The South African NPO Crisis
- time to join hands

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March 2013

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1. **Introduction**

This article comments on the recent large-scale de-registrations of South African nonprofit organisations and suggests practical steps on the way forward.

More than 85,000 nonprofit organisations were registered in terms of the Nonprofit Organisations Act (NPO Act) at the end of March 2012. From October 2012 until January 2013 more than 23,000 organisations were de-registered by the Directorate for Nonprofit Organisations which falls under the auspices of the Department of Social Development. In addition, more than 35,000 organisations were marked as ‘non-compliant’. In contrast, during the 2011 financial year only 468 organisations were de-registered. All organisations were, in the wake of a public outcry, reinstated and reflected as re-registered during February 2013. Organisations have been given a six-month period to become compliant.

Registration in terms of the NPO Act is, although voluntary, usually a requirement to access donor funding, including state funding. The implication is that ‘de-registered’ or ‘non-compliant’ organisations risked losing their donor funding. Many non-profit organisations in South Africa are dependent on donor funding. This posed a significant risk for many of the vulnerable beneficiaries being served by these organisations.

2. **The South African nonprofit sector**

The South African non-profit sector plays a significant role helping the South African government to fulfill its constitutional mandate. The South African Constitution has entrenched a number of socio-economic rights in its Bill of Rights. These rights are aimed, as stated in the preamble, at improving the quality of life of all citizens and free the potential of each person. The socio-economic rights would be out of reach for most South Africans without the presence of a vibrant non-profit sector. The South African government has, in its National Development Plan, conceded that: “All provinces rely heavily on not-for-profit organisations to deliver services.” The National Development Plan further states that: “In social welfare services, the state has adopted a partnership model of service provision and relies mainly on non-governmental welfare organisations to provide professional social services.”

This partnership model is taken on in the context that the South African nonprofit sector consists mainly of smaller informal/voluntary organisations. Voluntary associations represented 95% of the organisations registered in terms NPO Act during the 2011 financial year. The Department of Social Development concludes in its 2011 report that: “For the community based organisations, registration not only adds to their credibility in the eyes of donors and community, but also sets a basis for the way in which they are run. The NPO registration

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3 Joint media statement by Minister Bathabile Dlamini and the Ministerial Task Team on Non-Profit Organisations (NPOs) 31 Jan 2013, available at: www.dsd.gov.za
4 Page 334 of National Development Plan
therefore sets a much-needed basis for organisations to run their affairs effectively and accountably."\(^6\)

The above context gave rise to the promulgation of the NPO Act.

### 3. Brief context to the NPO Act

The NPO Act came into operation on 1 September 1998. The Act was aimed at providing a supportive regulatory system for (predominantly) smaller emerging organisations. According to its preamble, the NPO Act should provide for an environment in which nonprofit organisations can flourish. Section 2 of the NPO Act provides that its objects are: "to encourage and support nonprofit organisations in their contribution to meeting the diverse needs of the population of the Republic by, amongst other, creating an environment in which nonprofit organisations can flourish." [emphasis added]

The NPO Act has five chapters. Two chapters are important for purposes of this article, namely: Chapter 2 which is entitled Creation of Enabling Environment and Chapter 3, entitled; Registration of Nonprofit Organisations. Section 3 which falls under Chapter 2 is, in my view, one of the most significant sections in the NPO Act and reads:

3. **State’s responsibility to nonprofit organisations.** 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.

This section is unprecedented within the international context and captures the state’s commitment to promote, support and enhance the capacity of nonprofit organisations to perform their functions.

The NPO Act also makes provision for the establishment of a Directorate for Nonprofit Organisations which is responsible for, amongst other; facilitating the process for developing and implementing policy and determining and implementing programs, including programs to ensure that the standard of governance within nonprofit organisations is maintained and improved. The Directorate is also responsible for facilitating the development and implementation of multi-sectoral and multi-disciplinary programs.

The NPO Directorate has, with limited resources, embarked on a number of initiatives to support and encourage non-profit organisations. It has, for example, conducted a number of research studies, implemented capacity-building initiatives and provided an online registration and reporting facility for registered organisations. More recently the Directorate partnered with Ricardo Wyngaard Attorneys and others, with the financial support of ICNL, to produce a training video on how to register and report in terms of the NPO Act.\(^7\)

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\(^6\) Ibid.

