



The Non-Profit Lawyer

ABOUT NPO LEGAL ISSUES:

This is an electronic newsletter published by: **RICARDO WYNGAARD ATTORNEYS** which is aimed at updating the non-profit sector on relevant legal issues.

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ATTORNEYS is a law practice that specialises in rendering advice and assistance on non-profit law and governance.

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POLICY FRAMEWORK ON NPO LAW

By Ricardo Wyngaard

The Department of Social Development hosted the South African Nonprofit Organisation Summit (the Summit) during 15-17 August 2012 in Johannesburg. At the Summit the Department circulated a document entitled: **Policy Framework on Nonprofit Organisations Law** (the Policy). The Policy captures the foundational principles of the state's intended review of the legislative framework affecting the non-profit sector.

Purpose behind the Policy:

The Policy further states that; *"The objective of the review is to ensure that the new regulatory framework is appropriate to the legal and socio-economy contexts of South Africa as a constitutional democracy and an open society."* The aim of the review is *"to enhance the existing enabling environment for the nonprofit organisations to flourish and protect the sector from abuse as well as minimise undue disruptions to many of the positive contributions."*

The South African Nonprofit Organisations Regulatory Authority

The Policy proposes, amongst other; the establishment of a new entity to be called The South African Nonprofit Organisations Regulatory Authority (SANPORA). It is envisaged that SANPORA will fulfil a different role to that which the NPO Directorate is currently fulfilling. SANPORA would, according to the Policy, be responsible for:

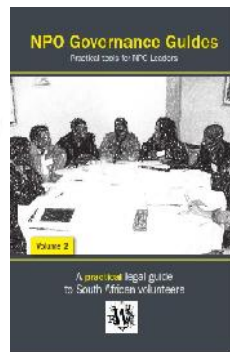
- **Registering organisations:** It will register NPOs and will introduce an electronic registration process.
- **Examining organisations:** It will *"have at least the right to examine books, records and activities of nonprofit organisations. To further ensure compliance, all reporting organisations must be subjected to random and selective audit by the supervisory organ."*
- **Issuing sanctions:** It will be responsible to issue sanctions against non-compliant organisations and the Policy states that: *"it is appropriate to have special sanctions for violations peculiar to nonprofit organisations."*
- **Promoting compliance and enforcing punitive measures:** SANPORA should; *"act swiftly and effectively to ensure compliance, prevent wrongdoing and enforce punitive measures."*
- **Providing guidance:** SANPORA will also provide advice and guidance to non-compliant organisations and educate office-bearers about their duties and facilitate access to accredited training programmes on governance.
- **Enabling blacklisting of organisations:** It will, through the provision of public access to information; *"enable the 'blacklisting' of organisations that have been involved in unscrupulous practices to be known and to be dealt with accordingly so as to protect the sector and avoid prejudicial generalisation of the sector."*

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In this edition we feature an excerpt from the our **Practical Legal Guide to SA Volunteers** which is selling for R250.

The Guide also contains:

- A sample **Volunteer Policy**
- A sample **Volunteer Agreement**
- A sample **Volunteer Indemnity Form**



Volunteers as drivers:

In 2003 the Labour Appeal Court found that Eskom, as an employer, cannot be vicariously held liable for the conduct of its employee because the employee acted contrary to its employment policy. In this case an employee of Eskom offered a certain Mr. Roux a lift in the company vehicle, which Roux accepted. The two were involved in an accident in which Roux was seriously injured. Eskom was sued for R2.5 million, on the grounds of vicarious liability.

Eskom's policy specifically prohibited its employees from giving lifts to other people without the required authorisation. The court decided that Eskom could not be held liable because the employee was prohibited from giving Roux a lift. The Eskom vehicle was also clearly marked. The court concluded that *'it would be unfair to hold the employer liable to the passenger who has associated himself, albeit innocently, with the forbidden act of the employee and who, in effect, assumed the risk of the association'*.

The implication is that NPOs should issue a clear policy to their employees and volunteers who are driving the organisation's vehicles, not to give lifts to people. If this is not a clear policy which is communicated to employees and volunteers, the NPO may be held liable in the case of a situation arising that is similar to the Eskom matter discussed above.

Policy Framework on NPO Law/....

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One size fits all?

The Policy is not clear on whether all NPOs will be treated the same. At one point it states that it will be imperative for all NPOs *to be subjected to the same rules regarding formation, governance and reporting requirements in order to circumvent any legal loopholes that will undermine the principles of public beneficitation and disclosure.* This statement is seemingly in contradiction with a later statement in the Policy which provides that: *"There will be therefore a need for the regulatory framework to differentiate between the different categories of NPOs and to align standards and the regulation regiment accordingly."*

International Organisations

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

Conclusion:

It is evident from the Policy that a more stringent regulatory framework is looming on the horizon for South African non-profits. This shift in government focus may perhaps be linked to the 2009 report published by the Financial Action Task Force and the Eastern Southern Africa Anti-Money Laundering Group entitled: Mutual Evaluation Report - Anti-Money Laundering and Combating the Financing of Terrorism. This report concluded that South Africa has not assessed potential risks that terrorist financing posed within the non-profit sector. It recommended, amongst other, that enforcement powers under the NPO legislation should provide for the power to sanction office-bearers, impose fines and freeze accounts of NPOs for violation of oversight measures.