31 October 2021

Director-General
Department of Social Development
For attention:
Mr Luyanda Mtshotshisa
Mr Luyanda Ngonyama
Ms Mpho Mngxitama

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Dear Mr Mtshotshisa, Mr Ngonyama and Ms Mngxitama

Comments on the Non-Profit Organisation Amendment Bill

1. The South African Institute of Chartered Accountants (SAICA), welcomes the opportunity to make submissions to the Department of Social Development on the Non-Profit Organisation Amendment Bill.

2. The South African Institute of Chartered Accountants (SAICA) is South Africa's pre-eminent accountancy body which is widely recognised as one of the world's leading accounting institutes. The Institute provides a wide range of support services to more than 52 000 members and associates who hold positions as CEOs, MDs, board directors, business owners, chief financial officers, auditors and leaders in their spheres of business operation.

3. Our members who are accountants provide services to these NPOs and we often receive questions on compliance, financial reporting and governance.

4. For ease of reference we have set out general comments in Annexure A and detailed comments in Annexure B. We also attached as Annexure C a summary of difference between the Companies Act, 71 of 2008 requirements and the Non-profit Organisations, Act 71 of 1997 which was prepared and published by SAICA in 2018.

We would also appreciate the opportunity engage further and we would be willing to discuss the comments, if required. Please do not hesitate to contact Viola Sigauke (Violas@saica.co.za) and Juanita Steenekamp (juanitas@saica.co.za) in this regard.

Yours sincerely,

Viola Sigauke	Juanita Steenekamp
Project Manager: Regulatory Reporting	Project Director: Governance and Non-IFRS Reporting

Table of Contents

ANNEXURE A: GENERAL COMMENTS

1. SAICA members and associates perform various services for non-profit organisations (NPOs). We have identified some inconsistencies with other legislation, specifically the Companies Act, 71 of 2008, (Companies Act) which needs to be addressed.

2. Section 17 of the Non-Profit Organisations Act , 71 of 1997 (NPO Act) refers to financial statements being drawn up and the terminology used include a statement of income and expenditure for that financial year; and a balance sheet showing its assets, liabilities and financial position as at the end of that financial year. The terminology of income statement and balance sheet is outdated and no longer used and we would like to request that the NPO Act is amended to align with best practice.

3. The NPO Act refers to financial statements being accompanied by an accounting officer's report. This does not take into account the Companies Act requirements for non-profit companies (NPC) which are also registered as non-profit organisations (NPO). The Companies Act requires companies to have their annual financial statements compiled and then either have the annual financial statements audited or independently reviewed. If the company meets certain owner –managed requirements, the company only require the AFS to be compiled. The requirements in the NPO Act does not take the Companies Act requirements into account and increases the costs of compliance for NPOs that are also registered as companies. An NPO that is also an NPC must appoint an accounting officer to comply with the NPO Act and would possibly also require the appointment of an auditor or independent reviewer to comply with the Companies Act.

4. We request that the NPO Act is also amended to allow for the annual financial statements to be audited or independently reviewed and where audit or independent review is applicable that the NPO is exempt from appointing an accounting officer.

ANNEXURE B: DETAILL COMMENTS

CLAUSE COMMENTED ON	PROPOSAL	MOTIVATION
Specific comments		
S12(2)(h) "specify the organisational structures and mechanisms for its governance, which shall at a minimum include the office of or designation of the chairperson, secretary and treasurer with their deputies"	SAICA proposes the following amendment: S12(1)(h) "specify the organisational structures and mechanisms for its governance, as required in terms of legislation that the non-profit organisation is constituted. For non-profit organisations that are not formed in terms of other legislation they shall at a minimum include the office of or designation of the chairperson, secretary and treasurer with their deputies "	The inclusion of the requirement to include the office or designation of the chairperson, secretary and treasurer with deputies does not take into account the Companies Act, 2008 requirements. Non-profit companies does not require a treasurer and a secretary but requires NPCs to have directors and / or members.
S12(2)(p) "disclose whether a member or office bearer has been previously been found guilty of an offence relating to the embezzlement of money of any nonprofit organisations and the status of the conviction"	SAICA proposes the following amendment: S12(2)(p) "disclose whether a member or office bearer has been previously been found guilty of an offence relating to the embezzlement of money of any [non-profit] organisations and the status of the conviction"	The proposal only requires disclosure where a member or office bearer has been found guilty of an offence relating to embezzlement of money of any non-profit organisation, this should be expanded to any organisation as any embezzlement or fraud would be relevant.
S12(5) "Any nonprofit organisation, including foreign nonprofit organisations that intend to operate business within the Republic must be registered in terms of this Act before operate and shall be subjected to the provisions of this Act and any other laws of"	SAICA proposes the following amendment : S12(5) "Any **foreign** nonprofit organisation~~,~~ ~~including foreign nonprofit organisations~~ that intend to operate business within the Republic must be registered in terms of this Act before operate and shall be subjected to the provisions of this Act and any other laws of……."	Section 2(f) of the Bill refers to the facilitation of voluntary registration of non-profit organisations and compulsory registration for foreign organisations operating within the borders of the Republic. Section 12(5) of the Bill refers to mandatory

