

A concise guide to
THE NONPROFIT ORGANISATIONS ACT 71 OF 1997

WHAT NONPROFIT ORGANISATIONS MUST KNOW



**The South African Institute for
Advancement**

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1. Background and Purpose of the Nonprofit Organisations Act

Under the Fundraising Act No. 107 of 1978 many nonprofit organisations (NPOs) in South Africa, did not receive State support during the apartheid years. The organisations that mostly suffered the brunt of this lack of support were those whose explicit purpose it was to challenge the apartheid regime. The legislative environment was hostile to nonprofit organisations as laws emerged from government's desire for political control.ⁱ

Following the demise of formal apartheid it was broadly accepted that government had limited resources to confront the challenges of transformation alone.ⁱⁱ The new government turned its attention to improving the legislative environment for nonprofit organisations as a strategy to support transformation in South Africa.ⁱⁱⁱ One such example is the promulgation of the Nonprofit Organisations Act No. 71 of 1997 (the Act), and the repeal of the debilitating provisions to the Fundraising Act. The Act became law on 3 December 1997.

The aim of the Act^{iv} is “...to encourage and support nonprofit organisations in their contribution to meeting the diverse needs of the population...”. It also states that nonprofit organisations will be supported through:

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

The Department of Social Development is charged under the Act to administer the affairs of nonprofit organisations through the Directorate for Nonprofit Organisations (the directorate.)^v This should not be interpreted to mean that all responsibility toward nonprofit organisations rests with the Department of Social Development. The Act is progressive in that all government departments are charged with a positive duty towards nonprofit organisations, more specifically:

“Within the limits prescribed by law, every organ of state must determine and co-ordinate the implementation of its policies and measures in a manner designed to promote, support and enhance the capacity of nonprofit organisations to perform their functions.”^{vi}

This clause demonstrates that the Act was not merely established to regulate nonprofit organisations but also to offer real benefits to being registered. To access these benefits, nonprofit organisations should register and comply with the provisions of the Act.

The purpose of this document is to serve as a resource to people wishing to start a nonprofit organisation or who are already running nonprofit organisations.

2. Which organisations may register in terms of the Act?

Many who intend to start a nonprofit organisation are under the mistaken belief that they may not begin their work until registered in terms of the Act. This misunderstanding is largely due to a lack of information about the difference between the formation of an organisation and its registration under the Act.

An organisation that has already been legally formed, and whose constitution (founding document) meets the requirements of the Act, qualifies to register. Registration is voluntary.

According to the Act, any nonprofit organisation may apply to the directorate to be registered.^{vii} In terms of section 1(1)(x)^{viii} an organisation must, in order to be registered, be established with the following characteristics:

- Only a trust, a company (a nonprofit company registered in terms of the Company’s legislation)^{ix} or other association of persons (voluntary association) may be a nonprofit organisation for purposes of the Act. This means that co-operatives, close-corporations and private companies are excluded from registration in terms of the Act.
- The organisation must have been established for a public purpose. This means that its services or the benefits derived under its objectives must be accessible to the general public.
- The income and property of the organisation may not be distributable to its members or office bearers. In other words, these persons are not entitled to the income and property of the organisation simply because they are members or office bearers. They may only be compensated reasonably for the services that they rendered to the organisation.

Three distinct forms of legal entities are recognised by the Act, namely, voluntary associations, nonprofit trusts and nonprofit companies. Before an organisation can

register in terms of the Act, it must form one of these legal entities. The table below illustrates, in a quick and comparative summary, the types of nonprofit organisations, their registration offices (where applicable), the laws that regulate their registration and the differences in their governing structures.

LEGAL ENTITY	Voluntary Association	Nonprofit Trust	Nonprofit Company
OFFICE OF REGISTRATION	No Registration office	Master of High Court	Companies & Intellectual Properties Commission.
REGULATING LAWS	Common Law	Common Law & Trust Property Control Act 57 of 1988	Companies Act 71 of 2008
GOVERNANCE STRUCTURE	Steering/Management Committees and/or General Members	Board of Trustees	Board of Directors and/or Members

It is important to keep in mind that even if a nonprofit organisation meets the criteria above, it cannot register in terms of this Act if it is an organisation of the state.^x

Requirements for the founding document (constitution)

The founding document of an organisation is its most important document. All affairs of the organisation have to be administered in terms of the founding document.

