

COMMENTS MADE BY
THE LAW SOCIETY OF SOUTH AFRICA
ON THE
PROPOSED REGULATIONS IN RESPECT OF AMENDMENTS TO
THE NON-PROFIT ORGANISATION ACT, 1997 (ACT NO. 71 of 1997)
AS CONTAINED IN THE GENERAL LAWS AMENDMENT ACT, 2022 (ACT NO. 22 of 2022)

The Law Society of South Africa (LSSA) has considered the proposed Regulations to be made under section 26 of the Nonprofit Organisations Act of 1997 (the NPO Act). Section 26 provides that:

The Minister [of Social Development] may make any regulation that is necessary or expedient in order to achieve the objects of this Act.

It must also be noted that section 27 of the NPO Act provides that:

- (1) *Any condition, restriction or prohibition contained in a regulation must—*
- (a) *be proportionate to the object pursued by that regulation; and*
 - (b) *limit the rights of persons and bodies as little as is reasonably possible.*
- (2) *If a failure to comply with a condition, restriction or prohibition contained in a regulation is an offence, that regulation must provide that, to the extent practicable, before being subjected to criminal liability, the affected person must be given notice of the offence and an opportunity to comply with the regulation.*

PROPOSED REGULATION 8A AND 8B

Regulation 3 (2)(c) Provides that:

For purposes of section 18(1)(bA) of the Act, a nonprofit organisation referred to in section 12(1)(b) of the Act must provide the director with the following information —

- (c) *in respect of the administration and operations of the nonprofit organisation –*
- i. the business address and, if applicable, registered address of the nonprofit organisation;*
 - ii. the trading name of the nonprofit organisation, if different from the name under which it is incorporated;*
 - iii. the countries or territories in which the NPO has donated funds, provided services or conducted activities in each of the previous three financial years;*
 - iv. a description of the activities or services provided in each country or territory outside the borders of the Republic in each of the previous three financial years; and*
 - v. confirmation as to whether the annual financial statements of the nonprofit organisation were audited in each of the previous three financial years, and if so the name of the auditing firm. [emphasis added]*

The LSSA is of the view that the underlined parts of the proposed Regulations are *ultra vires* the NPO Act for the following reasons:

- 1) The above obligation to register, as contained under section 12(1)(b) of the NPO Act, comes into effect on **1 April 2023**. Read with the proposed Regulation it appears that the organisation that is compelled to become registered under section 12(1)(b) will be obligated to provide information to the NPO Directorate in respect of the administration and operations of the NPO for:
 - i. the countries or territories in which the NPO has donated funds, provided services or conducted activities in each of the previous three financial years; and
 - ii. a description of the activities or services provided in each country or territory outside the borders of the Republic in each of the previous three financial years;
- 2) Our understanding is that the duty to provide reports and information as imposed on:
 - a. registered non-profit organisations commences upon registration (whether voluntary or compulsory) and
 - b. organisations that are compelled to become registered under section 12(1)(b), but failed to do so (see section 12(1)(d)),commences on 1 April 2023.
- 3) The South African Constitutional Court has stated in the matter of: *S v Mhlungu & others 1995 (3) SA 867 (CC) paras 65 – 67*: “First, there is a strong presumption that new legislation is not intended to be retroactive.” The Court further stated: “In general, our courts have held that in the absence of a discernible contrary intention, it is presumed that a new statute is not intended to have retroactive or retrospective effect.”
- 4) Neither the NPO Act nor the General Laws Amendment Act, No. 22 of 2022 provide for a discernible intention that any of the amended (or existing) provisions of the NPO Act are to apply retrospectively.
- 5) As required under section 27 of the NPO Act, any condition, restriction or prohibition contained in a regulation must (a) be proportionate to the object pursued by that regulation; and (b) limit the rights of persons and bodies as little as is reasonably possible. The introduction of retrospective information and reporting requirements are, in our view, contrary to section 27 of the NPO Act.

The LSSA suggests that the above Regulations should read:

- i. the countries or territories in which the NPO has donated funds, provided services or conducted activities in each of the previous three financial years provided that no such obligation shall apply to a period prior to 1 April 2023;
- ii. a description of the activities or services provided in each country or territory outside the borders of the Republic in each of the previous three financial years provided that no such obligation shall apply to a period prior to 1 April 2023.

