

# **Establishing and maintaining the formal structures of a CBO**

## **Level 4**

### **- Facilitator Guide -**

#### **The development practice project**

These learning materials were generated by the Development Practice project, hosted by the [Sustainability Institute](#) and in partnership with the [Community Connections](#), [AIDS Consortium](#) and [Keystone](#). This project generated a set of competence standards with development practitioners in Cape Town, Johannesburg and Durban, between 2005 and 2009. This manual is part of a set of materials consisting of a competence standard, learner's manual, facilitator's guide and an assessment tool. More information on this project is available on the [Development Practice](#) website.



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## SOME NOTES ON FACILITATION SKILLS

### What is facilitation?

Facilitation is the process of making learning easy. This is done through the use of various approaches such as small group discussions, debates, question and answer sessions, personal reflection and sharing, experiential activities and practical exercises. You allow participants to discover solutions for themselves and encourage them to internalise lessons learnt, rather than lecture on topics.

### Your role as the facilitator is to:

- Give direction to the group
- Create a comfortable and friendly environment for the group
- Observe what goes on in a group
- Identify the main needs of the group
- Learn ways to address these needs
- Adjust to the level of the group – in language, content, presentation, and pace.
- Apply and practice these skills in many different situations



## Key principles of facilitation

**Confidentiality:** What is shared in the group remains in the group. Personal and sensitive information will not be told to others. However as evaluations of the course need to be done, and lessons learnt from each course, obviously you will need to discuss some of the content with your colleagues.

**Respect:** We should respect each other's opinions and experiences, even if they are different from our own or we do not agree with them –this includes the facilitator, who needs to model respect for every learner's opinion and contribution, and to make sure that s/he provides opportunity for all to participate.

**Non-Judgmental:** It is fine to disagree with another person's point of view but not to judge or put down another person because they do not feel the same as you do. This is particularly important because as a facilitator you have a lot of power in the group (people look up to you) and so you need to make sure that you do not appear to judge or dislike someone.

**Use I-statements:** Using I-statements ensures that the view you are expressing comes from you. It also shows confidence and assertiveness. It clarifies that you are speaking for yourself and not for the group.



**Integrity:** Walk your talk! Be a role model for the group. For example, the ground rules apply to the facilitator the same as for the participants – if it says cell phone silent, do not answer calls in the workshop!

## Do's and don'ts of facilitation

| Do's  | Don'ts   |
|---|--|
| Plan and prepare for sessions in advance                  | Create a long dialogue with one participant                |
| Show interest when listening                              | Criticise on a personal basis                              |
| Use simple language                                       | Dominate the group   |
| Act responsibly   | Be biased  |
| Be patient  | Be insensitive   |
| Allow participants to discover                            | Allow Domination   |
| Encourage active interaction                              | Go beyond time allocated                                   |
| Ask for suggestions from the group in answering questions | Exaggerate enthusiasm about delivering session – be false. |



## Critical skills of a facilitator

**Listening:** You pay attention to what is being said, show interest by nodding your head and maintaining eye contact. Allow the speaker to finish without interrupting (unless they are dominating the group and haven't allowed others to speak).

**Paraphrasing:** You repeat what the person said using your own words (i.e. interpret or reword). This is to ensure you understand and are not making assumptions.

**Summarising:** You sum up by going over the main points. You help participants to gain a better understanding of the subject.

**Creativity:** You must always have a plan B. Be imaginative and stimulated. Make your sessions fun yet educational by ensuring that the group does not miss the learning points. You know when and how to use humour (without being offensive), ice-breakers and energisers. Identify different ways of achieving the objectives without compromising the quality of the session.

**Awareness:** You pay attention to what is not being said in the group, people's unspoken needs and watch out for group dynamics that need attention. You are able to "read" the energy and level of the group and adjust your programme accordingly.



## Qualities of a facilitator

| Good                   | Bad                                  |
|------------------------|--------------------------------------|
| Punctual and organised | Disorganised                         |
| Presentable            | Messy, no care taken in presentation |
| Confident              | Low self-esteem                      |
| Assertive              | Passive                              |
| Friendly               | Rude/impolite                        |
| Knowledgeable          | Uninformed                           |
| Approachable           | Intimidating                         |
| Creative and flexible  | Rigid and unaccommodating            |

## The difference between facilitation and presentation

| Facilitation   | Presentation                                       |
|--|--|
| Interactive process  | One way process                                    |
| Use of different methods of approach   | More formal  |
| Participants discover for themselves   | Audience receive the message                       |
| Facilitator works with participants as a team                                  | Presenter delivers the message                     |
| Use different ways of facilitating (e.g. Role plays, debate, small groups etc) | Use one way of presenting – normal “lecture” style |

## Tips for being a good facilitator

- Remember that you are a role model. Do your best to practise the behaviour you are talking about
- Keep studying and researching, learn about the issues, develop leadership skills
- Share information, be open to new experiences – there is always something to learn
- Ensure you give accurate and updated information
- Understand your target audience
- Use target/ age appropriate activities
- Always strive to keep to time
- Use Ice-breakers and energisers that add value to sessions (and where possible, link to the content presented)
- Keep your mind open and flexible
- Have fun, love and enjoy what you are doing



## OVERVIEW

These notes are to support the training and facilitating for the competency standard: **Establishing and maintaining the formal structures of a Community Based Organisation.**

Many community organisations emerge to meet the needs in community and operate for many years in an informal and unstructured way. If you visit the poorest areas in South Africa, or even the most remote part of the country, you will nearly always find a small community project or someone working hard to improve the community in which they live. Community organisations are a vibrant and important part of civil society, that often fill the gap between the needs of the people and the services that government is unable to provide. It is the work of many small, dedicated groups of community volunteers and passionate development workers that are essential to the development and growth of our communities.

Community organisations take many forms and have many different purposes. During Apartheid many community organisations played an active role in the struggle and were activist in nature. Now many community organisations exist to provide support to the community or a service that the government cannot. From their history and their role, many community organisations are very informal in structure and operation. This course should not suggest that every community organisation needs to adopt a more formal structure. For most, if they are functioning well as they are, they may choose to remain that way.



However, sometimes under-pressure from the growing need in the community, in order to gain credibility or the desire to get financial support from funders who expect certain structures, community organisations choose to organise themselves in a more formal way. They decide what kind of organisations they want to become (legal structure), develop the rules and procedures for how the organisation will be run (founding document/ constitution), select a group of people who will oversee and guide the organisation (governing body), and then ensure that there are people to do the work (staff with a management structure). It is important as a facilitator not to dictate any one structure to these organisations that have often been functioning in an autonomous way for many years, but to suggest options (and why this could be beneficial) and to educate on those areas that are legally required. Many of the suggested structures and approaches covered in the learner's guide can be adapted to suit differing organisations and environments. For that reason, it is important to have knowledge of NPO governance, the legal requirements for NPOs and to keep up to date with these areas. Some information is included at the end of this manual but things change and so it is important to keep up-to-date with current developments.

It is also important to remember that a number of the processes (and activities) described in the course, need to be implemented by all the members of the organisations to build accountability and ownership of the organisation. For example, the visioning exercise can be done for learning purposes during the training but if only a few representatives of the organisation are present, it should not be seen as the final version.



This course is for those community development workers who are either in an informal community organisation that would like to formalise, or for those who are in the process of establishing a new organisation. It will even be useful to those well-established organisations as a way to improve and maintain the formal structures of their organisation.

The learner guide, accompanies the facilitated programme of activities, and should be followed up by practical 'on-the-job' experience and practise (supported by a mentor if possible).

Below follows the Specific Outcomes and Assessment Criteria that the course is based on. This means that at the end of the learning period, participants should be able to practice all the points listed below. Remember to remind participants to keep and file proof of their work. At the end of each section in the workbook, there is a symbol for checking understanding – you can use these questions to check the understanding of the participants.

Please read the competency standard below carefully.



