

REGULATORY FRAMEWORKS REQUIREMENTS FOR THE SOUTH AFRICAN CIVIL SOCIETY SECTOR TO PROMOTE THEIR ACTIVE PARTICIPATION IN A DEVELOPMENTAL STATE

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DEVELOPMENTAL STATE**



POLICY PAPER



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**REGULATORY FRAMEWORKS REQUIREMENTS
FOR THE SOUTH AFRICAN CIVIL SOCIETY SECTOR – March 2021**

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SUMMARY

A capable, ethical, and developmental state cannot be achieved without an active civil society sector representing those who, for various reasons, are unable to ensure that their voices are heard in the South African democratic state.

This paper aims to assist the National Development Agency (NDA), the sector and government with proposals for developing regulatory frameworks that can promote the active participation and independence of the sector in development initiatives.

There are a number of deficiencies in the current design of regulatory frameworks for the civil society sector:

- The regulations do not place appropriate responsibilities and accountability in the hands of the sector itself, instead assuming that the state must play an administrative justice role for the sector, while the sector's only role is to comply.
- The regulations apply a 'one size fit all' model that does not take into account the diversity of organisations operating in this sector. The design of the current regulatory framework fails to acknowledge the diversity among CSOs and results in burdensome overlaps, especially for smaller CSOs and CBOs.

The regulations have also been poorly implemented. Some of the reasons for this are closely related to misconceptions about the nature and role of civil society, and the role that 'regulation of CSOs' plays. In particular, government tends to conflate its regulatory role (which should be applicable to all CSOs) with its developmental and democratic role, creating the misconception of civil society as being a single, coherent and organised sector with one overarching, organising vision. The NPO Directorate's ambitious mandate as the primary regulatory body has not been matched by the necessary resources to effectively implement its mandate, resulting in weak implementation of its mandate and declining levels of compliance by CSOs with reporting requirements.

Our key recommendations include:

1. The NPO Act should be amended as it does not adequately serve the purpose for which it was designed.
2. The amended NPO Act should:

- a. Limit its application to non-profit entities that provide an external public benefit;
 - b. Continue to confer formal legal status on organisations that choose to register (e.g. community-based organisations); and
 - c. Automatically register all participating organisations whose turnover falls below a certain threshold (say, R250,000) with SARS as public benefit organisations (PBOs)
3. The entity responsible for the implementation of the revised NPO Act should:
 - a. Establish an online facility for the easy collection and dissemination of data on those organisations that choose to register; and
 - b. Ensure that the information submitted is easily accessible online for public inspection.
 4. The users of the database (other CSOs, donors, or government entities) should be able to use this information as inputs into their decisions about whether or not to support individual CSOs. In particular, the regulatory entity should not take responsibility for the accuracy or completeness of the data submitted.
 5. CSOs providing services on behalf of or with government entities should continue to be regulated in terms of the requirements of the relevant professional field, such as healthcare, social services, education, and so on.
 6. The regulatory authority should publish annual updates on the state of the database, including the number and type of CSOs registered, and those that have up-to-date information.
 7. The question of whether to establish an independent entity with regulatory functions and a complaint mechanism should be investigated further, but this issue should be separated from the management of the registration process outlined above.
 8. A separate framework to regulate organisations that solicit funds from the general public (and/or that receive funds above some threshold amount) should be put in place in order to ensure that such organisations are able to publicly account for any funds they receive.

1. BACKGROUND AND INTRODUCTION

1.1 Research objectives

One of the seven priorities of the Sixth Administration announced by President Ramaphosa in his State of the Nation Address on 20 June 2019 is to focus on ‘A capable, ethical and developmental state’. Such a state cannot be achieved without an active and fully participating civil society sector.

The purpose of this policy paper and its underlying research report is to assist the NDA, the sector and government with proposals for developing regulatory frameworks that can promote the active participation and independence of the sector.

Current regulatory frameworks do not place appropriate responsibilities and accountability in the hands of the sector itself. Instead, the Non-Profit Organisations Act 71 of 1997 (NPO Act) requires the state to play an administrative justice role for the sector, while the sector’s only role is to comply. Some in the sector have expressed frustration at being seen merely as service providers to the state and private sector, while others view current regulatory frameworks as discriminating against smaller entities or those that fail to register using the current burdensome regulations. In addition, government has developed these regulations without necessarily taking due account of the diverse range of needs and interests affecting organisations operating in the sector.

