A black and white photograph showing the silhouettes of three children on a wooden structure, possibly a bridge or a play structure, over a body of water. The children are positioned at different heights on the structure. The background is a textured, light-colored surface, possibly a wall or a large piece of fabric.

LEGAL A TO Z FOR NGOS

iProbono

TABLE OF CONTENTS



Purpose

3



NGOs in India

4

- Terminology
- Charitable Purpose
- Types of Organisations



Fundraising

18



Legality and Compliance

22

- Tax exemptions
- FCRA
- Internal Policies

PURPOSE

This guide provides information about setting up an NGO and engaging in charitable work in India. For those interested in the sector, this guide demystifies terminology associated with charitable organisations, and explains the various registration requirements, compliances and benefits that each type of organisation may be eligible for.

Those currently involved in charitable activities will get a better understanding of how NGOs can fund their work, and advice on how to comply with non-profit sector legislations and relevant procedural requirements. The guide covers important issues such as Tax Compliances, Foreign Contribution Regulation Act (FCRA) Regulations and Internal Policies.

NGOS IN INDIA



Photo Credit: The Guardian

Terminology

One often hears of organisations referred to as non-governmental organisations (NGOs), non-profit organisations (NPOs), civil society organisations (CSOs), foundations, service delivery organisations (SDOs), etc. What are the differences between such organisations? In fact, all these terms are colloquial with no specific legal meaning or recognition in India. They can be used interchangeably.

Different terms have been popular at different times and in different contexts. For instance, NGO or non-governmental organisation is a term coined by the United Nations and World Bank where organisations would undertake work that governments should undertake.^[1] The term Foundation has become popular in India recently, due to its use by American organisations, such as the Bill and Melinda Gates Foundation and Ford Foundation.

[1] World Bank Group, Legal Framework for Social Enterprise, Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/26397/114405-18-4-2017-15-11-50-DesignLegalFrameworksforSEsApr.pdf?sequence=1&isAllowed=y> (December 2016).

In India, another common term without a legal definition is social enterprise.^[2]

It can refer to an organisation that uses commercial strategies to maximise improvements in human and environmental well-being. It could be structured as a for-profit organisation (of which there are various examples in India^[3]), non-profit, or hybrid organisation.^[4]

- **For-Profit:** It may be a sole proprietorship, one-person company, limited liability partnership, private company, or public limited company. In this case, while a company's liability is confined to its shares, a proprietorship would provide for personal liability of the proprietor.^[5]
- **Non-Profit:** It would have to be a trust, society, or Section 8 company. Notably, non-profit does not mean a loss-making organisation, instead it signifies an organisation that does not distribute dividends to its members and instead invests its revenues back into the organisation to fulfil the purpose of the company. In the case of a company, for instance, such a company will have a balance sheet and an income and expenditure statement but they will not have a profit and loss statement.

Note: While for-profit organisations may also have charitable purposes, they must be listed as non-profits in order to receive benefits under any legislation, including the Income Tax Act, 1961 (IT Act) and Foreign Contribution (Regulation) Act, 2010 (FCRA).

[2] Ministry of Skill Development and Entrepreneurship, National Policy for Skill Development and Entrepreneurship, 2015, Available at: <https://msde.gov.in/sites/default/files/2019-09/National%20Policy%20on%20Skill%20Development%20and%20Entrepreneurship%20Final.pdf>.

[3] Anisha Aditya, *Scaling and Replication Of Social Enterprises In India*, *Business World* (4 May 2020).

[4] British Council, *The State of Social Enterprises in India*, 2016, Available at: https://www.britishcouncil.org/sites/default/files/bc-report-ch4-india-digital_0.pdf.

[5] Avishkaar Group, *List of Indian Social Enterprises*, August 2020. Available at: https://www.jica.go.jp/india/english/office/others/c8h0vm0000f9enll-att/list_02.pdf.

Charitable Purpose

While a non-profit organisation may be registered as a company, society, or trust, the taxation laws do not distinguish among them. As long as they independently satisfy the definition of 'charitable purpose' under the IT Act, a central legislation that applies to all trusts, societies and Section 8 companies, each enterprise enjoys the same treatment under taxation and foreign contribution laws.

Section 2(15) of the IT Act states that *"charitable purpose includes relief of the poor, education, yoga, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility".*

While the last category of 'general public utility' is broad, it is also complex since it is affected by a 2015 amendment to Section 2(15) under Finance Act, 2015, which includes the following provisions:

"Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity, unless— (i) such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and (ii) the aggregate receipts from such activity or activities during the previous year, do not exceed twenty per cent of the total receipts, of the trust or institution undertaking such activity or activities, of that previous year".

Note: Importantly, if the organisation receives donations or grants in excess of this limit, this provision would not apply because these are recognised as gifts rather than business 'income'. If the organisation engages in any business or commercial activity that generates income in excess of this amount, the entire income along with any money obtained from donations and grants, would become liable to taxation. This does not, however, imply that the organisation would be treated as illegal or get de-registered.



Photo Credit: Medium

Types of Organisations

How does an organisation decide which type of registration to undertake?

While there are some distinctions between a trust, society and Section 8 company, the tax benefits and FCRA applicability are the same as long as the phrase 'charitable purpose' is satisfied.

Trust

While the term 'public trust' is not defined by any central legislation, Section 3 of the Indian Trust Act defines 'trust' as an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner. While the aforementioned Act does not specifically apply to public trusts, its principles can be applied to them.^[6]

