

Checklist of provisions for NPO Laws

This basic checklist of provisions that should be included in legislation governing not-for-profit organizations (NPOs) is useful for assessing whether NPO legislation currently on the books or in draft form meets generally accepted international practices. It is based on the research effort conducted by ICNL in connection with writing the World Bank “Handbook on Good Practices for Laws Relating to Nongovernmental Organizations” (Discussion Draft, 1997) as well as subsequent research activities. Laws and country reports were collected from over 100 countries and analyzed to ascertain prevailing international practices. Since that time ICNL has endeavored to improve and increase the information available in its Database and Online Library, which now includes information on more than 150 countries. Access to information about various countries, including individual country laws and regulations, codes of ethics, information about GO-NGO partnerships, etc., can be obtained through ICNL’s web site at www.icnl.org or in hard copy from ICNL’s Washington office. The catalog of materials is available online.

1. Protecting Fundamental Freedoms

1.1: Creation of an NPO: Protecting fundamental freedoms of expression, association, and peaceful assembly means that NPOs should be allowed freely to come into existence. It also means that NPOs should not be required to obtain legal personality in order to engage in lawful activities.

1.2: Registration (Incorporation) of NPOs. Laws governing NPOs should be written and administered so that it is relatively quick, easy, and inexpensive for all persons (including natural and legal persons) to register or incorporate an NPO as a legal person.

1.3: Registration or Incorporation Organ. The organ of the state that is vested with the responsibility for giving legal existence to NPOs should be adequately staffed with competent professionals, it should be even-handed in fulfilling its role, and its decisions not to register NPOs should be appealable to an independent court. If the registration or incorporation organ is a court, its adverse decisions should be appealable to a higher court.

1.4: Public Registry. Whether NPOs are registered or incorporated in one or many locations, there should be a single, national registry of all NPOs that is accessible to the public (in addition to any local public registries that may exist).

1.5: Termination, Dissolution, and Liquidation. The highest governing body of an NPO should be permitted to voluntarily terminate its activities, dissolve it as a legal person, and liquidate its assets pursuant to the decision of a court and upon application by the organization. The registration or supervisory organ or court should be allowed to involuntarily terminate an NPO’s existence only for the most flagrant of violations, and then only after a requested correction of a legal or ethical violation has not occurred. To ensure that fundamental rights are not violated, all involuntary terminations should be subject to judicial supervision.

1.6: Permitted Purposes and Activities

(a) In general, NPOs should be treated like all other legal entities and be permitted to engage in activities for the benefit of their members and in public benefit or “charitable” activities.

(b) NPOs are key participants in framing and debating issues of public policy and should have the right to speak freely about all matters of public significance, including debate about and criticism of existing or proposed state policies and actions.

(c) Any NPO engaging in an activity (e.g., health care, education, social services to persons living with HIV/AIDS, etc.) that is subject to licensing or regulation by a state organ should be subject to the same generally applicable licensing and regulatory requirements and procedures that apply to activities of individuals, business organizations, or public organs.

1.6: Qualification for Public Benefit Status. Where it is thought appropriate to establish a separate state organ to determine whether an organization qualifies for public benefit or charitable status, such an entity should be an independent, mixed commission (with representatives of the public, the government, and the NPOs themselves), similar to the Charity Commission of England and Wales.

1.7 Media Access. NPOs should have access to media outlets to publicize their activities, including state-owned media, where such exist.

2. Integrity and Good Governance

2.1: Mandatory Provisions for Governing Documents. The laws governing NPOs should require that certain minimum provisions necessary to the operation and governance of the organization be stated in the governing documents of an NPO. The requirements may be different for membership and nonmembership organizations, with the latter possibly being required to have additional governing bodies (e.g., supervisory boards, audit commissions, etc.) because they do not have members.

2.2: Optional Provisions for Governing Documents. Laws governing NPOs should give an NPO (through its highest governing body) broad discretion to set and change the governance structure and operations of the organization within the limits provided by the law.

2.3: Internal Reporting and Supervision: Duties and Liabilities of Governing Bodies and Their Members. The highest governing body of an NPO (or its delegate) should be required by law to receive and approve reports on the finances and operations of an NPO. The law should provide that officers and board members of an NPO have a duty to exercise loyalty to the organization, to execute their responsibilities to the organization with care and diligence, and to maintain the confidentiality of non-public information about the organization.

2.4: Prohibition on Conflicts of Interest. Careful consideration should be given to whether and the extent to which the law should provide that founders, officers, board members, and employees of an NPO must avoid any actual or potential conflict between their personal or business interests and the interests of the NPO.

2.5: Prohibition on the Distribution of Profits and Other Private Benefits.

(a) Laws governing NPOs should provide that no earnings or profits of an NPO may be distributed as such to founders, members, officers, board members, or employees.

(b) Laws governing NPOs should provide that no NPO should be permitted to distribute assets to its founders, members, officers, board members, or employees upon the dissolution of the NPO.

(c) Laws governing NPOs should provide that the assets, earnings, and profits of an NPO may not be used to provide special personal benefits, directly or indirectly, (e.g., scholarships for relatives) to any founders, members, officers, board members, employees, or donors connected with the NPO.

2.6: Methods and Subjects of Voluntary Self-Regulation. Although basic standards of conduct and requirements for governance of all NPOs should be enacted as published laws, NPOs should be permitted and encouraged to set higher standards of conduct and performance through self-regulation and codes of ethics.

2.7: Umbrella Organizations. The laws should permit and the society should encourage the formation of umbrella organizations to adopt and enforce principles of voluntary self-regulation.

