Position on Trust Bill and NGO Policy Guidelines (2007)

Joint submission of Concerned NGOs/CSOs in Ghana[1]

A. Background

The Government of Ghana in 1993 attempted to introduce an NGO bill to regulate NGOs/CSOs which was found to be unfavourable for the effective functioning and growth of NGOs/CSOs in the country. Consequently, the bill was withdrawn. In 2000, Government collaborated with NGOs/CSOs through a series of workshops, seminars and meetings to produce a policy document – *Draft National Policy for Strategic Partnership with NGOs/CSOs* – to regulate NGO activities in the country. The first document was released in 2000 and revised in 2004.

At a joint meeting between NGOs/CSOs, the Ministry and the Legislative drafter from the Attorney General's Department, it was agreed that\ the *Draft National Policy for Strategic Partnership with NGOs/CSOs* would form the basis for sections of the law related to NGOs/CSOs. In 2006, the Government introduced a *Trust Bill* which included the regulation of NGOs/CSOs. Numerous organizations came together under the platform of the Ghana Association of Private Voluntary Organizations in Development (GAPVOD) and wrote to the Ministry expressing concerns about including NGOs/CSOs within the Trusts Bill. The Government, however, went on to formulate the *Draft NGO Policy Guidelines 2007* document, which is meant as subsidiary legislation for the Trust Bill. This, combined with the President's mention of passing this legislation in the last State of Nation Address, affirms Government's determination to have the law passed in its present state despite NGO/CSO concerns.

In view of these developments, on 11th May 2007, the concerned NGO/CSO sent another letter to the Ministry requesting a hold on the process, while the community reviews the policy guidelines in detail and builds broad consensus on their position. The present NGO Joint Position Paper reflects the worries of the NGO/CSO community as it requests further consultations with Government on the matter.

B. Summary of Position

At the onset, it is important to highlight that NGOs/CSOs welcome the attempt to provide a national regulatory framework. Currently, NGOs/CSOs are put together with profit making companies for the purpose of regulation. The separation of NGOs/CSOs from for-profit companies for regulatory purposes is an improvement, both conceptually and practically. However, the proposed regulatory framework as reflected in the Trust Bill and the NGOs Policy Guidelines (2007), if implemented, would stifle and constrict civil society in Ghana and the rich contribution it is making to development in the country.

[1] List of concerned organizations signing on is annexed to this document

We have three key recommendations, which are set forth in detail in this position paper. They are as follows:

1. **NGO Legislation should be separated from the Trust Bill**
2. **NGO Policy guidelines should be enabling, not constricting**
3. **The new Regulatory Framework should be based on the *Draft National Policy for Strategic Partnership with NGOs/CSOs (2004)***

C. Detailed Position

Recommendation 1
NGO Legislation should be separated from the Draft Trust Bill

The Draft Trust Bill seeks to regulate, not only public and private Trusts but also, NGOs/CSOs. This is by reference to the Definition Section clause 117, which provides that a "'trust'" includes an executorship, administratorship, guardianship of children or the office, committee or receiver of the estate of a person with mental disorder or a person Incapable of managing that person's own affairs, a charitable trust *and organization* [NGO]". The following clearly outlines why regulating NGOs and Trusts under one law will not work:

1. Narrow conceptualization of NGOs/CSO

The provisions of the Trust Bill show that they are premised on a mistaken perception of what NGOs/CSOs are, their diversity, what they do, the challenges they face and the appropriate options for their regulation. NGOs/CSOs in Ghana vary enormously according to their purpose, philosophy, sectoral expertise and scope of activities. Three broad types may, however, be distinguished from the maze: a) NGOs/CSOs that concentrate on Service Delivery to individuals, groups and communities; i.e. Self-help, Relief and Development oriented; b) NGOs/CSOs that work more to engineer individual, group and community rights, economic and social empowerment i.e. capacity building, accountability, policy analysis and advocacy NGOs/CSOs; c) NGOs/CSOs that locate safely in both categories.

An examination of the Trust Bill reveals that it is the first conceptualisation of NGOs/CSOs and CBOs that informs it: NGOs/CSOs as self-help, relief and development oriented groups working solely and directly to assist government agencies to fulfil their social service obligations to the citizenry. This was true in Ghana until the mid-1990s.

