



LEGAL UPDATE NOTE PREPARED FOR NASCEE: OCTOPUS ACT AND RELATED LAWS APRIL 2023

1. GENERAL LAWS (ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING) AMENDMENT ACT 22 OF 2022

Towards the latter half of 2022, Parliament rushed to amend quite a few pieces of legislation in an attempt to prevent the grey-listing of South Africa by the international Financial Action Task Force. The Bill was far-reaching and sought to amend five Acts in one fell swoop – becoming known in the sector as the “Octopus Bill.” The Bill, among other things, proposed changes to the legal landscape that regulates non-profits and sought to reduce the risks of non-profit organisations being used as a front for terrorist activities, or money laundering.

The Bill initially sought to (among other things):

- Increase the list of persons who are disqualified from serving as an office bearer of a voluntary association or trustee of a trust (to align with those who cannot serve as a director of a company and then to add some Fraud-related offences;
- Enable the “beneficial owners” of non-profits to be made available to the public;
- Make it compulsory for all not-for-profit organisations “operating” in South Africa to register under the Non-Profit Organisations Act 71 of 1997 (NPO Act).

NPO status has been a voluntary status that organisations can elect to apply for (usually if they wish to receive funding from DSD, the Lotteries Commission or other government grants). The NPO Act replaced the 1978 Fundraising Act which required registration *before* an organisation could raise funds for non-profit activities. The compulsory registration requirement of the Octopus Bill, for many, echoed the draconian requirements of the old 1978 Fundraising Act, which was used by the Apartheid Government to stop funding to organisations that opposed the State.

The NPO Directorate under the Department of Social Development (DSD) is an under-resourced and under-capacitated structure. Its systems are notoriously slow and incapable of dealing with the administrative burden they currently carry. The compulsory registration of **all** not-for-profit organisations would have included the registration of every school, mosque, church, sewing circle and knitting club currently operating in South Africa. This would, at an estimate, have added an extra 700 000 organisations to the DSD system that is currently looking after 300 000 organisations with NPO status.

With an initial deadline of 21 days for comment on this “Octopus Bill,” the NGO sector was under pressure to galvanise a wide response and ensure that the Bill would not have the unintended consequence of breaking the systems of DSD as well as placing unnecessary burdens on NGOs not requiring the status. Universal registration would also not have allowed the ‘at risk’ organisations to be separately identified or tracked.

ngoLAW made submissions in the interests of their client base and joined forces with a team of non-profits who came together as the NPO Working Group for a greater representative voice from the sector as a whole. (This group had already worked together to make submissions on amendments to the NPO Act that had been proposed (and withdrawn) towards the end of 2021 (before the release of the Octopus Bill)).

Our submissions on the Bill recognised the need for regulation and compliance in the NGO sector and supported the efforts of the Bill to attempt to prevent grey-listing of South Africa, but asked for a focused scope of impact that addressed the actual risks as highlighted by FATF instead of taking a broad approach.

Summary of the process:

- NPO amendment Bill October 2021
- General Laws Amendment Bill (AML-CTF Bill) went to Cabinet
- AML CTF Bill issued for comment **23 September 2022**
- Deadline for submissions by **10 October 2022**.
- Parliamentary committee hearing held.
- Deadline for submissions on AML-CTF Bill extended **25 October 2022**.
- NPO Bill re-issued 19 Oct 2022
- NPO Bill comment deadline **18 November 2022**
- AML CTF BILL – reissued for comment by the Council of Provinces **7 November 2022**
- 23, 25 and 28 Nov NCOP meetings (submissions and discussion)
- **AML CTF Bill promulgated on 29 December 2022**

Our submissions were heard and the Bill which was enacted did not require registration of *all* non-profits, but only if those South African organisations which conduct activities or provide funding outside of South Africa. **NPO status therefore remains voluntary for organisations that do not fund activities or conduct projects outside of South Africa.**

Organisations for whom registration as an NPO is now compulsory are those SA-based organisations which:

- make donations to individuals or organisations outside of South Africa; or
- provide humanitarian, charitable, religious, educational or cultural services outside of South Africa.

The implementation of these changes is staggered and, although the section of the NPO Act requiring the compulsory registration of cross-border organisations is effective from 1 April 2023, regulations are to be issued indicating the deadline by which registrations must be in place.

We are recommending that all organisations which are not yet registered as NPOs and which now must be, should register without delay and avoid the mad scramble.