		registration for local and foreign non-profit organisations. This creates confusion on the actual requirement and should be clarified. Section 12(5) has not been completed and should be updated.
S17(1) “Every registered non-profit organisation must, **[to the standards of generally accepted accounting practice]** in the prescribed manner — (a) keep accounting records of its income, expenditure. assets and liabilities; and (b) within six months after the end of its financial year, draw up financial statements. which must include at least— (i) a statement of income and expenditure for that financial year; and (ii) a balance sheet showing its assets, liabilities and financial position as at the end of that financial year.”	SAICA proposes the following amendment: 17(1) “Every registered non-profit organisation must, **[to the standards of generally accepted accounting practice]** in the prescribed manner — (a) keep accounting records of its income, expenditure. assets and liabilities; and (b) within six months after the end of its financial year, [draw up] <u>compile</u> financial statements. which must include at least— (i) a <u>statement of comprehensive</u> income [and expenditure] for that financial year; and (ii) a <u>statement of financial position</u> [balance sheet] showing its assets, liabilities and financial position as at the end of that financial year.”	SAICA supports the removal of standards of generally accepted accounting practice as that terminology is no longer used. There is no “generally accepted accounting practice” and financial statements are prepared using a financial reporting standard. The following general purpose frameworks are prescribed in South Africa: International Financial Reporting Standards or The International Financial Reporting Standards for Small and Medium-sized entities. Entities can also use their own reporting framework. The Act requires a company to “draw up” financial statements within 6 months. There is no certainty on whether “draw up” would include the financial statements to be reviewed / audited or whether the accounting officer’s report must be finalised within 6 months.

		In our view the term "draw up" would include the final set of the annual financial statements and where applicable the annual financial statements will have to be audited or independently reviewed within the six months. SAICA request clarity on the requirements and request that "draw up" is changed to "compile".
S18(1)(a) "a narrative report of its activities **[in the prescribed manner**] together with its financial statements and the accounting officer's report as contemplated in section 17 (1) and (2) [,**within nine months after the end of its financial year**];".	SAICA proposes the following amendment: S18(1)(a) "a narrative report of its activities **[in the prescribed manner**] together with its financial statements and the accounting officer's / <u>independent reviewer or registered auditor's</u> report as contemplated in section 17 (1) and (2) [,**within nine months after the end of its financial year**];".	SAICA request the changes to include the additional options that applies to non-profit companies, including the audit or independent review of annual financial statements. An audit or independent review can also be applicable to NPOs that are not companies and this would provide a higher level of assurance.
S24"(1) The director must keep a register in the prescribed form of: (a) all nonprofit organisations that have been registered <u>within that financial year</u>;"	SAICA proposes the following amendment: (1) The [**director**] <u>Registrar</u> must keep a register in the prescribed form of: (a) all nonprofit organisations that have been registered, <u>including non-profit organisations that have been registered</u> <u>within that financial year</u>;	The inclusion of the requirement that a register must be kept of all NPOs that were registered in that financial year, seems to indicate that no register needs to be kept and updated for NPOs that are still registered from previous years. Subsections (b) and (c) only requires the register to be updated with NPOs whose' registrations were cancelled or that have voluntarily deregistered. The section needs to be amended to include a register of all NPOs.

ANNEXURE C: SAICA ARTICLE ON DIFFERENCES BETWEEN A NPO AND NPC

Is my organisation a Non-Profit Organisation or a Non-Profit Company?