NGOs/CSOs in Ghana have experienced a major shift in focus, character and importance for over a decade and a half now. They concentrate not only on self-help and livelihood projects, but also on campaigns and advocacy projects for accountability, transparency, non-discrimination and other issues that promote good governance, respect for human rights and the delivery of the right levels and right quality of social services. The targets of these actions are not only government but also the private sector operatives such as mining, timber and industrial fishing companies. Even the NGOs/CSOs that still concentrate on self-help and livelihood projects also engage in advocacy activities in support of their goals. Therefore the new role of NGOs/CSOs in the development equation has been enhanced.

2. The convergence through oversight under one Ministry is unlikely to be achieved

First, Government states that it is better to have NGOs/CSOs registered and oversighted by the same ministry, the Ministry for Manpower Youth and Employment (MMYE), to prevent regulatory duality. This makes complete sense. Public and Private "Trusts", by their nature, are best administered by the Registrar-General under the Ministerial oversight of the Ministry of Justice. Although the Draft Trust Bill is said to be under the ministerial oversight of "the Minister to whom functions under this Act are assigned by the President" (Clause 116), the tenor of the Bill and the NGO Policy Guidelines affirm that it is the MMYE that will perform these functions. Government's aim to bring all "Trusts" and "Trust-like" entities under the oversight of one commission and one ministry will not be achieved by coupling NGOs/CSOs with Trusts in one law.

It is possible that the fears being expressed about regulatory non-convergence will be solved by the President designating (under Clause 116 of the Bill), one ministry (say the Ministry of Manpower Youth and Employment or the Ministry of Justice) and charging it with oversight of both "Trusts" and "NGOs/CSOs". Yet, this solution will end up the same way that the non-operative convergence created by putting together for-profit and non-for-profit agencies under the regulatory oversight of the Registrar-General of Companies and the Ministry of Justice. As noted in the Memorandum to the Bill, the Registrar was "clearly over-burdened having regard to the enormous work on [for-profit] companies alone" and simply ignored the not-for-profit sector that was then very minuscule.

This time round we should not couple NGOs/CSOs with other things, especially as the dangers that attended the previous coupling exercise attend the current attempt also.

3. Provisions on Trusts may be inappropriately applied to NGOs/CSOs

NGOs/CSOs and Trusts put together in one law also has very grave legal consequences in the actual operationalization of the law. A most enduring and age-old rule of statutory interpretation is that a statute must be interpreted or construed as a whole. The real effect of this rule is that provisions from any part of the statute may be drawn upon and used for

the interpretation of any other part of the statute. In effect, Trusts and NGOs/CSOs in one bill will ensure that all the rules applicable to the one are also, through the mechanism of statutory interpretation, potentially applicable to the other. Thus, all the provisions regulating Trusts in the Trust Bill may be made partially or wholly applicable to NGOs/CSOs. One practical effect of this is that the traditional heavy hand of the courts in the management of very minute aspects of public and private trusts will be easily applied to the management of NGOs/CSOs in Ghana.

An example is provided in Clause 46 of the Bill which provides that the "The Commissioner may apply to the Court to appoint trustees of a trust or an [NGO] where there are no trustees or a vacancy occurs in the number of trustees of a charitable trust or [NGO]." This makes perfect sense in the case of a Trust, but not in the case of an NGO/CSO. NGOs/CSOs have their own internal governance structures that allow the Directorships/Board Memberships of the NGOs/CSOs to be filled. This is not necessarily the case with a Trust. There are many Trusts that do not provide for how vacancies in the group of Trustees may be filled. Thus, it makes sense for the Commissioner to seek to fill such vacancies. In the case of NGOs/CSOs, this provision poses a problem and represents an unnecessary intrusion into the affairs of NGOs/CSOs when the Commissioner is given the mandate to decide who sits on the board.

4. Bill puts together incompatible constructs and gives insufficient attention to NGOs/CSOs

Generally, the greater part of the Bill, including the Preamble, is biased in favour of Trusts. The NGO/CSO part is not adequately reflected. No more than 10% of the text of the Bill is devoted exclusively to NGOs/CSOs.