## SPECIFIC OUTCOMES AND ASSESSMENT CRITERIA

| Specific outcomes  | Assessment criteria  |
|--|--|
| <p><i>Competence in this standard means that the learner has clearly shown that s/he is able to...</i></p> | <p><i>Tasks and activities completed by the learner contain the following evidence of competence...</i></p>  |
| <p>Identify community needs in a defined context</p>   | <ul style="list-style-type: none"> <li>• Hypothetical or actual descriptions or records of how members of the constituencies could be assisted to identify problems that need to be addressed.</li> <li>• Needs are prioritised</li> <li>• The assets and capabilities that exist within the target constituency are mapped.</li> <li>• The relevant factors that could support or threaten success are identified</li> </ul>                                      |
| <p>Develop an organisational mission and vision</p>  | <ul style="list-style-type: none"> <li>• Different ways to develop a vision and mission are listed</li> <li>• A vision of success for the project (its specific objectives - what it intends to achieve) – what they hope to achieve and what success would look like – is developed and explained</li> <li>• A mission is developed and explained for a specific case</li> <li>• Knowledge of an inclusive and participatory approach is demonstrated.</li> </ul> |

|   |  |
|---|--|
| <p>Develop a plan to establish a CBO</p>                                    | <ul style="list-style-type: none"> <li>• The advantages and disadvantages of available organisational forms (volunteer association, section 21, NPO etc) are described</li> <li>• An appropriate institutional form is selected and justified</li> <li>• Knowledge of the legal environment is demonstrated (and where to seek advice on institution-building)</li> <li>• Essential elements of a model constitution are understood and listed</li> </ul>  |
| <p>Demonstrate an understanding of basic guidelines for good governance</p> | <ul style="list-style-type: none"> <li>• Guidelines for an appropriate governance structure are discussed.</li> <li>• Basic roles and responsibilities of governing bodies, in particular the oversight role vs the management functions are explained and discussed</li> <li>• The difference between the management and oversight functions are discussed</li> <li>• The steps for the establishment of the institution are listed</li> <li>• Mechanisms to support good governance are described and explained– such as code of conduct, annual AGMs, the need for board evaluation, regular meetings and competent records of meetings etc.</li> <li>• Useful qualities and capabilities for members of governing bodies are identified (Financial know-how, credibility with community, integrity, participatory leadership, relevant technical expertise)</li> </ul> |



|  |  |
|--|--|
| Design an appropriate management system                  | <ul style="list-style-type: none"> <li>• Identify leadership roles and responsibilities</li> <li>• Identify operational functions</li> <li>• Appropriate decision making procedures are described (individual authority; relationship to the board; extent and limits of decision-making authority)</li> </ul>   |
| Identify networks to help support organisational mission | <ul style="list-style-type: none"> <li>• Possible collaborative relationships to enhance intended outcomes are explored, the organisation’s capabilities (what they are able to do) are described</li> <li>• Organisational needs are noted and where to source relevant training or expertise is discussed</li> <li>• Relevant networks are identified and there is evidence of participation in these</li> </ul> |

**Note:** Tasks may be presented for an actual or hypothetical organisation but must be learner’s original work and not copied from existing documents. Learners should be able to explain and justify their statements

### The Learner Materials

The Learner materials work hand-in-hand with the facilitator guide and include space for doing the activities described in the facilitation outline. However, there are certain activities that need other materials or that should be done on flip chart paper that can be put up and discussed in the classroom. Make sure that you have a good understanding of the workbook and how it connects to the facilitator’s notes before training the course for the first time.



# ESTABLISHING AND MAINTAINING THE FORMAL STRUCTURES OF A CBO

## COURSE PLAN

### Workshop – Day 1

| Time  | Topic                    | Activity/Method   | SO  | Assessment Criteria |
|-------|--------------------------|---|-----|---------------------|
| 9h00  | Introduction and welcome | Name games as ice-breaker<br>In pairs, share a bit about yourself and your organisation/ or what you do in your community. Feedback from the pair into the group. |     |                     |
| 9h45  | Overview                 | In groups, come up with steps/ actions that you need to do to establish a CBO.<br>Share in large group and discuss course content                                 | All |                     |
| 10h30 |                          | Tea   |     |                     |



| Time  | Topic                               | Activity/Method   | SO  | Assessment Criteria   |
|-------|-------------------------------------|---|---|---|
| 10h45 | Needs assessment                    | Brainstorm – before I start an organisation I need to know what the area of focus is. How do I know this?<br>Brainstorm in the plenary, ways to do needs assessments<br>If time, draw up a short survey questionnaire – go and interview people from another group and swop.<br>Discuss what you learnt | Identify community needs in a defined context | Hypothetical or actual descriptions or records of how members of the constituencies could be assisted to identify problems that need to be addressed<br><br>Needs are prioritised |
| 11h30 | Identifying assets and capabilities | Mapping of your community – either alone or in groups from organisations draw a map of the assets and capabilities in your community– share together. Have a brief discussion about factors that could threaten your programmes.  | Identify community needs in a defined context | The assets and capabilities that exist within the target constituency are mapped.<br><br>The relevant factors that could support or threaten success are identified               |
| 12h15 | Visioning for an                    | Briefly do a guided visualisation with  | Develop an                                    | A vision of success for the project   |



| Time  | Topic        | Activity/Method   | SO                                      | Assessment Criteria   |
|-------|--------------|---|---|---|
|       | organisation | <p>the group, getting each person to visualise what success would look like in their community/sector. (5mins)</p> <p>Then get them to draw this (either in organisational groups or alone). This then gets shared in pairs/ groups and common elements noted.</p> <p>Show how this becomes a vision statement.</p> <p>Guidelines for writing a vision statement are explained. Get organisations/ groups to write their vision statement. Share with the group and review (if they already have a vision statement, get them to review it)</p> | organisational<br>mission and<br>vision | (its specific objectives - what it intends to achieve) – what they hope to achieve and what success would look like – is developed and explained<br>Different ways to develop a vision and mission are listed |
| 13h00 |              | Lunch   |   |   |



| Time  | Topic                | Activity/Method   | SO   | Assessment Criteria  |
|-------|----------------------|---|--|--|
| 1h45  | Mission statement    | What is a mission? Read some examples of mission statements in small groups and come up with elements of a mission statement – what to include and how to write it. Set homework for them to write a mission statement for themselves/ their organisation | Develop an organisational mission and vision | A mission is developed and explained for a specific case   |
| 2h30  | Objectives and SMART | Brainstorm in pairs – what might you do as an organisation (what projects) could you do to achieve your vision and mission.<br><br>Once you have decided, teach them how to write an Objective –what, how, when, how much.                                | Develop an organisational mission and vision | A vision of success for the project (its specific objectives - what it intends to achieve) – what they hope to achieve and what success would look like – is developed and explained |
| 15h00 |                      | Tea   |  |  |



| Time  | Topic      | Activity/Method   | SO   | Assessment Criteria  |
|-------|------------|---|--|--|
| 15h15 | Objectives | Get them to write 2 objectives for their organisations and then assess with SMART. Go around to each person and assist with Who? What? Where etc. Check for things one can measure – numbers and amounts and how often etc. | Develop an organisational mission and vision | A vision of success for the project (its specific objectives - what it intends to achieve) – what they hope to achieve and what success would look like – is developed and explained |
| 16h30 |            | Close   |  |  |



## Workshop – Day 2

| Time | Topic                         | Activity/Method  | SO   | Assessment Criteria  |
|------|-------------------------------|--|--|--|
| 9:00 | Mission statement and review  | Individuals to share mission statements of organisations as check in (homework)  |  |  |
| 9:30 | Identify networks for support | Looking at these objectives and mission, re-look at your map and brainstorm what networks you could access to achieve these goals, what partnerships would you need to form. In small groups, share your ideas and come up with some other suggestions for each other. | Identify networks to help support organisational mission | <p>Possible collaborative relationships to enhance intended outcomes are explored the organisation’s capabilities (what they are able to do) are described</p> <p>Organisational needs are noted and where to source relevant training or expertise is mentioned</p> <p>Relevant networks are identified and there is evidence of participation in these</p> |



| Time         | Topic                   | Activity/Method   | SO                                | Assessment Criteria   |
|--------------|-------------------------|---|-----------------------------------|---|
| 10:00        | NPOs/ NGOS              | Brainstorm: What is an NPO? (what is an NGO)<br><br>What is the role of the NPO in society?   |                                   |   |
| <b>10h30</b> |                         | <b>Tea</b>  |                                   |   |
| 10:45        | Different legal options | Explain the need for registration and teach the 3 different legal options for NGOs – Volunteer association, section 21 and trust.<br><br>Break into 3 groups and assign them each 1 institutional form.<br><br>Get them to brainstorm why they would choose that one. | Develop a plan to establish a CBO | The advantages and disadvantages of available organisational forms (volunteer association, section 21, trust etc) are described<br><br>An appropriate institutional form is selected and justified<br><br>Knowledge of the legal environment is demonstrated (and where to seek advice on institution-building) |



| Time         | Topic            | Activity/Method  | SO   | Assessment Criteria  |
|--------------|------------------|--|--|--|
| 11:15        | NPO Registration | If there are groups in the room already registered, get them to share stories of their registration process.<br><br>Start to map on the wall the steps towards registering your organisation (Who to approach? What you need? etc) |  |  |
| 11:30        | Constitution     | In small groups, get the groups to list what needs to be included in a constitution. Share in plenary and then add more if necessary.<br><br>Then specify what is legally required for NPO registration.                           | Develop a plan to establish a CBO                | Essential elements of a model constitution are understood and listed |
| <b>12h30</b> |                  | <b>Lunch</b>   |  |  |
| 1:15         | Governance       | Read the case story (below) of an organisation developing – what happened? What did you notice? Use  | Demonstrate an understanding of basic guidelines | Guidelines for an appropriate governance structure are discussed     |