GRAMMATICAL RECOMMENDATIONS

The LSSA has made several grammatical recommendations to the proposed Regulations.

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF SOCIAL DEVELOPMENT

NO. 3071

21 February 2023

REGULATIONS IN RESPECT OF AMENDMENTS TO THE NON-PROFIT ORGANISATION ACT, 1997 (ACT NO. 71 of 1997) AS CONTAINED IN THE GENERAL LAWS AMENDMENT ACT, 2022 (ACT NO. 22 of 2022)

I, **Lindiwe Zulu**, the Minister responsible for Social Development hereby intend to make Regulations in respect of amendments to the Non-Profit Organisation Act, 1997 as contained in the General Laws Amendment Act, 2022 (Act No. 22 of 2022).

Interested parties are invited to submit comments on the proposed regulations **within 30- days from of the date of publication of this notice** to the Director-General: Social Development, Private Bag X 901, Pretoria, 0001, fax number (012) 312 7015/7333/7214 or e-mail: Mphomn@dsd.gov.za or Lindimk@dsd.gov.za or LuyandaMt@dsd.gov.za (for the attention of: Ms M Mngxitama or Ms L Mkhwanazi, or Luyanda Mtshotshisa

Copies of the draft regulations can be obtained from the Government Printer Pretoria, or from reception at 134 Pretorius Street, Pretoria, or from the website of the Department of Social Development www.dsd.gov.za



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Ms Lindiwe D Zulu, MP
Minister of Social Development

SCHEDULE

Insertion of 7A in Regulations in respect of amendments to Non-Profit Organisation Act, 1997 as contained in General Laws Amendment Act, 2022

1. The Directorate must-

(1) for purposes of section 25A(9) of the Act, establish and maintain a register of persons who are disqualified from serving as ~~an~~ office-bearers in terms of an order of a court pursuant to the Act, or any other law;

(2) allow any person to inspect the register referred to in subregulation (1), at the office of the Director of ~~Nonprofit~~ Non-profit Organisations between the hours of 08:30 and 12:00, and 13:30 and 15:30, from Monday to Friday.

(3) ensure that the register referred to in subregulation (1), includes, to the extent that the information is available to the Directorate, the following details regarding the persons listed therein:

(a) full forenames and surname;

(b) thirteen digit identity number in the case of a South African citizen, or passport number and date of birth in the case of ~~if~~ a foreign national;

(c) case number of the court proceedings pursuant to which the person became disqualified;

(d) date on which the court order resulting in disqualification takes effect;

(e) date on which the disqualification expires; and (f) reason for disqualification.

(4) within [30] days after a court order is granted the consequence of which is that an office-bearer of a registered ~~nonprofit~~ non-profit organisation ("NPO") becomes disqualified to serve as an office-bearer, ~~compel the NPO to that non-profit organisation~~ provide the information listed in subregulation (3) to the director in writing, in relation to that person.

(5) ensure that upon the expiry of any period of disqualification, the person concerned, notifies the director in writing, with supporting information and documentation, of the expiry of the ~~person's~~ ~~their~~ period of disqualification;

(6) ensure that within [30] days of receipt of the information and documentation referred to in subregulation (5), the director removes the person's name and details from the public register of persons disqualified from serving as ~~an~~ office-bearers, unless it is established that the period of disqualification has not expired.

Insertion of section 8A in Regulations in respect of amendments to Non-Profit Organisation Act, 1997 as contained in General Laws Amendment Act, 2022

2. For purposes of regulation 8B and the register referred to in section 24(1) of the Act,

- (a) “fiscal sponsorship” means an agreement between a registered ~~nonprofit~~NPO organisation and an unregistered NPO ~~nonprofit organisation~~ in terms of which the registered NPO ~~nonprofit organisation~~ provides fiduciary oversight, financial management, administrative or operational services to support the capacity of the unregistered ~~NPO nonprofit organisation~~. Fiscal sponsorships are often used by a newly formed NPO ~~nonprofit organisations~~ before it is registered, or becomes tax-exempt by the South African Revenue Service, to facilitate its fundraising and to maintain controls over the expenditure before it has independent capacity to maintain oversight over its financial management, administrative, or operational services in its start-up phase of development.

