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SUBMISSION OF NON-PROFIT ORGANIZATION ACT AMENDMENT
BILL,2021

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NONPROFIT ORGANISATION AMENDMENT BILL, 2021

SUBMISSION

INTRODUCTION

1. The Alliance of NPO Networks (ANNET) is a fully registered Apex Body of the non-profits which was formed in April 2020 because of the fragmentation, disunity, and unstructured voice of the grassroots Non-Profit Organizations in our country. The founding national networks are South African NPO Coalition (SANGOCO), South African Congress of Non-profit Organizations (SACONO), South African NPO Federations (SANPOF), National NPO Congress (NANPOC), Patient User Network (PUN) and Disabled Migrants Rights Networks Organization, (DRMN). In total the entire membership derived from this national membership is 22 5000. The aim of this NPO Alliance is to facilitate active collaboration platform within the NPO Sector on a national scale.

FOUNDATIONAL COMMENT

2. The Alliance is of the view that the Bill in its current form and content does not take into consideration the progressive realization of the NPO Sector and should be immediately withdrawn and replaced by an inclusive drafting committee in its place. This drafting team should comprise of civil society organizations, reputable academics, and Department of Social Development. The proposed changes are:
 - 2.1.1 Not-fit-for-purpose, not reflecting a developmental paradigm and will negatively impact on the ability of non-profit organisations to deliver services, especially social services, to many vulnerable communities. The impact of such compliance changes on NPOs could result in deregistration or undue delays for organisations, particularly if they provide services to the state.
 - 2.1.2 Fail to consider relevant and related legislation governing some non-profit organisations; and
 - 2.1.3 Not consistent with recommendations that emanated from relevant research that have been undertaken aimed at addressing legislative shortfalls; and
 - 2.1.4 There are basic drafting errors contained in the Bill and it presents numerous legal uncertainties. In summary, the Bill is poorly drafted and vague.

- 2.1.5 The proposed Bill fails to consider social, political, and economic contexts impacting NPOs and civil society.
3. Further to the above, the Alliance of NPO Networks request for an opportunity of appearing in Parliament and make a verbal presentation and motivate why we wish this process should be withdrawn.
4. In support of the above *Foundational Comment*, the Alliance provides the following examples of fundamental errors contained within the Explanatory Memorandum and Bill:

EXPLANATORY MEMORANDUM

- 3.1 It must be noted that no Explanatory Memorandum was initially published with the publication of the Bill on 01 October 2021, despite the invitation referring to the Memorandum on objects of the Bill. The Rules of the National Assembly specifically provide that when Bills are being initiated by Cabinet members, it must include a memorandum explaining the objects of the proposed legislation. This is a very basic oversight in the process. The Department has displayed a blatant disregard for parliamentary processes. The Memorandum was eventually made available by the Department on its website, offers little guidance on why the specific proposals are contained in the Bill. There is a disconnect between the Explanatory Memorandum and the Bill. The Memorandum, as published on the website refers to the NPO Amendment Bill, 2018. Perhaps, this explains the disconnect between the Bill and Memorandum.
- 3.2 The Department has engaged with several organisations aimed at explaining the motivation behind the Bill. Suffice to say that the explanations have not provided much clarity, if any, on the proposals contained within the Bill.
- 3.3 The Explanatory Memorandum provides that the main objectives of the Bill are to seek:
 - 3.3.1 Alignment with international best practices.
 - 3.3.2 Simplification of reporting requirements.
 - 3.3.3 Alignment with the Companies Act as far as possible.
 - 3.3.4 Introducing a tiered/risk approach to financial reporting requirements to facilitate reduced compliance for smaller NPOs and more stringent compliance for NPOs of significant size or activities.
 - 3.3.5 Reducing the likelihood of abuse of the NPO business form.

- 3.3.6 Strengthen regulatory instruments and supervision of NPO sector to ensure that NPOs are not abused for any reasons besides what they are established for.
- 3.3.7 Increased efficiencies within the NPO Regulatory Framework; to reduce red tape in the administration of the NPO Regulation.
- 3.3.8 Decentralise NPO services to ensure easy and efficient access to services at local level.