The South African context for the sector requires regulatory frameworks that do not merely establish organisations through a registration process through “one size fit all” legislation. Instead, these regulatory frameworks should recognise the diversity of organisations operating in the civil society sector – and should recognise and regulate any organisation that does work for the ‘public good’. There is, however, a danger of over-regulation of the sector, and, as elsewhere in the world, even suppression.

1.2 Research approach and methodology

This policy paper is based on a research study conducted on behalf of the NDA which reviewed the current legislative, policy and regulatory environment and its impact on the functioning of civil society in South Africa, and conducted a comparative study of other regulatory frameworks worldwide. The study included a desktop qualitative literature review and an agreed limited number of six interviews with knowledgeable individuals with extensive experience of government regulation of the sector, grant-

making, sector organisational and legal advice, and operating in and representing the sector. The findings aim to contribute to the formulation of appropriate legislative, policy and regulatory frameworks for the sector. The NDA intends that the primary outcome of engagements based on the research findings and this policy paper will be the creation of an enabling environment for the sector to thrive as the ‘third pillar of ... democratic governance’ (NDA Terms of Reference, 2020).

2. THEORETICAL FRAMEWORK: CONCEPTUALISATIONS AND DEFINITIONS OF CIVIL SOCIETY

Any discussion of regulatory frameworks for civil society begs the question of what *is* ‘civil society’. The main difficulty facing any attempt to clearly define civil society and its institutional forms, primarily and most broadly termed civil society organisations (CSOs), is their multi-faceted diversity, including features such as form, size, capacity, location, degree of formalisation, objectives, roles and functions, degree of autonomy, relationship with the state or government, and sources of funding. These differences are exacerbated in South Africa due to the continuing legacies of apartheid and its associated socio-economic and spatial inequalities.

South African civil society has been compelled to take on a broad array of activities because of the failures by government and the market, a recent example being the laudable response by CSOs to the desperate needs arising from the socio-economic impacts of the Covid-19 pandemic. Civil society ‘structures form a powerful space for social cohesion and solidarity, service delivery and a voice of critique and expression.’ Civil society ‘is thus a key partner in a democratic and free society’ (CASE *et al*, 2008).

This partnership has a particular pertinence in South Africa, where civil society, especially social justice and human rights organisations, played a fundamental role in the struggle against apartheid and its legacies, and in the transition to democracy. They have emerged as key actors of democratic transformation by spearheading many of the initiatives leading to constitutional and legal reforms, litigating public interest cases, contributing to policy development, providing technical and professional expertise, research and analysis, and by raising constitutional awareness for the purpose of eradicating poverty and inequality.

The Minister of Social Development has acknowledged this historic role, adding that implementation of the National Development Plan: Vision 2030 (NDP) ‘requires ... vibrant [CSOs]’ one of whose key roles is the ‘promotion and creation of [an] active citizenry’. Realising the NDP’s goals, including ‘building safer communities, building a capable state, promoting accountability, fighting corruption, transforming society and uniting the country[,] requires a more organised civil society capable of undertaking *all* these important tasks’ (Dlamini, 2016: ix; emphasis added).

2.1 Definitions in the Statutory Framework

The NPO Act does not define civil society or CSOs, but focuses narrowly on the scope of its mandate, i.e. NPOs, which are defined as:

- a trust, company or other association of persons
- (a) established for a public purpose; and
- (b) the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered.

The Act focuses on the “intent” of the organisations to which it applies, stipulating that they have a public purpose and are not formed in order to personally enrich the members or office-bearers of the entity. ‘Public purpose’ is not defined in the NPO Act.

The Income Tax Act of 1962 introduces the term ‘public benefit organisation’ (PBO), which refers to those organisations that have been granted tax exemption. To qualify as PBO, an organisation must carry on as its sole or principal object one or more public benefit activities listed in the Income Tax Act, and these activities must be carried on in a non-profit manner and with an altruistic or philanthropic intent.

The Value-Added Tax Act 1991 confers certain benefits on organisations that qualify as ‘associations not for gain’, ‘welfare organisations’ or both.

The NDA Act defines CSOs even more laconically and narrowly than NPOs in the NPO Act – a CSO is ‘a trust, company or voluntary association established for a public purpose, but does not include an organ of state.’

These laws represent a hierarchy of definitions ranging from the broadest (NDA Act – all PBOs regardless of whether or not they are established on a non-profit basis), to the slightly less broad (NPO Act – all non-profit PBOs), to a more restrictive approach (Income Tax Act – NPOs working for the common good in specified areas), to the most

restrictive (VAT Act). All definitions have a common thread – they focus on the organisation’s intent rather than its form.