Insertion of section 8B in Regulations in respect of amendments to Non-Profit Organisation Act, 1997 as contained in General Laws Amendment Act, 2022

3.(1) For purposes of section 18(1)(bA) of the Act, a registered NPO ~~nonprofit organisation~~ which makes donations to persons, provides services, and conducts activities, exclusively in the Republic, must provide the director with the following information in respect of each office-bearer of the ~~NPO nonprofit organisation~~ —

- (a) full forenames and surname;
(b) thirteen digit identity number if South African citizen, or passport number and date of birth if ~~non-South African~~ a foreign national;
(c) position or portfolio in the ~~NPO nonprofit organisation~~; and (d) postal address.

(2) For purposes of section 18(1)(bA) of the Act, a NPO ~~nonprofit organisation~~ referred to in section

12(1)(b) of the Act must provide the director with the following information —

- (a) in respect of each office bearer of the ~~NPO nonprofit organisation~~ —
i. full forenames and surname;

- ii. thirteen digit identity number if South African citizen, or passport number and date of birth if foreign national non-South African; iii. position or portfolio in the NPO nonprofit organisation; and iv. postal address;
- (b) in respect of the control structure of the NPO nonprofit organisation –
- i. legal form of the organisation; ii. registration number, if applicable; iii. income tax and/or value added tax number; iv. type of control structure; v. titles of any sub-committees of the control structure; and vi. names of affiliate organisations and fiscal sponsorships.
- (c) in respect of the administration and operations of the NPO nonprofit organisation –
- i. the business address and, if applicable, registered address of the NPO nonprofit organisation;
- ii. the trading name of the NPO nonprofit organisation, if different from the name under which it is incorporated;
- iii. the countries or territories in which the NPO has donated funds, provided services, or conducted activities in each of the previous three financial years;
- iv. a description of the activities, or services provided in each country, or territory outside the borders of the Republic in each of the previous three financial years; and
- v. confirmation as to whether the annual financial statements of the NPO nonprofit organisation were audited in each of the previous three financial years, and if so the name of the auditing firm.

- (3) The Republic of South Africa must apply a risk-based approach to ensure that measures are introduced to prevent or mitigate money laundering and terrorist financing are and which are commensurate with the risks identified by the Financial Action Task Force (FATF) Recommendation.
- (4) The Minister must, in relation to NPOs, provide for measures to protect NPOs from potential terrorist financing abuse and should apply target in line with the risk-based approach, apply focused measures in dealing with identified threats of terrorist financing abuse to NPOs.

- (5) The approach contemplated in sub-regulation (35) must take into account-
- (a) the diversity within individual national sectors;:-
 - (b) the differing degrees to which parts of each sector may be vulnerable to terrorist financing abuse;:-
 - (c) the need to ensure that legitimate charitable activity continues to flourish;:- and
 - (d) the limited resources and authorities available to combat terrorist financing in each country.:-"
- (6) The risk-based approach as contemplated in/by ~~Financial Action Task Force (FATF)~~ should justify differential treatment as between ~~NPOs non-profit organisations~~ which elect to be registered in terms of the Act and those which are required to register.
- (7) In relation to ~~NPOs non-profit organisations~~ which are required to register, additional and more detailed information should be provided to the director.
- (8) The information recorded for ~~NPOs non-profit organisations~~ who elect to register must consist of information currently provided to the Directorate under the Act.

Insertion of Regulation 8C in Regulations in respect of amendments to Non-Profit Organisation Act, 1997 as contained in General Laws Amendment Act, 2022

- 4.(1) Access to the information referred to in section 18(1)(bA) may be requested from the registered ~~-NPO nonprofit organisation-~~ in accordance with the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).
- (2) Any person may inspect the register referred to in section 24(1)(d) of the Act, at the office of the Director of ~~NPOs nonprofit organisations~~ between the hours of 08:30 and 12:00, and 13:30 and 15:30, from Monday to Friday.
- (3) The director may provide electronic access to the information in the register referred to in section 24(1)(d) of the Act.
- (4) Information relating to the identity of the person(s) who own, control or direct the activities of high risk-~~NPOs nonprofit organisations~~, including senior officers, board members and trustees, should be made publicly available.
- (5) The amendments to Form 4 through the creation of a Part B of that Form 4 in these Regulations must be regarded as a proactive disclosure of certain categories of information in section 18(1)(bA).
- (6) Additional information that is sought may be accessed under the Promotion of Access to

Information Act No 2 of 2000 (PAIA), and the Protection of Personal Information Act No 4 of 2013 (POPIA), which give effect to the right to privacy.