THE BILL - DRAFTING ERRORS

The Arbitration Tribunal

- 3.4 The Bill, in its preamble states the aim is to provide for the Arbitration Tribunal for the dispute's resolution. No further reference is made to this in the Bill or the Memorandum.
- 3.5 There is no need for the Bill to provide for an Arbitration Tribunal as section 9(1) of the Non-profit Organisation Act (the NPO Act) provides that the Minister [of Social Development] must appoint persons to maintain a panel of arbitrator consisting of at least seven persons.

Register of NPOs - Section 24(1)(a)

- 3.6 The Bill proposes the addition of the phrase 'within that financial year' to this subsection, which means that the NPO Director will only be required to keep a register of all NPOs that have been registered during that financial year.
- 3.7 In its amended form, the section will read as follows:

24. Register of non-profit organisations. — (1) The director must keep a register in the prescribed form of—

(a) all non-profit organisations that have been registered within that financial year

(b) all non-profit organisations whose registrations have been cancelled; and

(c) all non-profit organisations that have voluntarily deregistered or have been wound up or dissolved.

- 3.8 The implication is that the director will be required to keep a register in the prescribed form of all NPOs that have been registered within that financial year. Conversely, no such obligation would exist in relation to the previous years.
- 3.9 It can only be assumed that this is another drafting error. An organisation may have been registered during 2005, but the director will no longer be required to keep a record of such organisation yet keep a register once that organisation's registration has been cancelled or voluntary deregistered. The Memorandum offers not feasible explanation for the proposed amendment.

Incomplete and confusing proposed section 12(5)

- 3.10 The Bill proposed a section that simply stops mid-sentence:

“(5) Any non-profit organisation, including foreign non-profit organisations that intend to operate business within the Republic must be registered in terms of this Act before operating and shall be subjected to the provisions of this Act and any other laws of...”

- 3.11 The proposed section is completed in the Explanatory Memorandum:

(5) Any non-profit organisation, including foreign non-profit organisations that intend to operate business within the Republic must be registered in terms of this Act before operating and shall be subjected to the provisions of this Act and any other laws of the Republic.”

- 3.12 **More concerning**, the proposed section would have the effect of compelling *any non-profit organisation that intend to operate business within the Republic to be registered in terms of this Act* – not only foreign non-profit organisations.

- 3.13 The proposed section is inconsistent with the proposed section 2(f) which provides:

The objects of this Act are to encourage and support non-profit organisations in their contribution to meeting the diverse needs of the population of the Republic by—

Facilitating voluntary registration of non-profit organisations and compulsory registration for foreign organisation operating within the borders of the Republic of South Africa

LEGAL AND PRACTICAL UNCERTAINTIES:

The Office of the registrar of NPOs

- 3.14 The Bill proposes the replacement of the definitions of ‘Director’ and ‘Directorate’ with ‘Registrar’ and ‘Office of the Registrar’. No changes are being proposed to the functions or reporting responsibilities of either the Director or the Directorate. It cannot be assumed that this is merely a superficial change in terminology. Question to ask are:
- 3.14.1 What the status of “the Office of the Registrar” would hold comparatively with that of the Directorate of NPOs. Would it be on par? Would it hold a higher stature or a lower one?
 - 3.14.2 If there is a change in stature, does that indicate a shift in policy in terms of prioritising NPOs?
 - 3.14.3 What are the budgetary implications, if any?
 - 3.14.4 More importantly, what is the impact in terms of the proposed Registrar’s access an accountability to Parliament as opposed to the Directorate?
- 3.15 The Explanatory Memorandum makes no effort to explain the proposed amendment.

The compulsory registration of foreign organisations

- 3.16 The Bill proposed the compulsory registration of “foreign non-profit organisations” but offers no definition for such organisations. That unfortunately leaves significant room for ambiguity.
- 3.17 The proposed clause 2(5) provides:

“Any non-profit organisation, including foreign non-profit organisations that intend to operate business within the Republic must be registered in terms of this Act before operating and shall be subjected to the provisions of this Act and any other laws of...”