2.2 Definitional options

- The most general (top-down) approach is simply to specify all entities with a public benefit purpose as CSOs, regardless of whether or not they are non-profit entities. This approach is perhaps too broad.
- The approach in the NPO Act is more tailored (limiting the scope to non-profit entities with a public benefit purpose), but it ignores the different types of entities and the particular purposes for which they have been established. In particular, the definition of ‘public purpose’ is open to fairly broad interpretation.
- The definitions used by SARS attempt to restrict the scope by listing the types of activities that qualify for inclusion. An obvious risk with any enumeration is omission of some types of entities, especially given the sector’s dynamism.
- All these attempts treat the entities involved as homogeneous, and in doing so may overlook some of the complexities of different organisational forms. The definitions proposed in the DSD’s 2012-14 draft policy framework were an attempt to uncover these differences by proposing definitions of different organisational forms.
- Civil society can usefully be conceptualised as those public entities operating outside of the family, state and private sector that collectively form a powerful space for social cohesion and solidarity, service delivery and a voice of critique and expression, and as a key partner in a free and democratic society.

One broad definition of civil society adopts an explicit citizen-centric focus:

‘An ecosystem of organised and organic social and cultural relations existing in the space between the state, business, and family, which builds on indigenous and external knowledge, values, traditions, and principles to foster collaboration and the achievement of specific goals by and among citizens and other stakeholders’ (Van Dyck, 2017: 1).

Any discussion of CSOs should take account of theoretical and historical perspectives, as well as the practical difficulties of defining entities. One could marry these approaches as follows:

CSOs are non-profit entities that may take a number of forms and operate for the public benefit (understood as either for the non-monetary benefit of the members of the organisation or for a specified group of external beneficiaries).

The distinction between organisations that serve their members rather than some external group for public benefit is crucial. Although the above definition of civil society includes both types, it is arguable that the scope of regulatory frameworks be limited to the latter group.

Organisations acting on behalf of their members are adequately governed by their internal democratic practices, the existing legal framework (which offers relief to members whose interests may have been prejudiced), or by existing statutory regulations. From a regulatory perspective, therefore, there is no added value in drafting further legislation to cover these entities.

The new regulatory framework for civil society should therefore be limited to those entities who act, or purport to act, on behalf of members of the public, but are not currently directly responsible or accountable to that constituency.¹ Entities may have some limited form of internal accountability (boards of directors, management-staff reporting lines, etc.), but this is a poor substitute for broader stakeholder accountability. This approach applies to most CSOs and social movements, in that they often claim to represent a broader constituency than their registered members. Regulation should, then, focus on providing an enabling environment and filling this 'accountability gap'.

3. EXISTING REGULATORY FRAMEWORK

States have adopted very different approaches towards civil society, which have been reflected in their respective regulatory frameworks. The term generally refers to all sets of state or non-state legal rules, policies or guidelines adopted or developed that govern the establishment, activities and functioning of civil society.

The regulatory framework in South Africa can be understood at multiple levels. Firstly, it entails a strategic-level understanding of the roles and functions of civil society in our particular political, economic and social context, which in South Africa is

¹ It may, however, be necessary to consider a separate regulatory framework for those organisations that raise funding directly from the public.

interpreted in accordance with the Constitution of the Republic of South Africa and National Development Plan (NDP). Secondly, a regulatory framework for civil society is closely linked to constitutionally guaranteed rights to freedom of association, freedom of expression, freedom of assembly, the right to property and the right of the public to participate in decision-making by the state. Thirdly, the operation and functioning of civil society are subject to the general provisions of state law, including administrative law, labour law, civil law, contract law, company law, tax law, criminal law and trust law, among others. Lastly, South Africa has recognised the special role and features of civil society and the unique circumstances in which civil society operates, and hence has adopted laws specifically governing civil society.

3.1 The Constitution and the National Development Plan

The Constitution commits the state to the advancement of social justice and human rights. The founding values of the Constitution (dignity, equality and freedom) and Chapter 2 the Bill of Rights bind all organs of state, and natural and juristic persons, including CSOs. The Constitution provides for a new relationship between the state and civil society, emphasising the importance of public participation and engagement as a central component of democratic governance. This is reinforced through the requirement of public participation in policymaking and legislative processes in all spheres of government, as well as the establishment of mechanisms for civil society to actively participate in the affairs of government.

The National Development Plan (NPC, 2011: 155) also explicitly acknowledges the role of civil society, emphasising the importance of a partnership approach between civil society and government and recognising the need for reforms and adequate funding schemes to support state-civil society models for delivering social services.