| Time | Topic      | Activity/Method   | SO  | Assessment Criteria  |
|------|------------|---|---|--|
|      |            | this to introduce issues of organisational development and governance issues.   | for good governance                                   | The steps for the establishment of the institution are listed  |
| 2:00 | Governance | <p>Teach the difference between management and governance (if necessary explain briefly that organisations go through different phases, and that there are different requirements from a governing body at these different phases).</p> <p>In groups, give them 2 different colours of paper and get them to brainstorm the tasks of the board and of management. Stick them up in front of the whole group and discuss. Be sure to notice 'grey' areas or areas of conflict.</p> | Understanding of basic guidelines for good governance | <p>The difference between the management and oversight functions are discussed</p> <p>Basic roles and responsibilities of governing bodies, in particular the oversight role vs the management functions are explained and discussed</p> |



| Time  | Topic                     | Activity/Method  | SO   | Assessment Criteria  |
|-------|---------------------------|--|--|--|
| 15h00 |                           | <b>Tea</b>   |  |  |
| 15h15 | Roles of governing bodies | Brainstorm what the basic office bearers are of a board. Explain that many different structures are available but these are some of the common ones:<br><br>Divide the group into 4 – treasurer, chairperson, the board and secretary. Get each group to write what they think that person does and then pass on their list to the next group to add/change. Discuss in plenary. | Demonstrate an understanding of basic guidelines for good governance | Basic Roles and responsibilities of governing bodies, in particular the oversight role vs the management functions are explained and discussed             |
| 16h00 | Capabilities of boards    | Draw a pie chart on the board. In plenary discuss, what kind of skills do we need on a board – e.g. financial, legal etc.<br><br>Then individually/ as organisations,  | Demonstrate an understanding of basic guidelines for good governance | Useful qualities and capabilities for members of governing bodies are identified (Financial know-how, credibility with community, integrity, participatory |



| Time  | Topic | Activity/Method   | SO | Assessment Criteria                       |
|-------|-------|---|----|---|
|       |       | reflect on your own board and its skills. What do you still need to develop in your board? How will you do this?<br><br>Share some discussion afterwards. |    | leadership, relevant technical expertise) |
| 16h30 |       | Close   |    |   |



## Workshop – Day 3

| Time  | Topic              | Activity/Method   | SO   | Assessment Criteria  |
|-------|--------------------|---|--|--|
| 9h00  | Good Governance    | In pairs/ 3s, come up with some ways you will ensure good governance in your organisation. Take feedback from the group and make sure that all is covered. Then spend 10 minutes assessing your board/ organisation against this list/ or assessment list.<br><br>Come up with 3 things you would like to implement to improve governance in your organisation – share in pairs/ 3s | Demonstrate an understanding of basic guidelines for good governance | Mechanisms to support good governance are described and explained - such as code of conduct, annual AGMS, the need for board evaluation, regular meetings and competent records of meetings etc. |
| 10h15 |                    | Tea   |  |  |
| 10h30 | Management systems | Using coloured card and flipchart paper the groups create an organogram.<br><br>Using colour card, identify the   | Design an appropriate management system                              | Identify leadership roles and responsibilities<br><br>Identify operational functions<br><br>Appropriate decision making  |



| Time  | Topic  | Activity/Method   | SO | Assessment Criteria   |
|-------|--------|---|----|---|
|       |        | <p>operational functions in your organisation – for example admin, manager etc. Also make a card for the board. Now arrange them according to reporting lines.</p> <p>How and when do they report to each other? (Write next to each line). How are decisions made – use another colour pen to write this. Are there limits to their decision making?</p> <p>Share your picture in small groups (if someone is not part of an organisation, they can join others or use a hypothetical example)</p> <p>Share learnings in the plenary</p> |    | <p>procedures are described (individual authority; relationship to the board; extent and limits of decision-making authority)</p> |
| 11h30 | Review | Go through steps to establishing a CBO – give each group one of the   |    |   |



| Time | Topic | Activity/Method  | SO | Assessment Criteria |
|------|-------|--|----|---------------------|
|      |       | <p>steps and get them to each teach one to the rest of group.</p> <ol style="list-style-type: none"> <li>1. Come together to address a need</li> <li>2. Create a vision</li> <li>3. Develop a clear mission that will work to address this need (participatory process and ongoing review)</li> <li>4. Select your aims and objectives (which is normally directly the opposite of your identified needs).</li> <li>5. Set up systems to support and ensure accountability (governance and legal structures)</li> <li>6. Set up the management systems to do the work.</li> <li>7. Access networks and partnerships</li> </ol> |    |                     |



| Time  | Topic | Activity/Method   | SO | Assessment Criteria |
|-------|-------|---|----|---------------------|
|       |       | to support your mission and work<br>8. Ongoing maintenance and improvement of these structures and processes  |    |                     |
| 12h30 |       | <b>Close</b><br>Reflect back on the course – what learnings do you take with you? What have you learnt? What do you want to implement? Share in pairs/ large group depending on time available. |    |                     |



## ADDITIONAL INFORMATION



### Case study: Impilo AIDS project

Two women from the same street whose children had died of AIDS related illnesses decided to do something to help other mothers. They felt that if only they as parents can be involved they can save many lives amongst the youth. They thought the cultural barriers that hinder parents from speaking openly to their children about safer sexual practices are contributing negatively to the spread of HIV/AIDS. They decided as parents they will concentrate on awareness programs that will teach youth safer sexual practices. The one woman had a big house and one of the rooms was used for training. They started with the children from their street and soon their information sessions attracted a number of youth from the different streets and ultimately, the whole community.

A number of people within the community who were affected by the impact of HIV/AIDS felt they needed to be involved with this project and soon the two women had eight volunteers. One day the project volunteers and leaders sat down and discussed the way forward for their project. They realized that the community is demanding more from them and that they have to make some decisions. The costs attached to their training had been money from donations from the local business people. The donations were no longer enough. They had heard that if they wanted to get funding they will have to be registered with the government. They decided to do it. They decided to try and become a formal structure. They decided

to call themselves Impilo AIDS Project. The two women became part of the board and some volunteers were also recruited to be part of the board. This meant that they were no longer workers in their project and had to allow others to take over their jobs. The services of the project were very popular and they were invited to many other communities, churches and schools to conduct their talks.

Creating more structure in the organization also meant that they needed to have a manager to take over the running of the organisation while the board remained volunteers and less active in the daily activities of the organisation. This was a very difficult time for the organization as the two women were very passionate about their work, having started the organization. The organization was nearly divided as the manager came in with her own ideas. The board was not always happy as they felt their project was changing unnecessarily. Although this phase was so difficult, at the end of the 1 year the organization became so organised and professional that it received more funding and grew from strength to strength.



## Extra reading for the facilitator

There are many good resources available on the internet. See the Legal Resources Centre Website ([www.lrc.org.za](http://www.lrc.org.za)) the Non-profit consortium's website ([www.npc.org.za/resources](http://www.npc.org.za/resources)) and the department of Social development's non-profit directorate website.

Below are a couple of good articles produced by the **Legal Resources Centre** – please acknowledge them if you use them or copy them for any purpose.

## Legal Structures commonly used by Non-Profit Organisations

### What is in this guide?

- The similarities and differences between non-profit and for-profit organisations
- Choosing a legal structure
- The Non-profit Organisations Act 71 of 1997
- Legal structures commonly used by NPOs
  - Voluntary Associations
  - Trusts
  - Section 21 companies
- What about for-profit organisations?
- More information

## Overview

### **Civil society is essential for democracy and development**

An organised, vibrant civil society is essential for participatory democracy and development. There are many different kinds of civil society organisations: some are set up to make a profit for their members, others are not for profit but to provide some form of service or benefit to their members or the public. What all civil society organisations have in common is that they are not part of government.

The new South African constitution (Constitution of the Republic of South Africa Act 108 of 1996) guarantees everyone the right to freedom of association. This means that you have the right to associate with other people and form organisations. This right to freedom of association is essential for the formation of civil society organisations.

South Africa, like other countries, has a legal framework for civil society organisations. The legal framework serves two purposes:

- It enables civil society organisations to establish themselves as legal structures.
- It regulates the way in which such legal structures operate.



## Focus on NPOs

We hope that the booklet will help everyone involved in building and strengthening NPOs to:

- understand the legal framework and principles that apply to NPOs
- recognise the differences between NPOs and for-profit organisations
- choose the appropriate legal structure for a particular NPO.

It is aimed at community leaders, service providers, paralegals, advice offices and NPOs themselves, and is part of a series of booklets which focus on the laws that affect NPOs, including 'Guide to the NPO Act' and 'New Tax Law for South African NPOs'.