- 3.17.1 The Memorandum offers the following motivation in support of this proposed amendment: *“There are Foreign NPOs that register without being registered with CIPC in terms of Companies Act sec 23.”*
- 3.17.2 Does the proposed clause refer to organisations that have been established in terms of the laws of another country? Or does this refer to the establishment of an organisation in terms of South African law but whose membership and governance structure composes of foreign nationals? Or even, an organisation with most of the membership or board membership composed of foreign nationals. This undefined concept will make for a discretionary requirement imposed by officials applying a wide interpretation thereof.
- 3.17.3 This arguably is inconsistent with our right to freedom of association, a fundamental right in our constitution. Particularly insofar as it pertains to an organisation composed of foreign individuals, it is foreseen that their right in this regard will be limited.
- 3.17.4 As it has been written so many times before, the bedrock of the South African civil society is the right to freedom of expression, freedom of association and freedom of movement.
- 3.17.5 Even worse, in our legal system a constitution is an agreement between members. An agreement can be reached orally and tacitly. A voluntary organisation can therefore be established this way. Would this amendment mean that it is now made compulsory for foreign nationals to draft a constitution? Does this mean that such groupings would be acting outside of the law if they don't register in terms of the NPO Act?
- 3.17.6 The following aspects are also unclear:
- 1) Whether this requirement would apply retrospectively to foreign non-profit organisations that are operating in South African and already registered as external companies in terms of the Companies Act of 2008?
 - 2) Whether such foreign non-profit organisations would be required to:
 - a. amend their founding documents (as adopted in their countries of origin) to comply with the requirements contained under section 12 of the NPO Act?
 - b. to appoint at least six office-bearers, if their current board membership is less than the proposed six office-bearers?

Six office-bearers: Proposed Section 12 (1) (h)

- 3.18 Before this it is required that a constitution of an organisation that wishes to register in terms of the NPO Act must:

“Specify the organisational structures and mechanisms for its governance;”

- 3.19 The proposed amendment now adds that it is now also required to state, *“at a minimum...the office or designation of the chairperson, secretary, and treasurer with their deputies.”*

- 3.19.1 The implication is that organisations that wishes to register as an NPO in term of the NPO act must have at least have six (6) governing board members.

- 3.19.2 This notwithstanding the fact that the common law requirement in South Africa is that a voluntary association only needs three members to be established. In turn the Companies Act only requires three directors to incorporate a non-profit company. That would mean that all organisations that wishes to register in term of the NPO Act will have to have six board members.

- 3.19.3 Again, it is unclear whether this requirement would apply retrospectively to organisations that are currently registered in terms of the NPO Act.

- 3.19.4 The Bill makes effort to address the issue of related office-bearers, which has for a lengthy period seemingly been incorporated internally as a matter of practice by the Directorate.

Embezzlement of funds: Proposed Section 12 (1) (p):

- 3.20 An additional requirement is that it is required by the insertion of this subsection that the organisation now discloses as to whether there is a member or office bearer (board member) has been found guilty of an offence involving the embezzlement of money of a NPO and the status of the conviction.

- 3.20.1 This requirement purportedly applies to ‘members’ of the organisation. The reason for this inclusion is unclear as organisations may have a vast number of ‘members’ – as opposed to board members - who are not involved with the day-to-day administration or governance of the organisation.

- 3.20.2 Also, no disclosure is required if someone has been found guilty of ‘embezzlement of money’ at a for-profit, organ or state or state-owned enterprise. The newly

named Registrar is not granted with any express power to refuse the registration of an organisation who has disclosed the presence of a convicted embezzler.

Similar Names: Proposed Section 12 (4):

3.21 The proposed amendment provides that:

“No non-profit organisation that has a similar or identical name to an existing non-profit organisation or any other organisation and such name is likely to cause confusion with any other organisation or individual person shall be permitted to register, unless there is sufficient proof that the applicant has a legal right to that name or has consent to use that name.”

3.21.1 It is not unusual to have legislation that deals with the limitations on the use of names for legal entities. This is present within the Companies Act As well as the Consumer Protection Act. There is however no alignment or streamlining with such legislation. It would also be practical nightmare to learn about conflicting names after going through all the trouble of: