

# The NPO Sector

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## Introduction

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# Introduction

*The information in this chapter pertains to current legislation including the South African Companies Act 1973. We are aware that a new Companies Bill is intended to replace the Companies Act in 2010 and an update of the Non-Profit Organisation Act is expected in late 2009 as the Department of Social Development, in consultation with its partners in local government, NGOs and civil society has identified gaps in the current legislation. This chapter will be updated accordingly. **Further information on how to find out the current status of South African legislation can be found in the Resources Section at the end of this book, along with information on how to access other publications by South African legal experts.***

How does NPO registration influence the NPO management? What are the 'pitfalls' around NPO registration and what measures can be taken to prevent these?

This chapter aims to highlight the Memorandum of Association and management pitfalls that palliative care organisations may be exposed to and guides you through the legal requirements that all palliative organisations need to meet in order to be recognised and registered as a Non-Profit Organisation in terms of South African law.

## What are NPOs?

Non-Profit Organisations (also sometimes called non-governmental organisations, NGOs) include all organisations whose main aim is not to make a profit for its members but rather to serve some common or public interest.

## Why is it helpful for an NPO to have a legal structure?

- A legal structure provides a framework and rules and therefore gives clarity on:
- The responsibilities, obligations and rights of the

individual members.

- It helps your organisation to be more accountable to the community you serve.
- It enhances the credibility of your organisation to potential donors.

## Do we have to register our NPO?

It depends on the type of legal structure that you choose for your NPO. You may choose a structure for which registration is not required, but others may require mandatory registration.

Regardless of which structure you choose, all NPOs may choose to register with the Department of Social Development (DOSD) as a NPO. The DOSD will usually require you to be registered prior to considering an application for funding.

## Types of legal structures

The three main types of Non-Profit Organisations are:

- Voluntary Associations
- Trusts
- Section 21 Companies

*Terms you will read in this chapter:*

**Altruistic:** unselfish concern for welfare of others

**Ancillary objective:** extra, less important aim

**Annexed:** attached/added to something larger

**Beneficiary:** someone entitled to money or property from a trust, will or insurance policy

**Corps:** group of people who work together

**Liability:** legal responsibility for costs or debts

**Mandatory requirements:** official or compulsory requirements

**Narrative report:** report of events in the order in which they happened

**Organogram:** an organisation's chart of human resources

**Philanthropic:** devoted to helping other people

**Prescribed period:** period of time set down by organisation or law

**Quorum:** minimum number of committee members to conduct business

# The Non-Profit Organisations Act, 71 of 1997

The Non-Profit Organisations Act 71 of 1997 came into effect on 1 September 1998. The Act aims to create an enabling environment for NPOs as well as to set standards of good governance, accountability and transparency within the NPO sector. An update of this Act is expected in late 2009.

The Act further creates a voluntary registration mechanism and serves to define what a Non-Profit Organisation is.

*A trust, company or other association of persons:*  
*A trust, company or other association of persons:*  
*(a) established for a public purpose; and*  
*(b) the income and property of which are not distributed to its members or office bearers except as reasonable compensation for services rendered; Section 1(x)*

The Act makes use of existing legal structures and adds certain basic requirements in order for these entities to be registered as Non-Profit Organisations with the NPO Directorate of the Department of Social Development.

## Requirements for registration

In order for the NPO to be registered there are certain requirements that must be met with regard to its founding documents. Without these clauses the NPO will not be registered. The mandatory requirements are laid out in Section 12(2) (d) of the Act:

- (2) Unless the laws in terms of which a Non-Profit Organisation is established or incorporated makes provision for the matters in this sub-section, the constitution of a non-profit 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 to 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 them being members*

- or office-bearers;*
- (g) specify the powers of the organisation;*
- (h) specify the organisational structures and mechanism 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 procedure for changing the constitution;*
- (n) set out procedure by which the organisation may be wound up or dissolved;*
- (o) provide that, when the organisation is being wound up or dissolved, any asset remaining after all its liabilities have been met, must be transferred to another non-profit organisation having similar objectives.*

## The implications of registration as a NPO

As soon as the NPO is registered its details are placed on a database of registered NPOs in the country. A certificate of registration will be issued within two months after the application has been received and will serve as proof of the NPO's registered status as well as proof that the NPO is a body corporate, which means that it will have an existence separate from that of its members. It will be able to enter into agreements in its own name, without the members incurring personal liability.

A NPO remains registered until the Directorate deregisters the NPO either for contravention of the regulations or on request of the NPO. In the event of non-compliance by a registered NPO the Directorate will give notice to the NPO in writing, requesting the NPO to comply. In the event that criminal activity is suspected the Directorate may choose to both deregister the NPO as well as report it to the South African Police Service.

## Duties and obligations of a registered NPO

As soon as the NPO is registered and the certificate issued, the NPO needs to comply with certain requirements in terms of the NPO Act.