In the Act, a founding document is simply referred to as “the constitution”. Each founding document of the legal entities discussed has a different name, as tabled below.

LEGAL ENTITY	FOUNDING DOCUMENT
Voluntary Association	Constitution
Nonprofit Trust	Trust Deed
Non Profit Company	Memorandum of Incorporation

A nonprofit organisation that intends to register in terms of the Act has to make sure that its constitution meets the requirements set out in section 12 (2). Appendix 1 contains a checklist to help identify if a founding document meets these requirements.

Important: An organisation is entitled to apply for registration if:

- 1. It has been formed either as a voluntary association, nonprofit trust or a nonprofit company.***
- 2. The founding document meets the requirements of section 12(2.)***
- 3. The organisation is not an organ of the state.***

3. What is the registration procedure?

Once an organisation has been legally formed, and once its founding document fits the requirements as already discussed, it may apply for registration. Application is made by submitting the following to the directorate:^{xi}

1. An accurately completed application form: the form can be obtained from the directorate's website.^{xii}
2. Two copies of the organisation's founding document. The Act does not require the original document and it is not recommended that this is submitted.
3. Such further information that may be requested by the directorate during the application process, so that it can determine whether the organisation meets the registration requirements.

The application for registration under the Act is free.

It is important to ensure that proof of the application is recorded and kept safely. Your application should include:

- Drafting a covering letter listing the documents required for the application.
- Making copies of the full set of documents.
- Sending these by registered mail.
- Keeping the copies and the proof of registered post.

After receipt of the application the directorate has two months to consider the application.

4. What are the benefits of registering?

Although registration is voluntary, the Act provides an organisation the opportunity to be formally recognised as a legitimate and accountable organisation.

Registration increases the organisation's:

- Accountability
- Legitimacy
- Credibility.

These are critical ingredients for creating an investment climate in the organisation.^{xiii}

Without legitimacy and accountability it is difficult to garner the resources required for the organisation to conduct its work. Organisational beneficiaries, partners and prospective donors will support an organisation if they trust and are confident in the manner in which it conducts its business. If an organisation is registered and adheres to its legal obligations, it is more likely to attract the external support required to advance its objectives.

Certain laws^{xiv} require that an organisation is registered if it wishes to seek funding from government agencies.

5. What are the duties of an NPO registered under the Act?

All laws impose duties on people or organisations they seeks to regulate. Under the Act, registered organisations are legally obligated to comply with the following:

5.1 General Duties

- i. To keep the founding document compliant with the requirements of the Act.
- ii. To ensure that the registered status and registration number appears on all official documentation.^{xv}

5.2 Duties in respect of accounting and financial records

- i. To keep accounting records according to the standards of Generally Accepted Accounting Practices.^{xvi}
- ii. To draw up financial statements after six months of its financial year end.^{xvii} For the year of assessment these should contain, at the minimum:

- A statement of income and expenditure
 - A balance sheet.
- iii. Within two months of drawing up financial statements, an appointed accounting officer^{xviii}, has to compile a written report and submit this to the organisation.^{xix} This report must state that:
- 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.
 - The organisation has complied with the provisions of this Act and with the provisions of its constitution as it relates to financial matters.
- iv. All books of accounts and supporting documents are to be kept in original or reproduced form for a period prescribed in the Government Gazette.