3.2 Statutory regulatory framework

The legal framework for CSOs in South Africa consists of four primary tiers. The first tier (establishment) allows for the establishment of the organisation under statutory and common law of the three legal forms of CSOs, namely, voluntary associations, non-profit trusts, and NPCs. The second tier of legislation (voluntary registration) allows any of these organisational forms to apply for the status of a registered NPO. The third legislative tier (partial tax exemption) enables CSOs to apply for the status of PBOs. The fourth legislative tier (donor deductibility status) allows PBOs to apply

for the right to receive tax-deductible donations on the basis that they undertake public benefit activities (PBAs). An additional tier of registration is required of CSOs that work as service providers for government and receive state funding: registration with line departments and / or with the National Treasury as service providers.²

3.2.1 Legal forms of CSOs

CSOs include different types of legal entities that can be categorised into two broad groups, namely, membership and non-membership organisations. In South Africa there exist three main types of legal entities including voluntary associations, non-profit trusts and non-profit companies (NPCs). Associations and cooperative societies are the most well-known forms of membership organisations, while the most common form of non-membership organisations are trusts and foundations. Typically, a trust lacks legal personality, whereas a foundation is an incorporated legal entity.

3.2.1.1 Membership organisations

South African law provides for legal forms of cooperation between individuals and/or legal entities who wish to achieve a certain shared goal. A voluntary association is the most common legal structure, which can take two forms – either a corporate entity with legal personality or an unincorporated association.

It is relatively easy to establish a voluntary association, either with or without a legal personality, through either a verbal or written agreement. Voluntary associations are governed by common law, with no registration requirement even for associations with a legal personality. Typically, however, voluntary associations register as NPOs with the NPO Directorate, which in effect renders them ‘corporate bodies’, enabling them to open a bank account in their own name, hold property in their own name, and access public funding.

3.2.1.2 Non-membership organisations

As with membership-based organisations, non-membership organisations may or may not have a separate legal personality. Trusts are the most common non-membership organisation and do not have their own legal capacity. They can be established for private benefit or for a charitable or philanthropic purpose. In terms of the Trusts Act, they must be registered with the Master of the High Court and do not have legal

² The transfer of state funds to CSOs is regulated mainly by the Public Finance Management Act 1 of 1999, the National Development Agency Act 108 of 1998, and the National Lotteries Act 57 of 1997.

personality, although trustees nevertheless enjoy limited liability. Non-profit trusts are accountable institutions in terms of the Financial Intelligence Centre Act of 2001 (FICA).

3.2.1.3 Non-profit companies

The Companies Act of 2008 provides for the establishment of a NPC that can also have either a membership or non-membership form. NPCs must be incorporated for a public benefit objective or an objective relating to one or more cultural or social activities, or communal or group interests. NPCs are incorporated and registered with the Companies and Intellectual Property Commission (CIPC) and may also register with the NPO Directorate. Historically, many civil society structures and philanthropic entities have utilised the non-profit 'Section 21 company' provided for in the Companies Act of 1973. With effect from May 2011, the 2008 Act provided for the transition of Section 21 companies into NPCs. This amendment entails enhanced standards of governance and introduced directors' liability for non-compliance with financial probity standards.

3.2.1.4 Cooperatives

Cooperatives, including social cooperatives ('co-ops'), are not classified as CSOs and are governed by the Cooperatives Act 14 of 2005. Described as 'businesses owned by beneficiaries' co-ops are voluntary, membership-based organisations registered with the CIPC. While co-ops are formed around a common goal and/or purpose, and the goals are aimed at social responsibility and development, they are generally characterised as a vehicle of economic development with some form of benefit attached to membership.

3.2.2 Incorporation and registration

Incorporation and/or registration entails several advantages, including legal personality, clear legislative regulation concerning core governance standards, limited liability of the directors and the company, as well as public accountability and availability of equity financing. However, incorporation may not be the best option if the need / preference is informality and flexibility with little regulation or control imposed by the state.

Regulation and supervision are closely related to ensuring compliance with the legal requirements and restrictions applicable to CSOs, and the imposition of sanctions

where appropriate. Regulatory frameworks become more stringent when CSOs receive funds from the government or perform functions to benefit the public.

3.2.2.1 The Non-Profit Organisations Act (71 of 1997)

The NPO Act defines an NPO, sets out the process of registration and deregistration, and includes measures for compliance. It establishes the NPO Directorate within the Department of Social Development (DSD) as the mechanism to institutionalise the recognition of CSOs by government.