*Section 16(3)*  
*Reflect its registered status and registration number on all its documents*

### *Section 17(1)(a) and (3)*

*Keep and preserve accounting records and supporting documentation for the prescribed period*

### *Section 17(1)(b)*

*Within six months of the end of its financial year, draw up financial statements which include a statement of income and expenditure and a balance sheet*

### *Section 17(2)*

*Arrange for an accounting officer to compile a written report within two months after drawing up its financial statements confirming that the financial statements are consistent with the accounting records; the accounting policies are appropriate and applied, and that the organisation has complied with the financial reporting requirements of the Act.*

### *Section 18 (a)*

*Submit to the Directorate a narrative report in the prescribed form together with its financial statements and the accounting officer's report within nine months of the end of the financial year*

### *Section 18 (1)(b-e)*

*Submit to the Directorate the contact detail of its office bearers, even if they were reappointed within one month of their appointment; the NPO's physical address for service of documents and notice of any change of address one month before it takes effect, any other prescribed/ information reasonable required by the Directorate for the purposes of ascertaining whether the NPO is complying with the material provisions of its constitution and the Act.*

## Legal structures used by NPOs

### Which structure is appropriate?

When deciding to register a Non-profit Organisation it is assumed that you have made the decision not to establish an entity which will make a profit, and which profit will be distributed amongst its members. However, as discussed above, there is more to NPOs than merely registering a Non-Profit Organisation. You need to establish which structure is suitable to the needs of the NPO.

Each entity therefore needs to be evaluated based upon the size, the capacity and complexity of the NPO that you wish to establish. Other factors that may influence the decision on the suitable structure are funding requirements and the tax implications.

### **Example:**

*The formal establishment and continued regulatory requirements of the current Section 21 Company structure are more complex than the requirements for the establishment of a Trust, or a Voluntary Association. The most common structure for small, newly established NPOs is a Voluntary Association, while trusts and Section 21 Companies are appropriate for larger, well established NPOs with large budgets, complex programmes and a large staff contingent and is the structure recommended for member hospices by the Hospice Palliative Care Association of South Africa. The Hospice Palliative Care Association recommends a Section 21 Company as this structure has more guarantees for accountability.*

## Voluntary Associations

A Voluntary Association is created when three or more people decide to form an organisation in order to reach shared non-profit objectives. Voluntary Associations are governed by common law, which requires that the Association's objectives are lawful and not primarily for gain or profit for its members.

Voluntary Associations are suitable entities for small community based organisations, which do not require management of large amounts of money and intricate financial policies, or ownership of land or valuable assets or property in order to reach its objectives.

A Voluntary Association will have a Constitution as its founding document, and the Constitution will regulate the governance of the Association. The Constitution will appoint a group of people and bestow management or executive powers on them to make decisions on behalf of the Association and to manage its affairs.

Constitutions of different types of Voluntary Associations may vary in style and content, but should the Association decide to register as a Non-Profit Organisation it is important to remember compliance with the Section 12 (2) requirements discussed above.

### **RESOURCES:**

The Department of Social Development has a Model Constitution available that can be used as a guide in order to draft a Constitution for a Voluntary Association. This Model Constitution can be obtained from the offices of the Department or from their website at <http://www.socdev.gov.za>

The Legal Resources Centre, a non-profit public interest law firm, which also specialises in assisting NPOs has a Model Constitution available on their website at <http://www.lrc.co.za>

## Trusts

A Trust is best described as an arrangement, which is set out in a written document (Trust Deed) in which an owner or founder hands over property/funds to a group of people (trustees) who administer the assets for the benefit of other people (beneficiaries) for a stated objective.

A Trust is governed by a Board of Trustees, whose powers are normally widespread to enable them to achieve the stated objectives of the Trust. Trustees are expected in terms of the legislation to exercise their duties with care, diligence and skill, which can be reasonably expected of a person who manages the affairs of others. Trustees should therefore be aware of conflict of interest, where their personal interest and that of the Trust is not the same. Trustees can receive reasonable remuneration for the work done, as long as this is not expressly prohibited by the Trust Deed.

In order to establish a Trust you will be required to have an attorney draft your Trust Deed and file the original copy thereof with the Master of the High Court. The Master will register the Trust and will issue Letters of Authority to the trustees formally appointing them to act on behalf of the Trust.

The Master may request that the Trustees provide security for the proper performance of their duties. This can be arranged through an insurance company. If you want to do away with the request for security a clause exempting the Trustees from furnishing security must be included in your Trust Deed document. In this case the Master will require the appointment of an auditor.

## Section 21 Companies

The Companies Act 61 of 1973 allows for the Incorporation of an association incorporated not for gain in terms of Section 21. Section 21 Companies therefore resemble business orientated (for profit) companies in their legal structure, but they do not have a share capital and cannot distribute shares or pay dividends to their members. They are instead limited by guarantee, which means that if the company fails; its members undertake to pay stated amounts to their creditors.

A company has a two tiered governance structure consisting of members and directors. The members are able to express their wishes and exercise their powers in general meetings. They appoint and remove directors, amend the founding documents when necessary and decide on disposing of assets. The directors, on the other hand, have broad executive responsibilities. They are required to

appoint auditors and convene the annual general meeting of the company.

A Section 21 Company, like all companies, must register with the Registrar of Companies in terms of the Act. Before the company can be registered, however, the name needs to be approved by the Registrar. A company, unlike a Voluntary Association, may not operate until such time as they have been registered with the Registrar.

