financial and other matters. There should be a clear set of rules of what constitute conflicts of interest.

8.4 Self-Regulation and Accountability

Despite the diversity and heterogeneous nature of the nonprofit sector, there are indeed common threads that sustain the nonprofit organisations.

An increased level of scrutiny, and complexity of questions being asked of the sector have resulted in the development of a range of different accountability mechanisms and tools designed to strengthen operational capacity, management structures, performance measurements, accounting practices and delivery systems. These efforts have inspired the desire within the nonprofit organisations to ensure excellence in the sector, through improved governance processes that strengthen transparency and accountability.

One of the international benchmarked prominent means of strengthening accountability and transparency is through the nonprofit sector's self-regulation efforts expressed in codes of conduct, codes ethics and good practices and other certification schemes. The emergence of fraudulent NPOs that have no legitimate purpose other than to take advantage of the foreign funds available for NPOs undertaking development work can be directly linked to lack of self-regulation in the nonprofit sector. Without some form of regulation, confidence in the nonprofit sector will diminish, particularly as a result of the abuse of funds and the emergence of fly-by-night NGOs and Briefcase NGOs (BRINGOs).

Regulation in the sector must ensure that there is accountability to donors and their beneficiaries who they provide services to or on whose behalf they speak. Self-regulation therefore enables the nonprofit sector to retain public trust and confidence, which is the cornerstone of the existence of nonprofit organisations, their relationship and image. Nonprofit organisations are more trusted than any other actor in society because of the values they espouse. Any actions or criticisms that undermine this base can have a significant impact on the ability of NPOs to carry out their activities.

In the context of the prevailing good governance discourse, it is important to have a sense of the factors and developments that are driving initiatives around self-regulation of the NPO sector. While some NPOs are addressing the issues of accountability individually through their own effort of self-regulation, many are also tackling it collectively through networks and other coalitions. A growing number of networking and coalition organisations are attempting to develop a set of common norms and standards to which they will hold themselves and their member organisations accountable. These efforts of the nonprofit sector to demonstrate good governance and care should be recognised as peer group pressure and moral persuasion can be effective tools in promoting a culture of transparency.

In most instances, self-regulatory measures overlap with the provisions of the mandatory regulatory requirements. Although self-regulation may not have the force of law, it still has the force of contract and the power to sanction organisations where there is violation on agreed code of conduct. Well informed self-regulation measures of nonprofit organisations should therefore be encouraged and can complement the prudent legal framework for nonprofit organisations.

There is a need to strike a balance between the mandatory regulatory provisions and the self-regulation requirements so as to preserve the soundness and integrity of the nonprofit sector. This will not only ensure that nonprofit organisations maintain high level of accountability and transparency to inspire greater public confidence and trust, but will also afford organisations the support they need to pursue their various missions and the flexibility to adapt to the changing needs of society. The principles of good governance are significant in this area for standards setting and the self-regulation can afford such an opportunity.

Therefore the initiatives of the nonprofit sector on improving its self-regulation mechanisms should be encouraged and the mandatory regulatory framework should be able to make provision for co-existence with a self-regulatory dispensation within the nonprofit sector.

9. INSTITUTIONAL MECHANISMS

It will be important to review the administration and regulatory mechanisms to ensure that:

- a world class nonprofit sector is promoted;
- regulatory obligations are effective and efficient;
- administrative infrastructure, systems and procedures facilitate and ensure compliance with the legal framework.

Equally important within the NPO legal framework will be an ombudsman function that will assume the responsibility of a trusted intermediary role between the regulatory authority and the nonprofit sector. This function can be assumed by the Arbitration Tribunal working in concert with the nonprofit sector and the regulatory authority.

9.1 Administration and enforcement

The primary objective of the NPO legal framework will be to ensure that through a proper system, it encourages good governance, disclosure and accountability within the nonprofit sector. Punitive actions need to be taken to discourage any wrongdoing. The decriminalisation of any wrongdoing is essential to ensure more effective and credible redress. However, criminal and personal liability as an enforcement mechanism is dependable on the availability of resources for stakeholders and communities to pursue legal recourse through the courts.

Experience has shown that the criminal justice system on its own is ineffective to enforce compliance and this method by itself is inherently defective. Rather than shifting the burden to shareholder enforcement, an independent and suitably empowered body is necessary and should be charged with the duty to ensure compliance with the regulatory framework and that wrongdoers are brought to book effectively and efficiently.

While the continued role of criminal and civil courts in enforcing the law is not questioned, there is also a need for a body with the power to issue

administrative orders and impose other measures to ensure the quick resolution of some non-compliance matters, especially those relating to internal organisational conflicts. Thus, a combination of criminal, civil and administrative remedies should be introduced. In addition, measures to disqualify persistent violators from access to funders and other benefits and to promote dispute resolution should also be considered. To make this possible, a new institutional arrangement is therefore proposed to implement the regulatory framework on nonprofit organisations.

The institutional arrangement consists of a nonprofit organisations regulatory authority, an arbitration panel and an advisory committee. These institutions are further explained below.