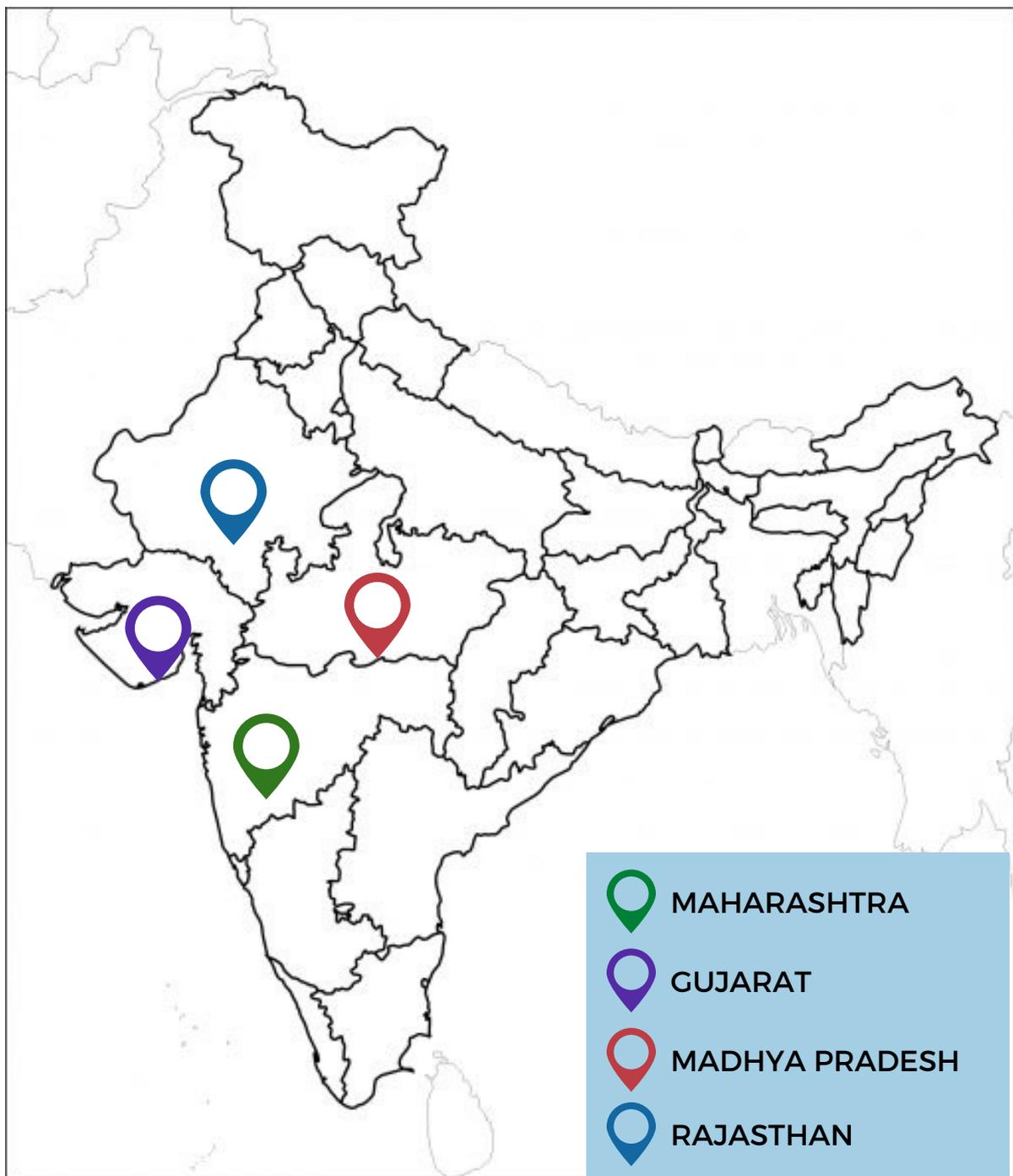


There are two types of trusts - public and private. In private trusts, the beneficiaries are specific individuals, whereas, in public trusts, they are the general public or a class thereof.^[7] There are religious and charitable public trusts that fall under the umbrella of public trusts. For the purposes of this guide, only public charitable trusts are relevant.

[6] Abdul Kayum v. Mulla Alibha, AIR 1963 SC 309

[7] Mahant Ram Saroop Dasji v. S P Sahi, 1959 Supp (2) SCR 583

Only four states in India have public trust legislation - Maharashtra, Gujarat, Rajasthan and Madhya Pradesh. These states also have an Office of the Charity Commissioner that governs any trust registered for a charitable purpose. Public trusts are governed primarily by their trust deeds in all other states. The principles of the Indian Trust Act, 1908, may be used to supplement the trust deed, but it is not directly applicable because its preamble indicates that it only applies to family or private trusts.



The definitions of 'public trust' and 'charitable purpose' under the four relevant state legislations are given below:

| | |
|---|--|
| <p>Maharashtra Public Trusts Act, 1950</p> <p>Section 2(13): <i>'Public trust' means an express or constructive trust for either a public religious or charitable purpose or both and includes a temple, a math, a wakf, church, synagogue, agiary or other place of public religious worship, a dharmada or any other religious or charitable endowment and a society formed either for a religious or charitable purpose or for both and registered under the Societies Registration Act, 1860.</i></p> <p>Section 9(1): <i>For the purposes of this Act, a charitable purpose includes -</i> <i>(1) relief of poverty or distress;</i> <i>(2) education;</i> <i>(3) medical relief;</i> <i>(3A) provision for facilities for recreation or other leisure time occupation (including assistance for such provision), if the facilities are provided in the interest of social welfare and public benefit, and</i> <i>(4) the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship.</i></p> | <p>Gujarat Public Trust Act, 1950</p> <p>Section 2(15): <i>'Public trust' means an express or constructive trust for either a public religious or charitable purpose or both and includes a temple, a math, a church, synagogue, agiary or other place of public religious worship, a dharmada or any other religious or charitable endowment and a society formed either for a religious or charitable purpose or for both and registered under the Societies Registration Act, 1860.</i></p> <p>Section 11: <i>For the purposes of this Act, a charitable purpose includes -</i> <i>(1) relief of poverty or distress,</i> <i>(2) education,</i> <i>(3) medical relief,</i> <i>(4) rehabilitation of persons affected due to earthquake, flood, scarcity or any other natural calamity, and</i> <i>(5) the advancement of any other object of general public utility, but does not include a purpose which relates:</i> <i>(a) exclusively to sports, or</i> <i>(b) exclusively to religious teaching or worship.</i></p> |
| <p>Madhya Pradesh Public Trusts Act, 1951</p> <p>Section 2(4): <i>"Public trust" means an express or constructive trust for a public, religious or charitable purposes and includes a temple, a math, a mosque, a church, a wakf or any other religious or charitable endowment and a society formed for a religious or charitable purpose;</i></p> | <p>Rajasthan Public Trusts Act, 1959</p> <p>Section 2(11): <i>'Public trust' means an express or constructive trust for either a public, religious or charitable purpose or both and includes a temple, a math, dharmada or any other religious or charitable endowment or institution and a society formed either for a religious or charitable purpose or for both.</i></p> |

Society

Charitable societies are registered under the Societies Registration Act, to which each state has made state-specific amendments.

Section 1 of the Societies Registration Act provides:

Societies formed by memorandum of association and registration

"Any seven or more persons associated for any literary, scientific, or charitable purpose, or for any such purpose as is described in Section 20 of this Act, may, by subscribing their names to a memorandum of association, and filing the same with the Registrar of Joint-stock Companies form themselves into a society under this Act."