The founding documents of the Section 21 Company are the Memorandum and Articles of Association. The memorandum sets out the purpose of the NPO; the Articles of Association regulate how it operates. Because the provisions of the Companies Act are detailed, companies are subject to substantial public disclosure obligations and statutory control. It is therefore required that an Attorney draft your founding documents for the Section 21 Company and advise you on these complex requirements. Further the annual reporting requirements for companies are extensive, and it is therefore not the recommended entity for a small community-based organisation. A Section 21 Company does however have considerable freedom of their internal management and the operation and running of day to day affairs. The Section 21 Company has a significantly improved risk profile compared to Voluntary Associations and Trusts due to the requirements for accountability, disclosure and independent audit.

## Good governance

It is important for the governing boards of NPOs to realise that they are obligated to adhere to the legal obligations imposed on them by the founding documents of the NPO, common law and the legislation that governs the NPO structure. For the different structures discussed above the legal obligations may differ, which is why it is critical for NPOs and their governing boards to ensure that they are aware of the legal obligations.

Certain legal obligations are applicable to all NPO governing bodies:

- Act in good faith and in the best interest of the NPO;
  - Do not allow personal interest to conflict with the interest of the NPO;
  - Do not act beyond the powers of the NPO/Governing Board or the limitations placed on such powers in terms of the founding document;
  - Exercise the degree of skill that may be reasonably expected from such a person of his/ her knowledge.
- It is however important to note that members are not required to have exceptional intelligence and will not be liable for errors of judgment;

- Apply his/her mind to decisions and exercise an independent discretion, and
- Give intermittent, not continuous attention to the affairs of the NPO.

## Legal obligations of Voluntary Associations

Voluntary Associations do not have a specific Act which sets out the legal obligations of members of Governing Bodies. The legal obligations are to a large extent contained within the Constitution of the Association. The Common law provides further principles applicable to Voluntary Associations.

The following are just some of the key legal obligations, which apply to members of Voluntary Association Governing Bodies:

- The Members must be familiar with the content of the Constitution and ensure that they give effect to the provisions as far as they are lawful and effective;
- Members are limited to act in terms of the Constitution and are not allowed to act beyond the powers delegated to them by the constitution;
- Members have a duty to act in good faith toward their fellow board members;
- Members have a duty of care to the association and other members as they accept the responsibility of managing the affairs of the association;
- Where a conflict of interest arises members have a duty to declare the conflict and to place the interest of the association before their own;
- Members can become personally liable in the event where they have acted beyond the scope, powers and limitations of the constitution;
- Where members act fraudulently or recklessly they can be held personally liable.

## Legal obligations of Trustees

The Trust as a legal structure is regulated by the Trust Property Control Act 57 of 1988 together with common law.

### Legal obligations in terms of the Trust Deed

- The First Trustees must lodge the Trust Deed with the Master of the High Court;
- Trustees must ensure that they are familiar with the content of the Trust Deed and are able to give effect to the provisions therein;
- Trustees must lodge amendments of the Trust Deed with the Master of the High Court.

## Legal obligations in relation to Trustees

- Trustees can only act in their capacities as trustees once authorised to do so in writing by the Master of the High Court;
- Trustees shall furnish the Master of the High Court with security if they are not exempted from payment thereof;
- Trustees must act with the care, diligence and skill which can be reasonably expected of a person who manages the affairs of another;
- Trustees must exercise an independent discretion;
- Trustees must provide the Master with an undertaking that they will:
  - Account to the Master for their administration and disposal of the Trust property,
  - Deliver to the Master any book, record, account or document relating to their administration or disposal of the Trust property,
  - Answer honestly and truthfully (to the best of their ability) any questions put to them by the Master in connection with the administration and disposal of the Trust property.
- Resigning trustees must notify the Master of the High Court and the beneficiaries of their resignation.

Please note that the above is not a closed list of legal obligations, which is why it is important that Trustees familiarise themselves with the relevant legislation.

## Legal obligations of Directors and Members of Section 21 Companies

As previously stated Section 21 Companies are governed by certain provisions of the Companies Act of 1973, as amended. Section 21 Companies must therefore comply with the provisions as set out for Public Companies unless otherwise indicated by the Act. NPOs are advised to seek legal assistance when registering Section 21 Companies as well as when dealing with the duties and obligations, which can be quite onerous. The following are just some of the duties and obligations.

### Duties and obligations in relation to the Memorandum and Articles of Association

- The company must send to every member at his/her request and on payment of the prescribed fee, a copy of its memorandum and articles, or shall, if so requested, afford to a member or his duly authorised agent adequate facilities for making a copy of such memorandum and articles (these copies must include all the amendments made thereto),

- The company must on written request from the Registrar, submit a copy of its amended memorandum after it has taken a special resolution altering the memorandum.

## Legal obligations in relation to the Register of Members

- Every company must keep a register of its members in one of the official languages of the Republic, and shall enter therein:
  - The name and address of the members;
  - The date on which his/her name was entered onto the register as a member, and
  - The date on which he/she ceased to be a member.