9.1.1 The South African Nonprofit Organisations Regulatory Authority

The proposed new South African Nonprofit Organisations Regulatory Authority (SANPORA) will have a mandate to encourage the formation of nonprofit organisations and their accountability through an efficient and effective registration facility that will create greater transparency and public confidence in the nonprofit sector. This mandate will be met through an efficient registration function for nonprofit organisations, education and awareness raising, dissemination of information on nonprofit organisations and enforcement of the law.

9.1.1.1 Registration of nonprofit organisations

The vision for nonprofit registration and the maintenance of that registration is to ensure an efficient service that is effective and imposes minimal constraints on the nonprofit sector and its donor community. The nonprofit registration service will have to be transformed into an efficient electronic registration service with expedited turnaround times. It will also allow nonprofit organisations to register or to update information through direct web online access.

Transitional arrangements will however have to be considered to ensure that this transformation does not cause undue disruptions to the organisations and to the internal processes. To this end, the new dispensation will have to also allow for paper based system for those organisations that cannot access the electronic system. This is more critical to ensure equitable access to all our client organisations without discriminations.

Access to registration services will need to be facilitated geographically, to ensure that all South Africans, even those in remote areas, are able to access the service. Additional services will need to be provided to those South Africans who are not computer literate or do not have

access to the internet. A network of partners will be considered, which could include provincial department offices, to ensure easy access on a national basis. In addition, electronic searches of nonprofit names and other nonprofit information will be available to expedite the service. Services will continue to be provided on a non-payment basis to encourage access to a diverse group of people, ranging from the lower to higher end of the market.

Many of these transformation imperatives are already underway in the Nonprofit Organisations Directorate. It will, however, require further emphasis on the transformation of NPO Directorate from a people intensive function to a largely systems oriented institution that can provide acceptable quality service to nonprofit sector and the broader public that is in line with best international practices.

In addition to the above transformation imperatives, the accountability of the registration service to its clients (nonprofit organisations) is paramount, especially in view of the fact that the registration service will be offered on a no-user-pay principle to enhance public accessibility and accountability. To this end, service standards will be developed and published. Updated information on meeting the standards will be regularly published.

9.1.1.2 Investigation and enforcement

In addition to the above core functions, another key activity of SANPORA will be to ensure that stakeholders have recourse and redress through the effective enforcement of their rights. The intention is not to create a body that will continually interfere in the affairs of organisations. Rather, the intention is to create a body that can, and should when needed, act swiftly and effectively to ensure compliance, prevent wrongdoing and enforce punitive measures.

The approach on investigation and enforcement should emphasise corrective measures in promoting the spirit of the legislation of creating an enabling environment for the nonprofit sector. Advice and guidance will be provided to an organisation to rectify any non-compliance challenges they are faced with. The aim will always be to put the organisation back on a proper footing without the need to intervene. All investigations will follow specific transparent processes that involve gathering information, analysing the information and making the outcomes of a formal inquiry available to the public.

9.1.1.3 Awareness and education

Funders and communities are increasingly requiring nonprofit organisations to adopt higher standards of ethics and conduct their affairs in a transparent manner. A significant proportion of SANPORA services will therefore be on providing nonprofit organisations with advice and guidance, helping organisations to comply with the legal obligations and improving their knowledge and understanding of best practices. Another important function will be to educate office bearers about their duties and responsibilities and to facilitate their access to accredited training programmes to enhance nonprofit governance and ethics. This will not only help organisations to work more effectively, but also increase the public understanding and support for the nonprofit sector.

Easily accessible and user-friendly information on new nonprofit law should be made available and disseminated. In addition, 'user notes' and guidelines will be made available to guide the public and specific shareholders, but also to promote voluntary compliance by nonprofit organisations.

SANPORA will also need to initiate campaigns to promote registration of voluntary associations in the rural and other disadvantaged communities and to educate smaller community based organisations about the benefits. Specific outreach programmes will need to be put in place.

9.1.1.4 Public access to information

As SANPORA will have access to key information on the nonprofit sector, it will be important that information is available to the general public. Stakeholders, including communities and potential funders, should be able to access relevant information with ease.

On regular basis, analytic information on the nonprofit organisations will be made available. This may require additional research on the nonprofit sector, their income levels and contribution to the South African economy.

This information will be available electronically and in a user-friendly manner through SANPORA. Where possible, links to individual nonprofit websites will be established. Furthermore, additional information may be added to the nonprofit information, such as any unscrupulous activities or any instances of potential risks that an organisation may get involved in.

Information dissemination and availability will enhance the ability of policy makers and funders to make policy decisions about the sector and will increase transparency in the sector. It will further enable the "blacklisting" of organisations that have been involved in unscrupulous practices to be known and to be dealt with accordingly so as to protect the sector and avoid prejudicial generalisation of the sector.

9.1.2 The South African Nonprofit Organisations Tribunal

It is proposed that, in addition to the new SANPORA, the existing tribunal and appeal mechanism should be equally strengthened to adjudicate certain matters brought under the new legislation. This new South African Nonprofit Organisations Tribunal (SANPOTRI) should be an independent body from SANPORA and it will continue to play a mediatory role between SANPORA and the nonprofit organisations. Its decisions should be binding to all parties concerned.

