

A new NPO Act for South Africa:

The implications of the proposed new policy framework for South African civil society



Background

Inyathelo: The South African Institute for Advancement commissioned a research report in October 2013 when it became evident that government was exploring the implementation of a new NPO Act.

In line with its mission, Inyathelo seeks to strengthen the civil society sector and this includes playing a role in ensuring that there is an enabling environment for the sector to flourish. We have therefore been tracking progress on the new NPO framework and believed it was time to engage with experts on non-profit law, the NPO Directorate itself and others who are interested in the viability of the sector in order to gain a clear understanding of what is proposed and what process is envisaged by government in taking this forward.

Context

The current Non-Profit Organisations Act, No 71 of 1997 replaced the former Fundraising Act which had been aimed at stopping funding to organisations advocating for democracy. The critical issue of self-regulation versus governmental regulation was fiercely debated but the NPO Act eventually settled on a system of voluntary regulation based on the principle that transparency is the most effective accountability mechanism.

Fifteen years on, and the principle of voluntary regulation is under pressure due to changes proposed by the Department of Social Development (DSD) to the legislative framework governing NPOs.

Methodology

Twelve interviews were conducted with government officials, legal experts and civil society representatives, including two NPO lawyers, five NPO Directors and three officials from the Department of Social Development, including the Chief Director of the NPO Directorate.

The key policy documents referenced in the report are recommendations from the provincial ministerial dialogues (2012), the report titled "An Impact Assessment of the NPO Act No 71 of 1997" (Umhlaba Development Services, 2005) and the "Assessment Report on the Practical Implementation of the Codes of Good Practice" (2009). With regard donor positions on regulation, the 2005 impact assessment report was used to cover donor views.

Proposed Policy Amendments

According to DSD, the proposed changes are based on research and consultations with civil society organisations. Their document, *Policy framework on non-profit organisations law: Proposed Amendments to the Non-Profit Organisations Act, Act 71 of 1997 (31 July 2012)*, makes the following proposals:

Proposal One: *“It is the intention of the review of the current legislation to simplify registration requirements so that ordinary persons can form and register a non-profit organisation”.* Automation of the system of registration is suggested as a solution to this. A “one size fits all” system of registration, as is currently the case, should be abandoned, and differentiated registrations developed on the basis of a risk assessment. Of all the recommendations, this one finds broad support in evidence gleaned from the interviewees and relevant reports.

Proposal Two: Compulsory registration of foreign NPOs must be implemented to mitigate the risk of money laundering and the *“financing of terrorist activities.”* This is a new issue, which does not arise in the 2005 impact assessment report, the 2009 good governance report, or the 2012 dialogues and summit. The 2005 impact assessment report is neutral on the issue of compulsory registration generally, although it acknowledges it as a “key debate”.

Proposal Three: A new set of governance rules must be implemented *“that will govern the rights and obligations of the office bearers as the responsible people for the governance of the non-profit organisations.”* This mandatory framework would exist alongside self-regulatory frameworks. The 2005 impact assessment report raises this issue under the question of standards of governance, transparency and accountability. It suggests that NPOs’ capacity to manage their affairs and deliver high quality services is generally weak but does not recommend a new set of governance rules.

Proposal Four: The policy framework proposes the introduction of a regulatory authority and an advisory committee. The proposed South African Non-profit Organisations Regulatory Authority (SANPORA) would be created in terms of section 10 of the Public Service Amendment Act 30 of 2007 to encourage the formation of NPOs and their accountability through a *“registration facility that will create greater transparency and public confidence in the non-profit sector”.* The authority would be equipped with investigative and enforcement powers to *“act swiftly and effectively to ensure compliance, prevent wrongdoing, and enforce punitive measures”.* It would be tasked with educating and advising organisations on their governance responsibilities and providing support for those organisations that are not able to access current systems.

Legal environment in Kenya, Brazil and India

We compared South African NPO laws to the legislative environment in Kenya, Brazil, and India.

South Africa has, in contrast with India, revised the legislative regime for NPOs since the end of colonial rule and apartheid. However, in India, small organisations are generally able to register without professional help, which is not the case in South Africa.

The experience in Brazil points to the value of having an apolitical system of registration, as in South Africa. The level of violence and intimidation in Brazil however is certainly higher than in South Africa. In Kenya, the NPO registration authority seems similar in operation to South Africa's NPO directorate. However, Kenya has an NPO tribunal with all the powers of an ordinary court, unlike Brazil and India.

Recommendations to the Department of Social Development in response to the Policy Framework for new NPO Act:

- We request that the NPO Directorate undertake widespread consultation and effective engagement with the full spectrum of non-profit organisations and not only those that are grantees of the provincial departments of Social Development.
- We support the simplification of registration requirements.
- We propose that the system of registration be automated and differentiated according to an organisational budgetary threshold based on a risk assessment.
- We reject the implementation of mandatory governance rules or codes by Government. Civil society's independence is underpinned by its right to self-regulation. In this regard, we request recognition for The Independent Code of Governance for Non-Profit Organisations in South Africa.
- We reject the proposal to give the South African Non-profit Organisations Regulatory Authority (SANPORA) "investigative and enforcement powers" that include the ability to "enforce punitive measures". We recommend that the SANPORA should remain focused on its registration and supportive role.
- We reject the proposal that decisions by the South African Nonprofit Organisations Tribunal (SANPOTRI) "should be binding to all parties concerned". NPOs should be allowed to appeal decisions made by SANPOTRI through the courts.
- We recommend that the compulsory registration of foreign NPOs be more thoroughly debated and only implemented once there is conclusive evidence that current policies and tax systems are not sufficient to mitigate the risk of money laundering and the financing of terrorist activities.