## Legal obligations in relation to the Special Resolutions

- Any special resolutions to be adopted by a company must comply with the requirements as provided for in Section 199 of the Act, and
- The company must within one month from the passing of a special resolution lodge copies of the resolution and a copy of the notice convening the meeting concerned with the Registrar who shall, subject to the provisions of the Act, and upon payment of the prescribed fee, register such resolution;
- A copy of every special resolution must be embodied in or annexed to every copy of the articles issued after the registration of the resolution.

## Can board members indemnify themselves in their constitution?

Yes, indeed. Board members can add a clause that outlines that the Company or Voluntary Association will indemnify them in the event of a third party claim. The Company or Voluntary Association will need to apply for indemnity insurance.

A clause of indemnification can be added into a constitution, but that does not stop someone from citing board members in their personal capacity. The organisation must then indemnify board members and support their defense that the organisation should be cited as a party as it is a body corporate (juristic person). Also, as a body corporate, the Voluntary Association has liability in the sense that it can sue and be sued in its own name. It is important to note that a board member can not be indemnified in the event where they have acted either fraudulently/negligently. A person cannot operate

unlawfully and then rely on indemnification as a protection mechanism. In essence, the protection is **only** enjoyed if the person acts in good faith.

## What is good faith?

“Good faith” constitutes actions which need to be interpreted in context. If the organisation has no funds, but still enters credit agreements, board members can still be held liable because they have an obligation to know and understand the financial position of the organisation. Good faith applies to intention, but actions can be seen as negligent in respect of fiduciary duties.

## Gender considerations

In many hospice NGOs, the Board of Directors comprise more men than women while there are more women on the management staff. Social norms assign primary responsibility for care to women and decision-making to men. The outcome of this is that often the strategy for the hospice is set without sufficient consideration of management perspectives. There may also be an imbalance of leadership skills with business and financial skills being considered more important than people skills. At strategic planning, the nursing services’ manager, for example may be reticent about questioning financial issues as this is not her area of expertise. It is important to develop skills for directors and senior staff including the skills of financial management, relationship skills, communication skills and strategic planning skills.

Hospices are charity organisations which often started with a strong volunteer corps. Hospice directors often still view professional staff in a volunteer or honorary capacity so that staff salaries are often not market related. Hospices can also be preferred places of employment for women as they can negotiate flexible working hours to be able to take children to school, or job sharing so that they can work half days to suit their family responsibilities. It is clear that these family-care tasks are gendered in our current society.

Women take advantage of policies regarding maternity leave. If there are no policies to engage replacement staff, the burden of work is then taken up by the staff in the job.

### RESOURCE:

**The Legal Resources Centre Information Series No. 6:** Legal Obligations of Members of Non-Profit Organisation Governing Bodies is a handy booklet which outlines the duties and obligations of Board Members. This booklet can be downloaded free of charge from the LRC website at [www.lrc.co.za](http://www.lrc.co.za)

The table below provides a quick summary and comparison of each of the three legal structures: Voluntary Association, Trust and Section 21 Company. Which type of structure is best for your NPO?