\(^7\) This video is available at: [http://www.youtube.com/watch?v=yX3YK6MiLcw&feature=youtu.be](http://www.youtube.com/watch?v=yX3YK6MiLcw&feature=youtu.be)
Chapter 3 of the NPO Act deals mainly with the registration and reporting requirements and cancellations of registration. Section 22 of the NPO provides for appeals against the cancellation of registrations. The process of registering organisations has seemingly taken up much of the NPO Directorate’s time and energy.

The need for the NPO Act is perhaps best summarized in a quotation from a conference held in Johannesburg in September 1996 entitled: Enabling frameworks for civil society in southern and eastern Africa. On the issue of self-regulation the report concluded: “Finally, and emanating more from a South African point of view, self-regulation could be seen as a bit of a luxury. In other words, there are empowered NGOs – what one could call progressive organisations – which have the ability, capacity and willingness to regulate themselves. But one should consider whether, in terms of the history of South African civil society, this was not just a luxury for a certain small grouping, and whether there should have been a supportive regulatory system for smaller emerging organisations.”

The NPO Act has been enacted to provide a supportive regulatory system for smaller organisations. If this is so, it begs the question why so many organisations (including the smaller ones) got either de-registered or deemed non-compliant.

4. Registration and de-registration in terms of the NPO Act
Registration in terms of the NPO Act has become increasingly important for voluntary associations which are established in terms of common law. Without a registration certificate a voluntary association in South Africa would find it virtually impossible to open a bank account. Other non-profit legal entities do not require registration in terms of the NPO Act to open a bank account as they are able to offer other forms of incorporation certificates. Registration in terms of the NPO Act is therefore essential for voluntary associations. The process to register in terms of the NPO Act is usually met with delays.

Once registered, the director for NPOs can de-register NPOs that are registered in terms of the Act if such NPOs have not complied with:
- a material provision of its founding document;
- a condition or term of any benefit or allowance conferred on it by the Minister of Social Development in terms of the Act; or
- its reporting obligations in terms of the Act.

The NPO Act requires that the director for NPOs must send a compliance notice in the prescribed form to a registered NPO if such organisation has not complied with its obligations in terms of the Act. This notice must, first, be in writing, second, notify the NPO of the compliance steps required and, third, inform the NPO that it has one month from the date of the notice to comply. It seems that some organisations claimed not to have received the non-compliance notice and only became aware of the de-registered or non-compliant status after having read about reports in the media.

The Department of Social Development released a media statement dated 31 January 2013\(^9\) in which it stated, amongst other, that:

a. The de-registration are linked to the failure by NPOs to submit financial and narrative reports; and

b. The Department has complied with the provisions of the NPO Act and issued non-compliance notices before having de-registered organisations.

I suspect that many de-registered organisations have either been non-compliant or dormant. Some may have failed to update their changed contact details with the NPO Directorate. This may have resulted in non-compliant notices being sent to wrong addresses. The NPO Act compels the director for NPOs to de-register an organisation that has not complied with the non-compliance notice. The director may extend the period for compliance on good cause shown by the organisation. No further discretion is given to the director for NPOs. Some organisations have however claimed that their reports were submitted timeously and were able to offer proof of that.

Compliance with the NPO Act is a prerequisite for continued registration. However, the requirement to comply with the NPO Act does not stop with registered NPOs.

5. The other side of non-compliance
Registered NPOs are not the only ones that have supposedly been non-compliant in terms of the NPO Act. Both the Minister for Social Development and the Directorate for Nonprofit Organisations have failed to comply with the provisions of the NPO Act. Examples of non-compliance include failure by:

1. The NPO Directorate to register new organisations within a two-month period, as required in terms of the Act,
2. The Minister of Social Development to appoint the Arbitration Panel as required in terms of the Act. This is particularly concerning given the magnitude of de-registrations,
3. The state to properly resource the NPO Directorate to implement its mandate in terms of the NPO Act,
4. The NPO Director, as alleged by some organisations, to issue a notice of non-compliance before de-registration – at least in some instances, and
5. The Department of Social Development to warn organisations through a public campaign of the imminent de-registration. This is not a legal requirement, but should have been done given the large-scale de-registrations.