## **The similarities and differences between non-profit and for-profit organisations**

### **Similarities**

Both NPOs and for-profit organisations are:

- Private, non-government organisations with self governing boards accountable to their owners or members (although NPOs also need to account to their donors and, arguably, to the general public since they claim to operate in the public interest).

And both NPOs and for-profit organisations must:

- Operate for lawful purposes
- Be efficient and effective to survive.

### **Differences**

| <b>Non-profit organisations</b>  | <b>For-profit organisations</b>                |
|--|--|
| Provide some public service or have some public purpose that goes beyond serving the personal interests of the members of the NPO (such as the promotion of social welfare, economic development, religion, charity, education or research). | Operate for the purpose of making profits.     |
| May make a profit, but may not distribute their property or profits to their members. They use any profits   | Distribute profits to their owners or members. |

|   |  |
|---|--|
| they make to further their public interest objectives.  |  |
| Frequently do not generate enough income to cover all their expenses, so they fundraise from the public or donors.                                      | Frequently borrow money, at a specified interest rate, if they cannot self-finance all their capital and operating costs. They calculate that they will be able to pay back the loan plus interest from the profits they intend to make. |
| On dissolution, any surplus assets, after payment of all debts, are given to an NPO with similar objectives. Assets are not distributed to the members. | On dissolution, after payment of all debts, distribute any surplus assets to the owners or members.  |

### Choosing a legal structure

What are the legal structures that civil society organisations can choose from?

The table below shows some of the structures that civil society organisations can choose from. You will notice that some structures can be used by both NPOs and for-profit organisations. Some structures require that you register with a government registry.

| NPO                   | Law   | For-profit organisations |
|-----------------------|---|--------------------------|
| voluntary association | common law  | partnership              |
| trust                 | common law and Trust and Property Control Act 57/1988 | trust                    |
|                       | Close Corporations Act                                | close corporation        |

|                                  |   |  |
|----------------------------------|---|--|
|                                  | 69/1984                                       |  |
| Section 21 company               | Companies Act 61/1973                         | private company (pty) ltd<br>or public company (ltd) |
|                                  | Co-operatives Act<br>91/1981                  | co-operatives  |
| communal property<br>association | Communal Property<br>Associations Act 28/1996 | communal property<br>association                     |

### **Which structure should an organisation choose? For profit or not for profit?**

First it depends on whether your organisation is for profit or not. If it is not for profit, then you must select the non-profit structure best suited to your work. This depends on many factors.

### **The size, capacity and complexity of your organisation**

The formal establishment and ongoing regulatory requirements are most complex for a Section 21 company, less complex for a trust and least complex for a voluntary association (VA). So the most common structure for small, newly established NPOs is the VA, while trusts and Section 21 companies are appropriate for larger, well established NPOs with big budgets, complex programmes and lots of staff. (While a VA is the simplest NPO to establish and manage in terms of ongoing regulatory requirements, it may nevertheless exercise all the powers and do the same things as a trust or Section 21 company.)

## **Funders' and others' requirements**

Sometimes people or organisations that your organisation will interact with, such as funders or government departments, may prefer a particular structure. This may influence your decision. For example, the business world tends to be familiar and comfortable with the legal framework which governs Section 21 companies. Your organisation will have to stick to the requirements of the law that governs the structure that you choose.

## **What about tax?**

Your choice of structure does not influence your organisation's eligibility for tax exempt status and donor deductible status; the purpose, objectives and activities of your organisation do. (Tax exempt status means exemption from paying income and other taxes. Donor deductible status means that people who make donations to your organisation receive a tax deduction.) The tax law requires that the constitutions of all NPOs which apply for tax exemption include a list of clauses which bolster and reinforce their essential non-profit distributing clauses. Our booklet, 'New tax law for South African NPOs', deals with these issues in detail.

## **The advantages of forming a legal structure which is registered with a government registry**

Not all legal structures have to register with a government registry, for example VAs and partnerships don't, while trusts and Section 21 companies do. If you comply with the necessary requirements for registration and then register your founding documents with a government registry they are available for public



scrutiny. After that you will need to comply with the ongoing regulatory requirements for your particular legal structure, such as filing an annual report. There are certain advantages in choosing to register.

### **Clarity and formality**

As organisations grow, they need to formalise their ways of operating. Working with an established set of legally binding rules helps to make things clear, to those within the organisation and to people outside the organisation who interact with it, work with it and do business with it.

### **Public accountability**

Often organisations want to publicly disclose and account to stakeholders, that is, donors, beneficiaries, the general public and the government. If an organisation is publicly accountable, stakeholders may trust the organisation more and be more willing to work with it, for example grant loans or donate money to it.

### **Independent legal identity**

Some structures, for example Section 21 or for-profit private or public companies, clarify the legal status of an organisation by making it a separate legal 'person', meaning that the organisation has an independent legal identity which is distinct from its members' legal identities. This usually means that:

- The liability of the organisation's members and office-bearers is limited. The organisation, as a legal person, not its members or office-bearers as

individuals, is responsible for debts, contracts and obligations (except in certain circumstances such as when there is fraud or gross negligence).

- The assets of the organisation belong to and are registered in the name of the organisation, not its members and office-bearers.
- The organisation has perpetual succession: it continues to exist even if its members and office-bearers change.
- The organisation can sue, be sued and enter into contracts in its own name.

For some types of organisations (like VAs or for-profit organisations with less than twenty members) registering is a choice, based on the advantages described above. But other types of organisations are obliged to register to protect the public and people they interact with. For example, a commercial organisation with over twenty members, set up for the purpose of making a profit, must register as a company or a co-operative (with the exception of the organised professions, such as attorneys and accountants).

## **The Non-profit Organisations Act 71 of 1997**

### **Background**

The Nonprofit Organisations Act 71 of 1997 repeals the Fund-Raising Act 107 of 1978 (with the exception of its chapter 2 which deals with disaster and relief funds). The Fund-Raising Act was able to be misused by the apartheid government to control the fundraising activities of civil society organisations and often to close them down. The NPO Act is the result of a lengthy policy and legal reform process in which civil society organisations and the state negotiated and made compromises. It came into operation on 1 September 1998.



## **Definition of an NPO**

The Act defines an NPO as:

a trust, 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  
(Section 1(x)).

## **Objectives of the Act**

Primarily its objectives are to:

- create an enabling environment for NPOs
- set and maintain adequate standards of governance, accountability and transparency.

It aims to meet these objectives by creating a voluntary registration facility for NPOs.

## **Voluntary registration**

The Act encourages NPOs to be accountable to the public, rather than penalising those which aren't, by allowing existing South African legal structures for NPOs (VAs, trusts, Section 21 companies and other non-profit associations) to register with the NPO Directorate of the Department of Welfare - if they want to and if the organisation meets certain minimum establishment and other ongoing reporting

requirements, such as filing annual narrative and financial reports. Registration and the ongoing reporting requirements which go with it are intended to improve standards of governance and increase accountability and transparency, which will increase public and donor confidence in NPOs (and, in turn, encourage organisations to register).

The Act's mandatory requirements for the registration of an NPO are similar to the common law's requirements for the establishment of a VA, including clauses in the constitution that:

- record the non-profit purpose and character of NPOs (whether they be set up as a VA, trust or Section 21 company), and distinguish them from for-profit organisations
- clarify the legal status of NPOs by recording that the NPO is a body corporate that has an independent legal personality
- always appear in the founding documents of all NPOs anyway, because they are essential to the basic functioning of an organisation.

### **Benefits of registration**

Registration as an NPO has different implications for different legal structures. We will deal with these in detail below. The benefits for all NPOs that register include:

### **Government benefits and allowances**

Section 11 of the Act allows the Minister of Welfare to prescribe benefits or allowances for registered NPOs. These will not apply to NPOs that do not register

with the department. In fact, it is likely that NPOs who receive any money or other benefits from government, such as a tax benefit, will be required to register.

It is too soon to tell whether voluntary registration is the best way to meet the Act's objectives.

### **Legal structures commonly used by NPOs**

The most common legal structures for NPOs are voluntary associations (VAs), trusts and Section 21 companies. Each of these is governed by certain laws. If an organisation chooses to register as an NPO then it will, of course, also be governed by the NPO Act.

In this section we look in some detail at each of these structures:

- their characteristics
- the laws that govern them
- what goes into setting them up
- their founding documents
- ongoing regulatory requirements
- advantages and disadvantages
- the implications of the NPO Act.

### **Voluntary associations**

#### ***What is a voluntary association?***

You create a VA by entering into an agreement with three or more people to form an organisation so that you can work together to achieve a common non-

profit objective. The agreement can be verbal; it does not have to be in writing. But putting it in writing can help to avoid disputes.

### ***Examples***

Voluntary associations are suitable for small community-based organisations that do not need to own or manage substantial amounts of money or valuable property and equipment in order to carry out their activities. The Midrand Soccer Club or Ulunthu School Parent Association are examples of VAs.