	Voluntary Association (VA)	Trust	Section 21 Company
Advantages and disadvantages	<ul style="list-style-type: none"> <li>• Simpler process to suit simpler, smaller organisations.</li> <li>• No registration required. Only contract. Voluntary registration of name.</li> <li>• VAs have all the powers of Section 21 Companies and Trusts.</li> <li>• Protects its members. The members of an Association are not liable for the debts of the Association when the organisation cannot pay its debts.</li> </ul>	<ul style="list-style-type: none"> <li>• Greater degree of credibility with funders.</li> <li>• Very structured and high level of accountability to the Master of the High Court.</li> <li>• Complex reporting process and audited financial statements are required.</li> <li>• Where it is not registered as a NPO with the Directorate, trustees can incur personal liability.</li> </ul>	<ul style="list-style-type: none"> <li>• Greater degree of credibility with funders.</li> <li>• Very structured and high level of accountability to the community.</li> <li>• Freedom of internal management and day-to-day running.</li> <li>• Complex requirements for establishing a Section 21.</li> <li>• Complex annual reporting requirements once established.</li> <li>• Separate Legal Entity registered in terms of the Companies Act, with statutory control by the Company Registrar.</li> <li>• Significantly improved risk profile compared to VAs and Trusts, due to the requirements for accountability, disclosure and an independent audit.</li> <li>• Directors are held accountable for their actions and the company has recourse in terms of Company Law against Directors who fail in their duty of care.</li> </ul>
Legal requirements	<ul style="list-style-type: none"> <li>• No registration required. <ul style="list-style-type: none"> <li>- Voluntary registration of name (in terms of Section 7 (2) of the Heraldry Act, 1962).</li> </ul> </li> <li>• A Voluntary Association is founded on a contractual basis. Any three or more people wishing to form the Association have to agree on the objectives and character of the Association for it to be incorporated under Common Law.</li> <li>• A constitution needs to be drawn up to govern how the organisation will function. If you wish to register as an NPO make sure your constitution meets the requirements for registration.</li> <li>• A group of people with executive powers must be appointed.</li> </ul>	<ul style="list-style-type: none"> <li>• A formal arrangement, in a written document (Trust Deed), between an owner of funds/property and a group of people (trustees) who apply the assets for the benefit of other people (beneficiaries).</li> <li>• An attorney must draw up the Trust Deed. The deed must be lodged with the Master of the High Court.</li> <li>• The trustees must make themselves aware of all their responsibilities (set out in 'Legal Obligations of Trustees in this document').</li> </ul>	<ul style="list-style-type: none"> <li>• Registration with the Companies and Intellectual Property Office (CIPRO). In order to do so the following is required.</li> <li>• A company name.</li> <li>• At least three directors, who sign consent to act as directors and thereby accept the obligations, responsibilities and rights of the appointment.</li> <li>• An independent auditor.</li> <li>• A memorandum and articles of association.</li> </ul>
Applicable legislation	<ul style="list-style-type: none"> <li>• Largely governed by its own constitution.</li> <li>• Falls under Common Law.</li> </ul>	<ul style="list-style-type: none"> <li>• Trust Property Control Act 57 of 1988.</li> <li>• Common Law.</li> </ul>	<ul style="list-style-type: none"> <li>• Companies Act of 1973 with amendments.</li> </ul>
Where to go	<ul style="list-style-type: none"> <li>• Any lawyer or if you do not have access you can approach the</li> <li>• Legal Resources Centre: A non-profit that helps NPOs (<a href="http://www.lrc.co.za">www.lrc.co.za</a>).</li> </ul>	<ul style="list-style-type: none"> <li>• Any lawyer or if you do not have access you can approach the Legal Resources Centre: A non-profit that helps NPOs.</li> <li>• The Trust must be registered with the Master of the High Court in whose area of jurisdiction the greatest portion of the Trust assets is situated.</li> <li>• See <a href="http://www.doj.gov.za/master/m_main.htm">www.doj.gov.za/master/m_main.htm</a> for your nearest office.</li> </ul>	<ul style="list-style-type: none"> <li>• Any lawyer or if you do not have access you can approach the Legal Resources Centre: A non-profit that helps NPOs.</li> <li>• The Section 21 Company must be registered with CIPRO. Forms can be obtained from their website <a href="http://www.cipro.co.za">www.cipro.co.za</a></li> </ul>
Forms to fill in		<ul style="list-style-type: none"> <li>• Acceptance of Trusteeship, to be completed by each Trustee.</li> <li>• Bond of security by the trustees, if required by the Master – Form J344 (not available online).</li> <li>• All the requirements in Form JM21.</li> <li>• An undertaking by an auditor, if applicable – see paragraph 5.2 of Form JM21.</li> </ul>	<ul style="list-style-type: none"> <li>• CM 5: Application for reservation of name.</li> <li>• CM 22: Notice of registered office and postal address.</li> <li>• CM 27: Consent to be appointed as a director.</li> <li>• CM 29: Registration of Directors, Auditors and Officers.</li> <li>• CM 31: Consent to act as an Auditor.</li> <li>• Power of Attorney: Authorisation to sign on behalf of members/directors.</li> <li>• The following documents will make up the Memorandum and Articles of Association: CM3, CM4, CM4B, CM44, CM44B, CM44C Company adopting Table B.</li> <li>• Purpose: Certificate of Incorporation and Memorandum of Association and articles of association in terms of the Companies Act.</li> </ul>

# New tax laws for NPOs

South African Law recognises two principal benefits for NPOs in relation to our tax laws:

## Income Tax Exemption

In terms of our previous laws, certain NPOs such as religious, charitable and educational institutions of a public character and any fund with the sole object of which is to provide funds for any religious, charitable or educational institution contemplated as stated above, were exempt from the payment of income tax.

The new law creates a PBO or Public Benefit Organisation. This stems from the Income Tax Act Section 10 (1)(cN) and is dealt with through the South African Revenue Service, separate from the NPO Act. A PBO is therefore not a legal entity, but a structure with a certain type of accreditation from SARS.

Basically, PBO status is an additional accreditation that first allows the organisation to be exempt from paying certain taxes, as well as being declared a Public Benefit Organisation. This allows for the organisation to issue invoices to donors where through they can claim a tax break. A PBO can be a Voluntary Association, a Section 21 Company or a Trust.

Due to the nature of the work done, hospices should qualify for PBO status in terms of the Ninth Schedule to the Act. All NPOs can and should apply to be PBOs because of the tax benefit this confers. However, NPOs need to be a legal entity before they can apply for PBO status.

## Public Benefit Organisation (PBO)

A Public Benefit Organisation (PBO) is defined as any organisation of a public character:

- Which is a Section 21 Company, Trust or Association; and
- The sole object/s of which are to carry on one or more of the Public Benefit Activities (PBAs) subject to certain trading restrictions and in a manner where:
  - Such activities are carried out in a non-profit manner and with altruistic and philanthropic intent;
  - The economic self interest of any fiduciary or employee of the organisation, is not indirectly or directly promoted, except by way of reasonable remuneration payable to that fiduciary or employee; and
  - At least 85 per cent of such activities (measured in time or cost), are carried out for the benefit of persons in the Republic, unless the Minister directs otherwise, but if

donations are received from persons outside of South Africa, such donations may be used for the benefit of people outside of South Africa; and

- Which complies with one of the following requirements:
  - Each activity should be for the benefit of or be widely accessible to the public at large, including any sector thereof;
  - Each activity should be for the benefit of or readily accessible to the poor and the needy; or
  - The organisation is at least 85 per cent funded by donations, grants from any organ of state or any foreign grants.

## Public Benefit Activity (PBA)

A list of Public Benefit Activities can be found in Part I of the Ninth Schedule. This is a list published by the Minister of Finance for purposes of income tax exemption. The Minister may from time to time by means of a notice make further additions to the list.

Part I lists 63 activities (since coming into the operation of the Revenue Laws Amendment Act 45 of 2003, which extended the list of activities by adding in the activities by adding the activity providing for the 'promotion of free speech and access to media') under the following 11 headings, being:

- Welfare and humanitarian activities
- Health care
- Land and housing
- Education and development
- Religion, belief or philosophy
- Cultural activities
- Conservation, environmental and animal welfare
- Research and consumer rights
- Sports
- Providing assets or other resources
- General

NPOs would have to carefully consider the list in order to determine whether the activities of their organisation match the list. If the NPOs activities fall within the definition of a PBO and their activities can be matched to Part I of the Ninth Schedule the NPO will be registered as an approved PBO and exempt from income tax. There are, however, further requirements in terms of Section 30 (3) of the Act that the NPO will need to meet in order to qualify such as:

- Any conditions prescribed by the regulator; and
- Submissions of a copy of the founding document which provides for the following:
  - Three unconnected persons must accept positions of fiduciary responsibility and no single person should directly or indirectly control the decision making power of the organisation;

- It is required to utilise its funds solely for its primary purpose;
- Surplus funds may only be invested in certain prescribed investments;
- Investments (other than business undertaking and trading activities) acquired by way of donations, bequests or inheritance may be retained in the form so acquired e.g. a donation in the form of a building may be retained and the organisation would not be required to sell the building;
- On dissolution, it must transfer its assets to a similar approved PBO, an institution established by law as defined, or a department of state as defined;
- It may not trade except under certain circumstances set out in the Act;
- It is prohibited from accepting certain donations which are revocable or conditional under certain circumstances;
- It must furnish SARS with copies of any amendments to its founding documents;
- It must not be party to a tax avoidance scheme;
- Remuneration to employees, office bearers, members or other person must not be excessive and no person should benefit from the organisation in a manner that is inconsistent with the Act;
- It must conform to certain reporting standards;
- Where the PBO provides funds to non-approved PBOs, it must take reasonable steps to ensure that the funds are used for the purpose for which they have been provided;
- It must be registered in terms of Section 13(5) of the Non-profit Organisations Act, unless exempt there from; and
- Not use its resources to directly or indirectly support, advance or oppose any political party.

The new law prohibits PBOs from trading except as provided for in either one or four categories prescribed in Section 30 (3)(b)(iv), namely:

- A *deminimis* rule that provides that gross income from trade may not exceed the greater of five per cent of gross receipts or R50 000. Though this limitation has recently been increased (from R25 000 to R50 000) organisations need to engage in more [large scale] trading activities in order to supplement their limited donor contributions.
- Related trading activities, substantially the whole of which are directed towards the cost recovery and which do not cause unfair competition in relation to taxable entities.
- Unrelated trading activities which are of an occasional nature and which are substantially carried out with voluntary assistance without compensation.
- A list of undertakings or activities which the Minister of Finance may approve having regard to certain criteria set out in Section 30(2)(b)(iv)(dd).

## Donor deductions

Part II of the Ninth Schedule of the Income Tax Act makes provision for PBOs which conduct Public Benefit Activities to qualify for donor deductible status.

Part II of the Ninth Schedule previously only listed 17 activities, but a further 26 activities have now been added.

The annual limits for individuals and companies have now been equalised at five per cent of annual taxable income. The limit to the amount of R1 000 has now been removed from the legislation. All taxpayers, companies or individuals, are entitled to a five per cent deduction from their taxable income should they donate to a PBO with donor deductible status.

## NPOs applying in terms of the new tax laws

It is advised that you complete the application forms with either a legal or financial advisor. The following steps serve as a brief outline:

Step 1. In consultation check:

- a) Part I of the Ninth Schedule and any gazetted schedules, if any, to ascertain whether the activities of your NPO are listed on it, for income tax exemption and
- b) Part II of the Ninth Schedule and any gazetted schedules, if listed on it, for donor deductible status.

Step 2. If the activities of your NPO are listed on the relevant schedule, then check that the founding document of your NPO complies with the provisions of the NPO Act as well as the new tax law. If not, the document needs to be amended accordingly.

Step 3. Ensure that your NPO is registered with the Directorate of Non-profit Organisations in terms of the Act.

Step 4. Complete the application form (Form EI 1), which is available at your nearest SARS office or the SARS website: <http://www.sars.gov.za/> You are required to submit the application along with a copy of the organisation's founding document as well as other certain information.