The large-scale de-registrations should not have taken place without the appointment of a fully functional Arbitration Panel. The absence of the Arbitration Panel effectively eliminates the right of de-registered organisations to dispute their de-registration. This conduct is simply not consistent with the NPO Act’s theme of encouragement and support for nonprofit organisations.

The Department of Social Development has since been advised by a ministerial task team, consisting of key stakeholders, appointed by the Minister of Social Development. As a result, in

\(^9\) Available at: http://www.dsd.gov.za/
a media statement dated 31 January 2013 the Department of Social Development committed, amongst other, to:

- Appoint the Panel of Arbitrators;
- Improve communication with registered organisations to ensure that organisations on the NPO database are aware of their registration status and compliance requirements;
- Work together with stakeholders to improve communication between the department and the sector; and
- Strengthen its own internal capacity to respond more adequately and effectively to needs of the NPO sector as a key development partner.

It is doubtful whether the media statement itself would ease the concerns of the South African non-profit sector. This is because of the presence of a controversial policy document published by the Department of Social Development prior to the mass de-registrations.

6. The Policy Framework on Nonprofit Organisations Law

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 further 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 minimize undue disruptions to many of the positive contributions.”

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:

a. Registering organisations - It will register NPOs and will introduce an electronic registration process.

b. 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.”

c. Issuing sanctions - It will be responsible to issue sanctions against noncompliant organisations and the Policy states that: “it is appropriate to have special sanctions for violations peculiar to nonprofit organisations.”

d. Promoting compliance and enforcing punitive measures - SANPORA should; “act swiftly and effectively to ensure compliance, prevent wrongdoing and enforce punitive measures.”

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10 Available at: http://www.dsd.gov.za/
e. 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.

f. 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.”

Foreign organisations operating in South Africa have also been targeted by the Policy. In this regard the Policy states 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.”

The underlying theme of the Policy is in stark contrast to that of the NPO Act. The need for enforcement has seemingly overshadowed the need to encourage and support nonprofit organisations. The Department’s conduct has also been more consistent with its policy proposal. It acted more swiftly to ensure compliance as opposed to providing advice and guidance to ‘non-compliant’ organisations.

The Policy and the subsequent large-scale de-registrations do not speak of a supportive regulatory system for smaller organisations. Having a database of registered nonprofit organisations that are non-compliant is also not appropriate and would cause a breakdown in public confidence. From the media reports I gather that the increased attention by the NPO Directorate on non-compliance is because of the concerns raised by the Auditor-General which is responsible for auditing state departments.

Compliance is no doubt necessary. However, regulation and support must go hand in hand within the South African context. Focusing only on compliance and regulation without providing the required support to smaller organisations would simply result in the alienation of the largest section of South Africa’s non-profit sector.

This does not only hold true for the state. Sadly, South African civil society organisations have, with the recent introduction of governance codes, increased the burden of regulation on smaller organisations without offering the required supporting framework.

7. Civil Society governance codes

The plight of smaller organisations does not stop with the Department of Social Development. The non-profit sector itself has to play a more supportive role with regards to smaller non-profit organisations. A number of membership and intermediary organisations are in existence in South Africa which are providing capacity building support for smaller organisations. However, more needs to be done.
The introduction of two governance codes in South Africa, namely the King III Code of Corporate Governance, initiated by the Institute of Directors of Southern Africa (the IOD), and the Independent Code, initiated by the Working Group, have become increasingly important for the South African non-profit sector. Both the IOD and the Working Group have contested the space to offer a solution to improve governance standards for non-profit organisations. Both their codes set governance standards that organisations should adhere and both claim suitability for all South African non-profit organisations. The Institute of Directors subsequently released Practice Notes as a guide to the application of King III for nonprofit organisations.