Section 20 provides:

To what societies the Act applies

"The following societies may be registered under this Act — Charitable societies, the military orphan funds or societies established at the several presidencies of India, societies established for the promotion of science, literature, or the fine arts for instruction, the diffusion of useful knowledge, the diffusion of political education, the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public, or public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs."

Specific amendments have been made to this section by various states, including Bihar, Delhi, Haryana, Maharashtra and Pondicherry.

Section 8 Company

A Section 8 company is simply a public or a private company that has been granted a license under Section 8 of the Companies Act. In other words, the company's objects serve a function enumerated in Section 8. The law obliterates the concept of a non-profit organisation.

Section 8 of the Companies Act provides:

Formation of companies with charitable objects, etc.

"8. (1) Where it is proved to the satisfaction of the Central Government that a person or an association of persons proposed to be registered under this Act as a limited company —

(a) has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;

(b) intends to apply its profits, if any, or other income in promoting its objects; and

(c) intends to prohibit the payment of any dividend to its members, the Central Government, may, by licence issued in such manner as may be prescribed, and on such conditions as it deems fit, allow that person or association of persons to be registered as a limited company under this section without the addition to its name of the word "Limited", or as the case may be, the words "Private Limited", and thereupon the Registrar shall, on application, in the prescribed form, register such person or association of persons as a company under this section.

(2) The company registered under this section shall enjoy all the privileges and be subject to all the obligations of limited companies."

Differences between Trust, Society and Section 8 Company

| CATEGORY | TRUST | SOCIETY | SECTION 8 COMPANY |
|---|---|---|---|
| Relevant Statute for Registration | <ul style="list-style-type: none"> Maharashtra, Rajasthan, Gujarat, Madhya Pradesh - State level public trust legislations.^[8] Other States - Trust deed registered under Indian Registration Act, 1908. | Societies Registration Act, as applicable in the state. ^[9] | Section 8 of Companies Act |
| Authority | <ul style="list-style-type: none"> Charity Commissioner Sub-Registrar's Office | Societies Registration Officer ^[10] | Registrar of Companies ^[11] |
| Approval of Name of the Organisation | No approval process - As a result, there may be many organisations with the same name, which could cause confusion. | No approval process - As a result, there may be many organisations with the same name, which could cause confusion. | Prior to registration, the name must be approved, and if RoC finds the identical name in the database or the name is a term prohibited by the Companies Act, such as a common word like 'union' or an obscene name, the name may be disallowed. |
| Board | Board of Trustees | Members of Governing Body | Board of Directors |

[8] Rajasthan Public Trust Act 1959, Gujarat Public Trust Act, 1950, Maharashtra Public Trusts Act, 1950, Madhya Pradesh Public Trusts Act, 1951.

[9] In Maharashtra and Gujarat, upon registration as a society, the organisation is automatically also registered with the Assistant Charity Commissioner as a "public charitable trust".

[10] Leads to automatic registration with the Office of the Charity Commissioner in Gujarat and Maharashtra.

[11] Does not require simultaneous registration with the Charity Commissioner's Office in any state, for instance DASRA, Magic Bus, etc.

| CATEGORY | TRUST | SOCIETY | SECTION 8 COMPANY |
|------------------------------|--|---|--|
| Minimum members | <p>In Maharashtra, Rajasthan, Gujarat, Madhya Pradesh - 3 members Other States - 2 members.</p> <p>Under the Indian Trust Act, in some circumstances and subject to trust deed permissibility, the notion of a sole trustee is also viable.</p> | <p>Minimum 7 members (who by default become the first governing body).</p> <p>The first set of members by default become the governing body of the society.</p> | <ul style="list-style-type: none"> • Public Company- minimum 3 directors • Private Company- minimum 2 directors • Public Company- minimum 7 members • Private Company- minimum 3 members |
| IT Act | 12AA (now 12AB) for tax exemption, 80G of the IT Act for tax deduction. | | |
| FCRA | Application to Ministry of Home Affairs. | | |
| Commercial Activities | Category of general public utility is subject to the provisions discussed in page number 25, i.e. business income cannot be more than 20% of non-business income. | | |
| GST^[12] | <p>GST registration is required if there is a supply of goods worth over 40 lakhs or supply of services worth over 20 lakhs.^[12]</p> <p>Note - GST registration does not imply any tax liability for the trust/society/company, because GST is payable by the consumer.^[13]</p> | | |
| Labour Laws | <p>All employment and labour laws will be applicable to trusts/societies/s8 companies if the thresholds of number of employees under the relevant legislation is satisfied.^[14]</p> <p>For instance, Employees Provident Fund Act, 1952 applies to entities with more than 20 employees.</p> | | |
| Board Liability | Trustees can be personally liable. | Members can be personally liable. | Limited Liability i. e., liability is restricted to share capital or assets of the company - no personal assets of members can be attached. |
| Rotation | There is no requirement for rotation or periodic evaluation unless the trust deed contains such a provision. | Periodic elections | Rotations mandatory |

[12] Section 22(1), Central Goods and Services Tax Act, 2017.

[13] The limit of turnover for both goods and services is INR 10 lakhs in special category states (i.e. Arunachal Pradesh, Assam, Jammu & Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh, Uttarakhand).

[14] PRADAN v. Employees Provident Fund Appellate Tribunal, WP(C) No.2954/1999, 25 February, 2010 (Delhi High Court); Andhra University v. R.P.F.C. 1985 (51) FLR 605; Employee's Provident Fund Organisation, Ministry of Labour, Govt of India, No Coord./1(1)2010/Notification u/s 16(2), 7 September, 2015, Available at http://www.srr-foundation.org/circulars/Applicability_EPFAct_24366.pdf.

| CATEGORY | TRUST | SOCIETY | SECTION 8 COMPANY |
|---|---|---|---|
| Need for AGM (Annual General Meeting) | Not mandated by law | 1 AGM a year | 1 AGM a year |
| Remuneration | <p>Two requirements must be met for remuneration to be granted:</p> <ul style="list-style-type: none"> • Should be enabled by constitution documents.^[15] • Section 13(2)(c) of the IT Act says it is allowed as long as it is reasonable: <i>"(c) if any amount is paid by way of salary, allowance or otherwise during the previous year to any person referred to in sub-section (3) out of the resources of the trust or institution for services rendered by that person to such trust or institution and the amount so paid is in excess of what may be reasonably paid for such services"</i>. <p>Factors to consider for determining reasonableness include the number of hours worked by the employee, the market rate and so on.</p> | | |
| Termination and Distribution of Assets after Dissolution | <p>There are no provisions under the public trust legislations for legally terminating or dissolving a valid public charitable trust.</p> <p>If the state has an Office of the Charity Commissioner, that office will distribute the trust's assets as per the trust's objectives, if all members of the trust have passed away.</p> <p>In other states, the High Courts are guardians of charitable trusts. Generally, a High Court would appoint administrators for an interim period until they can appoint new trustees or the assets can be distributed as per the objects of the trust. Individual trustees will not receive any of the trust's assets.</p> | <p>Section 13 of the Societies Registration Act provides that a society can be dissolved if three fifths of its members agree to such dissolution.</p> <p>If any assets of the society remain after discharging its liabilities, they shall be handed to another society chosen by three-fifths of the society's members.</p> | <p>The first step is to surrender the license obtained under Section 8 and conversion to any other company except a one person firm.</p> <p>Following that, the company is wound up in accordance with Section 271 of the Companies Act or the Insolvency and Bankruptcy Code, 2016.</p> <p>Section 8(9) provides that at the time of winding up, surplus assets be transferred to another company registered under Section 8 having similar objects, or the assets may be sold and proceeds thereof credited to Insolvency and Bankruptcy Fund formed under Section 224 of Insolvency and Bankruptcy Code, 2016.</p> |

[15] Constitution documents would be the trust deed in a trust, memorandum and articles of association in a company and memorandum of association in a society.

| CATEGORY | TRUST | SOCIETY | SECTION 8 COMPANY |
|--|---|---|--|
| <p>Process for changing objects</p> | <p>The process of changing the objects should be enabled by the trust deed.^[16] Also, in Maharashtra, Gujarat, Madhya Pradesh and Rajasthan, the provisions of the state public trusts act will apply which include informing the Charity Commissioner of the State and changing the register of the Commissioner accordingly.^[17] In addition, under FCRA, intimation would have to be given to the Ministry of Home Affairs. Till the Ministry responds to such intimation, both the exemption under IT Act and benefits under FCRA would be suspended.</p> | <p>The society's governing body may submit the proposition to the members of the society according to the regulations of the society. No such proposition shall be effective unless such report is delivered to every member of the society 10 days prior to the special meeting and unless such proposition is agreed to by the votes of three-fifths of the members.^[18] Additionally, under FCRA, intimation would have to be given to the Ministry of Home Affairs. Both the exemption under IT Act and benefits under FCRA would be suspended until the Ministry responds to such notification.</p> | <p>An extraordinary general meeting resolution and an application to the RoC are required for approval.^[19] Thereafter, under the IT Act, Section 12A exemption will have to be reapplied for. Additionally, under FCRA, intimation must be submitted to the Ministry of Home Affairs. Both the exemption under IT Act and benefits under FCRA would be suspended until the Ministry responds to such notification.</p> |

[16] R.P. Kapur And Anr. vs Kaushalya Educational Trust, ILR 1982 Delhi 801.

[17] Section 22, Maharashtra Public Trusts Act.

[18] Section 12, Societies Registration Act, 1860.

[19] Section 8(4)(i), Section 13, Company Act, 2013.

Insights on establishing a charitable entity

Acquisition of an NGO

To avoid the hassles of registration, people sometimes acquire an existing trust or society with similar or identical objectives to their own, by replacing the old members with new members who will run the new entity. This is also beneficial to the members of the old entity because it avoids the complicated process of termination.

Note - For a company, the process of mergers and acquisitions under Chapter XV of the Companies Act would apply.

Drafting of Vision/Mission Statements and Objects Clauses

In order to maintain flexibility, the mission statement and object clauses should be drafted in broad terms to include all general objects listed in Section 2(15) of the IT Act. If the organisation later decides to undertake work that is unrelated to its original mission, it will not be required to alter its objects clause.

FUNDRAISING

Fundraising Choices

Funds can be raised from various sources. Some of them are:

Corporates: Corporate fundraising means gathering financial support from commercial companies. The corporation may donate its profits, employee time, support fundraising activities, etc. According to the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021, one must be registered as a trust, society or Section 8 company with a track record of three years of service and have both 12A and 80G registration to be eligible for the corporate social responsibility (CSR) fund.^[20] All these requirements make an organisation eligible for CSR, and it is then up to the organisation to raise funding in this manner.

Foundations: Foundations are grant-making entities. They are organised non-profits that exist for the purpose of disbursing funds to other non-profits in the form of grants in order to bring about positive change according to its own mandate.

Governments: Any monetary fund granted by Government of India to an organisation comes under the category of government funding. If an organisation wishes to obtain government funding, it needs to submit a project proposal to the ministry. If the government approves, the organisation will receive funds.

Networks: A fundraising network is a group of people who have agreed to raise money on behalf of an organisation or charity. Many organisations have multiple fundraising networks working for them.

[20] http://www.hja.legal/wp-content/uploads/2021/03/MCA_Notif_GSR.40E_22.01.2021_Co.-CSR-Policy-Amendment-Rules-2021.pdf

Retail fundraising: This is when funds are raised through small donations from many individuals. It can be collected through donations from high net worth individuals, cash box donations, bequests, and door-to-door fundraising.

Digital fundraising: This is fundraising using digital technology. It can take place over a variety of different sources, including the organisation's website, social media, online crowdfunding portals, etc.



Self-generated sources: This form of funding aims to generate income and support through an NGO's own efforts. Membership fees and subscriptions, fees for services such as training and consultancy, income generating activities related to the NGO's work such as sale of products, and income generating activities unrelated to the NGO's work like investment income from reserves and endowment funds, are all included in this category.

Note: It is interesting to note that the world's top charities in terms of revenue do not receive their major funds from large institutions or corporate houses. They mostly rely on retail fundraising, which entails a large number of people donating small amounts of money. For example, Amnesty International has a total revenue of 0.41 BI USD, with retail fundraising accounting for 75% of it.^[21] In fact, retail fundraising accounts for 75% of global charitable giving.

[21] <https://www.amnesty.org/en/2019-global-financial-report/>

Types of Donations

General: The donor likes the organisation or resonates with the objective and gives a donation. The donor leaves the use of money to the discretion of the organisation. Money donated can be used for any purpose.

Corpus: Corpus is the capital receipt, which means it is not counted towards the organisation's income. An organisation cannot accept a donation to the corpus fund unless it has the donor's written consent. When corpus donations are given, it is not treated as income in income and expenditure statements. Instead, it is recorded into the balance sheet as capital receipt. This money is supposed to stay there and donors who make corpus donations are required to be tagged under the Finance Act, 2021.