Step 5. If you have not amended or cannot amend the founding document so that it complies with the provisions of the new tax law, then in addition to the application form, complete and submit the SARS Letter of Undertaking (Form EI 2) which is available from your nearest SARS office or the website.

# Guide to problem solving within the Palliative Care sector

When establishing an NPO, it is essential to word the founding document in such a way that the rules around the Governance of the Hospice are in place and have been discussed. The relationship between the Operational Management Team and the Board of Directors of an NPO is historically difficult to manage. To optimise the efficacy of the NPO, it is important to establish the roles and responsibilities of the Board of Directors and Management committee (staff) when establishing the organisation.

The focus of the Board of Directors is on strategy and includes financial oversight, sustainability, good governance. Management and personnel (staff and volunteers) focus on operational matters which include the day-to-day interaction with patients, guided by community needs and medical and psychosocial support.

A significant amount of time and energy can be wasted on managing this relationship and therefore it is important to be aware of possible pitfalls and how to avoid them. This will ensure optimal functioning of the Hospice and best possible care for patients and family members. The following are possible management pitfalls and suggested ways to help avoid conflict.

Management pitfalls	Management suggestions
<p>1. The overlapping of the Board of Directors (BoD) and Management Committee functions and responsibility:</p> <ul style="list-style-type: none"> <li>• This could result in the Manager and management committee having many bosses with individual ideas.</li> <li>• The Directors may experience a lack of control, information and relevant knowledge, which would assist with making fair decisions.</li> <li>• The role of the Directors, Manager or Heads of Departments could be undermined if lines of communication and responsibility are not clear. The one party experiences the other as interfering in their business.</li> </ul>	<ul style="list-style-type: none"> <li>• Clear negotiated guidelines on roles and responsibilities need to be documented as part of policies.</li> <li>• Clear lines of communication need to be identified in line with the Organogram.</li> <li>• The executive function and operational management should be separate, clearly defined and documented with effective communication.</li> <li>• The Manager appoints the members of and chairs the Management Committee meetings. The composition of the Management Committee should include heads of departments and or relevant volunteers/ community members who will ensure that the strategic plan of the Hospice is managed on a day-to-day basis.</li> <li>• The BoD approves a budget and the Manager and Management Committee allocate the funds accordingly.</li> <li>• The performance appraisals of both the Manager and Management Committee are measured against the strategic plan criteria.</li> <li>• The role and responsibility of Board Sub-committees and Management Committee need to be clarified.</li> <li>• Legal, signed and dated minutes of all meetings are to be kept.</li> </ul>
<p>2. The Board of Directors may lose touch with changing demands and needs of the organisation.</p> <ul style="list-style-type: none"> <li>• This may result in a conflict of interests, mistrust and lack of mutual respect, frustration and an inability to adequately perform tasks as requested by the BoD.</li> <li>• Fundraising and funding opportunities may be missed, if the Hospice is not prepared to adapt to changing trends and embrace funding opportunities, which could bring about change.</li> <li>• Job satisfaction of staff may be negatively impacted as frustration levels build over the lack of responsiveness to community needs.</li> </ul>	<ul style="list-style-type: none"> <li>• It is essential to ensure that Directors are suitable and fully representative of the community. They should be passionate and informed about the service delivery.</li> <li>• Ensure that there are management committee members with full Board membership e.g. the Manager and maybe another head of department.</li> <li>• Directors need job descriptions, orientation and regular evaluation.</li> <li>• Senior managers should attend Board meetings as ex-officio members. This encourages transparency and communication.</li> <li>• A Hospice sub-committee should be established with the function of recruiting and approving Directors.</li> </ul>
<p>3. A sense of complacency may develop amongst certain Directors if there is lack of involvement and motivation, i.e. they have become an institution on the Board.</p> <ul style="list-style-type: none"> <li>• Directors may be continually unopposed and re-elected to fill a vacancy because of reluctance to offend a volunteer.</li> <li>• Often only Directors are members of Hospice, which sustains the re-election pattern.</li> <li>• The Directors may not familiarise themselves with the changing environment and needs of the organisation.</li> <li>• These Directors may discourage growth and adaptation to changing needs to limit potential risk and disruption to the organisation.</li> </ul>	<ul style="list-style-type: none"> <li>• Members need to be empowered to fulfil their role and responsibility in the selection of Directors.</li> <li>• Hospice Articles of Association should clearly define terms of office, election and re-election processes.</li> <li>• The election of new Directors could be staggered to retain continuity of expertise.</li> <li>• Directors should be required to attend official events and should a Director fail to attend three Board meetings without apology, the Director should be asked to resign.</li> </ul>