For a bit more detail on the process so far see the opening part of our previous newsletter (<https://ngolawsa.co.za/last-quarter-2022-ngolaw-in-brief/>)

1.1 OCTOPUS ACT CHANGES TO THE NON-PROFIT SECTOR IN GENERAL:

This section summarises the main changes made across all types of organisations. The details specific to each type of legal entity are then set out in parts 2, 3 and 4.

1.1.1 Accountable institutions

The Octopus Act expanded the list of what are termed “accountable institutions”. An accountable institution is a business or operation that has a duty to disclose certain information about their clients when called upon by the Financial Intelligence Centre, established under the Financial Intelligence Centre Act (FICA). *Please note that it is not non-profits themselves who are accountable institutions, but those who provide certain services to the organisations.* The relevant institutions on the list are now-

- Lawyers and legal service providers (those who set up companies and trusts)
- Trustees/directors who are service providers (eg an accountant who as a part of their service package serves as a trustee/director)
- Estate agents
- Banks
- Credit providers
- Financial services providers
- People who, as their business, sell “High Value goods” to the organisation where a single item is R100 000 or more – eg. A car or vehicle
- Crypto currency service providers

1.1.2 Beneficial owners

The Octopus Act aims to make visible and disclosable not just the legal entity (organisation or corporate) but also the human beings ultimately in control of the company, trust, or organisation. Changes have been made to the Trust Property Control Act (TPCA), Companies Act, and Non-Profit Organisations Act that require non-profits to create and maintain a record of all “beneficial owners” of the organisation and of their up to date contact details.

The word “owner” feels ill-fitting, as a non-profit by its nature cannot be owned. Nevertheless, the Master, CIPC and the NPO directorate will require that the names of all those who

ultimately control non profits (directors and trustees, founders, outside legal entities with additional powers of decision making in the organisation's founding document, and all the members, shareholders and directors or trustees of those organisations) are recorded and reported as 'beneficial owners' .

2. CHANGES TO THE TRUST PROPERTY CONTROL ACT (TPCA)

2.1.1 Beneficial owners

The TPCA, in line with the requirements, has introduced procedures in which "beneficial owners" of trusts must provide "prescribed information" to be lodged with the Master and held on record.

"Beneficial owners" include the founders and people who control the founders of the trust (people who directly or indirectly appoint the trustees). For charitable trusts, the founder is usually an historic figure and does not retain ongoing powers or rights. However, regardless of whether the named donor/founder has ongoing rights, the Master of the High Court now has to be updated on any changes in their details. And where that founder is a company or other legal entity, the people who control that organisation or company (its board) will have to be disclosed and their details provided to the Master. Where a trust has specific named beneficiaries, these (or the people behind them) will also have to be disclosed as "beneficial owners".

These provisions also apply to any person or organisation given 'effective control' in the trust deed.

These new provisions require us to evaluate and determine what would constitute 'effective control' of 'the administration of trust arrangements' and our view is that this would include:

- Powers reserved to a person/body to have the decisive vote or veto rights on major decisions of the trust (sale of major assets, amending the trust deed, closing the trust down); and
- The power to appoint all or the majority of the trustees.

If these *are* in the trust deed, they typically are for the named founder but in case any 'effective control' powers are given to a person/entity, the details of the person/entity (and, if applicable the actual people on the board of that entity) must be disclosed and recorded with the Master.

However, please note that regardless of whether a founder has 'effective control' they are still 'beneficial owners' and their details (and the details of their boards) must be disclosed and updated. We anticipate new forms to be issued by the office of the Master to take care of this requirement.

2.1.2 Disqualified persons: public record

The TPCA expanded the list of persons who are unable to serve as trustees of a trust and added to the list people who have been convicted of fraud and terrorism related offences. (The same expanded list now applies to trustees, company directors, and boards of voluntary associations which are registered NPOs.)

The Master of the High Court is required to keep a public record of people who have been convicted for these kinds of offences and will remove from their office trustees who appear on that list. The trust is under the obligation to report any trustees who have been convicted of these offences to the Master as a reason for their removal as a trustee.

2.2 DRAFT TRUST REGULATIONS

The Draft Regulations to the Trust Property Control Act are not yet finalised nor effective, but seek to align some mechanisms of the Master's office with the changes made by the Octopus Act. This includes the processes of recording people disqualified from serving as trustees, accountable institutions, and beneficial owners of trusts.

The regulations were issued on 11 January 2023. The regulations are widely anticipated to become effective on 1 April 2023, but are not yet finalised.

2.2.1 Summary of the draft TPCA regulations:

Clause 2. Register of disqualified trustees

The Master is required to establish and maintain an electronic register to record the names, identity number, and grounds on which a person is disqualified from serving as a trustee. This register must be made accessible to the public.

