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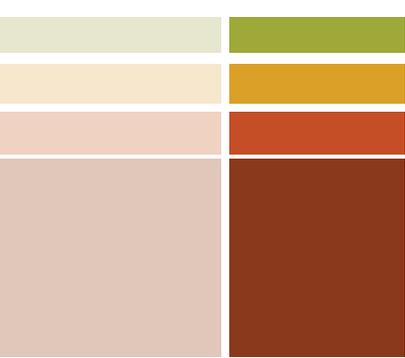
**THE VOLUNTARY INDEPENDENT CODE OF GOVERNANCE AND VALUES  
FOR NONPROFIT ORGANISATIONS IN SOUTH AFRICA**

# **THE INDEPENDENT CODE**

This is the first draft of a proposed Voluntary Independent Code of Governance and Values for NPOs in South Africa. It has been initiated by a group of NPOs, and is intended to recognise their wide diversity of size, purpose, resources, and capacity. As an initial draft, comment, criticism, and suggestions are invited and encouraged.

It is intended that this Code should be in the public domain, and that it should not “belong” to any one or more organisations. Whatever steps may be needed to secure the integrity of the text, it should be made freely available to all NPOs and to all sectors of society to whom NPOs are accountable.

This Independent Code is entirely voluntary and does not have any official or legal status, nor is it intended that it should be imposed or enforced. However, it is widely supported by the donor community, and has the full backing of the Non-Profit Organisations Directorate.



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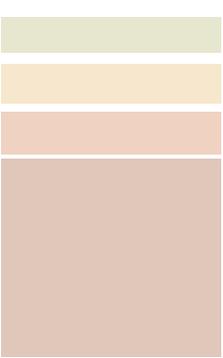


# INTRODUCTION

# 1

## THE OBJECTIVES OF THE INDEPENDENT CODE INCLUDE THE FOLLOWING:

1. to **promote good governance, high standards, and best practice, amongst NPOs.**
2. to **avoid the imposition of inappropriate unattainable, and unaffordable standards.**
3. to ensure that the eventual Code is **informed by a process of wide consultation and collaboration** amongst NPOs.
4. to **recognise the wide diversity of size, capacity, and resources** amongst NPOs.
5. to identify **core values and principles** that should be attainable by and acceptable to the nonprofit sector as a whole (in its diversity).
6. to give due recognition to the **importance of other Codes**, including the King 111 Code, which was devised by the IOD primarily for its own members within the corporate sector
7. to recognise that **NPOs are a distinct category of organisation and warrant and need a separate and distinct Code of Governance.**
8. to recognise that **the NPO sector comprises organisations of a voluntary nature**, formed on a non-profit basis at the initiative of individuals and entities within civil society, to meet a need or advance a purpose in the public interest.
9. to recognise that **NPOs are values-based institutions which stand in a position of trust** towards beneficiaries and Donors; and that they have a duty of **accountability to a number of interested parties, including donors, members, employees and the general public.**
10. to acknowledge that success for NPOs is **not measured merely by reference to size, budget, or reputation**, but by their actual effectiveness in achieving their stated goals.
11. to recognise that **the best interests of beneficiaries and of society as a whole** need to be paramount in undertaking non-profit work.
12. to adhere to the principle that the work and resources of an NPO must at all times be dedicated solely to the **advancement of a public benefit purpose.**



## WHAT IS A CODE OF GOVERNANCE?

A Code of Governance is a set of values and principles intended to guide and inform the way organisations are managed and conduct their affairs. It is also intended to serve as a standard or measure to assess performance, and guide members of governing boards, and others who carry responsibility for governance. Frequently, the principles, values and objectives of a code are embodied in a Board Charter, to which each serving member is required to subscribe. The Independent Code envisages similarly that there should be a written voluntary Commitment and Undertaking of Compliance signed on behalf of the Board, the Members and the Employees of the organisation concerned. Such joint Commitment and Undertaking should be reviewed and renewed at regular intervals.

Some Codes are embodied in laws, regulations, and rules and are therefore compulsory. The message of such compulsory codes is often characterized as: “Comply, or else!”, where failure to comply results in negative consequences, which can involve penalties or sanctions. In a serious case, non-compliance can lead to the personal liability and culpability of Board members.

There are also other kinds of Codes, whose message may be described as: “Comply, or explain!”. Such Codes are not enforced by law or regulation, but can still entail negative consequences for non-compliance –such as, for example, the loss of benefits (e.g. tax exemption, or the loss of funding eligibility, or preferred beneficiary status).