In practice, CSOs must be registered with the NPO Directorate in order to persuade donors and government that they do hold themselves accountable to at least certain core governance standards and that they are, therefore, suitable entities to entrust with funding. This element of the applicable regulatory frameworks is partly enabling and partly permissive.

3.2.2.2 Trust Property Control Act (57 of 1988)

In terms of the Trust Property Control Act (Trusts Act), the Master of the High Court oversees the registration of not-for-profit trusts. The Trusts Act allows the trust deed to designate its objective and beneficiaries, without specific limitations. Voluntary associations can conduct subsidiary activities that generate some income, provided that this is not their primary objective or activity.

3.2.2.3 Financial Intelligence Centre Amendment Act (FICA) 2017

The Financial Intelligence Centre Act of 2008 as amended (FICA) lists 'non-profit trusts' as 'accountable institutions' that must register with FICA and that must notify the Centre of any changes to their registration details.

3.2.2.4 Companies Act 71 of 2008 (as amended)

The establishment of a non-profit company (NPC) is provided for by the Companies Act, and the CIPC is responsible for registration of incorporation. The NPC is defined as 'a company incorporated for public benefit or other object relating to one or more cultural or social activities, or communal or group interest'.

3.2.2.5 Income Tax Act 58 of 1962 (as amended)

Only voluntary associations, trusts and non-profit companies established in South Africa, as well as branches of foreign tax-exempt organisations, can apply to SARS to

be recognised as PBOs in order to obtain certain tax exemptions. Each of the organisation's activities must be for the benefit of, or widely accessible to, the general public or any part thereof. PBO status requires that the organisation's sole or principal³ purpose must be to undertake one or more of the enumerated public benefit activities,⁴ which must be carried out in a not-for-profit manner and with an altruistic or philanthropic intent. However, the Act does not define 'altruistic or philanthropic intent'. The Davis Tax Committee's report (2018: 18-19) observed that, in addition to complex anomalies in tax treatment and burdensome administrative requirements on small PBOs:

The NPO sector has to comply with the dictates of multiple regulatory organisations, including the [NPO D]irectorate, SARS, the Master's Office and the [CIPC ...] There is a clear misalignment or limited alignment within the regulatory system and between governing Acts across the different types of regulation. Legislation governing legal form, governance and taxation is not harmonised and congruent with each other. As a result, NPOs have to register multiple times with different regulators[,] submitting the same information more than once [... . No] ... regulator ... look[s] at the general burden of compliance ... on the sector as the whole. Manifestly this is an area that requires a specific and coherent response.

The Davis Tax Committee also identified significant disincentives facing would-be philanthropists and donors in South Africa, including regulations that discourage building up reserves, investing in a donation or endowment, and the low ceiling on tax-deductible donations.

4. FINDINGS AND LESSONS LEARNED

4.1 Key Deficiencies of the Current Regulatory Framework for CSOs

The NPO Act was adopted in 1997 following South Africa's transition to democracy to validate civil society's role in the democratic dispensation, to introduce new solutions after the Fundraising Act 107 of 1998 had been repealed, and to improve the accountability of CSOs. In addition, the NPO Act offered voluntary associations (established under the common law) a route through which they could formalise their

³ Limited business undertaking or trading activity is permissible.

⁴ Either itself or by providing funds, assets or other resources to others.

existence – to incorporate as entities with a legal personality. Although the regulatory framework was designed to protect and promote freedom of association, expression and assembly, in practice this approach has been beset by a range of challenges. The current difficulties are largely linked to challenges with the role and design of the regulatory framework, and its practical implementation.

4.1.1 Challenges at the conceptual level

The first set of challenges relates to misconceptions, particularly the role of civil society and the “regulation of CSOs”. We argue that the policy environment has incorrectly conceptualised civil society as being a single, coherent and organised sector with one overarching, organising vision, whereas, in practice, civil society has been characterised by a broad diversity of actors and activities. Secondly, the state has limited its understanding of civil society only to those organisations that contribute to government’s objectives (on behalf of or in collaboration with government departments or agencies).

These considerations are closely linked to the government’s willingness to adopt ‘policy documents on cooperation’ (PDCs) as an overarching policy framework to guide the relationship between (the entirety of) civil society and the state developmental / democratic purposes. Despite the absence of such a policy, the state continues to look at the entirety of civil society through the lenses of the NDP and the NDA’s mandate, thus conflating the state’s developmental and democratic roles (i.e. enabling and supporting civil society’s meaningful role in meeting major societal challenges, and consultation on policy development and implementation) with the regulatory framework for CSOs.

