



THE INDEPENDENT CODE

OF GOVERNANCE FOR NON-PROFIT ORGANISATIONS IN SOUTH AFRICA



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FOREWORD

The process of developing an Independent Code of Governance for the Non-Profit Sector in South Africa began at a meeting held in Cape Town on 25 August 2010 that was attended by civil society organisations from different parts of the country.

The meeting was convened to consider the implications for the non-profit sector of the King III Code (corporate code) which had come into effect six months earlier without any consultation with the non-profit sector. On the agenda was also a report back on a meeting with representatives of the King Committee and the Institute of Directors which had taken place on 19 August 2010 where the concerns of the non-profit sector had been raised.

The civil society meeting agreed that the implementation of a corporate code of governance presented a threat to the sustainability of the majority of organisations in the non-profit sector. Of further concern was the language and cadence of the corporate code which was largely inaccessible to non-profit organisation (NPO) personnel and which did not adequately reflect the values and ethos of the NPO sector.

The civil society representatives at the meeting recognised that there was a need for a widely-accepted code of governance for NPOs in South Africa and that it was preferable to self-regulate rather than be regulated, either by the state or the corporate sector. The meeting elected an ad hoc working group with a mandate to consult the sector more broadly, with the view to developing a separate code of governance. Over the ensuing months, a series of consultative meetings took place in different parts of the country. The first phase of consultations took place between May and August in 2011 and sought to inform the content, structure and applicability of the code. The second phase was held during March and April 2012 at which the draft version of the code was made publicly available for comment. Five consultative workshops were held across the country. This Independent Code is therefore reflective of the values and principles upon which non-profit organisations are established and the realities in which non-profits operate. It belongs to the non-profit sector and serves as a document that is supportive and inspirational.

The currency of this Independent Code is dependent on civil society itself and its adoption as its code of choice. The level of support experienced by the working group is an assurance that there has been great appreciation for the need to develop this Code and we are confident that the Independent Code will be recognised as a major contribution to non-profit governance in South Africa.

The Working Group
July 2012

ACKNOWLEDGEMENTS

This document is the product of extensive and comprehensive consultations with the civil society sector in South Africa. The contribution of the many organisational representatives, board members, donors and grantmakers, accountants, lawyers, and individuals is acknowledged with the deepest gratitude and appreciation. The participation, input and support of all these stakeholders has added greatly to the depth, relevance and applicability of this Code to the non-profit sector in South Africa.

Our sincere appreciation goes to members of the Working Group who voluntarily gave of their time over the two-year consultative process, and for their support, optimism and determination to manage and co-ordinate the process of developing the Code. They are:

- Shelagh Gastrow (Inyathelo – The South African Institute for Advancement);
- Colleen du Toit (Charities Aid Foundation Southern Africa);
- Chris Mkhize (Uthungulu Community Foundation);
- Jimmy (Nontobeko) Gotyana (SANGOCO);
- Rajesh Latchman (National Welfare Forum); and
- Richard Rosenthal (Legal Advisor).

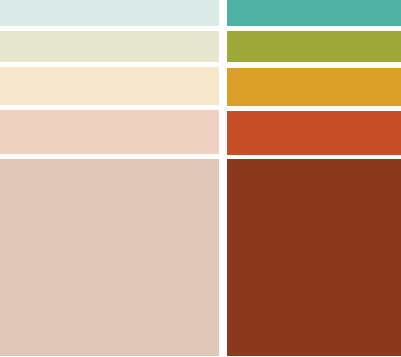
Special mention and gratitude should be given to Richard Rosenthal, who has been largely responsible for the content and drafting of the Code. His consummate skill in producing a basic framework for the Code was matched by his capacity to synthesise the myriad comments and feedback received by the Working Group.

Our deep appreciation also goes to the funders of this initiative for their support and confidence in this process, namely the Anglo American Chairman's Fund, CDT Foundation NPC, Charities Aid Foundation Southern Africa, Hospice Palliative Care Association, Inyathelo, Iqraa Trust, and the Uthungulu Community Foundation.

Acknowledgement also goes to Janine Ogle for co-ordinating the consultative process towards finalising the Code.