3. Financial Sustainability

3.1: Fundraising Activities -- General Rule. NPOs should be permitted to engage in all legally acceptable and culturally appropriate fundraising activities, including door-to-door, telephone, direct mail, television, etc., campaigns, lotteries, raffles, and other fundraising events. Lotteries, charity balls, auctions, and other occasional activities conducted primarily to raise funds for an NPO are a form of fundraising and should not be regarded as economic or commercial activities.

3.2: Fundraising Activities -- Limitations, Standards, and Remedies. Fundraising through a public solicitation method should require registration with a state organ or an independent supervisory organ, which will issue permits, badges, and other identification materials to the fund raisers, set standards for public solicitation activities, provide information to the public, and sanction inappropriate conduct.

3.3: Economic Activities. An NPO should be permitted to engage in lawful economic, business, or commercial activities, provided that (i) the NPO is organized and operated principally for the purpose of conducting appropriate not-for-profit activities (e.g., culture, education, health, etc.), and (ii) that no profits or earnings are distributed as such to founders, members, officers, board members, or employees. Such activities may be engaged in provided that the appropriate requirements for licensing and permits are met.

3.4: Income or Profits Tax Exemption for NPOs. Every NPO, whether organized for mutual benefit or for public benefit, and whether a membership or nonmembership organization, should be exempt from income taxation on moneys or other items of value received from donors or governmental organs (by grant or contract) and regular membership dues, if any. A variety of approaches may be taken with respect to exemption for interest, dividends, or capital gains earned on assets or the sale of assets, with greater preferences on such items generally being made available to public benefit NPOs.

3.5: Income Tax Benefits for Donations. To encourage philanthropy and good citizenship, donations of individuals and business entities to public benefit NPOs should be entitled to reasonably generous income tax benefits (such as deductions or credits).

3.6: Taxation of Economic Activities. NPOs should be allowed to engage in economic activities as long as those activities do not constitute the principal purpose or activity of the organization. Any net profit earned by an NPO from the active conduct of a trade or business could be --

- (a) exempted from income taxation,
- (b) subjected to income taxation,
- (c) subjected to income taxation only if the trade or business is not related to and in furtherance of the not-for-profit purposes of the organization, or
- (d) subjected to income taxation under a mechanical test that allows a modest amount of profits from economic activities to escape taxation but imposes tax on amounts in excess of the limit.

3.7: VAT, other taxes, and customs duties. Public benefit NPOs and their activities should be given preferential treatment under a value added tax (VAT), other taxes (e.g., property taxes), and customs duties provided that appropriate limitations are in place to guard against fraud and abuse.

3.8: Support for Endowments. The laws should contain provisions that support the formation and maintenance of endowments. These include special tax incentives for donations to form endowments, prudent investment policies, etc.

3.9: Foreign Funding. An NPO that is properly registered or incorporated should generally be allowed to receive cash or in-kind donations or transfers from aid agencies of another country, a multilateral agency, or an institutional or individual donor located in another country, as long as all generally applicable foreign exchange and customs laws are satisfied.

3.10 3.10 Volunteers. The laws should encourage volunteers to work for NPOs, by encouraging employers to permit employees to have time off for such work.

3.11 3.11 NGO-government partnerships. The laws, including the procurement legislation where appropriate, should contain provisions that encourage partnership between government and NGOs, providing for government financing of projects carried out by NGOs, through grants and contracts.

4. Accountability and Transparency

4.1: Reporting Generally. To the maximum feasible extent, all reports required of NPOs should be as simple to complete and as uniform among state organs as is possible.

4.2: Reporting to Supervisory Organ.

(a) Any NPO having significant public benefit activities or with substantial public support should be required to file appropriate reports at least annually on its finances and operations with the appropriate organ (court, ministry, organ of local administration, or specialized organ) that is responsible for general supervision of NPOs.

(b) All reporting requirements should contain appropriate provisions to protect the legitimate privacy interests of donors and recipients of benefits as well as the protection of confidential or proprietary information.

4.3: Audit by Supervisory Organ.

(a) Consistent with the normal state powers of inspection for all legal entities, the supervisory organ should have the right to examine the books, records, and activities of an NPO during ordinary business hours, with adequate advance notice. This audit power should not be used to inhibit the freedom of association of the individuals connected with the organization nor to harass the organization.

(b) To ensure compliance with the laws, all reporting NPOs should be subject to random and selective audit by the supervisory organ, but such audits should not be used to harass organizations or individuals connected with them.

4.4: Reporting to and Audit by Tax Authorities. It is appropriate for separate reports to be filed with the taxing authority(ies). Different kinds of reports may be required for different kinds of taxes (e.g., profits taxes, VAT).

4.5: Reporting to and Audit by Licensing Organs. Any NPO engaged in an activity subject to licensing by a state organ should be required to file the same reports with that organ as individuals or business organizations are required to file.

4.6: Disclosure or Availability of Information to the Public. Any NPO with significant activities or assets or with substantial public support should be required to publish or make available to the public a report of its general finances and operations; this report may be less detailed than the reports filed with the general supervisory organ, the taxing authority(ies), or any licensing organ and should permit anonymity for donors and recipients of benefits in addition to protecting confidential or proprietary information.

4.7: Special Sanctions: In addition to the general sanctions to which an NPO is subject equally with other legal persons (e.g., contract or tort law), it is appropriate to have special sanctions (e.g., fines or penalty taxes, or the possibility of involuntary termination) for violations peculiar to NPOs (e.g., self-dealing, improper public fundraising practices, special rules contained in tax legislation).