

ANNEXURE 2

VARIOUS FORMS OF REGISTRATION

Introduction

Following is a brief overview of the various forms of registration available to NPO's (Non Profit Organisations), and the advantages and disadvantages of these. This document has been prepared for the HAWC Organisation Development Sub-Committee to facilitate discussion in various hospices with regards to registration.

What is a non-profit organisation?

A non-profit organisation (NPO) is a civil society organisation that has a self-governing board, accountable to its owners or members. NPO's:

- Provide a public service or have some public purpose that goes beyond serving the personal interests of the members of the NPO (such as the promotion of social welfare, economic development, religion, charity, education or research)
- May make a profit, but may not share any of the profits with its members – profits can only be used to carry out the work of the organisation
- Usually need to fundraise from donors as they do not generate sufficient income to cover their expenses

Legal structures available to NPO's

NPO's can register under the following structures – Section 21, Trust or Voluntary Association:

1. SECTION 21 COMPANY

A nonprofit organisation can register as a Section 21 company under the Companies Act No 61 of 1963.

What is a section 21 company?

- It is any association not for gain incorporated under the Companies Act No 61 of 1963 which shall include the statement "Association incorporated under section 21" in its name (A company "Limited by guarantee" shall be deemed to be a public company for purposes of the Companies Act.
- The memorandum of such an association shall comply with the requirements of the Companies Act No 61 of 1963 and shall, in addition, include the following provisions:
 - (a) The income and property of the association shall be applied solely towards the promotion of its main object and no portion thereof shall be paid by way of dividend or bonus to its members;
 - (b) Upon its winding-up, the remaining assets shall be transferred to some other associations having objects similar to the Company's main object.
- Large organisations that run big programmes and budgets and have a large number of employees usually set up a section 21 company. Section 21 companies have an independent legal identity which is distinct from its members, which means –

- (a) The organisation, and not the members and staff, are responsible for the organisation's debts, contracts and other legal responsibilities
- (b) The assets of the organisation are in the name of the organisation, not its members
- (c) The organisation carries on with its work even if its members or staff change
- (d) The organisation can sue, be sued and enter into contracts in its own name

Who runs a section 21 company?

The company consists of a minimum of seven members. These members appoint directors (minimum of two) who have executive powers and are responsible for the day-to-day running of the company.

Forming a section 21 company

All companies, including section 21 companies, are registered with the Registrar of Companies under the Companies Act. To register as a section 21 company the organisation must:

- Be established for a lawful objective
- Have as its main objective the promotion of religion, the arts, science, education, charity, social activity or a communal or group interest
- Only use its income and property to promote the main objective
- Not distribute its money or property to the members or staff, except as reasonable remuneration for work done
- Appoint official auditors
- Keep financial and accounting records
- Hold an annual general meeting
- When the company is dissolved, its assets must be transferred to another organisation with a similar purpose.

The memorandum and articles of association for a company

The founding documents for a section 21 company are the Memorandum and the Articles of Association. The memorandum sets out the purpose of the NPO and the Articles of Association describes how it will work.

Implications of the NPO Act

The requirements of the Companies Act ensue that section 21 companies are accountable to the public. So, unlike voluntary associations, which need the Act to register, and trusts, which need the Act to acquire an independent legal personality, there is no particular reason for section 21 companies to register in terms of the NPO Act. However, as the Companies Act is being reviewed, it may be necessary to register in the future if they wish to be eligible for government benefits (e.g. tax benefits).

Advantages and disadvantages of a Section 21 company

- Substantial public disclosure and internal independence
Because the provisions of the Companies Act are complex and detailed, companies are subject to substantial public disclosure obligations and statutory control. However, they do have considerable freedom in their internal management and the day to day running of their affairs.
- Independent legal personality

The independent legal personality of a company is a clear and well-understood concept. It means that for the organization to be an independent legal personality it should

- continue to exist even if the membership changes
- the assets and liabilities (debts) of the organisation will be held separately from those of its members.

In essence, it means that an organization must exist in its own right and is not dependent on who its members are, who works for the organization etc. The organization can sue and be sued (as a whole – not the members)

▪ Professional assistance

Professional assistance is required to set up a company, which can be costly initially, but the long-term benefits could justify the costs.

▪ Complex reporting requirements

The annual reporting requirements for companies are complex and extensive and not suitable for all NPO's.

PLEASE NOTE THAT THE COMPANIES ACT IS CURRENTLY BEING REVIEWED.