Insertion of Regulation 9A in Regulations in respect of amendments to Non-Profit Organisation Act, 1997 as contained in General Laws Amendment Act, 2022

Administrative sanctions

5.(1) The director may impose an administrative sanction on any registered ~~NPO, nonprofit organisation~~ or a ~~NPO nonprofit organisation~~ which is required to register, when satisfied on available facts and information that the ~~NPO nonprofit organisation~~ has failed to –

- (a) perform any duty imposed by, or has failed to comply with the requirements of, section 12 or 18(1)(bA) of the Act; or
 - (b) register as required in terms of section 12(1)(b) of the Act, within the period determined by the Minister by notice in the Gazette in accordance with section 12(1)(c) of the Act.
- (2) No administrative sanction may be imposed until the director has issued a compliance notice to the ~~NPO nonprofit organisation~~ in accordance with section 20 of the Act, and the time-period during which compliance must be effected has expired without the ~~NPO nonprofit organisation~~ having rectified the non-compliance.
- (3) When determining an appropriate administrative sanction, the director must consider the following factors:
- (a) the nature, duration, seriousness and extent of the relevant non-compliance;
 - (b) whether the ~~nonprofit organisation~~NPO has previously failed to comply with any compliance notice;
 - (c) any remedial steps taken by the ~~NPO nonprofit organisation~~ to prevent a recurrence of the non-compliance; or
 - (d) any other relevant factor, including mitigating factors.
- (4) The director may impose any one or more of the following administrative sanctions:
- (a) a caution not to repeat the conduct which led to the non-compliance referred to in sub-regulation (1);
 - (b) a reprimand;
 - (c) a directive to take remedial action or to make specific arrangements; or

- (d) the restriction or suspension of certain specified activities of the ~~NPO~~[nonprofit organisation](#).
- (5) The director may—
- (a) in addition to the imposition of an administrative sanction, make recommendations to the relevant [NPO nonprofit organisation](#) in respect of compliance with this Act, or any compliance notice issued in terms of this Act;
 - (b) suspend any part of an administrative sanction on any condition the director deems appropriate for a period not exceeding five years.
- (6) Before imposing an administrative sanction, the director must give the ~~nonprofit organisation~~[NPO](#) reasonable notice in writing—
- (a) of the nature of the alleged non-compliance;
 - (b) of the intention to impose an administrative sanction;
 - (c) of the amount or particulars of the intended administrative sanction; and
 - (d) that the ~~NPO nonprofit organisation~~ may, in writing, within a period specified in the notice, make representations as to why the administrative sanction should not be imposed.
- (7) After considering any representations and the factors referred to in sub-regulation (3), the director may impose such administrative sanction as the director considers appropriate.
- _____
- (8) ~~New~~ Regulation 9A provides for administrative sanctions, for non-compliance with the registration requirement applicable to ~~NPOs~~[nonprofit organisations](#) contemplated in section 12(1)(b), and the reporting requirements applicable to registered ~~—NPOs~~[nonprofit organisations](#), in terms of the Act.
- (9) The administrative sanctions are not punitive in nature, but rather, are meant to encourage compliance with the Act.
- (10) Section 20 of the Act also provides for sanctions for noncompliance with the constitutions and obligations of ~~nonprofit organisations~~[NPOs](#) (including criminal sanctions, where appropriate), and section 21 of the Act provides for cancellation of registration of ~~NPOs~~[nonprofit organisations](#).