### ***Governance structure***

Usually the constitution provides for the appointment of a group of people with executive powers, such as an executive committee, to manage the affairs of the VA subject to the terms of the constitution.

### ***Which laws govern VAs?***

VAs are governed by the common law, which requires that the VA's objectives must be lawful and not primarily for gain or profit for its members.

### ***Independent legal personality***

If you want to create a VA that is an incorporated association (universitas) with an independent legal personality, the common law requires that you have provisions in your constitution that specify that:

- the organisation will continue to exist despite changes in its membership (perpetual succession)



- the assets and liabilities of the organisation will be held separately from those of its members.

We have discussed the advantages of having an independent legal personality above.

### ***How to form a VA***

An agreement (written or verbal) is all that that the law requires to recognise your organisation. There is no government registry with which you must register. If you choose to register a VA in terms of the NPO Act, it will have to comply with the Act's registration requirements. These are similar to the common law requirements for establishing a VA.

### ***The founding document of a VA***

The written agreement or founding document is called the constitution. The constitution sets out the agreed rules which will govern the VA, such as its main purpose and objectives, its membership and governance structures and procedures, and the rights and duties of the organisation and its members and office-bearers. A constitution provides clarity about these issues for everyone, both inside and outside the organisation.

The constitutions of VAs vary enormously depending on the organisation. The basic clauses that must be included for your constitution to comply with the requirements of both the common law and the NPO Act, as well as those that should be included in the constitution of any VA to enable it to function properly, are described below.



### ***Background***

Background clauses describe the context, circumstances and motivations which gave rise to the creation of the VA.

### ***Name***

Your constitution must state the full name, and any abbreviation of the name, of your VA. Usually, the name tells people what kind of VA it is.

### ***Objectives***

The objectives describe the purpose of the VA and what it intends to do. These clauses should show that the VA exists to promote a public interest objective and not primarily for the self-interest, gain or profit of its members and office-bearers. You must list your main objectives in general terms.

### ***Legal status***

Your constitution must define your VA as an incorporated association with its own legal identity.

### ***Will not distribute profits to members***

Your constitution must state that the income and property of the VA will be used to promote its objectives and will not be distributed to its members or office-bearers, except as reasonable payment for their work. You must make it clear that the members and office-bearers of your VA have no personal right to



the property of the VA. This principle applies not only during the lifetime of the organisation but also when it closes down ('dissolution' in legal language). Your constitution must state that on dissolution of the VA its property will be given to an organisation with similar objectives.

### ***Powers***

A VA may need the power to purchase, mortgage and sell movable or immovable property, for example, or invest the funds of the VA in any way to employ and pay employees. Your constitution must set out your VA's powers and they must be consistent with its non-profit objectives.

### ***Members***

Membership clauses define who may become a member of the VA, the procedures for admitting and removing members and the duties and privileges of members. You may include a list of your initial members in your constitution.

### ***Structure***

This is an important part of the constitution because structures and procedures build in accountability by the office-bearers to the members of the VA. There should be a clause which identifies the highest governing body of the VA, usually a general meeting of members or a managing body. There is usually a clause which entrusts all the powers of the VA to a managing body to enable it to manage and control the affairs of the VA. But if the managing body is not the highest governing authority, then such powers should be subject to the



instructions of the highest governing authority, such as members in a general meeting.

Your constitution must specify the structure of your VA and the mechanisms and procedures for governing and managing it. You must include clauses that specify how your VA will conduct meetings and make and record decisions. There may also be clauses on the appointment of office-bearers.

### ***Financial matters***

This section of the constitution states how the money of the VA will be managed and accounted for. There should be clauses that describe how the organisation will prepare annual financial statements. You must have clauses which set a date for the end of the VA's financial year and state that the VA will use a banking account.

### ***Amendments to the constitution and dissolution of the VA***

You must have clauses which explain how the constitution can be changed and how the VA can be closed down by its members.

### ***Indemnity***

The constitution should provide that the members and office-bearers of the VA are not personally liable for any of its obligations and debts. These clauses reinforce the principle of limited liability captured in the legal status clauses.

### ***Disputes***

The constitution may set out a procedure for resolving serious disputes between members about how to interpret the constitution.

### ***Ongoing regulatory requirements***

Because a VA does not have to register with a government registry, there may be no public authority which regulates its conduct or affairs. If a VA chooses to register as an NPO it will have to comply with the ongoing regulatory requirements of the NPO Act.

### ***Advantages and disadvantages***

Being easy to establish can be both an advantage and a disadvantage for VAs.

### ***Quick, easy, cheap***

Not having to register with a government registry means a VA can be established quickly, easily and cheaply.

### ***Funders prefer more formal arrangements***

VAs may not be particularly attractive to funders because of the lack of government regulation and statutory control. Even the general public who interact with the VA generally prefer greater formal accountability and transparency.



### ***The constitution may not protect members of the VA***

Members of the VA may not be protected if key clauses in the constitution are missing or not properly drafted, for example if the clauses relating to the legal status of the VA are not clear.

### ***Implications of the NPO Act***

In the past, VAs could not register with a government registry. This caused problems, because donors and others often require that organisations have a degree of legal formality and public accountability which registration provides. Now, the NPO Act provides a registration and regulatory authority for VAs. This is one of the ways in which the NPO Act is considered to be helpful to the non-profit sector.

We have seen that registering as an NPO can remedy the disadvantages of the VA structure through providing the opportunity to register and thus comply with the ongoing regulatory requirements of the registering authority.

## **Trusts**

### ***What is a trust?***

A trust is an arrangement, set out in a written document (called the trust deed) in which an owner or founder hands over property and/or funds to a group of people (called trustees) who administer the assets for the benefit of other people (called beneficiaries) for a stated objective.



### ***Example***

The Legal Resources Trust (LRT), which was set up to establish and support the Legal Resources Centre to give legal assistance to the vulnerable and marginalised, is an example of a civil society organisation which is suited to being a trust.

### ***Governance Structure***

A trust is governed by its Board of Trustees. Trustees' powers are normally as wide as possible to enable them to achieve the objectives of the trust, and usually similar to the powers of a company. Trustees are expected to exercise their duties with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. Trustees should not make self-serving decisions and should avoid taking decisions in situations where there is a conflict between what is best for the trust and what is best for a trustee personally (conflict of interests). They may receive reasonable payment for their work for the trust unless the trust deed forbids this.

### ***Which laws govern trusts?***

Trusts are regulated by the common law and the Trust Property Control Act 57 of 1988.



### ***Trusts do not have an independent legal personality***

Except in certain circumstances, such as for tax and insolvency purposes, trusts do not have an independent legal personality. If there is a legal dispute (litigation), the trustees acting in that capacity sue or get sued, not the trust, although trust property is protected and the Trust Property Control Act requires trust property to be kept separate from trustees' personal property. Also, trusts are required to have their own bank accounts.

### ***How to form a trust***

You need a notary public to write and attest your trust deed. (A notary public is an attorney with an additional qualification which authorises him or her to certify that documents to be filed in a government registry are authentic.) Then you must register the trust deed with the Master of the High Court. The trust deed names your intended trustees, but it is the Master who actually formally appoints them.

### ***Security***

The Master of the High Court may ask the trustees to provide security for the proper performance of their duties. This is usually arranged through an insurance company. If you want to do away with the need for this security, the Master usually requires that you appoint auditors and give a full set of reasons why the trustees should be exempted.

### ***The founding document of a trust***

The trust deed is the founding document of a trust. Trusts vary enormously, but all trust deeds should contain clauses which deal with the following. Remember that the tax law requires certain clauses if you want tax exemption and the NPO Act will require certain other clauses if you want to register as an NPO.

- Preamble
  - Record of why the trust came into being
- Name
- Purpose
- Donations
- Founding donations and future donations
- Powers of the trustees
- Use of trust funds
  - Clauses controlling how the trustees use the trust's funds and partial indemnity for losses sustained through reasonable error
- Appointment of trustees and alternatives
- Exemption for trustees from paying security
- Procedures
  - Meetings and notices
- Financial control and annual filing of accounts
- Amendments to the trust deed and dissolution of the Trust
- Clauses recording the non-profit purpose and character of the trust
  - These clauses must state that:



- All income and property must be applied solely towards the promotion of the trust's main objective and no amount or asset may be given or distributed to the trustees, except as reasonable payment for their services.
- On dissolution of the trust, all surplus assets must be transferred to another organisation with similar purposes.

### ***Ongoing regulatory requirements***

The Master of the High Court registers the trust and oversees and controls the appointment of trustees. You must notify the Master if you change any of your trustees. The Master exercises a high degree of supervision over the appointment of trustees, but not over their activities. Even though the Master may call trustees to account about the administration of trust property, in practice this supervision is limited.