Conceptualising this overarching, strategic-level vision of civil society as part of the regulatory framework, and conflating the developmental, democratic and regulatory roles of the state with regard to civil society, have resulted in further difficulties relating to the NPO regime, as well as the respective mandates of the NDA, the DSD and the NPO Directorate. The NPO Act includes both the strategic-level commitments (e.g. Section 2(a) and (e), and Section 3) and commitments that deal with the details of the regulatory framework itself (Section 2(b)-(d)), while the NPO Directorate, the DSD and the NDA are portrayed as the main centres for the government’s interaction with civil society regarding policy development and implementation, thus introducing further

confusion. Indeed, the NPO Directorate, the NDA and the DSD have been predominantly focused on their democratic and developmental role vis à vis civil society, which raises challenges at two levels. The pursuance of a democratic / developmental role at such a general level is not possible because its practical implementation is often limited to a subset of civil society (for example, the focus on social development CSOs within the DSD and the NDA) or because the problem at that level is intractable – it is too difficult to consult the entirety of civil society on each issue.

4.1.2 Challenges related to the design of the regulatory framework

Initially, the regulatory framework envisaged by the NPO Bill was to complement and reinforce other regulatory regimes, particularly tax regulation. In practice, other regimes developed without taking account of NPO registration, resulting in overlapping regulatory regimes that are often inaccessible, confusing, burdensome and incoherent, particular for smaller CSOs and CBOs.

Firstly, several specific issues relate to the design of the regulatory framework – “non-profit” assessment that is performed at the stage of the establishment of the legal form (i.e. non-profit company, voluntary association, non-profit trust) and then again under the NPO Act and / or the Income Tax Act; an overcomplicated tax regime that differentiates between “public benefit” activities for the purpose of a general tax exemption and tax relief for donations; and the additional layer of regulation for those CSOs that provide services on behalf or in partnership with the state.

Secondly, the current regulatory framework fails to acknowledge the diversity of civil society in South Africa in terms of size, scope of work, functions, and funding opportunities, in particular, between the large and professionalised NGOs operating predominantly in large urban centres and small grass-roots organisations that work in rural and peri-urban areas. The regulatory frameworks (in particular, the NPO and tax regimes) do not differentiate between these organisations and as a result include identical registration and compliance requirements for all types of organisations. In addition, the two registration processes (in terms of the NPO Act and the Income Tax Act) are separate, which in practice means that all CSOs must submit applications at least twice to the respective regulators with little or unclear guidance from the regulators on the processes or guidance to render them complementary. This

negatively impacts smaller grass-roots organisations that undertake critical work in their communities but lack the capacity and resources to meet registration and compliance requirements.

Thirdly, a number of respondents criticised the abandonment of the initial design of the NPO Directorate as an entity independent from government, and that the Directorate had effectively become one of the units within DSD, raising questions about civil society independence from the state. The NPO Directorate as regulator is simultaneously a major government donor for the CSO sector, raising questions of a potential conflict of interest. Establishing the NPO Directorate within the DSD is also indicative of government's narrow understanding of civil society as being limited only to those organisations that take on part of the state's service delivery role.

Fourthly, the accountability provisions under the NPO Act have in practice left the NPO Directorate toothless. Apart from the poor implementation of a publicly available database of CSOs, the application of sanctions for non-compliance (that is, deregistration) by the Directorate does not automatically mean that a non-compliant organisation is dissolved and ceases to operate. The NPO Act also does not provide for a procedure that enables a member of the public to report a CSO whose operations are questionable; and neither does it include regulations protecting whistle-blowers. The Directorate's Arbitration Panel, whose operations remain shrouded in secrecy, deals only with appeals against deregistration or refusal to register.

Fifthly, it appears that the initial mandate of the NDA to become a conduit for CSO funding has been side-lined and it has instead focused on providing capacity-building to CSOs. As one respondent noted, CSOs are often better placed to provide capacity building, such as on issues related to strategic planning, organisational or project management. Similarly, the NDA may not be best placed to engage in dialogue with the civil society sector as a whole given the sector's diversity and functions, which do not all necessarily align with the state's more narrowly focused developmental goals pursued by the NDA.

4.1.3 Challenges with the operationalisation of the current regulatory framework

Inadequate implementation of the regulatory framework predominantly relates to the operationalisation and capacitation of the NPO Directorate, and the lack of comprehensive data on the civil society sector. As the main regulator for CSOs, the

Directorate has a broad and extensive mandate, including registration, compliance-monitoring and sanctioning powers. This ambitious mandate, without the necessary financial and human resources to realise it, has resulted in weak implementation.