There is a third kind of Code which is entirely voluntary, supportive, and self-imposed. Such a Code is not subject to official oversight, or enforced by law, nor is it enforced by threat. The purpose of such a Code is to encourage and empower, rather than regulate, sanction or impose. This is the objective of the proposed Independent Code. This code seeks to promote a culture of “best governance practice”, and seeks to provide guidance, information, and resources with a view to:

- improving governance standards and practice amongst NPOs;
- strengthening governance capacity of NPOs and their Boards; and
- encouraging public confidence in and support for the nonprofit sector.

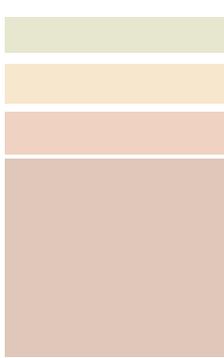
## DOES “ONE SIZE” FIT ALL?

There are a great many nonprofit organisations in South Africa. In fact, no one really knows how many. One recent estimate<sup>1</sup> suggests that there may be as many as 150 000 such organisations, depending on how the term “nonprofit organisation” is defined. Of these, 85 000 have an NPO number – which indicates formal registration with the NPO Directorate in the Department of Social Development.

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<sup>1</sup> based on research conducted during 2005 by Mark Swilling and Bev Russell.





Only around 10 000 NPOs have a PBO number, indicating that they have been approved by SARS (the South African Revenue Service) as “Public Benefit Organisations” (PBOs). A nonprofit organisation is only exempted from Income Tax, Donations Tax, Estate Duty, and other fiscal levies once it has been approved by SARS as a PBO. Even fewer organisations (in addition to being registered NPOs and approved PBOs) are also exempt from charging VAT, and entitled to reclaim VAT paid on their supplies.

What is loosely described as “the NPO sector” is therefore a very large and diverse sector. It includes well-established organisations with large donor grants, as well as many much smaller, informally constituted, community-based organisations (CBOs). Many CBOs don’t have written constitutions, are not registered NPOs, don’t have PBO status and therefore can’t make the most of the tax benefits available to nonprofit organisations.

In this context, with organisations of varying size, capacity and purpose, it is unrealistic to conceive of a single Code of Governance that is applicable in the same ways to all organisations, large or small, formal or informal, whether endowed, community-based, or even multinational. But in spite of these differences there are certain fundamental values and operating principles to which all NPOs should subscribe. Although the manner in which these values and principles are applied in practice may differ across the nonprofit sector, this Code seeks to recognize both similarities and differences. This voluntary Code of nonprofit governance seeks to promote core values that apply universally, and to recognise and allow for differences in how these are practically implemented.

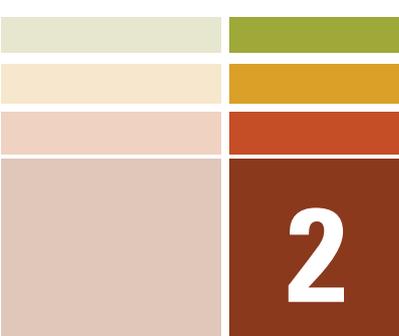
## **WHAT IS DIFFERENT AND SPECIAL ABOUT THE NON-PROFIT SECTOR RELATIVE TO THE CORPORATE SECTOR?**

Despite their wide diversity, NPOs share a number of defining characteristics that make them distinct and different from corporates and other entities established for-profit.

For example:

- NPOs are voluntary organisations, which means that they are created on the initiative of ordinary citizens, and not by any government or state structure.
- NPOs exist to address a social need or to advance a purpose in the public interest.
- NPOs are barred from pursuing individual self-interest or private profit, and must apply all their resources to advance a purpose for public benefit.
- NPOs may be legally established simply by the mutual agreement of three or more people.
- Upon dissolution of an NPO, any remaining assets must be transferred to some other NPO having the same or similar purpose.

NPOs are, by nature, committed to a number of values and principles that are distinct and very different from those applicable to the corporate sector. The primary difference of purpose is that an NPO exists to serve the common good, and promote a public benefit, rather than to achieve individual profit or advance self-interest, which is the purpose of for-profit entities.



# 2

## NONPROFIT GOVERNANCE

### VALUES, PRINCIPLES AND RESPONSIBILITIES

NPOs are special kinds of institutions which exist in order to serve the common good. They represent a practical manifestation of the principle described as "Ubuntu." This implies a relationship of mutual and reciprocal responsibility between individuals and communities. Their major purpose is to meet a need or advance a purpose in the public interest. They are a means whereby communities share resources; demonstrate concerns; promote values and purposes; and demonstrate a shared responsibility for those within society who are in need, or have difficulty caring adequately for themselves. They are formed on the initiative of ordinary citizens, and are constituted independently of Government, though they remain accountable to the communities they represent and serve.