If a trust registers as an NPO it must comply with the ongoing regulatory requirements of the NPO Act.

### ***Advantages and disadvantages of trusts***

A trust is very flexible and can suit many NPOs, their objectives and situations.

### ***Professional assistance***

You need professional assistance to establish a trust. This can be expensive and take some time.



### ***Limited public disclosure***

The requirements for public disclosure for trusts are very limited. For example, there need be no auditor or audited financial statements unless these are required by the trust deed.

### ***No independent legal personality***

Except in certain specified circumstances, a trust does not have a legal personality. However, trust property is protected and a trustee acting in that capacity is not personally liable for trust debts (except if he or she has been grossly negligent or committed fraud).

### ***Implications of the NPO Act***

Before the NPO Act was passed, trusts could not have an independent legal personality, other than for certain specific purposes such as tax and insolvency. Now, a trust that also registers as an NPO (in addition to registering with the Master of the High Court) is recognised by the law as a body corporate with an independent legal personality. Indeed, trusts acquire independent legal personality through such registration.

## **Section 21 companies**

### ***What is a Section 21 company?***

Section 21 of the Companies Act 61 of 1973 allows for a 'not-for-profit company' or 'association incorporated not for gain'. Section 21 companies resemble business oriented (for profit) companies in their legal structure, but do not have a share capital and cannot distribute shares or pay dividends to their members. Instead they are 'limited by guarantee', meaning that if the company fails its members undertake to pay a stated amount to its creditors.

### **Example**

You may choose to be a Section 21 company if you are a large organisation like a development foundation, because a company has a well developed legal structure and its methods of operation are familiar to the business world.

### ***Governance structure***

A company has a two-tiered governance structure consisting of the members and directors. The members exercise their powers in general meetings. For example, they have the power to appoint and remove directors, amend the founding documents of the company, and dispose of the NPO's assets. The directors have broad executive responsibility. However, they must appoint independent auditors and convene an annual general meeting at which various matters, including the presentation of the audited financial statements, are attended to.



### ***Which laws govern Section 21 companies?***

Section 21 companies (like for-profit companies) are governed by the Companies Act and have independent legal personality.

### ***How to form a Section 21 company***

All companies, including Section 21 companies, are registered with the Registrar of Companies in terms of the Companies Act. Before you are registered, the Registrar must approve the name you have chosen. A company may not begin its work until it is registered, which takes about two to four months.

To register as a Section 21 Company:

- Your organisation must be established for a lawful objective
- Your main objective must be the promotion of religion, the arts, science, education, charity, social activity or a communal or group interest
- All income and property must only be used for the promotion of the main objective and no amount or asset may be given or distributed to the organisation's members or office-bearers, except as reasonable compensation for their work for the organisation
- On dissolution of the company, all surplus assets must be transferred to another organisation with similar purposes
- Along with other public companies, your organisation must have at least seven founding members and two directors

### ***The founding documents of a Section 21 company***

The founding documents for a Section 21 company are the memorandum and the articles of association. The memorandum sets out the purpose of the NPO; the articles of association regulate how it operates. A typical memorandum and articles of association will contain clauses dealing with the following:

- Name
  - The phrase 'association incorporated not for gain' must follow the name
- Statement of purpose
  - Describing the main object and the main business of the company
  - Powers of the company
- Governance structure
- Procedural clauses
- Meetings, quorums, notice periods and so on
- Financial control and reporting
- Standard of conduct required of office bearers
- Indemnity for officers acting in good faith

### ***Ongoing regulatory requirements***

In order to be registered and then remain registered, a company is obliged to comply with the extensive formalities and ongoing reporting requirements of the Companies Act, including the following:



- The company must appoint auditors and inform the Registrar of Companies of any change of auditors.
- The company must appoint a registered address and inform the Registrar of any change of address.
- The company must keep up-to-date registers of members and directors in the prescribed form.
- The directors' names must appear on all letters, catalogues and circulars distributed or published.
- Directors must ensure that proper minutes and attendance registers are kept of all meetings.
- The company must hold an annual general meeting in accordance with the prescribed procedures.
- The company must keep financial and accounting records in the prescribed form, present these to the AGM of members and file them with the Registrar.
- The directors' report must be presented to the AGM.

### ***Advantages and disadvantages of a Section 21 company***

#### *Substantial public disclosure and internal independence*

Because the provisions of the Companies Act are complex and detailed, companies are subject to substantial public disclosure obligations and statutory control. But they have considerable freedom in their internal management and the day to day running of their affairs.



### *Independent legal personality*

The independent legal personality of a company is a clear and well understood concept.

### *Professional assistance*

You will need professional assistance to set up a company.

### *Complex reporting requirements*

The annual reporting requirements for companies are complex and extensive and not always suitable for small community-based organisations.

### ***Implications of the NPO Act***

The requirements of the Companies Act make Section 21 companies accountable to the public. So, unlike VAs, which need the Act to register, and trusts, which need the Act to acquire independent legal personality, there is no particular reason for Section 21 companies to register in terms of the NPO Act. However, in the future, if they wish to be eligible for government benefits (such as tax benefits) they may need to register.

### **What about for-profit organisations?**

Partnerships, close corporations, private and public companies and co-operatives are the commonly used legal structures for for-profit enterprises.



They differ in certain ways and are appropriate for different sizes and kinds of businesses. The founding documents always set out how profits are to be made, declared and distributed. All of them usually require professional assistance to set up and establish.

### **More information**

These resources will provide you with more information on the laws that govern non-profit organisations.

Bamford, B. *The law of partnership and voluntary association in South Africa*. 1982. Juta

Commonwealth Foundation. *Non-Government Organisations: Good Policy and Practice Training Kit*. 1997

Department of Welfare, Directorate: NPOs. *Legislation Affecting the Nonprofit Sector*. Information Series No. 1. 1999.

Rosenthal, R. and Walton, M. *Guidelines to Section 21 Companies, Trusts and Voluntary Associations*. Memorandum prepared for the Legal Resources Centre 1998.

Honore, T. & Cameron, C. *Honore's South African Law of Trusts*. Juta. 1992.

Honey, M. *A Guide to the NPO Act 71 of 1997*. Information Series No. 2. Legal Resources Centre.

Honey, M. *New Tax Laws for South African NPOs*. Information Series No. 3. Legal Resources Centre. 2000.

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This information was prepared by the NPO Legal Support Project of the Legal Resources Centre (LRC) in Cape Town. The LRC is an independent non-profit law centre which uses the law to pursue justice, democracy and the realisation of socio-economic rights. The NPO Legal Support Project provides legal support for the establishment and good governance of non-profit organisations (NPOs).

## **Legal Obligations of Members of Non-profit Organisation (NPO) Governing Bodies**

### **Introduction**

Members of governing boards of non-profit organisations (NPOs) must adhere to the legal obligations imposed on them by the founding documents of the NPO, the common law and the legislation governing the NPO. For each kind of NPO (*Voluntary Association /Trust/Section 21 Company*) these legal obligations may differ. It is important that NPO governing board members are aware of and comply with these legal obligations in order for the NPO to govern itself effectively.

### **Purpose of this information handout**

The purpose of this information handout is to set out some of the important legal obligations that members of NPO governing bodies must adhere to. Some of these obligations are similar and applicable to all NPOs whereas others are different and applicable only to a particular kind of NPO.

When considering the legal obligations of NPO governing board members, it is important to bear in mind the principle of limited liability. Therefore, when the NPO is



liquidated, the creditors are not allowed to hold the members personally liable for any outstanding debts of the NPO. There are however exceptions to this principle and we shall set out the circumstances when members can become personally liable for the debts of the NPO.

### **Legal obligations applicable to all NPO governing board members**

All board members must exercise the following legal obligations when acting for the NPO they serve:

- Act in good faith and in the best interests of the NPO,
- Not allow personal interests to conflict with the interests of the NPO,
- Not act beyond the powers of the NPO/Board or the limitations placed on such powers in terms of the founding documents,
- Exercise the degree of skill that may be reasonably expected from such a person of his/her knowledge. It is however important to note that members are not required to have exceptional intelligence and will not be liable for mere errors of judgement,
- Apply her/his mind to decisions & exercise an independent discretion, and
- Give intermittent, not continuous attention to the affairs of the NPO.

### **Legal Obligations of Members of Voluntary Associations**

There is no particular Act setting out the legal obligations of members of governing bodies of voluntary associations. The legal obligations of these members are to a large extent contained within the constitution of the voluntary association. The

Common Law provides us with further principles applicable to voluntary associations.