It is clear that the Bill has bundled together quite incompatible constructs and has been compelled to concentrate on one whilst making the other a less prominent partner in the scheme of things. The merger of Trusts with NGOs/CSOs is very artificial in the draft bill. Clauses 1-8 deal with Trusts; 9-13 deal with NGOs/CSOs; 14-27 deals with Trusts with very few passing references to NGOs/CSOs; and the rest of the bill from clause 28-117 (except clauses 41-49 which deal with NGOs/CSOs and 93-117 which deal with both) launches into a discussion of the intricacies of Trusts.

While the Bill contains detailed provisions with respect to the internal governance of "trusts," it is largely silent with respect to the internal governance of NGOs/CSOs. The Bill also makes provision for the establishment of an independent body to oversee the activities of trusts and NGOs/CSOs but note that the chief executive of the body is designated as the *Trusts* Commissioner.

5. Governance of the Trust Commission

The Governing Council/Board of the Trust Commission has too few representatives from CSOs. Even if we count the representative from the Faith-Based Organizations (FBOs) as a CSO representative, it brings the total number to three (3) clear CSO representatives in

a Board numbering nine (9) members. If we take the representative of the FBOs out, it comes down to two (2) clear NGO/CSO representatives.

What is worse, the representative from the FBOs is nominated by the President and those of CSOs by the MMYE. All the other members of the Board of the Commission are nominated for appointment by the President, the Minister for Manpower, Development and Employment or the Minister for Women and Children's Affairs, and they are all appointed by the President.

If the Trusts Commission is to regulate NGOs/CSOs, then the latter should have greater representation amongst the proposed numbers for the Board of the Commission. The Government's response to this proposal may be that the Bill is also meant to regulate Trusts. This answer actually would make the case, once again, for a separate law on NGOs/CSOs.

There are other worrying provisions related to the governance of the Commission. It is provided in Clause 18(5) of the Bill that "The President may by letter addressed to a member [of the Board of the Commission] revoke the appointment of that member." Again, Clause 23 provides that "The Minister may give policy directives in writing to the Commission and the Commission shall comply." These provisions make it abundantly clear that the Commission is not meant to be an independent body. It might be useful to remember that NGOs/CSOs mobilised to thwart the passage of the 1993 NGO Bill chiefly because they objected to the creation of a National Council on NGOs/CSOs headed by a Minister of State and dominated by Government appointees with the power to micro-manage NGOs/CSOs and to de-register NGOs/CSOs who refused to cooperate with Government.

6. The Role of Commissioner and Commission becomes confusing when they have to oversee both Trusts and NGOs/CSOs

The supervision of the operation of trusts and NGOs/CSOs is a confusing mandate for the Commission, since each operates in quite different ways. The difference between a trust established for the benefit of a minor and a large advocacy organisation with hundreds of employees who work to empower millions of citizens to engage with Government on governance and livelihood issues is striking indeed.

The Commissioner would need to possess a mix of skills to better perform the myriad of functions assigned him/her effectively. To buttress our point, the same Commissioner is assigned the following tasks under the Bill:

I. Be an administrator of registries;
II. Resolve "complaints against [NGOs/CSOs]" [Clause 25, subsection (3)];
III. Have technical expertise to carry out delicate trusteeship responsibilities [Clauses 27, ff.];
IV. Act as a judicial trustee;
V. Act as a custodian trustee;

VI. Act as a constructive trustee;
VII. Act as an ordinary trustee;
VIII. Act as trustee for persons with mental disorders [Clause 27];
IX. Be available for appointment as a new, sole or additional trustee under the same conditions as an ordinary trustee [Clause 34];
X. Have the same powers, duties, liabilities, rights and immunities as a private trustee acting in the same capacity;
XI. Be subject to the same control of the courts as any other trustee;
XII. Be available to be directed to oversee settlement of the property of a person with mental disorder [Clause 36];
XIII. Be empowered to accept probate of a will or letters of administration [Clause 37];
XIV. Be available to be ordered by a court, upon applications to the court by executors or administrators of the estate of a deceased person, for an order of the court to transfer the estate to the Commissioner to administer.

It is clear that the Commissioner and the Commission risk concentrating on their numerous responsibilities relating to Trusts and neglecting their other role of supervising NGOs/CSOs.

7. NGOs/CSOs are likely to spend more time in the Courts

The mechanism of a Trust is such that someone has to constantly watch over it less there is theft or dissipation of trust property through the conscious or unconscious acts or omissions of the trustee. This entity is the court. This is why there are references to the court in many clauses all through the Bill. In addition, an omnibus clause (Clause 109) provides that "A person who is aggrieved by an act, omission or a decision of the Commissioner in relation to a trust or an [NGO] may apply for redress to the Court which may make the appropriate order".