5.3 Duties in reporting to and updating records with the directorate

- i. Within nine months of its financial year end, the organisation must submit a narrative report to the directorate on the prescribed form available on the directorate's website.^{xx}
- ii. Should there be a change in the particulars of any of the organisation's office bearers or the address of the organisation, the directorate should be informed.
- iii. Within one month of receipt of the notice of the request, an organisation is obliged to provide, at the request of the director, any information or documentation that would enable the director to determine if the organisation is complying with:
- The provisions of its founding document
 - Any conditions of any benefit received from the Minister in terms of section 11, or
 - Any other provisions of the Act.
- iv. When changing its constitution the organisation must observe the requirements set out in section 19. Under section 19(1) the NPO is specifically required to furnish the directorate with the following:
- A copy of the resolution that the constitution will change

- A certificate by an authorised office-bearer stating that the resolution complies with all laws and the organisation’s constitution
- The NPO certificate originally issued to the organisation if the amendments involve a change in the organisation’s name.

6. What is the consequence of non-compliance under the Act?

It is a criminal offence to “*make material false representations in any document or a narrative, financial or other report submitted to the director [of the directorate].*”^{xxi}

If an organisation fails to comply with the provisions of its founding document or the provisions of the Act, the director of the directorate of nonprofit organisations (the director) must notify that organisation in writing. Should the organisation persist with its non-compliance, the director may refer the matter to the South African Police Services for criminal investigation.^{xxii}

The director also has the authority to deregister non-complying organisations on the following grounds:^{xxiii}

- If there was a failure to timeously comply with the notice that was issued
- If a false representation was made in any document, narrative or financial report submitted to the director.

Deregistration involves cancelling the certificate of registration, notifying the organisation of the cancellation and amending the directorate’s register of nonprofit organisations accordingly.

7. Conclusion

Every nonprofit organisation has a responsibility to maintain legitimacy, transparency and accountability in fulfilling its stated mission. The Nonprofit Organisations Act provides an enabling legislative framework in which registered organisations can establish credible and accountable governance systems and practices. In addition it creates a framework that establishes reporting requirements for organisational finances, operations and administration, and sets mechanism in place to facilitate organisational accountability. It is the adherence to these standards that greatly enhances an organisation’s reputation and increases the extent to which it will be able to attract external support.

Appendix 1

FOUNDING DOCUMENT COMPLIANCE CHECKER	
Section 12 (2) of the Nonprofit Organisations Act requires that the founding document contains all the elements listed below.	Indicate in what paragraph of your founding document the corresponding requirement can be found
The organisation's name	
The main and ancillary objectives of the organisation	
A provision that the organisation's income and property cannot and will not be distributed to its members or office-members, unless it is as reasonable compensation for services rendered	
A clause providing that the organisation is a body corporate, having an identity and existence distinct from its members or office-bearers	
A provision that the organisation will continue to exist, even if its members and office-bearers change	
A provision stating that that the members or office-bearers have no rights in the property or other assets of the organisation simply because they are members or office-bearers	
The organisation's powers	
The organisation's structures and governance mechanisms	
The rules for convening and conducting meetings, the required quorum and a provision that minutes will be kept of meetings	
The manner in which the organisation's decisions are to be made	
A provision that the organisation's financial transactions will be conducted by means of a banking account	
A date for the end of the organisation's financial year	
A procedure for changing the constitution	
A procedure for dissolving the organisation	
A provision that on dissolution, and after the liabilities are met, any assets must be transferred to an NPO with similar objectives	

Appendix 2

Other Resources:

- The Nonprofit Organisations Act 71 Of 1997

http://www.dsd.gov.za/npo/index.php?option=com_docman&task=cat_view&gid=30&Itemid=116

- The Codes of Good Practice for South African Non-profit Organisations,

http://www.dsd.gov.za/npo/index.php?option=com_docman&task=cat_view&gid=20&Itemid=116

- James Tickell and Campbell Tickell 1st edition (2005) Good Governance – A Code for the Voluntary and Community Sector, National Council for Voluntary Organisations, United Kingdom.

http://ec.europa.eu/justice_home/news/consulting_public/code_conduct_npo/contributions/contribution_acevo2_en.pdf

- Governing Boards in the Non-Profit Sector (2005) 1st edition, Ricardo Wyngaard, Patric Tariq Mellet & Shelagh Gastrow, Inyathelo – The South African Institute for Advancement
- Good Governance Guide no.1: Recruitment, Orientation and Involvement of Non-Profit Boards (2009) 1st edition, Ricardo Wyngaard, Inyathelo – The South African Institute for Advancement
- Good Governance Guide no.2: Risk Management for Non-Profit Boards (2009) 1st edition, Ricardo Wyngaard, Inyathelo – The South African Institute for Advancement
- Good Governance Guide no.3: Effective Governance for Non-Profit Boards (2009) 1st edition, Peter SA Hendricks, Inyathelo – The South African Institute for Advancement

ENDNOTES

ⁱ Erica Emdon, Wallace Mgoqi & Richard Rosenthal (1995) *Report on the Establishment, Registration and Administration of NGOs - The independent study into an Enabling Environment for NPOs*, The Development Resources Centre, p2. It was also remarked by Derric Reid, Geoff Budlender, David Cuthbert, Jennifer Kinghorn & Lloyd Mogotsi (1995) in the Report on Fundraising Volunteering and Giving in the same study that “Every application is referred to other government offices, other fund-raising organisations, involved in similar work, and if the activity in any way ‘political’, also to the security police.”

ⁱⁱ Davis, D and Mogatle D (1995) *Report on the Tax Status of NPOs - The independent study into an Enabling Environment for NPOs*, The Development Resources Centre 1995, p2

ⁱⁱⁱ “To make these roles possible, government and leading NPOs have co-created an elaborate legal and policy framework that has defined a new public space for managing relations between the state and civil society, and for funding NPOs.” Mark Swilling & Bev Russell (2002) *The size and scope of the Non-profit Sector in South Africa, Graduate School of Public & Development management* (University of Witwatersrand) and the Centre for Civil Society (University of Natal), p2

^{iv} Section 2 of Act No. 71 of 1997

^v Section 4 of Act No. 71 of 1997 provides for the minister to establish a Nonprofit Directorate. According to section 8 an employee of the Department of Social development will be appointed as the director. The latter shall be in charge of the directorate and fulfil such other functions conferred by or in terms of the Act or any other law.

^{vi} Section 3 of Act No. 71 of 1997

^{vii} Section 12(1) of Act No. 71 of 1997

^{viii} Act No. 71 of 1997

^{ix} The Company’s Act No. 71 of 2008 has replaced The Company’s Act No. 61 of 1971. Whereas the latter referred to what was commonly known as the section 21 Company, the former replaces it with The Non Profit Company.

^x Section 12(1) of Act No. 71 of 1997

^{xi} Section 13(1)(a)(b) and (c) of Act No. 71 of 1997

^{xii} The application form can be downloaded at http://www.dsd.gov.za/npo/index.php?option=com_docman&task=cat_view&gid=29&Itemid=116

^{xiii} Inyathelo promotes organisational and institutional advancement. Central to the advancement paradigm is the notion that nonprofit organisations perform valuable work, in the public interest, and should position themselves to attract investment for such work.

^{xiv} Such as the Public Finance Management Act No 1 and Public Finance Management Amendment Act 29 of 1999

^{xv} Section 16(3) of Act No. 71 of 1997

^{xvi} Section 17(1)(a) of Act No. 71 of 1997

^{xvii} Section 17(1)(b) of Act No. 71 of 1997

^{xviii} An accounting officer is a member of a professional accounting body, such as a qualified accountant. This does not necessarily mean that the person has to be qualified as a chartered accountant or auditor. There may be some good reason why an organisation would choose to appoint a chartered accountant or auditor as an accounting officer. One such reason may be that a donor requires the accounting records of the company to be audited.

^{xix} Section 17(2)(a)(b) and (c) of Act No. 71 of 1997

^{xx} Section 18(1)(a). The Narrative report is available in pdf format at the following link, http://www.dsd.gov.za/npo/index.php?option=com_docman&task=cat_view&gid=20&Itemid=116

^{xxi} Section 29(2)(c) of Act No. 71 of 1997

^{xxii} Section 20(1)(a) and (b) of Act No. 71 of 1997. This applies only if the director of the directorate of nonprofit organisations is satisfied that the non-compliance constitute an offence.

^{xxiii} Section 21 of Act No. 71 of 1997