Matching contribution:

Matching is when the donor places a condition on the donation requiring the organisation to establish its credibility and competence, such as by funding half of a project on the condition that the organisation raises funds for the other half. Matching grants are frequently given by international funding organisations.

Earmarked: If an organisation engages in multiple activities but the donor is only interested in a specific activity of the organisation, then he can make an earmarked donation. For example, if there is an organisation which is involved in education of both boys and girls but the donor only wants to donate to the education of girls, then it is an earmarked fund.

Donations and Grants

Donors, (which might include governments, organisations, foundations, businesses, and individuals,) provide cash, services, and products in the form of both donations and grants to help those who are in need. Despite the fact that both are in the nature of a gift, there are some key differences:

| | DONATION | GRANTS |
|-------------------------|---|--|
| Nature | Donations are free and unrestricted contributions. The donor gives a free hand to the organisation on how it wants to spend the money - be it for programs, services or operating expenses. | Grants are for a specific purpose or project with set terms and conditions. They typically have a budget, timeline and term. |
| Approval Process | Donations can just be asked for directly, and may be granted without formalities such as a letter of request. | Grants have a complex process for approval. A grant application would have to be drafted, submitted and approved before goods or services are given. |

LEGALITY AND COMPLIANCES

Tax Exemptions

Section 12A of the Income Tax Act, 1961

What does it say?

Section 11 read with Section 12 of the IT Act provides that income from property (including income from business undertaking or voluntary contributions) held for charitable purposes will not be included in taxable income.

Section 12A(1) lays down the conditions to be fulfilled by any trust or institution subject to which it can avail an exemption under Sections 11 and 12. One of the conditions is that the trust or institution is registered under Section 12AB.^[22]

The Finance Act 2020 provides that existing trusts/institutions registered under Sections 12A/12AA must be re-registered under Section 12AB by October 2020.^[23] All registrations hereon would be valid only 5 years, subject to renewal. The renewal application must be submitted at least 6 months prior to expiry of the current registration.

Section 12AB also provides for a provisional registration, which is valid for a period of 3 years. Notably, in case of provisional registration, the trust is eligible to claim exemption from the assessment year following the financial year in which the application is made. The organisation must apply for conversion to a final registration after 6 months from the commencement of charitable activities^[24] or at least 6 months prior to the completion of the three years of provisional registration, whichever is earlier.

[22] To be filed in Form 10A (<https://www.incometaxindia.gov.in/Forms/Income-Tax%20Rules/103120000000007795.pdf>)

[23] <https://egazette.nic.in/WriteReadData/2020/218938.pdf>

[24] Form 10AB (<https://www.incometaxindia.gov.in/Forms/Income-Tax%20Rules/103520000000036034.pdf>)

As per **Section 11(5) of the IT Act read with Rules 17C of the Income Tax Rules**, to claim benefit of this exemption, organisations can invest their funds (including reserve and corpus) only in permissible investments like bank FDs, certain approved mutual funds etc but cannot invest in shares and stock.^[25]

As per Rule 17C of Income Tax Rules investments that are permissible are:^[26]

“investment in the units issued under any scheme of the mutual fund; any transfer of deposits to the Public Account of India; deposits made with an authority constituted in India by or under any law enacted either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both; investment by way of acquiring equity shares of a depository; investment made by a recognised stock exchange; investment made by a person, authorised under Section 4 of the Payment and Settlement Systems Act, 2007; investment by way of acquiring equity shares of an incubatee by an incubator; investment by way of acquiring shares of National Skill Development Corporation; investment in debt instruments issued by any infrastructure Finance Company registered with the Reserve Bank of India.”

Who does it apply to?

Any organisation that satisfies the definition of 'charitable purpose' under Section 2(15) of the IT Act may register under Section 12A to claim tax exemption on its income. If a non-profit organisation fails to register under Section 12A, all future financial transactions and receipts will be deemed taxable.

[25] https://www.incometaxindia.gov.in/_layouts/15/dit/Pages/viewer.aspx?path=https://www.incometaxindia.gov.in/Rules/Income-Tax%20Rules/103120000000007315.htm&IsDlg=0

[26] <https://www.incometaxindia.gov.in/pages/rules/income-tax-rules-1962.aspx>

Forfeiture of exemption ^[27]

Conditions under which a charitable trust cannot avail the tax exemption:

- **Section 13(1)(a)**: any income incurred by a charitable trust that doesn't come under the ambit of satisfying public benefit cannot avail exemption under Section 11.
- **Section 13(1)(b)**: any income of a trust or institution established on or after 01.04.1962 to benefit a particular community or caste cannot avail the exemption under Section 11.
- **Section 13(1)(c)**: any income of a trust or institution established on or after 01.04.1962 which is used to promote the benefits of the trust's author or any other person as mentioned under Section 13(3) is not eligible for exemption under Section 11.

Note: As per **Section 13(6)**, if a trust provides educational or medical facilities then it cannot be denied exemption only because it provides such facilities to the interested person.

- **Section 13(1)(d)**: exemption from tax to a trust or institution will be forfeited if any funds are invested or deposited otherwise than in a form or mode specified in the Act.

Note: From the next financial year, as per the Finance Act 2021, the exemption under Section 11 is available only if at least 85% of the income is applied for charitable/religious purposes in India during the year and the remaining amount is invested in the modes specified under Section 11(5).

[27] <https://legislative.gov.in/sites/default/files/A1961-43.pdf>

What do you need to do?^[28]

- Obtain PAN;
- Obtain TAN (tax deduction account number) for TDS;
- Self-certified copy of instrument creating or establishing the organisation;
- Self-certified copy of registration with Registrar of Companies or Registrar of Firms and Societies or Registrar of Public Trusts, as the case may be;
- Self-certified copy of registration under FCRA, if registered;
- Self-certified copy of existing order granting registration under Section 12A or Section 12AA or Section 12AB, as the case may be;
- Where the applicant has been in existence during any year or years prior to the financial year in which the application for registration is made, self-certified copies of the annual accounts of the organisation relating to such prior year or years;
- Where the applicant's income includes profits and gains of a business as per the provisions of Section 11(4A) and the applicant has been in existence during any year or years prior to the financial year in which the application for registration is made, self-certified copies of the annual accounts of such business relating to such prior year or years and self-certified copy of the audit report^[29] for such period;
- Self-certified copy of the documents evidencing adoption or modification of the objects;
- Note on the activities of the applicant.