Regrettably, both these codes will remain largely irrelevant for most of the smaller organisations. Policies and processes suggested by these codes that should supposedly be in place for non-profits include:

- conflicts of interest policies,
- induction programmes,
- formal succession plans,
- annual evaluations,
- remuneration policies,
- risk policies and plans,
- disaster recovery plans,
- information security management systems, and
- integrated reports

These policies and processes are no doubt valuable and may ultimately improve governance practices. However, smaller organisations would simply not have the capacity and resources to implement the noble standards of governance without the necessary support. In the absence of the required support, smaller organisations would eventually find themselves ‘non-compliant’.

The to-do lists that culminate from the both the King III practice notes and the Independent Codes could perhaps be implemented by bigger more sophisticated organisations. Smaller organisations will require more than to-do lists. A more active intervention is required to appropriately contribute towards capacitating smaller organisations on various governance aspects. The non-profit sector also has its role to play in this regard.

8. Way forward

The South African Nonprofit Organisations Act is extraordinary in capturing the state’s commitment to and support for nonprofit organisations. The implementation has however not been consistent with the noble objectives contained in the NPO Act. The current controversy presents the country with another opportunity to deal meaningfully with the key challenges facing the South African non-profit sector.

The government simply cannot deal with these challenges on its own. This has been foreseen by the legislator when it inserted as one of the objectives of the NPO Act to promote a spirit of co-operation and shared responsibility within government, donors and amongst other interested persons in their dealings with nonprofit organisations.
Steps the government should consider within the next six months include:

1. Withdrawing (or at least seriously reviewing) its Policy Framework on Nonprofit Organisations Law. The Policy does not set the tone for a spirit of co-operation and shared responsibility. It will simply cast a cloud of suspicion over the actions of the South African government.

2. Increasing resources to the Directorate for Nonprofit Organisations to effectively execute its responsibilities. This recommendation is not new and an Assessment of the NPO Act, as commissioned by the Department of Social Development, found in 2005 that the resources and capacity for the NPO Act is severely lacking. The Assessment found that: “The financial resources allocated for the implementation of the Act are insignificant when compared to the size, scope and vibrancy of the NPO sector on the one hand, and the complexity of the NPO Act on the other.” Changes that were introduced since then have not been sufficient as the Department still needs to strengthen its own internal capacity to respond to the needs of the non-profit sector.

3. Collaborating more effectively with other state departments and key civil society stakeholders to extend the reach and impact of the Department. In its 2012 Annual Report the Department states that a total of 32 capacity building workshops were held for 1323 NPOs and 144 provincial officials. It further states that a total of 210 community-based organisations and 152 community development practitioners were trained. I have no doubt that more organisations can be reached through collaborations with other Departments and civil society organisations.

4. Reviewing the reporting requirements for registered non-profit organisations. Currently all non-profit organisations are subjected to the same reporting requirements. For smaller organisations the reporting requirements may be onerous and intimidating. This recommendation is also not new as the Impact Assessment also made the following comments:

   “The reporting requirements as stipulated in S17, S18 and S19 of the Act are particularly difficult for many (especially the smaller, less capacitated organisations) NPOs to comply with. The Act expects NPOs to cover the cost of financial reporting, whether it relates to proper auditing of statements or merely certification by an accounting officer. This requirement does not take into account that many organisations operate with little or no money resources.”

5. Appointing an advisory or technical committee as provided in terms of the NPO Act. The Minister of Social Development is given the discretion in terms of section 10 of the NPO Act to appoint any advisory or technical committee in order to achieve the objects of the Act. The presence of sound advisory or technical committees could perhaps have avoided the

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11 Available at: www.dsd.gov.za/NPO (on page 109 of Assessment)
12 Ibid.
13 Available at: www.dsd.gov.za/NPO (on page 98 of Annual Report)
14 Available at: www.dsd.gov.za/NPO (on page 73 of Assessment)
controversy around the large-scale de-registrations. It would also provide a platform for more interactive engagement between the state and civil society.

9. Conclusion
It is imperative for the South African government and civil society organisations to join hands and make a concerted effort to attend to the needs of the smaller organisations. In the absence of this, the implementation of the National Development Plan would be in jeopardy. Both role-players will have to act swiftly and effectively to ensure that appropriate attention and support are given to community-based organisations.