Management pitfalls	Management suggestions
<p>4. The Board of Directors may be hesitant to respond to the changing community needs e.g. Hospices have changed from being 'white' organisations looking after patients who have cancer to organisations looking after AIDS patients, including community HBC workers, managing anti-retrovirals, to managing potential orphans and vulnerable children.</p>	<ul style="list-style-type: none"> <li>• To encourage the awareness of the latest community sentiments it is essential that there is community and management committee representation on the Board.</li> <li>• Directors have a responsibility to maintain awareness of current trends. Management reports to the board should include current issues. Directors are encouraged to attend sector meetings, e.g. regional hospice meetings, conferences.</li> <li>• Good communication between HPCA and the Hospice BoD around the changing environment and prediction of trends will provide the necessary information.</li> <li>• Empowerment of the Board / Hospice sub-committees for making strategic decisions that guide policy in line with the mission, vision and WHO palliative care definition, is important for being current and relevant in service delivery.</li> </ul>
<p>5. The possible 'take over' of Hospice resources and mission by the community could be a real threat if not managed proactively e.g.</p> <ul style="list-style-type: none"> <li>• A renegade group could hijack the Hospice for their own needs</li> <li>• The emphasis of the Main Business could be diluted to benefit a small group interests such as job creation, housing etc.</li> </ul>	<ul style="list-style-type: none"> <li>• A selection committee must approve and approach potential new Hospice members.</li> <li>• The Main and Ancillary Business stated in the Articles of Association needs to be concise and tight within the parameters of palliative care.</li> <li>• The Articles of Association must meet the requirements of the companies act with regard to quorum requirements for special resolutions.</li> </ul>
<p>6. Loss of focus on the core business, the mission and vision of the Hospice could be the result of poor communication between the manager and the Board. This may result in not enough attention being paid to the core function at Board level. Sustainability needs and anxiety may overshadow service delivery requirements.</p>	<ul style="list-style-type: none"> <li>• Yearly strategic planning should be done and an operational management programme made and managed by management committee and supervised by the BoD.</li> <li>• The mission, vision and strategic objectives of the organisation must guide decisions.</li> <li>• Decisions must be made in committee and not by individuals.</li> </ul>
<p>7. Adjusting to and managing the changing goals and demands of affiliated Bodies like HPCA and DoH due to changing funder requirements and community needs e.g. management of orphans and vulnerable children, mentorship, training, generic HBC, accreditation, the expanded scope of palliative care and paediatric palliative care.</p>	<ul style="list-style-type: none"> <li>• The Hospice Board and management should remain knowledgeable with regard to the changing environments, current community needs and health care trends. This will assist Board and management in deliberating the scope of involvement and the impact on the Hospice.</li> <li>• Major policy changes need to be discussed at a strategic meeting consisting of Directors, management committee, key volunteers and interested parties as decided by the Board/management sub-committees.</li> </ul>
<p>8. Approval of writing and implementation of policies and procedures may result in uncertainly.</p>	<ul style="list-style-type: none"> <li>• The Board of Directors should authorise management committee to develop operational policies and procedures.</li> <li>• The Board of Directors must oversee the Financial and Governance policies and have the responsibility to ratify policies and procedures developed by the management committee.</li> <li>• Human resource policies are guided by Labour Law.</li> </ul>
<p>9. Directors acting outside of their scope of practice</p>	<ul style="list-style-type: none"> <li>• The scope of practice of Directors must be documented and circulated.</li> <li>• Board orientation in the function of the Board and the Directors' responsibilities as well as the function of Hospice, is essential.</li> <li>• The Board of Directors needs to establish clear guidelines for disciplinary procedures of Directors.</li> <li>• The Manager needs to establish a forum where grievances can be discussed.</li> </ul>
<p>10. Service delivery may be compromised because of funding constraints or restraints placed by Directors on staff. If funding dries up, appropriateness of service needs to be questioned.</p>	<ul style="list-style-type: none"> <li>• The financial committee and the fundraising committee need to work closely together guided by the strategic plan, mission and vision of the Hospice.</li> <li>• It is essential that the Manager and Department Heads remain in touch with latest trends to ensure the sustainability of the Hospice. Therefore they should be involved with HPCA, other NPOs, CBOs and the DoH.</li> <li>• Networking ensures that the responsibility of care is not only Hospices' responsibility.</li> </ul>

# Conclusion

This chapter describes the various NPO structures and the legal requirements for each.

# Bibliography

These resources will provide you with more information on the laws that govern Non-Profit Organisations.

## Bibliography

- Bamford, B. 1982. *The law of partnership and voluntary association in South Africa*. Juta.
- Department of Welfare, Directorate. 1999. *NPOs Legislation Affecting the Non-profit Sector*. Information Series No. 1.
- Honore, T. & Cameron, C. 1992. *Honore's South African Law of Trusts*, Juta.
- Geach, W.D. & Schoeman, T. (eds). 1992. *The Guide to the Companies Act and Regulations*. Juta.
- The Legal Resources Centre. *Legal Obligations of Members of Non-profit Organisation Governing Bodies Information*. Series No. 6.
- The Legal Resources Centre. *Legal Structures Commonly Used by Non-profit Organisations*. Series No. 1.
- The Legal Resources Centre. *New Tax Law for South African Non-profit Organisations*. Series No. 3.

## Relevant Legislation

- The Companies Act No. 61 of 1973
- The Income Tax Act No. 58 of 1962
- The Non-profit Organisation Act No. 71 of 1997
- The Trust Property Control Act No. 57 of 1998