Shelagh Gastrow
Executive Director
Inyathelo - The South African Institute for Advancement





EXECUTIVE SUMMARY

The Independent Code represents a statement of values, principles, and recommended practices, to which all non-profit organisations (NPOs) in South Africa are invited and encouraged to subscribe.

The Code does not constitute an official document, nor is it imposed by law. However, it does make provision for a formal written commitment in terms of which an organisation may record its voluntary commitment to subscribe to the core values and core principles of good governance.

The essence of the Code is the widely-held belief that there are certain fundamental values and principles which can and should be observed and implemented by all NPOs in South Africa, despite their diversity of size, capacity, and resources.

These fundamental values and principles are discussed under the following topics:

Ensuring adherence to eight basic values:

1. Fidelity to purpose;
2. Altruism and benevolence;
3. Integrity;
4. Optimising resources;
5. Conflicts of interest and self-dealing;
6. Equality and non-discrimination; and
7. Democracy and empowerment
8. Independence and impartiality.

Ensuring good leadership in six key areas:

1. Vision, purpose and values;
2. Accountability and transparency;
3. Fundraising, sustainability and risk management;
4. Collaboration and synergy;
5. The Board and other governance structures; and
6. Procedural governance.

Ensuring good implementation in five key legal and fiscal areas:

1. Establishment and incorporation;
2. Administrative and procedural requirements;
3. NPO Act – consequences and benefits of registration;
4. PBO status – fiscal benefits and conditions; and
5. Other legislative and regulatory compliance.



GLOSSARY

Board	The uppermost governance structure of an NPO – whether it is known as a Board of Directors; Executive Committee; Board of Trustees, or some other term. This is the body which exercises responsibility for high-level decision-making, and reports to the members of the organisation, if any
CBO	Community-based organisation
CEO	Chief executive officer
CIPC	The Companies and Intellectual Property Commission established in terms of the Companies Act
Companies Act	The Companies Act 71 of 2008, as amended
NPO	An organisation of a voluntary nature, formed on a non-profit basis, at the initiative of individual members of civil society, to address a need or advance a purpose in the public interest
Income Tax Act	Income Tax Act 58 of 1962, as amended
King III	The Third Report on Governance compiled by the so-called King Committee, appointed by the Institute of Directors in Southern Africa (IOD)
Management	The supervisory structure within an organisation, which undertakes executive responsibility for administering the affairs of an organisation, and which implements the decisions of the Board
9th Schedule	The 9th Schedule to the Income Tax Act, in terms of which 'public benefit activities' are defined
Nonprofit Organisations Act	Nonprofit Organisations Act 71 of 1997, as amended
NPC	Non-profit company in terms of the Companies Act
NPO	Non-profit organisation
NPO Directorate	Directorate for Nonprofit Organisations established in terms of the NPO Act and located within the Department of Social Development
PBO	Public benefit organisation approved as such by SARS in terms of the Income Tax Act
Public benefit activities	The activities listed and described as such in terms of the 9th Schedule
SARS	South African Revenue Service
Trust Property Control Act	Trust Property Control Act 57 of 1988, as amended
VAT Act	Value-Added Tax Act 89 of 1991, as amended



1.1 OBJECTIVES

The objectives of the Independent Code include the following:

1. To define the non-profit organisation (NPO) sector for purposes of this Code as comprising organisations of a voluntary nature, formed on a non-profit basis, at the initiative of individuals within civil society, in order to address a need or advance a purpose in the public interest.
2. To recognise that the NPO sector is an important and distinct part of civil society, for which a distinct Code of Governance is needed.
3. To recognise the wide diversity of size, capacity, and resources amongst NPOs.
4. To acknowledge that success for NPOs is measured not merely by reference to size, capacity and resources, but by commitment and effectiveness in achieving their goals.
5. To promote good governance, high standards, integrity, and best practice amongst NPOs.
6. To avoid the imposition of inappropriate, unattainable, and unaffordable standards.
7. To ensure that the Code is informed and developed through a process of sector-wide consultation and with the collaboration of all stakeholders.
8. To identify the core values and principles that should be implemented and practised by the non-profit sector as a whole, in all its diversity.
9. To recognise that the best interests of beneficiaries, and of society as a whole, must be the overriding consideration in carrying out the work of NPOs.
10. To recognise that NPOs are values-based institutions, which stand in a position of trust towards their various constituencies – including beneficiaries, donors, and society as a whole – and to which constituencies NPOs have a continuing duty of accountability.
11. To affirm the principle that the work and resources of an NPO must be dedicated exclusively to the advancement and support of a public benefit purpose.
12. To acknowledge the existence and importance of other Codes, including the Department of Social Development NPO Code, the King III Code, and the South African NGO Coalition Code, insofar as they may be relevant to particular organisations.