Note: If the organisation is classified as having 'general public utility' under Section 2(15) of the IT Act, the business income should not exceed 20%. If an organisation's total receipts for fees for services have already reached 20%, but it still wishes to pursue projects that are generating revenue, it should consider establishing a dual entity i.e. non-profit and a for-profit entities.

[28] Rule 17A, IT Rules - shorturl.at/fqDQZ

[29] Section 44AB, IT Act

Section 80G of the Income Tax Act, 1961

What does it say?

Section 80G of the IT Act allows for donations made to specified relief funds and charitable institutions to be claimed as a deduction from donor's gross total income, before arriving at taxable income. Depending on the entity to which the donation is made, the amount that qualifies for a deduction under Section 80G can be either 100% or 50%. In other circumstances, the deduction is further limited to 10% of adjusted gross total income. Many government-run entities qualify for a 100% tax deduction, whereas non-government entities usually only qualify for a 50% deduction.^[30]

Section 80G^[31] not only provides for new registrations, but also provides for re-registration of organisations that were already registered thereunder. Such re-registration would have to come into effect by 31 August, 2021. All registrations thereon would be valid for only five years, subject to renewal. The renewal application must be submitted at least six months before the existing registration expires.

A provisional registration is also available under Section 80G, which is valid for a period of three years. Notably, in case of provisional registration, the trust is eligible to claim exemption from the assessment year following the financial year in which application is made. For conversion to a final registration^[32], the organisation would need to apply after completion of six months from the commencement of charitable activities, or at least six months prior to the completion of the three year provisional registration period, whichever is earlier.

[30] <https://www.thehindubusinessline.com/news/section-80g-deduction-an-added-incentive-to-donate-to-the-pm-cares-fund/article31233321.ece>

[31] Rule 11AA, Income Tax Rules, 1962 ("IT Rules"); To be filed in Form 10G (<https://www.incometaxindia.gov.in/Forms/Income-Tax%20Rules/103120000000007829.pdf>)

[32] Rule 18AB, IT Rules; Form 10AB (<https://www.incometaxindia.gov.in/Forms/Income-Tax%20Rules/103520000000036034.pdf>)

Who does it apply to?

Any donor who makes a donation to an organisation that is registered under this provision would avail tax benefits based on the size of their donation. It is a direct benefit to the donor rather than the organisation. The donor is thus incentivised to donate more. It only applies to donations made in cash (upto INR 2000),^[33] cheque, or draft, and not to in-kind donations.

What do you need?

Every fiscal year, organisations must file ITR-7 returns, including an audit report produced by an auditor in Form 10B.

The following documents are required for registration under Section 80G:

- The instrument/document establishing the applicant's fund or institution, such as the memorandum of association, articles of association, trust deed, rules/regulations of the applicant and those of other institutions like schools, hospitals, etc. managed by the applicant, as applicable;
- Certificate of registration with Registrar of Companies/Firms/Societies/Public Trusts etc, wherever applicable;
- Accounts and balance sheet (audited accounts and balance sheet with the audit report, where audit is required under the relevant laws) for the previous three years or since commencement, whichever is shorter;
- A note on the activities as reflected in the accounts and annual reports, with particular attention to the appropriation of income for applicant's purposes, if applicable;
- Order granting registration under Section 12A or Section 12AA, as the case may be, if any;
- Application in case applied for approval under Section 12AA, as applicable.

[33] Section 80G(5D)

Foreign Contribution Regulation Act Regulations (FCRA)

The Foreign Contribution Regulation Act, 2010 and its Rules regulate foreign donations and are applicable to all associations, groups and NGOs which intend to receive them. It is mandatory for all such NGOs to register themselves under the FCRA.^[34] The registration is initially valid for five years and can be subsequently renewed if all requirements are met.

Objective: The purpose of this Act is to ‘consolidate the law to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto.’^[35]

Definition of foreign contribution: Section 2 (h) of the FCRA defines foreign contribution as *“the donation, delivery or transfer made by any foreign source,-*

(i) of any article, not being an article given to a person as a gift for his personal use, if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be specified from time to time, by the Central Government by the rules made by it in this behalf;

(ii) of any currency, whether Indian or foreign;

(iii) of any security as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and includes any foreign security as defined in clause (o) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).”

[34] <https://fcraonline.nic.in/home/index.aspx#>

[35] https://fcraonline.nic.in/home/PDF_Doc/FC-RegulationAct-2010-C.pdf

Examples of Foreign Funds and Local Funds

Funds received from NRIs: Contributions made from personal savings by an Indian citizen living in another country (including non-resident Indians) through normal banking channels are not considered as foreign contributions. However, before accepting any such donations from NRIs, it is advisable to obtain their passport details to ascertain that they are Indian passport holders.^[36]

Funds received from OCIs: Donations made by an Indian who has acquired foreign citizenship are considered foreign contributions. This will also apply to holders of Person of Indian Origin (PIO) cards and to Overseas Citizens of India (OCI).^[37]

Funds received from citizens of a foreign country: As per Section 2(1)(j) of the FCRA, citizens of a foreign country are foreign sources.

Donations/grants from companies where more than 50% of shareholding is by foreigners: Section 236 of the Finance Act 2016 has amended Section 2(1)(j)(vi) to exclude Indian companies with foreign shareholding in excess of 50%. Prior to this amendment, all Indian companies with more than 50% foreign shareholders were considered as foreign sources and the FCRA law was applicable.^[38]

Who can receive foreign contributions?^[39]

A 'person', as defined in Section 2(1)(m) with the exclusion of those mentioned in Section 3 of FCRA, 2010, with a definite cultural, economic, educational, religious or social programme can receive foreign contribution after it obtains the prior permission, or gets registered with the central government.

[36] https://www.mha.gov.in/PDF_Other/ForeignD-ForeignD-FCRA_FAQs.pdf

[37] *Ibid.*

[38] https://fcraonline.nic.in/home/PDF_Doc/fc_amend_07102020_3.pdf

[39] https://fcraonline.nic.in/home/PDF_Doc/FC-RegulationAct-2010-C.pdf

Who cannot receive foreign contributions?^[40]

Section 3 of the FCRA bans several persons from receiving foreign contributions for any specific cultural, educational, economic, religious or social programme. These include a candidate for election; correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper; judge, government servant or employee of any corporation; members of any legislature; and a political party or office bearer thereof. The 2020 Amendment Act has also added public servants to this list.