The difference between a Non-Profit Organisation ("NPO") and a Non-Profit Company ("NPC") remains a cause for confusion. A NPC is a company registered in terms of the Companies Act, No. 71 of 2008 ("Companies Act"). All section 21 companies (as they were previously known under the Companies Act, No 61 of 1973) have automatically been converted to non-profit companies. The section 21 company's memorandum and articles of association are now classified as the NPC's Memorandum of Incorporation ("MOI"). However, as the existing memorandum and articles of association will not incorporate the provisions regarding NPC's as set out in the Companies Act, these companies are encouraged to review their memorandum and articles of association and update where required.

An NPC is defined in the Companies Act as a company that is incorporated for a public benefit or an object relating to one or more cultural or social activities, or communal or group interest.

The Non-Profit Organisations Act, No. 71 of 1997 (Non-Profit Organisations Act), allows a number of legal vehicles to be registered as a Nonprofit Organisation (NPO), ie trusts, companies (NPC's) or other associations of persons established for a public purpose, and the income and property of which are not distributable to its members or office bearers except as reasonable compensation for services rendered,

Examples of NPO's include charities, religious organisations, homes for the aged, voluntary associations, research institutions and child care institutions.

Non-Profit company

Schedule 1 of the Companies Act allows for an NPC to either have members or no members. The incorporators of an NPC are its first directors and its first members if the MOI provides for members. An NPC requires at least 3 directors to manage the company.

The MOI can also provide for no more than 2 classes of membership, voting and non-voting and the MOI must also set out the qualification for members, process for applying for membership, costs, rights and obligations and grounds on which membership will be lost. Juristic persons are also allowed to be members of the NPC.

If an NPC has members, the MOI must set out the basis on which the members choose the directors of the company and if any directors are to be elected by voting members, it must provide for the election of at least one-third of those elected directors.

If the NPC has no members, the MOI must set out the basis on which directors are to be appointed to the Board. "Voting members of an NPC" would be similar to the concept of shareholders of a private company, as stated in section 10(4) of the Companies Act.

An NPC must also comply with further requirements as stated in the Companies Act, including:

- the name must include the letters "NPC" (section 11(3)(c))
- keeping of accounting records (section 28(1))
- preparation of annual financial statements within 6 months after year end (section 30)
- calculation of public interest score (regulation 29)
- /audit or independent review of annual financial statements (section 30)
- retention of documents for a certain period (section 24)
- use of company name and registration number on all notices and official publications (section 32). The number normally consists of a year, and eight numbers, for eg. "1990*/xxxxxx/xx".*

An NPC must apply all of its assets and income to advance the objective stated in the MOI. The income and property are not distributable to the incorporators, members, directors, officers or related persons except to the extent permitted by the Companies Act.

The entire net value of the NPC on dissolution or winding-up must be distributed to one or more NPC's or voluntary associations or non-profit trusts that have a similar objective as per the NPC's main object and as determined by its

- MOI; or
- by its members, if any, or directors, at or immediately before the time of dissolution; or
- by the court, if the MOI or the members or directors fail to make such a determination.

Non Profit Organisation

Registration as an NPO with the Directorate of Social Development enhances the credibility of an NPO, as it reports to a public office. This assists with fundraising and raising the profile of the NPO.

As an NPO can be a trust, company (NPC) or other association, it can have trustees or directors and/or members or members of the association. Any organisation that is not for profit and is not part of government can apply for NPO registration including:

- Non- Governmental Organisations (NGO)
- Community Based Organisations (CBO)
- Faith Based Organisations (FBO)
- Organisations that have registered as Section 21 Companies under the Company Act 61 of 1973 which has been changed to Non-Profit Companies as per the Companies Act, No 71 of 2008
- Organisations that have registered as Non-Profit Companies as per the Companies Act, No 71 of 2008

- Trusts that have registered with Master of the Supreme Court under the Trust Property Control Act 57 of 1988.
- Any other Voluntary Association that is not-for-profit.

The Directorate only registers organisations that have a constitution or any other founding documents **(including the Memorandum of Incorporation or MOI or Trust Deed)** that meets the requirements in section 12 of the Non-profit Organisations Act, which includes the financial year, decision-making process, powers of the organisation, etc.