## Legal Obligations

In addition to the general principles mentioned in point 3 above, the following legal obligations apply to members of governing boards of Voluntary Associations:

- The members must familiarised themselves with the contents of the Constitution and give effect to the provisions thereof insofar as they are lawful and effective
- Members are not allowed to act beyond the powers laid down in the constitution
- Standard Legal Obligations contained in the constitution of a voluntary association **may** be the following:
  - Preparing annual financial statements for the annual general meeting of the association,
  - Preparing a Chairperson’s report for the annual general meeting of the association,
  - Convening Annual General Meetings within specified time periods,
  - Opening a bank account in the name of the NPO, and
  - Depositing money within account of NPO within specified time period.
- The members have a duty to act in good faith towards one another<sup>1</sup>,
- The members have a duty of care to the association and other members as they accept the responsibility of managing the affairs of the association<sup>2</sup>, and
- In matters where there is a conflict of interest between the association and one of its members, the interests of the association must be protected<sup>3</sup>.

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<sup>1</sup> Rowles v Jockey Club of SA & Others 1954 (1) SA 363 (AD) at 365

<sup>2</sup> Mkhando & Others v Mangwende NO 1977 (1) SA 851 (RAD) at 854

<sup>3</sup> ECA (SA) & another v BIFSA (1) 1980 (2) SA 506 (W) at 509



## Personal Liability

- As in the case of contractual law, members can become personally liable in the event that they have acted beyond the scope and limits of the constitution, and
- Members will also become personally liable when they conduct the affairs of the association in a reckless or fraudulent manner.

## Legal Obligations of Trustees

The **Trust Property Control Act, No. 57 of 1988**<sup>4</sup> together with the Common Law regulate the operation of trusts and sets out the most of the legal obligations of trustees.

## Legal Obligations in relation to the Trust Deed

- The first trustees must lodge the Trust Deed with the High of the High Court (*section 4*),
- Trustees must become familiarised with the contents of the Trust Deed and give effect to the provisions thereof insofar as it is lawful and effective, and
- Trustees must lodge amendments to the Trust Deed with the Master of the High Court (*section 4*).

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<sup>4</sup> All reference to sections in this paragraph are sections from the Trust Property Control Act.



## Legal Obligations in relation to the Trustees

- Trustees can only act in their capacity as trustees once authorized thereto in writing by the Master of the High Court (*section 6*),
- Trustees shall furnish the Master of the High Court with security if they are not exempted from the payment thereof (*section 6*),
- Trustees must act with **care, diligence and skill** which can be reasonably expected of a person who manages the affairs of another (*section 9*),
- Trustees must exercise an independent discretion<sup>5</sup>,
- Trustees must provide the Master with a physical address for the service of any notice or court process and must advise the Master by registered post within fourteen (14) days of any change in that address (*section 5*),
- Trustees must, at the written request of the Master do the following:
  - Account to the Master for their administration and disposal of trust property,
  - Deliver to the Master any book, record, account or document relating to their administration or disposal of the trust property, and
  - Answer honestly and truthfully (to the best of their ability) any question put to them by the Master in connection with the administration and disposal of the trust property (*section 16*).
- Resigning Trustees must notify the Master of the High Court and the ascertained beneficiaries (or their tutors or curators) of such resignation (*section 21*).

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<sup>5</sup> Estate Gouws & Registrar of Deed 1947 (4) SA 403 (T).



## Legal Obligations in relation to the Trust Property

- Trustees must:
  - In terms of common law, immediately upon taking of office, ascertain the nature of the trust property,
  - Register and identify of each of trust assets and indicate that the property is held in their capacity as trustee (*section 11*),
  - Where applicable, register trust property or keep it registered in such a manner as to make it clear from the registration that it is trust property (*section 11*),
  - Take control of the property of the Trust, and if lost, recover such lost assets,
  - Diligently collect the debts owed to them in respect of the trust property<sup>6</sup>, and
  - Not without the written consent of the Master destroy any document which serves as proof of the investment, safe custody, control, administration, alienation or distribution of trust property before the expiry of a period of five years from the termination of a trust (*section 17*).

## Legal Obligations in relation the Finances of the Trust

- The trustee deposit money received in his/her capacity as trustees in a separate trust account at a banking institution or building society (*section 10*),

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<sup>6</sup> Boyce NO v Bloem 1960 (3) SA 855 (T) at 860 A-B, 864-5, 868-9



- Trustees should invest money that accrues to the Trust Fund, which is not required for immediate payment, without delay. It is improper for a trustee to borrow trust money<sup>7</sup>,
- Duty of trustee to ensure that reasonable return is obtained on the Trust Capital<sup>8</sup>,
- Indicate clearly in the bookkeeping which property is held in his/her capacity as trustee (section 11), and
- Make any account of investment at a financial institution identifiable as a trust account or trust investment (section 11),

### **Failure to perform Legal Obligations**

- If any trustee fails to comply with a written request by the Master of the High Court as provided for in terms of law or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty (*section 19*).
- Beneficiaries who have suffered a loss as a result of breach of trust are entitled to bring a damages claim against the trustees for breach of trust.

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<sup>7</sup> Est Loock v Graaff-Reinet Board of Executors 1935 CPD 117.

<sup>8</sup> Boyce NO v Bloem 1960 (3) SA 855 (T) at 876.



### **Legal Obligations of Directors and Members of Section 21 Companies**

Section 21 Companies are governed by the provisions of the **Companies Act No. of 1973<sup>9</sup>**. A Section 21 Company is deemed to be a public company in terms of the Companies and must accordingly comply with the requirements for a public company, unless otherwise provided for by the Act. Both members and directors of a Section 21 company stand in a fiduciary relationship towards it. The Companies Act sets out various obligations that must be complied with and it is submitted that these obligations, unless specifically provided otherwise, are the obligations of both the members and the directors.

### **Legal Obligations in relation to the Displaying the Name of the Company**

- The phrase “*Association incorporated under section 21*” must be included in and be subjoined to the name of the Company (*section 49*),
- The Company’s name must be displayed on the outside of its registered office and everywhere else where it is doing business (*section 50*),
- The name of the Company must be engraved in legible characters on its seal (if any) (*section 50*),
- The Company must also display its name and registration number on all official documents of the Company as referred to in the Act (*section 58*), and
- The business letters, trade catalogues and trade circulars of the Company must bear the company’s name and in respect of every director his/her present forenames, or the initials thereof, and present surname (*section 171*).

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<sup>9</sup> All reference to sections in this paragraph are sections from the Companies Act.



### Legal Obligations in relation to the Memorandum and Articles

- The company must send to every member at his/her request and on payment of the prescribed fee, a copy of its memorandum and of its articles, or shall, if so requested, afford to a member or his duly authorized agent adequate facilities for making a copy of such memorandum and articles (these copies must include all the amendments made thereto) (*section 68*), and
- The Company must, on written request from the Registrar, submit a copy of its amended memorandum after it has made a special resolution altering its memorandum (*section 67*).

### Legal Obligations in relation to the Register of Members

- Every company must keep in one of the official languages of the Republic a register of its members, and shall enter therein:
  - The names and addresses of the members,
  - The date on which his/her name was entered in the register as a member, and
  - The date on which he/she ceased to be a member (*section 105*),
- The register of members may be kept either by making entries in bound books or by recording the particulars required in any other manner allowed by the Act (*section 105*), and
- The register of members of a company shall be open to inspection by any member or any other person (*section 113*).



## Legal Obligations in relation to the Register of Directors

- Every company shall keep in one of the official languages of the Republic a register of directors of the company and cause to be entered therein in respect of every director:
  - His/her full forenames and surname and any former forenames and surname,
  - His/her identity number or, if he/she has no such number, his/her date of birth,
  - His/her nationality if not South African,
  - His/her occupation, his/her residential, business and postal addresses,
  - The date of his/her appointment, and
  - The name and registration number of every other company of which such director is a director and particulars of change (*section 215*).
- The name and date of the appointment of the auditor of the company and the date and particulars of any change of such name and date of appointment must also be included in the register (*section 215*),
- Directors shall furnish the particulars to be entered into the register in writing to the company within the required time limits (*section 216*), and
- A return, in the prescribed form reflecting the contents of such register, must be submitted to the Registrar within the required time limits (*section 216*).



## Legal Obligations in relation to the General Meetings of the Company

- Every company shall hold annual general meetings as prescribed in terms of the Companies Act and the Memorandum and Articles of Association (*section 179*),
- The directors must convene a general meeting in accordance with the Act after the lodgment of a requisition by the members (*section 181*),
- Members must also be provided, if requisitioned by them, with copies of resolutions that are to be moved at next general meetings (*section 186*), and
- The annual general meeting or a general meeting called for the purpose of passing a special resolution must be called on not less than twenty-one clear days' notice in writing and any other general meeting must be called by not less than fourteen clear days' notice in writing (*section 186*).