Weak implementation has affected the process of registration of CSOs, with delays of up to three months impacting the application process; burdensome paperwork (affecting predominantly smaller NPOs), and little assistance from the Directorate to meet registration and compliance requirements. Moreover, the Directorate has been unable to effectively perform its compliance function. During 2015-2020 only forty-six NPOs were deregistered. The Directorate has not met its responsibility to ensure public accountability by failing to produce or disseminate updated information about NPOs and the status of their compliance with the Act. Further, the unavailability of reliable data has resulted in limited acknowledgment of the economic benefits generated by the civil society sector (for example, through taxes, creating employment, and providing assistance, whether on behalf of the state or independently) and its overall contribution to nation-building and democracy.

Although the NPO Directorate was meant to ensure a certain level of transparency and accountability by CSOs to a broad range of stakeholders, in practice this function has limited impact. While some CSOs have voluntarily adopted some level of self-regulation, for example, by disclosing the identity of their donors on their websites and by publishing annual (narrative) reports on their websites, reports on whether or not their activities are underpinned by sound administrative and staffing systems, fair employment practices and financial probity are usually provided only to donors. Other stakeholders must rely on ad hoc responses to requests.

No procedure exists to enable a member of the public to report a CSO whose operations or activities are questionable to any independent institution, such as an ombudsman. Similarly, the absence of regulations dealing with the issue of whistle-blowers within the civil society sector remains one of the regulatory framework's serious omissions.

4.2 Lessons learned from comparative studies

Approaches to regulating CSOs differ from country to country and are conditional upon multiple factors, including the state's understanding of the role of the CSOs, the prevailing model of governance and political regime, as well as the country's economic

and social circumstances. There is therefore no single model of a regulatory framework for CSOs that serves as a best practice to be replicated in South Africa.

Neither is there compelling evidence that South African regulatory solutions have been poorly chosen or designed; but, for various reasons, these policies have been poorly implemented or have become too complex and complicated over time.

There are three major legal forms available to CSOs in South Africa. They are available in both membership and non-membership forms, with and without a legal personality, and are flexible enough to accommodate the range of existing CSOs. Only when a voluntary association wishes to open a bank account, enter into a contractual agreement or receive a grant or donation, is it obliged to register with the NPO Directorate to acquire an 'official' legal personality and formalise its existence. Considering this, there exists a sufficient diversity of suitably flexible legal forms to meet the needs of civil society.

The establishment of independent regulators in England and Wales, and in Australia, has been closely linked to the context and historical underpinnings behind their charity laws, as well as the large income that charities in those countries derive from individual grants (soliciting funds from the general public.) The independent regulators (vested with active oversight powers) require significant resources to ensure their independence and the effective operationalisation of their activities. In addition, most often in countries where independent regulators exist civil society has also initiated a degree of self-regulation.

One notable example of good practice is when registration with the CSO regulator makes a subsequent registration for the tax benefits a mere formality. For example, UK charities registered with the Charity Commission can register with Her Majesty's Revenue Service (HMRC) for tax relief purposes by simply submitting an on-line application. Accordingly, the HMRC must recognise the decision of the Charity Commission on the charitable status of the organisation.

The practice in the US shows how the administrative and compliance burden on smaller organisations can be eased. For example, smaller tax-exempt organisations that normally have annual gross receipts of USD 50,000 or less must submit electronically only a so-called 'e-postcard' (an annual electronic filing requirement).

Another example of a good practice is so-called ‘co-regulation’. An interesting model of co-regulation has been developed in the US, where Guidestar (a non-profit organisation), in an agreement with the Internal Revenue Service (IRS), has been scanning submitted Forms 990s (an annual return by tax-exempt organisations) for online posting. Furthermore, in 2001 the Charity Navigator (also a non-profit entity) began publishing ratings of larger charities based on their IRS financial reports.

Some countries have also made the list of “public benefit” objectives required for tax benefits non-enumerative or non-exhaustive, avoiding the need for repeated amendment of the Ninth Schedule to the South African Income Tax Act in an effort to keep up with developments in a dynamic civil society sector.

Several countries also provide good examples of the development of a database of CSOs. This database may serve as a simple register or as a tool for data and information collection with a view to ensuring public accountability and a way of better informing any decision-making in relation to CSOs in the future. Good practices include the civil society-run UK Civil Society Almanac that has been developed by the National Council for Voluntary Organisations (NCVO), one of the biggest umbrella organisations in the UK, or CSOs Map in Brazil.