1.2 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 and measure of performance to guide members of governing boards, and those 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 a joint Commitment and Undertaking should be reviewed and renewed at regular intervals.

Some codes are embodied in laws, regulations, and rules and their application is compulsory. The message of such compulsory codes is often characterised as: 'Comply, or else!' where failure to comply results in negative consequences, which may 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 has been characterised as: 'Comply, or explain!' Such codes are not enforced by law or regulation, but they 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 the threat of penalties or sanctions. The purpose of such a code is to encourage and empower, rather than to regulate, sanction or impose. This is the objective of the Independent Code. The Code seeks to promote a culture of 'best governance practice', and seeks to provide guidance, information, and resources with a view to:

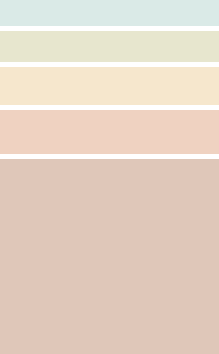
- improving governance standards and practice amongst NPOs;
- strengthening governance capacity of NPOs, and their Boards; and
- encouraging public confidence in, and support for, the non-profit sector.

1.3 DOES 'ONE SIZE FIT ALL'?

There are a great many non-profit organisations in South Africa. In fact, no one really knows how many. Recent estimates suggest that there may be as many as 150 000 such organisations, depending on how 'non-profit organisation' is defined. Of these, roughly 85 000 have an NPO number – which indicates formal registration with the NPO Directorate in the Department of Social Development.

Only around 10 000 NPOs have a PBO number, indicating that they have been approved by the South African Revenue Service (SARS) as a 'public benefit organisation' (PBO). An NPO is only exempted from income tax, donations tax, estate duty and other fiscal levies if it has been approved by SARS as a PBO, or as one of a small number of other categories of exempt institutions, e.g. recreational clubs, chambers of commerce, trade unions and political parties. Even fewer organisations (in addition to being registered NPOs and approved PBOs) are also exempt from charging value-added tax (VAT) on the services they render, and entitled to reclaim VAT which they have 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 even have written constitutions, are not registered NPOs, and do not have PBO status. Consequently, such organisations cannot make the most of the tax benefits available to non-profit organisations.



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

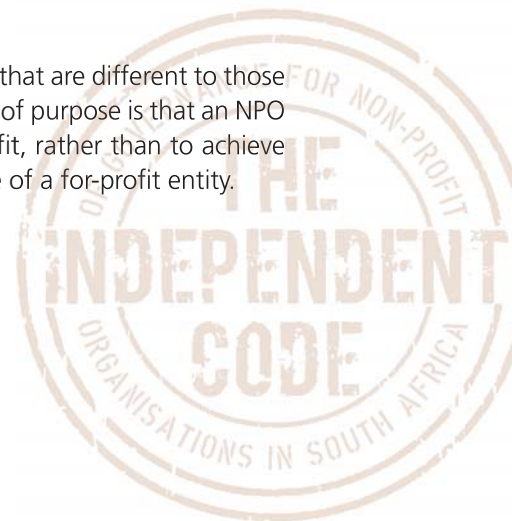
1.4 WHAT IS DIFFERENT AND SPECIAL ABOUT THE NON-PROFIT SECTOR?

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 established at the initiative of individuals, and not as a result of the passing of some law, or a decision of government or a parastatal corporation.
- 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 established simply by the act of agreement between three or more people as a voluntary association.
- If an NPO is dissolved, any remaining assets must be transferred to some other NPO having the same, or a similar, purpose.