Clause 3. Accountable institutions

The definition of an accountable institution has been inserted into the TPCA, however, this does not mean that all trusts are accountable institutions. Accountable institutions are institutions listed in Schedule 1 of the Financial Intelligence Centre Act 38 of 2001 (FICA), and include attorneys, accountants, estate agents, and people who carry on the business of creating a trust arrangement for a client or carries out the *business* of serving as a trustee.

Under the Draft Trust regulations, trustees are required to keep a record of the name, registration or identity number of the accountable institution, the nature of the functions or services offered by the accountable institution, and the date of the transaction or date of when the business relationship between the trust and the accountable institution started. There is no requirement that this information is reported to anyone, only that a record of this information is kept.

Clauses 4. – 6. Beneficial ownership

Clause 4 - The draft regulations require that the trustees keep a record of full names, date of birth, nationality, Identity and passport numbers, residential and other addresses, and means of contact of all "beneficial owners" of the trust (including a copy of their certified ID). The record must also reflect what makes the person a beneficial owner, and the date on which that person became a beneficial owner.

Clause 5 – The Master is under the obligation to keep a record of beneficial owners of a trust, and maintain an electronic register of beneficial owners. The trust will have to register "beneficial owners" with the Master through a password protected portal, and keep the information disclosed on "beneficial owners" up-to-date. The Master will be able to receive these documents electronically.

Clause 6. Information on "beneficial owners" of a trust will only be accessible by the trust, the Master and designated officials such as the NPA, Police, intelligence services and SARS etc.

3. COMPANIES ACT AND REGULATIONS:

Companies Act has required a higher standard of annual reporting, disqualification of persons who are serving as directors, and the visibility of office bearers than the TPCA or the NPO Act. For this reason, the changes to the Companies Act and draft regulations as a result of the Octopus Act are not as extensive as those to the TPCA and NPO Act, and mostly build on the existing systems to bring the Companies Act in line with the aims and purposes of the Octopus Act.

In the non-profit sector, these changes mostly affect with-members NPCs and external (foreign) companies who conduct activities in South Africa. The regulations which have been issued are not yet in effect and submissions have been made on the draft regulations.

3.1.1 Beneficial owners

With-members NPCs are required to compile and keep an up-to-date record of the members of the organisation (members' register). This has been a requirement since the Companies Act came into effect in 2011 and was a requirement under the 1973 Act. It is in any event a matter of good governance to keep up-to-date the list of who has the power to vote, and appoint the board, and take special resolutions in the company. The members register has always been a matter of public record and may be inspected by any person during business hours at the office of the company, should a person wish to do so.

However, with the Octopus Act and new Companies Act regulations, the members register is now a document that must also be uploaded with the NPC's Annual Returns each year. This upload includes the contact numbers and addresses of members of the NPC.

In the non-profit sector, this raises concerns about the privacy and personal safety of members, especially in areas of the sector that are highly political, activists, or which may have more

vulnerable members such as women's safety organisations. ngoLAW has made submissions on these new regulations and highlighted the importance of protecting the personal information that is provided to CIPC.

4. NPO ACT: DRAFT REGULATIONS

The promised regulations relevant to the NPO Act and the amendments made to it by the Octopus Act were released in draft form for comment on 21 February 2023, with a 30-day deadline for comments.

Parts of these draft regulations will affect all organisations which are already voluntarily registered as Non Profit Organisations (NPOs) as well as that group of organisations for whom NPO registration will become compulsory with effect from 1 April 2023; and then there are parts which will apply only to those who fit the definition of organisation for whom registration is now compulsory.

ngoLAW has made submissions on the draft regulations, made recommendations, and highlighted provisions where, in our opinion, the regulations are inconsistent with the function and mandate of the NPO Directorate.

4.1 Summary of the NPO draft regulations

7A In December 2022 a new Section 25A was added to the main NPO Act and contains a list of sorts of status or behaviour which will bar people from service on governing bodies of NPOs. *This is the first time the NPO Act has had such a list.* This list includes disqualifications/ineligibility standards already applicable to directors of NPCs and trustees of trusts, but adds convictions or sanctions for fraud, dishonesty, money laundering or terrorist financing (amongst others) to the list.

This regulation 7A deals with the register of disqualified persons which the Directorate of NPOs must now maintain, the details required to be kept, and a right of public inspection of this list (limited to inspection of a physical list, kept in Pretoria and during office hours only – not terribly useful).