## Legal Obligations in relation to the Special Resolutions

- Any special resolutions to be adopted by a company must comply with the requirements as provided for in section 199 of the Act, and
- The Company must within one month from the passing of a special resolution lodge a copy of the resolution and a copy of the notice convening the meeting concerned with the Registrar, who shall, subject to the provisions of the Act, and upon payment of the prescribed fee, register such resolution (*section 200*).
- A copy of every special resolution must be embodied in or annexed to every copy of the articles issued after the registration of the resolution (*section 200*).



### Legal Obligations in relation to the Keeping of Minutes of Meetings

- Every company shall cause minutes of the proceedings at any meeting of the company to be entered, in one of the official languages of the Republic, in one or more minute books kept for the purpose, within one month after the date on which the meeting was held (*section 204*), and
- Any such minute book shall be kept at the registered office of the company or at the office where such minute book is made up and shall be open for inspection to members in accordance with the provisions of the Act (*section 204*).

### Legal Obligations in relation to the Declaration of Interests

- A director of a company who is in any way, whether directly or indirectly, materially interested in a contract or proposed contract as provided for in the Act, which has been or is to be entered into by the company or who so becomes interested in any such contract after it has been entered into, shall declare his interest and full particulars thereof as *provided in this Act (section 234)*,
- The Company must record in the minutes every declaration of interest made by any director in terms of the Act (*section 239*),
- Every company must keep at its registered office or at the office where it is made up a register of interests in contracts in one of the official languages of the Republic, and shall enter therein the particulars of any declarations of interest made by directors as provided for in the Act (*section 239*),
- The directors of a company must, in one of the official languages, keep minutes of all meetings of directors or managers which must be entered into



a book kept for that purpose at the registered office of the company (section 242), and

- Every director of a company present at any meeting of directors, and every manager thereof present at any meeting of managers, shall at the meeting sign his/her name under the date of the meeting in a book complying with the provisions of section 242 (3) to be kept for that purpose (*section 245*).

### **Legal Obligations in relation to the Finances of the Company**

- Every company must keep in one of the official languages of the Republic such accounting records as are necessary to fairly present the state of affairs and business of the company and to explain the transactions and financial position of the trade or business of the company, including:
  - Records showing the assets and liabilities of the company,
  - A register of fixed assets setting out the detail as required by the Act,
  - Records containing entries from day to day in sufficient detail of all cash received and paid out and of the matters in respect of which receipts and payments take place,
  - Where the trade or business of the company has involved dealings in goods, records of all goods sold and purchased and other detail as required by the Act, and
  - Statements of the annual stocktaking, where applicable (*section 284*).
- The accounting records must be kept at the registered office of the company or at such other place as the directors think fit and shall at all times be open to inspection by the directors (*section 284*),



- The directors of a company shall lay the annual financial statements in one of the official languages before the annual general meeting of the company. The statements shall consist of:
  - A balance sheet, including any notes thereon or document annexed thereto providing information required by this Act,
  - An income statement as required in terms of the Act,
  - A cash flow statement,
  - A directors' report complying with the requirements of this Act, and
  - An auditor's report as required in terms of the Act (*section 286*).
- The annual financial statements of a company shall contain particulars showing:
  - The amount of the emoluments received by directors,
  - The amount of the pensions paid or receivable by directors and past directors,
  - The amount of any compensation paid to directors and past directors in respect of loss of office, and
  - Details of directors' service contracts (*section 297*).
- The annual financial statements of a company other than the auditor's report, must be approved by its directors and signed on their behalf by two of the directors (*section 298*), and
- A copy of the annual financial statements of a company must be sent to members of the company as required in terms of the Act (*section 302*).



### **Legal Obligations in relation to the Auditors for the Company**

- A written consent by the auditor of the company to be formed must be lodged in the prescribed form with the lodgment of the memorandum and articles of association at the Registrar (**section 269**),
- A company must at every annual general meeting appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting of the company (*section 270*), and
- Directors must provide the auditor of the company with the information and explanations as necessary for the performance of his/her duties as auditor (*section 281*).

### **Legal Obligations in relation to the Winding up of the Company**

- In any winding-up of a company unable to pay its debts, every director and officer of the company shall attend the meetings of creditors as provided for in the Act (*section 414*),
- Where it is intended to pass a resolution for a creditors' voluntary winding-up of a company, the directors of that company shall make out or cause to be made out, in the prescribed form, a statement as to the affairs of the company and lay it before the meeting convened for the purpose of passing such a resolution (*section 363*), and
- Directors whose address's change during the winding up process, must notify the liquidator of the company by registered post (*section 363A*).

## Personal Liability Of Directors

- When the business of the company is carried on recklessly or with intent to defraud creditors the Court may declare that any person who was knowingly a party to such behaviour, be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct (*section 424*), and
- Directors or members who have misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any breach of faith or trust in relation to the company may be ordered by the Court to repay or restore the money or property or any part thereof, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retention, breach of faith or trust as the Court thinks just (*section 423*).

## Legal Obligations of Governing Board Members when registered in terms of the NPO Act

Registration in terms of the **Nonprofit Organisations Act, No. of 1997**<sup>10</sup> is voluntary and organisations may choose whether they want to register. If NPOs do register in terms of the Act, then they must comply with certain requirements as stipulated in the Act. The main requirements are set out below.

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<sup>10</sup> All reference to sections in this paragraph are from the Nonprofit Organisations Act, No. of 1997.



### Legal Obligations in relation to the Documentation of the NPO

- The registered status and registration number of the nonprofit organisation must be reflected on all of its documents (*section 16*).
- The organisation must comply with the provisions of its founding document which relates to financial matters (*section 17*).

### Legal Obligations in relation to the Finances of the NPO

- The NPO must keep, accounting records of its income, expenditure, assets and liabilities to the standards of generally accepted accounting practice (*section 17*).
- Draw up financial statements, within six months after the end of its financial year, which must include at least:
  - A statement of income and expenditure for that financial year, and
  - A balance sheet showing its assets, liabilities and financial position as at the end of that financial year (*section 17*).
- Arrange for a written report, within two months after drawing up its financial statements, to be compiled by an accounting officer and submitted to the organisation stating whether or not:
  - The financial statements of the organisation are consistent with its accounting records,
  - The accounting policies of the organisation are appropriate and have been appropriately applied in the preparation of the financial statements, and
  - The organisation has complied with the provisions of this Act and of its constitution which relate to financial matters (*section 17*).

- The books of account, supporting vouchers, records of subscriptions or levies paid by its members, income and expenditure statements, balance sheets and accounting officer's reports, in an original or reproduced form, must be preserved for the prescribed period (*the time period is not defined in terms of the Act*) (*section 17*).

### **Legal Obligations in relation to the Information to be submitted to the Director of NPOs**

- The Director of Nonprofit Organisations must be provided, in writing, with the following:
  - A narrative report of its activities in the prescribed form together with its financial statements and the accounting officer's report as required in terms of the Act, within nine months after the end of its financial year,
  - The names and physical, business and residential addresses of its office-bearers within one month after any appointment or election of its office-bearers even if their appointment or election did not result in any changes to its office-bearers,
  - A physical address in the Republic for the service of documents to be received from the Directorate of Nonprofit Organisations,
  - Notice of any change of address within one month before a new address for service of documents will take effect, and
  - Such other information that may be required by the Director in terms of the Act (*section 18*).

### **Legal Obligations in relation to the Changes to the Founding Document**

- When the organisation changes its constitution or name, it must send to the director:
  - A copy of the resolution and a certificate signed by a duly authorised office-bearer confirming that the resolution complies with its constitution and all relevant laws, and
  - Where the organisation has resolved to change its name, the original of its current certificate of registration (*section 19*).

### **Legal Obligations in relation to the Winding-up or Dissolution of the Organisation**

- When the organisation resolves to wind-up or dissolve it must, within one month after completion of the winding up or dissolution process or the relevant order of court, send to the Director of Nonprofit Organisations a written notice:
  - Stating that the organisations resolved to wind-up,
  - Containing certified copies of all relevant documents confirming the winding up or dissolution, and
  - A copy of the narrative report, financial statements and the accounting officer's report for the period from its previous financial year up to the date of the written notice (*section 23*).

***Compiled by:***

**Ricardo Wyngaard**

**NPO Legal Support Project, Legal Resources Centre, October 2001**



## Course evaluation form

Date: \_\_\_\_\_

Facilitator/s: \_\_\_\_\_

**What did you like about the course?**

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**What part of the content was most useful to you?**

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**What was not useful to you?**

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**What did you not like or would change about the course?**

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**Please rate the following (circle or underline your choice):**

|                            |             |                 |          |
|----------------------------|-------------|-----------------|----------|
| <b><i>Facilitation</i></b> | Excellent   | Good            | Not Good |
| <b><i>Pace</i></b>         | Perfect     | Too fast        | Too slow |
| <b><i>Content</i></b>      | Appropriate | Not appropriate |          |

**Do you have any other comments or feedback for the facilitator/s?**

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**What support would you like in implementing the learnings from this course?**

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