A draft paper was due to be posted on the DTI's website at the end of March 2006, outlining the proposed changes, but as yet it has not appeared. This paper recommends that NPO's registration be removed from the Companies Act.

2. TRUSTS

An organisation can be set up as a Trust under common law and the Trust and Property Control Act No 57 of 1988. It is easier to set up a Trust than a section 21 company.

What is a trust?

A trust is a written agreement between an owner and trustees. The owner hands over property and/or funds to the trustees, who use this to assist beneficiaries to meet a specific objective.

Who runs a trust?

A trust is managed by a Board of Trustees. A deed of Trust states what the powers and duties are of a trust. Trustees can be paid for the work they do for the NPO.

Which laws govern trusts?

The common law and the Trust Property Control Act No 57 of 1988 govern trusts.

Trusts do not have a separate legal personality. In the case of a legal dispute, the trustees, and not the trust, can sue or be sued. The property of the Trust is protected and the Trust Property Control Act states that trust property must be kept separate from the trustees' personal property. Trusts must have their own bank accounts.

Forming a Trust

A notary public must write and attest the trust deed, and the trust must be registered with the Master of the High Court. If there are any changes to trustees at any stage the Master must be given notice of this.

The trust deed

The trust deed is the founding document of a trust.

Registering under the Nonprofit Organisation Act

If a trust registers as an NPO under the NPO Act (in addition to registering with the Master of the Court) it becomes a body corporate with an independent legal personality.

Advantages and Disadvantages of Trusts

- Flexible
A trust is very flexible and can suit many NPOs, their objectives and situations.
- Professional assistance
Professional assistance is needed to establish a trust. It can be a costly and time-consuming process.
- Limited public disclosure
The requirements for public disclosure for trusts are very limited. For example, it is not necessary to appoint an auditor or present audited financial statements unless this has been stipulated in the trust deed.
- No independent legal personality
Except in certain specified circumstances, a trust does not have a legal personality. However, trust property is protected and a trustee acting in that capacity is not personally liable for trust debts (except if he or she has been grossly negligent or committed fraud).

Implications of the NPO Act

Prior to the NPO Act being passed, trusts could not have an independent legal personality, other than for certain specific purposes such as tax and insolvency. Now, a trust that also registers as an NPO (in addition to registering with the Master of the High Court) is recognised by the law as a body corporate with an independent legal personality.

3. VOLUNTARY ASSOCIATIONS

This is the easiest and simplest structure to set up and manage. It has the same powers as a trust or Section 21 company. Presently, Cotlands falls under this form of registration.

What is a voluntary association?

A voluntary association (VA) can be set up when three or more people enter into an agreement to form a non-profit organisation. VA's are best suited to small community-based organisations that do not need to own or manage large amounts of money or property and equipment. It is the quickest and cheapest structure to set up.

Who runs a voluntary association?

A constitution provides for the appointment of a group of people with executive and/or management powers.

Which laws govern voluntary associations?

Common law and the Communal Property Associations Act No 28 of 1996 govern VA's.

For a VA to have an independent legal personality, the constitution must specify that:

- The organisation will continue to exist even if the membership changes
- The assets and liabilities of the organisation will be held separately from those of its members

How do you form a voluntary association?

A VA is formed by having a written or verbal agreement. It does not have to be registered with any government registry but it can register under the Nonprofit Organisation Act.

The constitution of a voluntary association

The constitution outlines the rules that govern the VA.

The Constitution of a VA usually has detailed and clear sections on:

- The purpose of the organisation
- The objectives of the organisation
- The type of organisation it is, for example a non-profit voluntary association
- The membership of the organisation – who may become a member and the rights and duties of members; how people can join, resign or be expelled
- The structures and main procedures of decision-making in the organisation:
 - (a) Annual general meetings and other meetings
 - (b) Elections and appointments for the different structures of the organisation
 - (c) Their powers and functions
 - (d) Who makes what decisions
 - (e) How the organisation is governed and how decisions are made
 - (f) How it is organised to get the work done
 - (g) The roles, rights and responsibilities of people holding specific positions and of the different structures: what individuals and structures are responsible for, and to whom must they account.
 - (h) How the finances and assets of the organisation are controlled
 - (i) Financial year and audit process
 - (j) Closing down the organisation - what process must be followed and what will happen to the money and assets of the organisation.

Registering under the Nonprofit Organisation (NPO) Act

If a VA wants to register as an NPO under the NPO Act it must follow the requirements set out in the Act. It is an advantage to register under the NPO Act, as funders generally prefer to work with organisations that have

been formally and legally recognised. NPOs that have registered under the Act also have access to certain government benefits.