Comparative analysis suggests that establishment of CSOs should be restricted only on the basis of clear and unambiguous provisions that are justifiable and proportionate.

5. RECOMMENDATIONS

1. The NPO Act should be amended. The Act was too ambitious and has been poorly implemented. As it is currently constituted and implemented, it does not serve the purpose for which it was designed.
2. The amended NPO Act should:
 - a) Limit its application to non-profit entities that provide an external public benefit;
 - b) Continue to confer formal legal status on organisations that choose to register; and
 - c) Automatically register all participating organisations whose turnover falls below a certain threshold (say, R250,000) with SARS as public benefit organisations (PBOs).

The limitation of scope (to non-profit entities that provide an external public benefit) implies that a whole range of CSOs would be excluded from the scope of the Act. There is no additional benefit to further regulating organisations such as trade unions, sports bodies or other membership-based organisations through the NPO Act.

The amended NPO Act should focus on the transactional components of the regulatory framework (the registration of CSOs and the dissemination of registration data) rather than the developmental aspects (such as assisting civil society in playing a meaningful role in meeting major societal challenges, and collaboration in the formulation and execution of government policy) and democratic aspects (civil society's role in advocating and representing sub-groups of citizens).

In our view, the latter two components (developmental and democratic) are very likely to fail if implemented as part of a general civil society regulatory framework. In practice, implementation is likely limited to a subset of civil society (as has been the case with the DSD and the NDA) or because the problem at that level is complex and intractable. Such interventions should focus on detailed interactions around particular issues, which would be best served by a general strategic policy guideline that can be interpreted and implemented by departments / agencies on a case-by-case basis.

3. The entity responsible for the implementation of the revised NPO Act should:
 - Establish an online facility for the easy collection and dissemination of data of those organisations that choose to register; and
 - Ensure that the information submitted is easily accessible online for public inspection.
- 3.1 Compliance with the regulatory framework should be facilitated by making registration and ongoing reporting as simple and efficient as possible, and by ensuring that the information collected meets the needs of potential users.
- 3.2 The information collected should include a statement about the intent (i.e. purpose or mission) and basic capabilities (i.e. staff and main activities) of the CSO (to be updated only when changes occur), a description of governance structures

(including names and ID numbers of board members and office-bearers), and a summary of activities over the past year.

3.3 Organisations with a turnover of more than R250,000 per year should also submit annual financial statements, including the source of all income and a summary of expenditure.

3.4 The users of the database (other CSOs, donors, or government entities) should be able to utilise this information as inputs into their decisions about whether or not to support individual CSOs. In particular, the regulatory entity should not take responsibility for the accuracy or completeness of the data submitted, as it is unlikely in the foreseeable future to have the capacity to undertake onerous compliance monitoring.

3.5 The fact of registration on the database should not be taken as certifying that the CSO possesses the claimed capabilities. Entities that wish to provide funds to CSOs, be they some form of funder or a state entity, should have the systems in place to verify that the recipient has the capabilities to deliver on the outputs required. The basic information available, and the fact that the organisation concerned is able, or not, to regularly update their information, should be considered by the funding entity, but should be treated only as a preliminary requirement.

4. CSOs providing services on behalf of or with government entities should continue to be regulated in terms of the requirements of the relevant professional field, such as healthcare, social services, education, etc. While, therefore, an immediate precondition for state funding may include registration with the regulator as an NPO, there should be additional stringent conditions related to internal governance and financial reporting, as well as professional registration related to the nature of services provided before a contractual relationship with government can be contemplated.

5. The regulatory authority should publish annual updates on the state of the database, including the number and type of CSOs registered, and those that have up-to-date information.

6. The question of whether to establish an independent entity with regulatory functions and a complaint mechanism should be investigated further, but this issue should be

separated from the management of the registration process outlined above. In the meantime, CSOs should give serious consideration to voluntarily holding themselves / each other more accountable to objective standards of good governance, for example, through adoption and implementation by their boards of the letter and spirit of the *Independent Code of Governance for Non-profit Organisations in South Africa* (Inyathelo, 2012).

7. We do not have any firm views on the location of the regulatory authority. Given that it will perform purely transactional and administrative functions, we do not believe that the location of the entity will make a substantial difference.
8. A separate framework to regulate organisations that solicit funds from the general public (and that receive funds above some threshold amount) should be put in place in order to ensure that such organisations are able to publicly account for any funds they receive.

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