Short title and commencement

6. These Regulations are called Regulations in respect of amendments to the Non-Profit

Organisation Act, 1997 as contained in the General Laws Amendment Act, 2022 (Act No. 22 of 2022) and shall come into force on publication ~~of~~ thereof in the Gazette

No. 48096

EXPLANATORY MEMO

New Regulation 7A provides for the establishment and maintenance of a register of persons who have been disqualified, in terms of a court order, from serving as office bearers. The wording "in terms of a court order" limits the register to a sub-set of disqualified persons, as not all disqualifications are derived from a court order.

The duty to notify the Directorate of court orders which disqualify a person is placed on the NPO, which may not allow a disqualified person to serve as an office bearer and must inform the Directorate if an office bearer is disqualified. The Directorate must maintain the public register and make it available for inspection (and possible online access). To minimise prejudice to a person who is no longer disqualified, the director must confirm the validity of the documents and information demonstrating that the period of disqualification has expired within 30 days, and remove the person's name from the register.

Concern may be raised about including personal information in the register. However, in terms of section 11 of POPIA, processing of personal information is permissible if, amongst others, the "processing complies with an obligation imposed by law on the responsible party" or the "processing is necessary for the proper performance of a public law duty by a public body". The new section 25A(9) of the NPO Act introduced by the GLAB requires the Directorate to maintain the register of disqualified persons, and requires that the register be public. Without information which enables the reader to identify such persons, the register would be meaningless. Personal information processed by public bodies as part of their functions and aimed at crime prevention as contemplated in section 38(1) of POPIA is also exempted from the provisions of sections 11(2), 12, 15 and 18 of POPIA which regulate objections, manner of collection, further processing etc. Moreover, the exclusion provided for in section 6 of POPIA will potentially be applicable.

Specifically, section 6(1)(c) of POPIA provides that the

Fiscal sponsorships are often used by a newly formed [NPO nonprofit organisations](#) before it is registered or become tax-exempt by the South African Revenue Service, to facilitate its fundraising and to maintain controls over the expenditure before it has independent capacity to maintain oversight over its financial management, administrative or operational services in its start-up phase of development.

FATF Recommendation 1 provides that countries should apply a risk-based approach to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified.

Furthermore, in relation to NPOs, the FATF Recommendations provide that “measures to protect NPOs from potential terrorist financing abuse should be targeted and in line with the risk-based approach” and “a risk-based approach applying focused measures in dealing with identified threats of terrorist financing abuse to NPOs is essential given the diversity within individual national sectors, the differing degrees to which parts of each sector may be vulnerable to terrorist financing abuse, the need to ensure that legitimate charitable activity continues to flourish, and the limited resources and authorities available to combat terrorist financing in each country”.

The risk-based approach suggested by FATF justifies differential treatment as between [NPOs nonprofit organisations](#) which elect to be registered in terms of the Act, and those which are required to register. In relation to those which are required to register, additional and more detailed information should be provided to the director. The information recorded for [NPOs nonprofit organisations](#) who elect to register consists of information currently provided to the Directorate under the Act.

FATF guidance suggests that information relating to the identity of the person(s) who own, control or direct the activities of high risk-[NPOs nonprofit organisations](#), including senior officers, board members and trustees, should be made publicly available. The proposed amendments to Form 4 through the creation of a Part B of that Form 4 in these Regulations creates proactive disclosure of certain categories of information in section 18(1)(bA).

To the extent that additional information is sought, access to information is regulated under the Promotion of Access to Information Act No 2 of 2000 (PAIA), and access to personal information is regulated under the Protection of Personal Information Act No 4 of 2013 (POPIA), which gives

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effect to the right to privacy. Together, these statutes balance the right to privacy with the right of access to information.

New Regulation 9A provides for administrative sanctions, for non-compliance with the registration requirement applicable to NPOs ~~nonprofit organisations~~ contemplated in section 12(1)(b), and the reporting requirements applicable to registered NPOs ~~nonprofit organisations~~, in terms of the Act. The administrative sanctions are not punitive in nature, but rather, are meant to encourage compliance with the Act.

Section 20 of the Act also provides for sanctions for noncompliance with the constitutions and obligations of NPOs ~~nonprofit organisations~~ (including criminal sanctions, where appropriate), and section 21 of the Act provides for cancellation of registration of ~~NPOs ~~nonprofit organisations~~~~.