Advantages and Disadvantages

Being easy to establish can be both an advantage and a disadvantage for VAs.

- Quick, easy, cheap
Not having to register with a government registry means a VA can be established quickly, easily and cheaply.
- Funders prefer more formal arrangements
VAs may not be particularly attractive to funders because of the lack of government regulation and statutory control. Even the general public who interact with the VA generally prefer greater formal accountability and transparency.
- The constitution may not protect members of the VA
Members of the VA may not be protected if key clauses in the constitution are missing or not properly drafted, for example if the clauses relating to the legal status of the VA are not clear.

Implications of the NPO Act

In the past, VAs could not register with a government registry. However, the introduction of the NPO Act now provides a registration and regulatory authority for VAs.

Registering as an NPO can remedy the disadvantages of the VA structure through providing the opportunity to register and thus comply with the ongoing regulatory requirements of the registering authority.

Factors to Consider when Choosing a Structure for and NPO

- Size, capacity and complexity of the organisation
The formal establishment and ongoing regulatory requirements are most complex for a Section 21 company, less complex for a trust and least complex for a VA. Small, newly established NPOs will most commonly select to be a VA, while trusts and Section 21 companies are appropriate for larger, well-established NPOs with big budgets, complex programmes and lots of staff. However, although a VA is the simplest NPO to establish and manage in terms of ongoing regulatory requirements, it can nevertheless exercise all the powers and perform in the same way as a trust or Section 21 company.
- Funder's and other's requirements
Donors funding the organisation may prefer a particular structure. It is noted that the literature reviewed states that corporates tend to prefer organisations to be section 21 companies, as the business world tends to be familiar and comfortable with the Companies Act.

Government is not prescriptive in terms of how an organisation registers. What is important though for them is the NPO registration that entitles organisations to access funding from for e.g. the Lotto and the NDA.

- Paying tax
The structure does not affect the amount of tax an organisation might have to pay. The factors that influence tax status are the purpose, objectives and activities of the organisation.
- Registering with a government registry
Only section 21 companies and trusts have to register with a government registry. The advantages of doing this include:
 - (a) There are rules and regulations which organisations have to follow if they are registered, which offers clarity to those inside and outside the organisation
 - (b) Organisations have to be accountable to the public. This means that all stakeholders, for example, donors, beneficiaries, the general public and government are aware of how money is being spent by the organisation

Registering with the Department of Non Profit Organisations

- Any of the three structures which seeks to register in terms of the NPO Act (Act 71 of 1997) must ensure that its founding document (the memorandum and articles, constitution or trust deed) contains the provisions set out in section 12 (2) of the NPO Act
- The constitution of a nonprofit organisation that intends to register must:
 - a) State the organisation's name;
 - b) State the organisation's main and ancillary objectives;
 - c) State that the organisation's income and property are not distributable to its members or office-bearers, except as reasonable compensation for services rendered;
 - d) Make provision for the organisation to be a body corporate and have an identity and existence distinct from its members or office-bearers;
 - e) Make provision for the organisation's continued existence notwithstanding changes in the composition of its membership or office-bearers;
 - f) Ensure that the members or office-bearers have no rights in the property or other assets of the organisation solely by virtue of their being members or office-bearers;
 - g) Specify the powers of the organisation;
 - h) Specify the organisational structures and mechanisms for its governance;
 - i) Set out the rules for convening and conducting meetings, including quorums required for and the minutes to be kept of those meetings;
 - j) Determine the manner in which decisions are to be made;
 - k) Provide that the organisation's financial transactions must be conducted by means of a banking account;
 - l) Determine a date for the end of the organisation's financial year;

- m) Set out a procedure for changing the constitution;
- n) Set out a procedure by which the organisation may be wound up or dissolved; and transferring the remaining assets to another NPO having similar objectives.

What is the purpose of the NPO Act?

The Nonprofit Organisations Act (NPO Act), 71 of 1997:

- Encourages the sector to be responsible and accountable to itself;
- Promotes good governance, auditing and accountability;
- Outlines how information about the sector is made public;

Benefits of registering as an NPO:

Registration will:

- Improve the credibility of the sector as nonprofit organisations must account to a public office;
- Bring organisations into the system;
- Satisfy funders who prefer to fund organisations that are registered with a public office;
- Promote better governance within the sector;
- Allow for information about the sector to be gathered and made publicly available.

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