Highlights of Foreign Contribution (Regulation) Amendment Act 2020:^[41]

No sub-granting: The amended Section 7 prohibits a person registered or having prior permission under the FCRA, 2010 to transfer foreign contributions received by it to another person. Thus, if an organisation is registered under FCRA and has received funds from foreign sources directly, it cannot pass any of this to another organisation even if that organisation is registered under FCRA. Earlier, such sub-grants were permitted and common.

Cap on administrative expenses: The amended Section 8 provides that not more than 20% of the foreign contribution received during a fiscal year can be spent on administrative expenditure. Rule 5 of FCRR 2011 provides a list of which expenses constitute administrative expenses. As per Rule 5(ii) administrative expenditure includes: *"all expenses towards hiring of personnel for management of the activities and salaries, wages or any kind of remuneration paid, including cost of travel, to such personnel"*.

However, Rule 5 also makes two exceptions:

"Provided that the expenditure incurred on salaries or remuneration of personnel engaged in training or for collection or analysis of field data of an

[40] <https://capindia.in/foreign-contribution-regulation-amendment-rules-2020-further-tightens-the-bolts/>

[41] https://fcraonline.nic.in/home/PDF_Doc/fc_amend_07102020_1.pdf

association primarily engaged in research or training shall not be counted towards administrative expenses."

"Provided further that the expenses incurred directly in furtherance of the stated objectives of the welfare oriented organisations shall be excluded from the administrative expenses such as salaries to doctors of hospital, salaries to teachers of school etc."

Freezing FCRA Account: Section 11 has been amended to provide that FCRA accounts can be frozen by the Ministry of Home Affairs (MHA) on the basis of a summary inquiry or report, or information received that the organisation is defaulting.

Aadhaar mandatory: Section 12A has been added to provide that all the board members have to provide their Aadhaar numbers to the central government.

Suspension: Section 13 has been amended to provide that organisations can be suspended for a full 360 days, instead of 180 days as was earlier the case, if any violation of FCRA is found.

Voluntary surrender of FCRA: Section 14A has been inserted to provide that in case of voluntary surrender of FCRA registration, all the assets created out of foreign contributions shall be vested in a competent government authority.

De-registration: Section 15 states that if the FCRA registration is cancelled, any assets derived from foreign contribution shall be vested in a central government authority.

Inquiry before renewal: As per the amended Section 16, an inquiry shall be conducted before renewing a registration to verify that the conditions of Section 12(4) are satisfied.

FCRA account with SBI: According to Section 17, the designated FCRA account should be with the State Bank of India (SBI), New Delhi main branch. To open an FCRA account, physical presence is not required; an FCRA account can be opened from any nearby branch. It is also possible to retain one's original FCRA account. Once money comes in, it can be transferred from the SBI FCRA account to any other account.



Highlights of The Foreign Contribution (Regulation) (Amendment) Rules, 2020:^[42]

Organisation of a political nature (Rule 3): If an organisation is of a political nature, it can't receive funds under FCRA. Organisations receiving foreign contributions shall be considered to be of a political nature if they participate in active politics or party politics, as the case may be.

[42] https://fcraonline.nic.in/home/PDF_Doc/fc_rules_12112020.pdf

Rule 3. Guidelines for declaration of an organisation to be of a political nature, not being a political party - “[1] The Central Government may specify any organisation as organisation of political nature on one or more of the following grounds: -

(i) organisation having avowed political objectives in its Memorandum of Association or bylaws;

(ii) any Trade Union whose objectives include activities for promoting political goals;

(iii) any voluntary action group with objectives of a political nature or which participates in political activities;

(iv) front or mass organisations like Students Unions, Workers' Unions, Youth Forums and Women's wing of a political party;

(v) organisation of farmers, workers, students, youth based on caste, community, religion, language or otherwise, which is not directly aligned to any political party, but whose objectives, as stated in the Memorandum of Association, or activities gathered through other material evidence, include steps towards advancement of Political interests of such groups;

(vi) any organisation, by whatever name called, which habitually engages itself in or employs common methods of political action like 'bandh' or 'hartal', 'rasta roko', 'rail roko' or 'jail bharo' in support of public causes.

[(2) The organisations specified under clauses (v) and (vi) of sub-rule (1) shall be considered to be of political nature, if they participate in active politics or party politics, as the case may be.]”

Eligibility criteria for Registration (Rule 9): The organisation must be in existence for at least three years and have spent a minimum amount of Rs. 15 lakh on its core activities for the benefit of society during the last three financial years.

Renewal (Rule 12): For renewal, organisations have to undergo a very rigorous process and have to fill form FC-3.^[43]

Revision (Rule 20): An application for revision of an order passed by the competent authority under Section 32 of the Act shall be made to the Secretary, Ministry of Home Affairs, Government of India, New Delhi on a plain paper and it shall be accompanied by a fee.

Note: List of some important forms ^[44]

- Form FC-6A: Change of name and/or address.
- Form FC-6B: Change in nature, aims, objects and registration.
- Form FC- 6C: Change in designated FCRA bank account.
- Form FC-6D: Opening additional FCRA utilisation account.
- Form FC-6E: Change in key members or chief functionary.

[43] <https://capindia.in/foreign-contribution-regulation-amendment-rules-2020-further-tightens-the-bolts/>

[44] https://fcraonline.nic.in/home/PDF_Doc/fc_rules_12112020.pdf

Key compliances under FCRA



- Register for Darpan ID on NITI Aayog portal for the association.^[45] Darpan ID is a unique identification number which is required for any FCRA related service such as registration, prior permission, renewal, change of details, and uploading of annual return etc.
- File form 6C within 15 days of opening of bank account.^[46]
- Maintain separate book of accounts for FCRA.^[47]
- Ensure that foreign contributions are reported quarterly, within 15 days of the close of the previous quarter.
- File annual returns on online form FC-4 by 31 December every year.^[48]
- Even if no foreign contribution is received, nil return should be filed.^[49]
- Any income generated from FCRA assets, be it interest or fees, must be accounted for under FCRA.^[50]



- No foreign national other than one of Indian origin should be a key member or chief functionary of the organisation.^[51]
- Fees or commercial receipts from foreign sources should not be treated as foreign contribution.^[52]
- Foreign contributions must not be invested in mutual funds or in speculative investments.^[53]

[45] <https://capindia.in/obtaining-ngo-darpan-unique-id/>

[46] <https://www.fcraforngos.org/intimation-of-change-in-fcra-designated-bank-account>

[47] <https://www.fcraforngos.org/books-of-accounts-and-method-of-accounting>

[48] https://www.mha.gov.in/PDF_Other/ForeigD-ForeigD-FCRA_FAQs.pdf

[49] *Ibid.*

[50] Section 2(1)(h) Explanation 2.