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



NON-PROFIT GOVERNANCE

2

2.1 VALUES, PRINCIPLES AND RESPONSIBILITIES

NPOs are special kinds of institutions which exist to serve the common good, or advance a purpose in the public interest. They represent a practical manifestation of the principle known in the Nguni languages as 'ubuntu'. Ubuntu can be translated as 'humanness', and is often illustrated by the idiomatic expression *umuntu ngumuntu ngabantu* (a person is a person because of people). Ubuntu implies a relationship of mutual and reciprocal responsibility between individuals and communities. The major purpose of NPOs is therefore to meet a need or advance a purpose in the public interest. They are a means for communities to share resources; demonstrate concerns; promote values; and demonstrate a shared responsibility for those within society who are in need, or have difficulty in caring adequately for themselves. They are formed on the initiative of ordinary citizens, and are constituted independently of government; and 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 – non-profit 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).

A few NPOs are able to rely on their own endowment capital and income flows, but most depend completely or substantially upon 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 the 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 management, with the support of employees, volunteers, donors and others involved with its operations. The Board must hold management accountable for the practical implementation of its responsibilities, and for ensuring the effective use of available resources; adhering to strategic objectives; prioritising needs, and maintaining budgetary discipline. The Board must also affirm core values; set attainable standards; provide strategic direction; monitor actual performance; and ensure responsible allocation of its available resources. However, a Board should never take over the responsibilities of management for the day-to-day operations, and implementation of work plans.

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

2.2 PRINCIPLES OF GOOD GOVERNANCE

1. ENSURING ADHERENCE TO VALUES

The fundamental responsibility of the Board of an NPO is to endorse, practise, and ensure a commitment to the core values that are inherent in 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.

The need for a commitment to these core values is both implicit and explicit. Some values are embodied in legislation, such as the Nonprofit Organisations Act; the Trust Property Control Act; and the Companies Act. Other values form part of our culture, tradition, and the common law. 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 some 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 side-tracked into unrelated causes and activities, however worthy. Any significant change of purpose must result from a formal decision to this effect, following a process of consultation that should, if possible, include members, donors and the beneficiary community. Such decisions must then be formalised by an amendment of the NPO's founding document.
- The importance of remaining true to purpose involves not only a duty that is owed to members, and a duty of trust that is owed to beneficiaries; but also a duty that is owed to donors and volunteer supporters. Conversely, donors owe a duty to NPOs to support their adherence to their constitution's stated objects and purposes. In terms of the Income Tax Act, notice of a change of purpose must be promptly sent 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 their 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 advancing the public interest, and not some self-interest, although certain NPOs may serve the shared interests of members of communities, provided they are not 'small and exclusive groups' (Section 30 of the Income Tax Act, 1962).

- The Board has a responsibility to ensure that neither its members, nor any of the organisation's employees or donors, uses the organisation to advance personal agendas. Examples of such agendas could be 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 seeking advantage for 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 all persons who represent or act on behalf of the organisation live up to these expectations.

- Integrity in this context has both active and passive aspects. Thus, a Board should be concerned not only with decisions and actions, but also with a failure to take necessary decisions and act appropriately. 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 fulfil a mandate of trust. There can be a failure of integrity both in the 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 throughout the organisation. 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 stands in a position of trust. It is given funds and resources for a specific purpose. Decisions of the Board and actions of management must be consistent with that purpose. Funds and resources must be put to use in a responsible manner, and without extravagance or undue risk. Even when funds are donated without a designated purpose, care 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 non-profit 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 preceding 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 loan). Similar principles should be regarded as applicable to all NPOs, and not just those which are constituted as non-profit companies.
- The Income Tax Act (Section 30) 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'.
- Ensuring compliance with these principles and statutory prescriptions represents an important board responsibility. A material failure to comply represents 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 often also serve on the organisation's executive committee. Such situations require particular care and management, which may include the need for special approval by members of the community, or the independent assurance of some independent, knowledgeable, and disinterested person. The appointment of relatives or friends as employees of an NPO, or as paid consultants or service providers, should also be avoided wherever possible, except in the most unusual circumstances.
- As to how these situations should best be handled, the Companies Act provides important principles and directions in respect of companies – including non-profit companies. Similar principles should be regarded as applicable generally to all NPOs, and not just those constituted as non-profit companies. Thus, the Companies Act stipulates that in the event of a 'conflict of interest' 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;

- 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, like all other members of society, 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 described as 'freedom of association'.

- In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, it is the responsibility of a board to take proactive steps to prevent unfairness in the conduct of the affairs of an organisation. In particular, a board must be vigilant in preventing unfair discrimination based on grounds of race, gender, or one of the other prohibited grounds referred to in the Act. A board must also promote a principle of fairness in its relationships with other organisations, and in its programmes and activities – including its selection of beneficiaries, and the principle of equal 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 for ensuring 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, in recognition of the need for involving consultation 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 relationships.

VALUE 8: INDEPENDENCE AND IMPARTIALITY

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 another.

A commitment to independence extends beyond the choice of beneficiaries, and includes a duty to make choices and arrive at decisions at arm's 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 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

Effective leadership is the core quality of good 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 encourage initiative, including income generation; and to hold managers to account; to provide them with the resources they need; and to ensure that the organisation has a common vision and strategy, which is carried into practical effect by management.

The Board should also be concerned to promote harmonious relationships; facilitate the resolution of conflict issues, preferably by negotiation, mediation, or ADR [alternative dispute resolution]. Whilst affirming the authority of the Executive, the Board should make it possible for employees and others with relevant information, whether inside or outside the organisation, to confidentially raise issues such as a lack of integrity or unfair discrimination.

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

KEY LEADERSHIP AREA 1: VISION, PURPOSE, AND VALUES

It is the responsibility of the Board to ensure that the vision, purpose, and values of an organisation are clearly defined and instilled throughout the organisation; that they are formally recorded in writing; and that they are reviewed at regular intervals, to ensure that they remain relevant, and are 'owned' and carried into effect at all levels of the organisation.

- It is recommended that basic statements of vision, purpose, and values are not only incorporated in the founding documents, but are also prominently displayed in the offices of the organisation; on its website (if applicable); and repeated in the organisation's literature, pamphlets, and other documentation, including its strategic plans, annual reports, newsletters, etc.
- To ensure that these matters are given due weight and prominence, it is a governance responsibility regularly to monitor and evaluate individual and collective performance against specific objectives; to identify strengths and weaknesses; and to provide opportunities for organisational learning and staff development. Issues such as favouritism, nepotism, self-dealing, bias, and preference should be given particular attention.

KEY LEADERSHIP AREA 2: ACCOUNTABILITY AND TRANSPARENCY

A critical responsibility of the Board is to ensure commitment to accountability and transparency. The way in which an organisation addresses this basic responsibility is an important indicator and barometer by which it will be evaluated and judged.

- The Board must ensure that there is effective and transparent financial reporting; and it must satisfy itself as to the existence of adequate financial systems and controls. 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 be either professionally audited, or at least reviewed by an independent person, in the way described in the Companies Act. Such statements should include, as a minimum, a statement of financial position; a statement of comprehensive income; a statement of changes in reserves; and a statement of cash flows (with comparative figures for the preceding financial year). For small organisations, a statement of financial position accompanied by a statement of income and expenditure (with comparative figures for the preceding year) may be adequate. However, in the absence of an audit, an independent review of financial statements is essential.
- The Board's 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 way in which it has sourced and applied its funds; the measure of its impact, including both failures and successes; and its plans and proposals for the future. It should also be concerned with respect to the organisation's environmental impact, and its compliance with relevant laws and regulations. This duty requires open and honest communication with stakeholders, including the general public through the media.

- NPOs are accountable to a number of constituencies and stakeholders. These include, but are not limited to:—
 - a. Donors – with respect to the organisation’s integrity and effective use of funds.
 - b. Beneficiaries – with respect to the organisation’s awareness of needs, and deployment of resources.
 - c. Members – with respect to democratic governance and fidelity to purpose.
 - d. Employees – with respect to fair remuneration, employment conditions, transformation and empathetic human relations.
 - e. Volunteers – with respect to their contributions of time, energy and skills.
 - f. Government – with respect to legal and fiscal compliance, and effectiveness in allocating resources and addressing needs.
 - g. Other NPOs – with respect to possible synergies and opportunities for collaboration.
 - h. The general public – with respect to tax benefits and fiscal privileges.

KEY LEADERSHIP AREA 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 the organisation remains adequately funded; and that it will be in a position to meet its anticipated costs and commitments to employees, beneficiaries and, importantly, to SARS.

- 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 as tangible evidence of their commitment; 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 donors and members. Depending on the size of the organisation, the nature of its activities, and the extent of its resources, 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 information provided to 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 generate income from other activities to supplement the organisation’s donation income. However, in these circumstances, there are a number of considerations which must 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. Net profits derived from ‘unrelated’ income-generating activity are likely to be subject to tax, and must be separately accounted for and recorded.
 - c. Board members and employees – and their relatives or friends – must be particularly careful to avoid conflicts of interest or draw personal profit in these situations.
 - d. Such activities should never involve undue commercial risk, which may put the organisation’s financial sustainability in jeopardy.

- Apart from the financial risks associated with the need for sustained funding, the Board must ensure that due consideration is given to identifying, managing, and where possible anticipating other systemic risks which may threaten the organisation's ability to deliver on its mandate. In a large organisation this may justify the appointment of a special committee charged with responsibility for risk; but for most NPOs, issues of risk will need to be managed in a manner that is affordable and appropriate to the resources of the organisation concerned.

KEY LEADERSHIP AREA 4: COLLABORATION AND SYNERGY

NPOs exist to serve a public benefit purpose, and they should not act competitively or seek exclusivity, to the detriment of other organisations involved with similar work. When opportunities arise, NPOs should act collaboratively and co-operate with similar entities – including, where appropriate, other NPOs, welfare agencies, and relevant bodies in the public and private sectors. The overriding concern should be to advance the interests of the intended beneficiaries, and of society as a whole, rather than to promote the self-benefit or self-aggrandisement of the organisation itself.

KEY LEADERSHIP AREA 5: THE BOARD AND OTHER GOVERNANCE STRUCTURES

The way the Board is composed is a crucial issue which impacts directly on the quality of governance of an NPO. For example, it is generally considered undesirable for the Director or Chief Executive to act as Chairperson of the Board. Board members should be recruited with due regard to a number of factors, including knowledge, skills, diversity, and available time. There should also be a policy directed at achieving, from year to year, a balance between the twin benefits of continuity and of renewal. Thus, new Board members should periodically be introduced, and long-serving members should periodically retire. In the case of self-funded, family or corporate foundations, the founders and funders are likely to require representation on the Board, but they may not exercise unilateral control over decision-making.

- Board members should be committed to attending and actively participating at Board meetings. Upon initial appointment, new Board members should be supported with background documentation, and with a process designed to familiarise them with relevant information.
- Traditionally, most Board members regard their appointment as an opportunity for service, and agree to make themselves available without remuneration. However, where the level of involvement is significant, NPOs sometimes pay a modest fee, and for the reimbursement of reasonable travel and accommodation expenses. It must be emphasised that any such remuneration or reimbursement must always be modest and proportionate to the resources of the organisation. Actual attendance or other active participation in the business of the Board should be a condition for payment of any such fee.

- Larger NPOs may require subordinate governance sub-structures to assist the Board in undertaking 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.
 - f. A Remuneration Committee.
- The terms of reference and composition of any such committee should be carefully considered and managed to ensure that there is an appropriate balance between internal and external members; that the Committee remains fully answerable to the Board; and that it does not supersede or override the limits of its delegated authority and responsibility. Moreover, the Board should be aware that the appointment of any such committee and the delegation of specific areas of responsibility does not absolve it from responsibility for ensuring the overall good governance of the organisation.
- It is strongly recommended that boards and their committees should regularly review their own performance – and that of their individual members – usually on an annual basis. Boards should also conduct an annual review of the performance of the Director or Chief Executive.
- A further board responsibility is to give timely attention to the need for succession planning about its own composition, and also to the CEO and senior executive appointments.

KEY LEADERSHIP AREA 6: PROCEDURAL GOVERNANCE

The founding documents of an NPO will usually prescribe a number of procedural issues related to board meetings and meetings of board 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. The frequency and minimum number of meetings.