The NPO sector is highly diverse. There are essentially three basic types of legal structure available to NPOs – Nonprofit Companies, Trusts, and Voluntary Associations. Each type of structure has its own distinct governance body – described variously as a Board of Directors; a Board of Trustees; or a Management Committee (amongst other names).

Some NPOs are able to rely on their own endowment capital or income flows, while others depend completely on donors and grantmakers. While only some NPOs have "members", all NPOs have beneficiaries—members of the public, to whom they are also accountable. A Code of Governance for NPOs must take account of these differences of size, nature, structure, capacity and objective.

Ultimately, it is the Board, by whatever name it is known, which bears primary responsibility for ensuring that an NPO remains true to its values and principles, faithful to its mission, and effective in carrying out its public benefit activities in the public interest. The "buck" stops with the Board, with particular reference (but not limited) to financial transparency and accountability.

Although the Board is ultimately responsible for the governance of an NPO, this responsibility is carried into effect by the organisational management, who must be supported by employees, volunteers, donors and others involved with its operations. A Board must also hold management accountable for the practical implementation of its mandate, and for ensuring effective strategic and budgetary discipline. It must also affirm core values; set attainable standards; provide strategic direction; monitor actual performance; and ensure responsible allocation of resources. However, a Board should never assume the responsibilities of organisational management for the day-to-day operations and implementation.

While affirming the critical responsibility of the Board, there are other stakeholders of an NPO who also bear their share of responsibility, and must play their part in ensuring that effective governance takes place. These stakeholders include an NPO's members (where applicable); employees; volunteers; and donors.

# PRINCIPLES OF GOOD GOVERNANCE

## 1. ENSURING ADHERENCE TO VALUES

The fundamental responsibility of the Board of an NPO is to endorse, practise, and require a commitment to the core values that are inherent in the African philosophy described as “Ubuntu”.

Archbishop Desmond Tutu described Ubuntu as “*the essence of being human*”. He said:

*Ubuntu speaks particularly about the fact that you can't exist as a human being in isolation. It speaks about our interconnectedness. You can't be human all by yourself, and when you have this quality – Ubuntu – you are known for your generosity. We think of ourselves far too frequently as just individuals, separated from one another, whereas you are connected and what you do affects the whole World. When you do well, it spreads out; it is for the whole of humanity.*

A commitment to these core values is both implicit and explicit in this Voluntary Code. Some values are embodied in legislation, such as the Nonprofit Organisations Act, 71 of 1997, as amended; the Trust Property Control Act, 57 of 1988, as amended; and the Companies Act, 71 of 2008, as amended. Other values form part of our culture and Common Law.

The values that are of particular relevance and concern to the NPO sector are outlined below.

### VALUE 1

### FIDELITY TO PURPOSE

For an NPO to be committed to the principle of fidelity, or loyalty, to purpose means that **all its resources, energies and activities must be devoted to promoting its public benefit purpose and not to any personal or private objective.**

- The purpose of an NPO must be clearly defined in its founding document, and the Board must ensure that the organisation remains true to that purpose, and does not become deflected into unrelated causes and activities, however worthy. Any change of purpose must result from a formal decision to this effect, following a broad process of consultation. Such decision must then be formalised by amendment of the NPO’s founding document.
- The importance of remaining true to purpose involves not only an obligation owed to members, and a duty of trust owed to beneficiaries, but also involves a duty owed to donors and supporters. In terms of the Income Tax Act, a change of purpose must be promptly notified to the Tax Exemption Unit of SARS, which may then review its initial approval of the organisation’s PBO status. A change of purpose can lead to the loss of tax exemption under Section 10(1)(cN) of the Income Tax Act. In certain instances, a change of purpose can also lead to the loss of approval for purposes of Section 18A (the right of donors to claim tax deductibility of donations to that organisation).

## VALUE 2

## ALTRUISM AND BENEVOLENCE

An NPO is constituted for a public benefit purpose. This implies that its actions and decisions must be motivated by reasons consistent with that purpose. **The underlying motivation must be one of public interest, not self-interest.**

- The Board has a responsibility to ensure that neither its members, nor any of the organisation's employees or its donors use the organisation to advance personal agendas, whether this involves private profit, political candidacy, individual reputation, promotion, advertising, or other self-benefit.
- Altruism or benevolence implies that the purpose underlying an action is a desire to benefit others, without benefit to oneself. It is the foundation of philanthropy or charity, and represents an intention to benefit society as a whole.

## VALUE 3

## INTEGRITY

**It is a primary responsibility of the Board to demonstrate a commitment to the highest standards of integrity**, and to require that other persons who represent or act on behalf of the organisation live up to the same standards.

- Integrity in this context has both positive and negative aspects. It can be concerned not only with actions, but also with defaults. Thus, for example, integrity is concerned with acts of dishonesty such as theft, fraud, corruption, lying and deceit. It is also concerned with the failure to fulfill a mandate of trust. There can be a failure of integrity both in doing something, as well as in not doing something, or in doing nothing.
- The Board must ensure that standards of integrity are effectively propagated and enforced. It must, for example, create mechanisms to protect "whistle-blowers", and must ensure that procedures and policies exist to deal with instances of dishonesty or malpractice. This may involve internal disciplinary proceedings but, in serious cases, it must be prepared to lay criminal charges and allow the courts to determine appropriate sanctions.

## VALUE 4

## OPTIMISING RESOURCES

An NPO holds a position of Trust. It is placed in possession of funds and resources which are given specifically to advance a public benefit purpose. **The Board must act responsibly and effectively in ensuring that valuable and limited resources are spent in an appropriate manner**, without extravagance or undue risk. Even when funds are donated without a designated purpose, modesty and prudence must be the watchwords.

- This important value has particular relevance to the issue of remuneration, including reimbursement of expenses incurred by Board members. As far as nonprofit companies are concerned, the guiding principles are now set out in the new Companies Act, which prescribes that remuneration may only be paid to Directors if the founding document so

permits, and if there is prior approval of a general meeting of members passed by Special Resolution within the past two years. Annual Financial Statements must disclose any such remuneration individually in respect of each Director (and any other financial benefits such as a bonus or a loan).

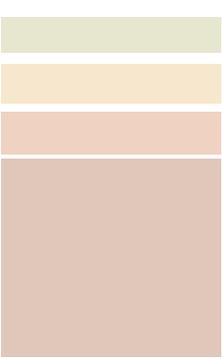
- Similar principles should be regarded as applicable to all NPOs, and not just those constituted as nonprofit companies.
- The Income Tax Act (Section 30) also prescribes that a tax-exempt PBO may not pay remuneration to any person, including a Director or Trustee, "*which is excessive, having regard to what is generally considered reasonable in the sector, and in relation to the service rendered.*"
- Compliance with these principles and statutory prescriptions represents an important Board responsibility. A failure to comply is a breach of trust, and may result in civil and even criminal consequences.

## VALUE 5

## CONFLICTS OF INTEREST AND SELF-DEALING

A fundamental principle and value of NPO Governance is the avoidance of "Conflicts of Interest". Such **conflicts arise when a person in a position of trust makes a decision or enters into a contract from which they themselves, or friends, relatives or associates, stand to benefit.**

- Occasionally, but rarely, such conflicts of interest cannot be avoided. In the NPO sector, a special problem arises in the case of community-based organisations, where community members are not only beneficiaries but also serve on the organisational Executive. Such situations require particular care and management, which may include the need for special approval by members of the community, or the assurance of some knowledgeable, independent and disinterested person. However, the appointment of relatives or friends as employees of an NPO, or as consultants or service providers, should be avoided wherever possible except in the most unusual circumstances.
- As to how these situations should best be handled, the Companies Act of 2008 provides guidance and stipulations in respect of companies – including nonprofit companies. Similar principles should be regarded as applicable to all NPOs, and not just those constituted as nonprofit companies. The Companies Act stipulates that in the event of a "conflict of interest" situation arising, the affected person:
  - a. must disclose the interest and its general nature before the matter is considered at the meeting;
  - b. must disclose to the meeting any material information relating to the matter, and known to the director;
  - c. may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;

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- d. if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraph (b) or (c);
  - e. must not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) and (c);
  - f. while absent from the meeting in terms of this subsection—
    - i. is to be regarded as being present at the meeting for the purpose of determining whether sufficient directors are present to constitute the meeting; and
    - ii. is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted; and
  - g. must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the Board.

## VALUE 6

## EQUALITY AND NON-DISCRIMINATION

NPOs are bound by rights, duties and obligations set out in the South African Constitution. In fact, the right to form an NPO is itself reflected in the fundamental right which is described as “The Freedom of Association”.

- In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, **it is the responsibility of the Board to take proactive steps to prevent unfair discrimination in the conduct of an organisation, including discrimination that may be based on grounds of race, gender, or disability.** A Board must also promote a principle of fairness in its relationships with other organisations, and in its programmes and activities - including the selection of beneficiaries, and the assurance of access to its services and support.

## VALUE 7

## DEMOCRACY AND EMPOWERMENT

In the conduct of its affairs and in its relationships with each of its stakeholders, an NPO must demonstrate a clear commitment to democratic process and decision-making. An NPO ultimately makes its own decisions, but these should be informed by knowledge, research, and a participative process allowing for wide-ranging consultation and feedback.

- Thus, for example, **a Board is responsible to ensure that employees are fairly treated, adequately represented, and appropriately consulted;** and that a culture of participatory decision-making is encouraged throughout the organisation.
- In its dealings with beneficiaries and communities, a similar value and principle should be encouraged by the organisation, involving democratic process and empowerment. **Beneficiaries should be shown respect, and given the opportunity to evaluate, and to praise or, if necessary, criticise the quality of products and services received.** The dignity, value and empowerment of each individual person should be the hallmark of an NPO's interactions.

A fundamental value that needs to be observed by NPOs is that of Independence and impartiality. A **public benefit** purpose implies that all eligible beneficiaries must be treated equally and fairly, without special favour or prejudice. Where it is necessary, because of limited resources, to choose between particular individuals or communities, the basis for choice must be such as to avoid the reality – or the possible perception – of unfair discrimination. This is particularly important where members of the Board – or senior executives – are identified with one beneficiary group rather than with another.

A commitment to Independence extends beyond the choice of beneficiaries, and includes a duty to make choices and arrive at decisions at arms length and without being dictated to by any particular constituency or interest group. Similarly, although Donors will generally designate their intended grant purpose, which could include identifying particular needy communities or groups, they may not control the final selection of individual beneficiaries, or attempt to advantage their own employees or persons with whom they may have some special relationship.

Similarly, although NPOs must ensure that they communicate effectively with official bodies, including local government, in order to ensure that their respective efforts are complementary and that there is no wasteful duplication of efforts and resources, they must always act independently and take particular care to avoid the perception of political preference or patronage.

## 2. EXERCISING EFFECTIVE LEADERSHIP

**Leadership is an essential ingredient of governance.** It relates not only to the external role of presenting and propagating the cause or mission of an NPO in the public domain; but also to the internal role that should be played by the Board in setting standards, giving direction, and determining strategy. Once again, **it is not the function of a Board to manage the organisation; but it is the function of the Board to hold managers to account; to provide them with the resources they need; and to ensure that there is a shared vision and strategy**, which is carried into effect throughout the organisation.

The substance and scope of the Board's responsibility to exercise effective leadership is considered under the headings below.

### LEADERSHIP PRINCIPLE 1

### VISION, PURPOSE AND VALUES

**It is the responsibility of a Board to ensure that the vision, purpose and values of the organisation are clearly defined;** are widely discussed in a workshop setting; are recorded in writing; and are reviewed at regular intervals, to ensure that they remain relevant and are "owned" and implemented at all levels of the organisation.

- It is recommended that basic statements of vision, purpose and values be incorporated in the founding documents, and that they are prominently repeated in the organisation's pamphlets, and other documents, including Strategic Plans; Annual Reports, etc.

- To ensure that these matters are given due weight and prominence, **it is a governance responsibility to regularly monitor and evaluate individual and collective performance**, to identify weaknesses, and to provide opportunities for learning and development.

## LEADERSHIP PRINCIPLE 2

## ACCOUNTABILITY AND TRANSPARENCY

**A critical responsibility of the Board is to ensure commitment to Accountability and Transparency.** The manner in which the organisation addresses this responsibility represents the main measure by which an organisation will be known and judged by its various stakeholders.

- Within a reasonable time (not exceeding six months) following the end of each financial year, an organisation should prepare, publish, and present its Annual Financial Statements, which should either be professionally audited, or at least reviewed by an independent person, in the manner contemplated by the Companies Act of 2008. Such statements should include, as a minimum, a Statement of Financial Position; a Statement of Comprehensive Income; a Statement of Changes in Capital and a Statement of Cash Flows (with comparatives for the preceding financial year).
- However, the duty of accountability and transparency is not restricted to the financial situation of an organisation, but includes its duty to give an account of its programmes and activities, including the manner in which it has sourced and applied its funds, the measure of its failures and successes, and its plans and proposals for the future.
- NPOs are accountable to a number of stakeholders for several complementary reasons. These stakeholders include:
  - a. Donors - with respect to the organisation's integrity and use of funds.
  - b. Beneficiaries - with respect to the organisation's recognition of needs, and deployment of resources.
  - c. Members - with respect to democratic governance and fidelity to purpose.
  - d. Employees - with respect to remuneration, employment conditions, transformation, and human relations.
  - e. Government - with respect to legal and fiscal compliance, and effectiveness in addressing societal needs.
  - f. Other NPOs - with respect to possible synergies and opportunities for collaboration.
  - g. General public - with respect to tax exempt status, and other fiscal privileges and responsibilities.

## LEADERSHIP PRINCIPLE 3

## FUNDRAISING, SUSTAINABILITY AND RISK

**It is the Board's responsibility not only to monitor expenditures and appropriation of funds, but also to ensure that an organisation continues to be adequately funded** and is in a position to meet its anticipated programme costs, operating expenses, and commitments to employees and beneficiaries.

- Board members should be encouraged not only to give of their time, knowledge and skills, but also, where possible, to make a personal financial contribution, and to provide support to those primarily responsible for fundraising and advancement.
- Part of the Board's responsibility is to ensure that the organisation communicates effectively with its various stakeholders, including its donors and members. This may require periodic project and programme reports; the establishment and maintenance of a website; the publication of newsletters; and the prompt and efficient handling of correspondence and other communications, including the media.
- It may also be appropriate for an NPO to recoup at least part of its expenditures through the levy of affordable fees and charges for its services. In some instances, there may be opportunities to collect income from other activities to supplement the organisation's donation income. However, in these circumstances, there are a number of considerations which need to be carefully considered. These include the following:
  - a. Any such income-generating activity must remain secondary and not become a primary focus, to the detriment of the organisation's public benefit purpose.
  - b. Nett profits derived from "unrelated" income-generating activity are likely to be subject to tax.
  - c. Board members and employees must be particularly careful to avoid conflicts of interest or personal profit in these situations.
  - d. Such activities should never involve undue commercial risk, which may put the organisation's financial sustainability in jeopardy.

#### LEADERSHIP PRINCIPLE 4

#### COLLABORATION AND SYNERGY

NPOs exist to serve a public benefit purpose, and they should not act competitively or seek to establish exclusivity in relation to other organisations involved with similar work. When opportunities arise, **NPOs should act collaboratively and cooperate with other similar entities**— including official government welfare agencies. The overriding concern should be the best interests of the intended beneficiaries, and of society as a whole.

#### LEADERSHIP PRINCIPLE 5

#### THE BOARD AND OTHER GOVERNANCE STRUCTURES

The manner of composition of the Board is a crucial issue, which impacts directly on the governance of an NPO. **Board members should be recruited with due regard to a number of relevant factors, including their knowledge, skills, diversity, and availability.** There should also be a policy directed at achieving, from year to year, a balance between the benefit of continuity of membership and periodic renewal. Thus, new board members should periodically be introduced, and long-serving members should periodically retire.

- Board members should be committed to actual attendance and active participation at Board meetings. Upon initial appointment, new Board members should be supported with background documentation, and a process designed to familiarise them with relevant information.

- Traditionally, most Board members serve without remuneration. However, NPOs sometimes make provision for the payment of a modest fee, and the reimbursement of travel and accommodation expenses, particularly where the level of commitment is significant. It must be emphasised that any such remuneration or reimbursement must be proportionate to the resources of the organisation and commensurate with the significance of the expense and the level of commitment required. Under no circumstances should remuneration or allowances be paid other than for actual attendance and participation at Board meetings.
- Larger NPOs may require subordinate governance sub-structures to assist the Board in executing its responsibilities. Such sub-structures may include, for example:
  - a. An Executive Committee
  - b. A Regional Committee
  - c. A Project Committee
  - d. A Fundraising Committee
  - e. An Audit Committee
- The terms of reference and composition of any such committee should be carefully defined and managed to ensure that there is an appropriate balance of internal and external members; that the Committee remains answerable to the Board; and that it does not supersede or override its delegated authority and legal responsibility.

## LEADERSHIP PRINCIPLE 6

## PROCEDURAL FORMALITIES

The Founding documents of an NPO will usually prescribe a number of procedural matters which have reference to Board meetings, and meetings of sub-committees.

- Procedural formalities prescribed in founding documents must be thoroughly observed, including for example:
  - a. Period of notice of meetings
  - b. Prior delivery of meeting papers
  - c. Participation by video - or teleconference
  - d. A formal agenda
  - e. Circulation and confirmation of prior minutes
  - f. Declaration of interests
  - g. Quorum
  - h. Preparation of minutes
  - i. Voting, which can include a Chairperson's casting vote.
  - j. Provision for "Round Robin" resolutions
  - k. Frequency and minimum number of meetings
- It is important that the Director or Chief Executive of an organisation attend Board meetings – with or without formal membership and voting rights. However, there should be a part of every Board meeting (usually at the end of the meeting) when that person is not present, and the Board has an opportunity to discuss any confidential matters (including the performance of the CEO). The presence of other managers or members of the executive may be desirable and important both for management and for the benefit of the Board.



- It is undesirable that the CEO should chair Board meetings; and care must be taken to facilitate the full participation of all Board members, and to ensure that meetings are not confined to, or dominated by, the statements and views of the executive.

### 3. ENSURING LEGAL AND FISCAL COMPLIANCE <sup>2</sup>

**It is the responsibility of the Board to monitor and ensure full compliance with relevant laws**, such as those that relate to registration, fiscal status, and the submission of statutory returns. This is not merely a formal or nominal responsibility, as Directors and those charged with fiduciary responsibility can be held personally liable in the event of non-compliance in terms of various laws. Such personal liability can arise, for example, if they are dilatory (intentionally cause delays), and fail to seek reasonable assurance from management or those responsible for providing information or verification.

There are many different laws which impose duties upon those responsible for the governance of NPOs. **A Board should, where necessary, seek professional advice and assurance** with respect to the extent of such duties and the fact that these obligations are being timeously addressed and effectively monitored.

Key compliance matters that should be considered by the Board are listed below.<sup>3</sup>

#### LEGAL/ FISCAL PRINCIPLE 1 ESTABLISHMENT AND INCORPORATION

**The form of legal structure in terms of which an NPO is established may determine how and when the responsibilities of governance arise.**

- A nonprofit company must comply with the registration requirements of the Companies and Intellectual Property Commission (CIPC) in terms of the new Companies Act, No 71 of 2008, as amended. As proof of such compliance the Incorporators will be issued with a Certificate of Incorporation, under the seal and signature of the CIPC. The initial Directors are then charged with assuming the ongoing responsibility of governance.
- A Trust must be registered in accordance with the requirements of the Master's Office in accordance with the Trust Property Control Act, No 57 of 1988, as amended. Upon registration of the Trust, Trustees are issued with Letters of Authority under the seal and signature of the Master of the High Court; and the Trustees must then assume the ongoing responsibility of governance.

<sup>2</sup> Please note that this Voluntary Code is not intended as legal advice. Organisations should seek professional legal advice on matters of legal and fiscal compliance.

<sup>3</sup> this is not a list of every single legal and compliance issue affecting South African nonprofit organisations.

- A Voluntary Association requires no prescribed statutory registration, and accordingly there is no dedicated office of Registry. In fact, it can come into existence without further formality upon agreement to this effect by a minimum of three people in accordance with the Common Law. Such agreement is usually (desirable, but not essential) evidenced by a written constitution. Responsibility for governance arises in consequence of such agreement (verbal or written) being reached. Responsibility then rests upon the members, unless provision is made for the devolution of responsibility upon a Management Committee, or similar structure.

## LEGAL/ FISCAL PRINCIPLE 2 ADMINISTRATIVE AND PROCEDURAL REQUIREMENTS

**Each form** of alternative legal structure, with the exception of the common law structure of a Voluntary Association, **has its own specific reporting obligations** to comply with applicable laws and regulations.

- It is the responsibility of the Board to seek and obtain assurance of due compliance with such prescribed requirements; and this duty would normally be that of the Chief Executive, assisted by staff, auditors and/or independent verifiers, where applicable.

## LEGAL/ FISCAL PRINCIPLE 3 NPO ACT - CONSEQUENCES AND BENEFITS OF REGISTRATION

Provision is made under the Nonprofit Organisations Act, No. 71 of 1997, for the voluntary registration of NPOs, irrespective of the particular form by which they are constituted. However, registration is not a precondition to the legal existence of the organisation or the commencement of the responsibilities for governance. The office of registry is described under the Act as the Nonprofit Organisations Directorate, and its Chief Executive is styled the Director.

- Although registration is voluntary, **there are certain benefits and advantages which result from registration**. These include:
  - a. The issuance of a Certificate of Registration, which serves as proof of the legal existence of the organisation, and the fact that it is a so-called body corporate, which means that it is a legal entity with an identity of its own, apart from that of its members.
  - b. Only registered NPOs are eligible to apply as grant recipients of the Lotteries Fund; the NDA; the IDT; Local and Provincial authorities, and various other public and private funding agencies.
- **Registration under the NPO Act gives rise to certain ongoing reporting duties**, including a requirement for the submission of annual Financial Statements, supported by the report of an independent accounting officer within 9 months of the end of each financial year; and a requirement for the submission of an annual narrative report describing the activities of the NPO during the preceding period – both such documents are to be prepared and lodged in the prescribed form.

- The Directorate also has powers of inspection and enquiry with respect to registered NPOs, and maintains a registry and database. In addition to annual reports, the Directorate's records include details of the constituting documents; the current office bearers; the address and contact details of the organisation, and other prescribed information. These records are accessible to members of the public upon payment of a nominal fee.
- Accordingly, registration implies a commitment to transparency and public accountability. It is therefore recognised as evidencing at least the intention to demonstrate best practice values.

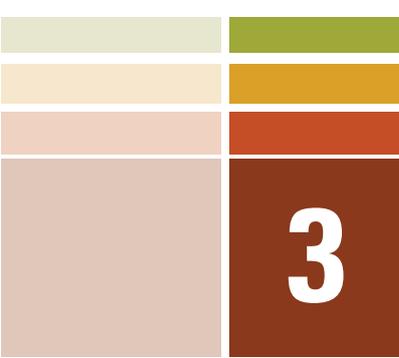
#### LEGAL/FISCAL PRINCIPLE 4 PBO STATUS - FISCAL BENEFITS AND CONDITIONS

In terms of Section 30 to the Income Tax Act, No 58 of 1962, as amended, an NPO may apply to SARS for approval as a so-called Public Benefit Organisation (PBO). The benefit of such approval includes exemption from Income Tax, and may also include exemption from a number of other taxes and duties. If a PBO conducts one of a restricted number of specified activities, it may also be eligible for "zero-rating", which enables it to reclaim VAT paid on its supplies. Some PBOs may be eligible for another important fiscal benefit (Section 18A) – which allows for the tax-deductibility of donations received from taxpaying donors.

- These fiscal exemptions and benefits represent a valuable privilege and indirect financial subsidy to NPOs. They are made available at a cost to other taxpayers.
- **It is a fundamental responsibility of the Board to ensure that such privileges are not squandered or abused**, and to ensure that an NPO approved for these purposes is thorough in its compliance with the prescribed fiscal conditions, including the timeous submission of tax returns, and the prompt and accurate discharge of the reporting requirements of the Tax Exemption Unit of SARS.

#### LEGAL/ FISCAL PRINCIPLE 5 OTHER LEGISLATIVE AND REGULATORY COMPLIANCE

In addition to the specific laws referred to above, there are other laws and regulations which have specific reference to the conduct of activities of certain NPOs. The Board's responsibility for governance includes a responsibility to ensure that the organisation remains compliant with all its statutory duties and obligations.



# 3

## COMMITMENT AND UNDERTAKING

### THE NONPROFIT ORGANISATION KNOWN AS

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HEREBY COMMITS ITSELF TO COMPLY WITH AND GIVE FULL EFFECT TO THE PRINCIPLES, VALUES AND GUIDELINES WHICH CONSTITUTE THE VOLUNTARY CODE OF GOVERNANCE FOR NPOs IN SOUTH AFRICA, IN ACCORDANCE WITH ITS INTENT AND PURPOSE, INCLUDING THE UNDERMENTIONED ISSUES:

1. An NPO exists to promote a public benefit purpose and shall serve the public interest with Fidelity, Altruism, Goodwill and Integrity.
2. The capacity and resources of the organisation shall be applied exclusively for the advancement and implementation of such public benefit purpose.
3. The Board accepts primary responsibility to ensure adherence to the Core Values; and to exercise Effective Leadership, and to secure Legal and Fiscal compliance as outlined in the Voluntary Code.
4. The organisation and its office bearers commit themselves to the operational principle of transparency and accountability to Donors, Beneficiaries and the General Public.
5. All Board members and others involved with the organisation shall observe utmost good faith, specifically avoiding self-benefit and conflicts of interest.
6. The organisation shall conduct its affairs in accordance with the principles of equality and non-discrimination, and shall treat all persons with due deference and respect.
7. The organisation shall remunerate its employees fairly, and observe best practice in the conduct of its staff policies and in its human relations.
8. The organisation shall respect the fundamental rights entrenched in the South African Constitution, including the principles of Equality; Non-Discrimination; Just Administrative Action; Human Dignity; and Freedom of Association.
9. The organisation shall at all times act with fairness, impartiality, and without fear, favour, or prejudice, in the best interest of its beneficiaries, specifically avoiding nepotism and self-benefit.
10. The organisation shall conform to the governance provisions of its constituting documents, and ensure full compliance with fiscal and other applicable statutory and regulatory obligations, as may be prescribed from time to time.