Once registered, an NPO is obliged to comply with various information and reporting provisions and formalities.

An NPO must:

- reflect its registered status and registration number on all its documents (Section 16(3)); the registration number consists of 6 numbers and the letter NPO "xxx-xxx NPO" ;
- keep accounting records and supporting documentation for the prescribed period. (sections 17 (1)(a) and (3));
- within six months after financial year end, draw up financial statements which include a statement of income and expenditure and a balance sheet (section 17(1)(b));
- arrange for a written report to be compiled by an accounting officer within two months after drawing up its financial statements. The accounting officer must state whether the financial statements are consistent with the accounting records; the accounting policies are appropriate and applied appropriately, and that the organisation has complied with the provisions of the Act and its constitution which relates to the financial requirements (section 17(2));
- submit to the Directorate a narrative report in the prescribed manner together with its financial statements and the accounting officer's report (section 18 (1)(a)) within nine months of the end of its financial year;
- submit to the Directorate the names and physical address, business and residential address of its office bearers, even if they were reappointed within one month of their appointment; the NPOs physical address for service of documents and notice of any change of address one month before it takes effect, any other prescribed/information reasonably required by the Directorate (section 18(1)(b-e)).

An NPO can therefore be an NPC and an NPC can be an NPO, where the entity meets the requirements of both the Companies Act and the Non-Profit Organisations Act.

Where an NPO is also an NPC, the requirements of both the Nonprofit Organisations Act and the Companies Act must be complied with. A company does not normally require an accounting officer, but an NPC which is also an NPO will have to appoint an accounting officer to fulfil the duties as stated in section 17 of the NPO Act. An NPC will require an audit in accordance with the Companies Act if it meets any of the following criteria as stated in the Companies Regulations:

- an NPC which in the ordinary course of its primary activities holds assets in a fiduciary capacity for persons who are not related to the company, and the aggregate value of such assets held at any time during the financial year exceeds R 5 million;
- any NPC, if it was incorporated—
    - directly or indirectly by the state, an organ of state, a state-owned company, an international entity, a foreign state entity or a company; or
    - primarily to perform a statutory or regulatory function in terms of any legislation, or to carry out a public function at the direct or indirect initiation or direction of an organ of the state, a state-owned company, an international entity, or a foreign state entity, or for a purpose ancillary to any such function; or
    - any NPC whose public interest score in that financial year is:

      (i) 350 or more; or
      (ii) at least 100, but less than 350, if its annual financial statements for that year were internally compiled.

An NPC and an NPO does not automatically qualify for exemption from normal tax. NPC's and NPO's must apply for a tax exemption and it is only where the organisation satisfies the criteria laid down in the Income Tax Act for a "public benefit organisation" and is given formal approval by SARS as such, that there will be any exemption from tax. Once the exemption is approved by SARS the organisation is registered as a PBO and receives a PBO number and letter from SARS. Registration with SARS as a PBO in terms of section 30 exempts a compliant organisation from Income Tax in respect of its own affairs. However, in order for donors to the organisation to be able to claim a tax deduction for any donations made, the organisation would also need to comply with the requirements of Section 18A.

Table 1: Differences between the requirements of a Non-Profit Company and a Non-Profit Organisation

	NPO	**NPC**
Legislation	Non Profit Organisations Act, No 71 of 1997	Companies Act, No 71 of 2008
Accounting records	Keep accounting records	Keep accounting records
Annual financial statements	Compile within 6 months after year end	Compile within 6 months after year end
Timing of Annual Financial Statements submission	Submit to NPO Directorate within 9 months after year end	Submit to CIPC where the NPC is required to audited
Other report(s)	Narrative report of activities to be submitted with annual financial statements and accounting officer's report	Directors' report to be included in the annual financial statements
Financial reporting framework	Not prescribed	IFRS / IFRS for SMEs or own framework in terms of Regulation 29
Accounting officer's report	Yes, to be submitted to NPO Directorate	Not applicable
Independent review	Not applicable	Yes, if meets the Companies Act criteria
Audit	Not required	Yes, if meets the Companies Act criteria

It is important to reiterate that it is possible for a single organisation to be both an NPC and an NPO. An NPC is legally constituted as a legal person under the Companies Act and this same NPC can be registered as an NPO under the Nonprofit Organisations Act using it Memorandum of Incorporation as the governing document.