- It is important that the Director or Chief Executive of an organisation attends Board meetings – with or without formal membership of the Board, and with or without voting rights. However, there should be a part of every Board meeting (usually at the end of the meeting) when that person is asked to leave the meeting so that 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 during relevant parts of the meeting may be desirable and important – both in recognition of their roles and responsibilities and for the benefit of the Board.
- The CEO should preferably not 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, statements by, and views of, the organisation's executive.

3. ENSURING LEGAL AND FISCAL COMPLIANCE

It is the responsibility of the Board to monitor and ensure full compliance with relevant laws, including those that relate to registration, tax status, and the submission of statutory returns. This is not merely a formal or nominal responsibility, as directors and those having 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 Board members do not pay attention to their duties or are dilatory (unintentionally cause delays); or fail to seek reasonable assurance where necessary 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 about such duties and whether these obligations are being timeously and effectively addressed and monitored.

Key legal and fiscal compliance matters that should be considered by the Board are discussed below.

KEY LEGAL/ FISCAL AREA 1: ESTABLISHMENT AND INCORPORATION

The form of legal structure of an NPO may determine how and when governance responsibilities arise.

- A non-profit company must comply with the registration requirements of the Companies and Intellectual Property Commission (CIPC) in accordance with the Companies Act. As proof of such compliance, the original incorporators are issued with a Certificate of Incorporation, under the seal and signature of the CIPC. The initial directors then assume responsibility for the ongoing governance of the company.

- A trust must be registered at the office of one of the Masters of the High Court in accordance with the requirements of the Trust Property Control Act. Upon such registration being effected, the trustees are issued with Letters of Authority under the seal and signature of the Master; and the trustees then assume their ongoing responsibility for governance.
- A voluntary association requires no formal statutory registration, and there is no dedicated office where such associations must be registered. In fact, in terms of the common law, a voluntary association can come into being simply by an agreement by a minimum of three people. Such an agreement is usually supported by a written constitution although, technically, this is not an essential legal requirement. Their responsibility for governance arises after such an agreement has been reached, whether it is verbal or written. Responsibility then rests upon the members collectively, unless provision is made for responsibility to be carried by a management committee, or similar structure.

KEY LEGAL/ FISCAL AREA 2: ADMINISTRATIVE AND PROCEDURAL REQUIREMENTS

Each form of alternative legal structure, with the exception of the common law structure of a voluntary association, has certain specific reporting obligations with which it must comply in terms of the applicable laws and regulations.

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

KEY LEGAL/ FISCAL AREA 3: NPO ACT - CONSEQUENCES AND BENEFITS OF REGISTRATION

Provision is made under the Nonprofit Organisations Act 71 of 1997 for the voluntary registration of NPOs, irrespective of the particular form they take. However, registration under the NPO Act is not a precondition for the legal existence of the organisation, or the commencement of responsibilities for organisational governance. The optional registration under the NPO Act is effected by the Non-profit Organisations Directorate in the Department of Social Development.

- Although registration under the NPO Act is voluntary, there are certain benefits and advantages which result from such 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 duly formed legal entity with an identity of its own, which is separate from the identities of its members.
 - b. Only registered NPOs are eligible to apply to become grant recipients of Lotteries Funding; the National Development Agency (NDA); the Independent Development Trust (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 nine 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 of these documents must be prepared and lodged in the prescribed form.
- The Directorate has powers of inspection and enquiry with respect to registered NPOs, and it maintains a registry and database that is open for public inspection, subject to payment of a nominal fee. In addition to annual reports, the Directorate records details of the constituting documents; the current office bearers; their addresses and contact details, and other prescribed information.
- Accordingly, NPO registration implies a commitment to transparency and public accountability. It is therefore recognised as evidence of at least the intention to demonstrate best practice values.

KEY LEGAL/ FISCAL AREA 4: PBO STATUS – FISCAL BENEFITS AND CONDITIONS

In terms of the Income Tax Act (Section 30), an NPO may apply to SARS for approval as a so-called public benefit organisation (PBO). The most important benefit of approval as a PBO involves exemption from income tax; but approval also leads to exemption from certain other taxes and duties, including donations tax (on donations made by or to the PBO); estate duty on bequests received from a deceased estate – and, in certain circumstances, exemption from the Skills Development Levy.