While there is currently a consolidation of administrative tribunals into the High Court and Supreme Court of Appeal, a compelling case can be made for other matters on nonprofit sector to be dealt with through a separate administrative body that has experience in nonprofit sector matters and that can expedite the adjudicative process. In particular, where there is in-fighting within nonprofit organisations, the SANPOTRI can arbitrate disputes within organisations that should be binding to all parties concerned.

As a matter of principle, many disagreements and disputes can be settled outside a court or tribunal system through less formal mechanisms. It may not be necessary to create a new institution for this purpose, as existing mediation mechanisms may be explicitly recognised in law. However, there will be a need to capacitate this function to effectively execute its mandate.

9.1.3 The Technical Advisory Committee

While SANPORA will necessarily make inputs into amendments and reviews of the nonprofit law, the consideration role should be given to an Advisory Committee consisting of experts and other role-players within the nonprofit sector that would provide independent inputs to the Minister of Social Development.

If our legal framework is to be effective and robust, the legislative and institutional framework that underpins it should ensure that the regulatory framework continues to keep pace with the changing needs and expectations of the nonprofit sector and the broader society. The legal framework should be updated so as to keep abreast with the best international practices and be able to deal with the changing environment within which the nonprofit sector

operates. There will therefore be a need to constantly review the legislation for nonprofit organisations. Appropriate institutional support, such as a technical advisory committee or working group will be critical to achieve this objective.

9.2 The Regulator Authority organisational form

Section 10 of the Public Service Amendment Act 30 of 2007 makes provision for a government service component as a separate entity from a government department. This new organisational form should provide for a specialised direct public service on a larger scale through a focussed and fully ring-fenced entity that still remains and reports to the responsible Minister.

This government organisation component provides an institutional mechanism for the delegation or assignment of a government function to a government agency within the public service without having to assign a separate juristic person (public entity) outside the public service. The SANPORA can easily meet this criterion of a government component as contemplated in section 10 of the Public Service Act.

By taking this organisational form, SANPORA will have its own administrative and operational arrangement that can be customised to suit the required service delivery environment. It will also be easier to transform the NPO Directorate into a government component as the staff members will remain public servants. The existing staff members do not have to resign when they take up positions in SANPORA. This will therefore ensure continuation and retention of existing staff members who have gained critical competence skills over a period of time.

It is envisaged that SANPORA will also provide the necessary infrastructure support for both the SANPOTRI and the advisory committee that would consist of people drawn from the nonprofit sector and not necessary being full time public servants.

10. CONCLUSION

It is envisaged that the Regulatory Reform on Nonprofit Organisations will proceed through three separate stages, that is:-

- consultation and finalisation of the policy framework;
- the drafting of a memorandum based on this policy document;
- and the drafting, publication and consultation on the new nonprofit organisation legislation.

This policy document will be presented to a range of stakeholders, first internally in government, and then externally to stakeholders and the nonprofit sector. Provincial workshops and road-shows were held as part of this consultation process that culminate into the National Summit of nonprofit organisations to further consolidate issues raised and inputs received.

Concurrent with public consultation on the policy framework, the Department, with the assistance of a local working group of experts supported by some international experts where required, will prepare a drafter's memorandum,

which will inform the new legislation. In preparing such a memorandum, current legislation, as well as international practice and regulatory provisions will be studied. The final document, drawn from inputs and feedbacks from all the different stakeholders and role-players, will clearly outline the thinking, and should be consistent with this policy framework.

The final stage in arriving at the new Regulatory Framework on Nonprofit Organisations will be the process of drafting the new law. This process will be based on the drafter's memorandum, giving effect to the policy. Once the new law has been drafted, both the legislation and the drafter's memoranda will be made public and extensive consultation on the new law will ensue. It is anticipated that the new legislation will be made public for further inputs. Given the nature of the topics to be discussed and the potential impact on the nonprofit sector, it is imperative that the process should be transparent and consultative and that all outputs should be widely publicised.

Due to the extensive nature of the proposed reform, an interim review of current legislation will be performed to deal with problematic provisions. Any amendments should be in line with the philosophy outlined in this policy framework.

A concurrent and equally important process is the establishment of the institutional framework. This will involve, as a first step, the transformation of the NPO Directorate into an efficient, sustainable and service oriented regulatory authority. A fundamental transformation of the systems, processes and organisational orientation will be necessary. Steps will be taken to ensure that the institutional framework envisaged in this policy framework is fully operational when the law comes into effect.

The functions of the NPO Directorate can easily be transformed into the envisaged SANPORA in this new organisational form of a government component where direct control and influence still remains with the Minister as the executive authority. This will allow greater flexibility to deliver an efficient regulatory oversight services to nonprofit organisations with appropriate government accountability arrangements within the same Budget Vote of the Department of Social Development. A feasibility study that will culminate in a business case on the motivation for such a government component (SANPORA) will be conducted to satisfy the requirements of the Public Service Act.