Regulation 7A also seems to place the burden upon registered non-profit organisations to assemble and populate this public list. It requires that a registered NPO having a disqualified person serving on their governing body must provide the necessary details to the NPO Directorate. **This is not in line with the amended NPO Act or other statutes, which place this burden on the regulating body.**

8B This Regulation adds to the list of information on persons serving on the governing body (referred to as 'office bearers') which must now be supplied to the Directorate in two categories:

1. For those organisations which have voluntarily registered as NPOs (and who do not fall inside of the definition of organisations for whom registration would be mandatory) , the following are **added** requirements regarding their board members:
 - Full names
 - ID/passport number
 - Position or portfolio held
 - Postal address

2. For organisations those for whom registration is compulsory, those listed above apply and the organisation must in addition supply various other details about the organisation itself including:
 - Tax reference number;
 - Affiliate organisations and ‘fiscal sponsorships’;
 - Countries worked/donated in for last three years and description of activities; and
 - Details of audit/auditor, if applicable.

8C This Regulation stipulates that:

- the information on board/governing body and on activities, affiliates, structures, etc may be requested from organisations under PAIA (the Promotion of Access to Information Act);
- the register of all of this information is open for public physical inspection during office hours and the director ‘may’ provide electronic access.

9A This Regulation deals with an issue which was hotly debated during submissions on the Octopus Act as it was initially proposed that criminal convictions could result from contravention of the amended NPO Act. The ardent rejection of this proposal resulted in an undertaking that sanctions would be ‘administrative’ in nature only and the amended Section 29 of the NPO Act refers to ‘prescribed administrative sanction’.

This Regulation is where it is ‘prescribed’ and the list of possible ‘administrative sanctions’ includes:

- a) a caution not to repeat the conduct;
- b) a reprimand;
- c) a directive to take remedial action; or
- d) the restriction or suspension of certain specified activities of the non-profit organisation.

Our initial take on this is to wonder about the enforceability of (d) and also the powers it confers on the Director. Submissions have been made in this regard.

5. 18A RECEIPTS: 1 MARCH 2023 NEW REQUIREMENTS

In our October 2021 Newsletter <https://ngolawsa.co.za/october-2021-news-and-updates-including-npo-amendment-bill/> we gave advance notice that SARS was working on tightening systems to deal with 18A fraud and that the donor details required to be captured on 18A receipts would be expanded and would probably include the donor's tax reference number.

Government Gazette 48104, issued on 24 February 2023, makes the expanded requirements for 18A receipts effective from 1 March 2023 (so, right away!), and all receipts issued from this date onwards must comply with the updated rules.

The information and details which organisations have, until now, been required to record were:

- The organisation's name, address and PBO number;
- The donor's name and address;
- The date of receipt of the donation;
- The value or amount of the donation; and

The required certification: that the donation would be used exclusively for the 18A objects of the organisation.

The list of information required has now got quite a bit longer and does include the tax reference number of the donor, but not as a compulsory item.

From 1 March 2023, an 18A receipt must, in addition to the details listed already, also include:

1. A unique receipt number
2. Donor:
 - a. Contact number
 - b. Email address
 - c. Income tax reference number (if available)
3. What kind of legal 'person' the donor is: NPC/human being/(Pty) Ltd/CC/(Inc)/trust)
4. **If** donor is a human being:
 - a. Identification type and country of issue (SA ID or passport and country)
 - b. ID or passport number
5. **If** donor is a legal entity:
 - a. Registration number of legal entity (CIPC/trust number)

- b. If it has a trading name different from its registered name, the trading name.

Important Note 1

- The Regulations specifically refer to 'all receipts issued' which means that, even if the receipts are issued for donations which have been received some time in the past, they must comply.

Important Note 2

- An 18A receipt need only be issued when the donor wants to claim a tax deduction. And this tax deduction can only be claimed within the South African tax system. So 18A receipts are only needed by South African taxpayers.

Important Note 3

- SARS has not made the recording of the donor tax reference number mandatory. This is because:
 - submissions made to SARS indicated that organisations feared that the extra schlep of finding and filling in a tax reference number would disincentivise donations, especially for online 'quick click'/scan donations;
 - SARS has the systems to find tax reference numbers based upon ID/other registration numbers, anyway.

We do still advise that the income tax reference number is collected, when possible.

6: SUMMARY OF ACTIONS TO BE TAKEN

- 1. Who are the organisation's "beneficial owners"?**
- 2. Is NPO registration compulsory for our organisation and, if so, are we registered?**
- 3. Are the records of our office bearers up to date?**
- 4. Have we produced a list of accountable institutions?**

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