Some approved PBOs may be eligible for another important fiscal benefit (Section 18A) – which involves the right granted to taxpaying donors to deduct the amount or value of donations they have made to a PBO from their taxable income. This benefit is available only in respect of certain public benefit activities (e.g., activities in such areas as welfare; humanitarian; health care; education; development; conservation; and housing – all public benefit activities listed in Part 11 of the 9th Schedule).

The VAT Act also contains provisions that may be of concern and benefit to certain eligible PBOs. For example, if an NPO's activities fall within certain narrowly defined categories, it is deemed to be a 'welfare organisation', which allows it to register under the VAT Act without having to satisfy the usual eligibility condition of a minimum annual turnover of R1 million. Registration then enables it to reclaim VAT paid on its purchases relating to qualifying activities. The services provided by a 'welfare organisation' may also be zero-rated for VAT purposes; and there are similar exemptions from VAT applicable to the provision of educational services, and services involving caring for children by a crèche or after-school care centre. However, registration under the VAT Act also brings with it administrative and compliance duties, and therefore the potential costs and benefits of VAT registration need to be carefully considered.

- Needless to say, tax legislation is complex, and each organisation should obtain professional advice concerning its liability for tax and its eligibility for tax benefits. Such tax benefits represent a valuable privilege that should not be abused, and amount to an indirect financial subsidy for eligible NPOs, which is made available at an indirect cost to other taxpayers. This is a further reason why tax-exempt PBOs should consider themselves broadly accountable to the general public.
- It is a fundamental responsibility of the Board to ensure that fiscal privileges are not squandered or abused, and to ensure that an NPO approved as a PBO is thorough in its compliance with the prescribed conditions, including the timeous submission of its tax returns, and that it promptly and accurately discharges its reporting requirements to the Tax Exemption Unit of SARS.

KEY LEGAL/ FISCAL AREA 5: OTHER LEGISLATIVE AND REGULATORY COMPLIANCE

In addition to the general laws referred to above, there are naturally 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 regulatory obligations.



COMMITMENT AND UNDERTAKING

TO THE INDEPENDENT CODE OF GOVERNANCE FOR NON-PROFIT ORGANISATIONS IN SOUTH AFRICA

3

THE NON-PROFIT ORGANISATION KNOWN AS

HEREBY COMMITS ITSELF TO COMPLY WITH AND GIVE FULL EFFECT TO THE PRINCIPLES, VALUES AND GUIDELINES WHICH CONSTITUTE THE INDEPENDENT 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 its public benefit purpose.
3. The Board accepts primary responsibility to ensure adherence to the core values and principles of good governance set out in the Code, to exercise effective leadership, and to ensure the organisation's legal and fiscal compliance.
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 undertake to observe utmost good faith, specifically avoiding improper self-benefit or conflicts of interest.
6. The organisation shall at all times conduct its affairs in accordance with the principles of equality and non-discrimination, and shall treat all persons with dignity and respect.
7. The organisation shall deal fairly with its employees and volunteers, including provision for reasonable remuneration or reimbursement of out-of-pocket expenses; and it shall observe best practice principles in its staff policies, and in its overall management of human relations.
8. The organisation shall respect the fundamental rights entrenched in the South African Constitution, including those which relate to 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 interests of its beneficiaries, specifically avoiding nepotism and self-benefit.
10. The organisation shall conform to the governance provisions of its constituting documents, and ensure due compliance with all legal, fiscal and other statutory and regulatory duties prescribed by law from time to time.

Signed at on this day of year

On behalf of the Board

On behalf of the Members

On behalf of the Employees

PLEASE NOTE THAT THIS VOLUNTARY CODE IS NOT INTENDED AS LEGAL ADVICE. ORGANISATIONS SHOULD WHERE NECESSARY SEEK PROFESSIONAL LEGAL AND FINANCIAL ADVICE ON MATTERS INVOLVING LEGAL AND FISCAL COMPLIANCE.



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