[51] https://fcraonline.nic.in/Home/PDF_Doc/fc_faq_07062019.pdf

[52] *Ibid.*

[53] *Ibid.*

Internal Policies

Why is it important to strengthen the policy framework?

Organisations are required to establish accountability and transparency and the most efficient way to ensure this is through a systematic internal policy framework. Establishing accountability relates to external and internal advantages that reduces litigation, improves client relations and increases productivity with increased satisfaction of the team members and other stakeholders.

Policy is a key pillar that brings structure to an establishment, provides guidelines, ensures consistency, and contributes to a healthy work atmosphere. Implementing these policies and procedures prepares an organisation to deal with crises, impart legitimacy to the actions of the management team, and prevent legal problems that can limit an organisation's liability. A robust policy framework also drastically diminishes scrutiny from third parties like an external agency or government body.

Important policies that organisations should know about:

Sexual harassment policy: The aim of this policy is to foster a productive and friendly work environment that is free of sexual harassment. Complaints should be handled promptly, thoroughly and confidentially.^[54] The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act) makes this policy mandatory for any company or organisation with 10 or more employees (including full-time, part-time, interns and consultants).

[54] Maria Pramila Dsouza and Kiran G Reddy, Role of Governance in Accountability of NGOs, April 2019, International Journal of Advanced Scientific Research and Management. Available at: http://ijasrm.com/wp-content/uploads/2019/04/IJASRM_V4S3_1289_188_192.pdf

Child protection policy (CPP): It ensures the highest standard of protection for children from all forms of abuse, exploitation, harm and neglect. This policy outlines common values, principles and beliefs as well as the steps that will be taken to ensure that children are protected.^[55] A Child Protection Policy should be in place for any organisation that works or deals with children. The Protection of Children from Sexual Offences (POCSO) Act and Rules, 2012, constitute the basis of the CPP. Rule 3(5) of the POCSO Rules, 2020 states that: *"The respective Governments shall formulate a child protection policy based on the principle of zero-tolerance to violence against children, which shall be adopted by all institutions, organisations, or any other agency working with, or coming in contact with children."*



In addition to this, a plethora of other child-related laws also have to be taken into consideration, while drafting the policy. These include the Right of Children to Free and Compulsory Education Act, 2009, the Juvenile Justice (Care and Protection of Children) Act, 2015, the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, the Rights of Persons with Disabilities Act, 2016 and the Mental Healthcare Act, 2017, the United Nations Convention on the Rights of the Child, 1989, the Constitution of India, 1950, the Indian Penal Code, 1860, the Information Technology Act, 2000, the Immoral Traffic (Prevention) Act, 1956, the Prohibition of Child Marriage Act, 2006 and the Code of Criminal Procedure, 1973.

[55] *Ibid.*

Privacy policy (Data Protection): This aims to secure and protect data stored, consumed, and managed by an organisation.

Financial policy: Financial policy involves recording financial transactions, monitoring and controlling expenditures, satisfying statutory reporting requirements, submitting timely and accurate financial and management reports to donors and grant-makers.^[56]

Whistleblower's policy: This policy provides credible and reliable mechanisms to safeguard the interests of whistleblowers and provides an avenue through which they can report actual or potential violations which are likely to cause financial or reputational loss to the organisation.



[56] *Ibid.*

Leave policy: The leave policy is created to give employees a clear picture of the number of leaves an employee is allowed to take annually as well as in particular circumstances, such as maternity and paternity leave. Organisations are also required to have an annual list of holidays.

Environment, health & safety policy: The aim of this policy is to ensure occupational health and safety for all employees.^[57]

Cyber/IT policy: It is the duty of the management to ensure they are protecting themselves, the staff and the systems from cyber-security vulnerabilities.^[58]

Intellectual property policy: This policy aims to clearly specify the position of the organisation with regard to the ownership, control and transfer of the IP created and owned by it. It also reduces the risk of infringement of IP rights of the organisation and third parties.

Employee manual: This manual sets down the policies, conditions, rights and obligations of employees. From the time of contract, each employee will have access to this policy, in order to be able to adhere to it with full knowledge and information.^[59]

[57] Alps Akdas, Occupational Health and Safety Responsibilities of Non-Governmental organisations. 10 November 2020, Erdem Legal, Available at: <https://erdemlegal.com/en/occupational-health-and-safety-responsibilities-of-non-governmental-organisations/>

[58] Stan Mierzwa, James Scott, Cybersecurity in Non-Profit and Non-Governmental organisations, February 2017, Institute for Critical Infrastructure Technology, Available at: <https://icitech.org/wp-content/uploads/2017/02/ICIT-Brif-Cybersecurity-and-NGOs.pdf>

[59] HR Policies, Serve Train Educate People's Society Available at: <http://www.steps.org.in/images/Resources%20-%20STEPS%20NGO%20Policies.pdf>.

The guidelines provided in this handbook include a combination of primary research and expert opinions of experienced stakeholders. The handbook was also inspired as a key takeaway from a seminar organised by iProbono, with industry experts Noshir H. Dadrawala and Rajesh Bhattacharjee. The session was recorded and is available on [iProbono's youtube channel](#).



Noshir Dadrawala

Noshir is Programme Director, Legal & CSR Compliance at Centre for Advancement of Philanthropy (CAP). He is a leading consultant in the field of legal compliance for nonprofits and corporate social responsibility. He has a very diverse and deep understanding and experience of the law, matched with a practical background of consultations with over 1,000 nonprofits over the past 32 years.



Rajesh Bhattacharjee

Rajesh is the Chief Executive Officer at Rootbridge, an organisation that partners with non-profits to provide affordable, quality-driven, and sustainable retail fundraising solutions. He has been a non-profit fundraiser for over two decades, providing fundraising and senior management leadership to top charities like Azim Premji Philanthropic Initiatives (APPI), Amnesty International, Care and Room to Read.

ABOUT **iProbono**

Our mission is to enable people to access their rights in pursuit of a just society. We provide pro bono legal support to NGOs on issues as varied as intellectual property disputes, regulatory compliances, reviewing contracts, drafting internal policies, etc. This allows NGOs to dedicate their financial resources to the core area of their work.

Additionally, through our panel of litigating lawyers, we represent hundreds of vulnerable individuals in the Supreme Court as well as High Courts and Trial Courts across India. You can read more about our work [here](#). If your NGO requires legal support, you can reach us at communications@i-probono.com.