Litigation is expensive, unpredictable and often disruptive of relationships. NGOs/CSOs need not dissipate their time, resources and energies on court proceedings. That has not been the case and is not in the best interest of NGOs/CSOs and Ghana.

For all these reasons, the inclusion of NGO/CSOs in the Trust Bill will not work. It should be acknowledged that the NGO/CSO sector in Ghana today is far too important and sophisticated to be effectively coupled with other sectors, especially when they are so coupled as a less prominent partner in an uncomfortable relationship.

Recommendation 2
NGO Policy Guidelines should be enabling, not constricting

The presence of a vibrant civil society is one of the hallmarks of a healthy democracy. In Ghana, the important role civil society is playing in the social, economic and political development of the country is well established. The legal framework which governs the operation of these organizations, should therefore, enable CSOs to thrive and develop

constructive relationships with Government. Unfortunately, the overall impact of the current proposed legal framework is more constricting than enabling. The understanding behind the drafting of the draft national policy was that it would serve as the basis for the formulation of a new NGO law. This has not happened. With respect to the draft NGO Policy Guidelines, these are severe and are contrary to the provisions on Freedom of Association and Assembly protected under Article 21(1) (e) of the 1992 Constitution.

The specific provisions are as follows:

1. **Guidelines provide for excessive intrusion by Government in NGOs/CSOs Activities**

In support of the fear that the Guidelines will give Government the power to excessively interfere in the work of NGOs/CSOs, one may refer to paragraph 6 on project formulation and implementation; paragraph 7 on Registration of Projects; paragraph 8 on Details of programmes; and paragraph 10 on Monitoring and Evaluation of Projects.

All these processes are subjected to the penetrating searchlight and prior endorsement of the (MMYE). According to the terms of paragraph 8(2), "A project shall not be implemented unless it has been approved by the relevant Ministry and registered with the Ministry [of Manpower, Youth and Employment (MMYE)]" This means that if an NGO, as part of its accountability programme, decides to do a project on the financial accountability of the MMYE, it must first get approval from the minister for MMYE before it embarks on the project. Secondly it must be monitored by the MMYE throughout the project period. Again, according to the terms of paragraph 11 of the Guidelines, "assets transferred to build the capacity of an organization [NGO] should be done through the [MMYE] which will identify the operation criteria". Excessive control will not promote innovation and would discourage INGOs/CSOs from coming into and operating in Ghana. Moreover, provisions for changing activities are overly rigid.

2. **Guidelines would render it difficult for many legitimate NGOs/CSOs to register and operate:**

Many types of organizations would find it difficult to comply with the unduly restrictive provisions of the policy guidelines. For example, many international NGOs/CSOs considering registering in Ghana would be deterred by a registration fee of $500,000, annual renewal of $200 and Government assumption of assets after the organization has left the country. Similarly, small organizations, particularly those based outside of Accra, may be deterred by the requirement that to be registered an organization must have three full time staff and the requirement to renew their registration periodically, ostensibly in Accra. Probably one of the most vulnerable groups of organizations under the current policy guidelines is advocacy organizations.

The registration process itself is unwieldy and will be compromised as regards integrity, speed and efficiency. The validity of registration certificates should be a minimum of three years to give organizations time to grow.

The process of registration under both the Trust Bill and the regulations leaves lots of discretionary power with Government. Unless the areas of discretion are removed, then these organizations are vulnerable to not having their registration renewed for vague reasons.

3. Definition of NGOs/CSOs is problematic

The definition of NGO/CSO here is at variance with the definition in the Bill. The definition does not capture the nature of the NGO landscape in Ghana especially where policy advocacy is concerned. The suggestion that NGOs/CSOs should be non political and should not have a religious or ethnic bias does not conform to international best practice definitions. NGOs/CSOs that engage in human rights, democracy and governance related issues would not qualify under this definition since their mandate relate to engaging governments on policy issues that have a political angle to it. Secondly the definition will exclude faith-based organizations. An appropriate formulation would be to replace non-political activities and religious activities with a phrase such as "non-partisan".

4. Guidelines make the Commission subordinate to the Ministry

It appears the Trust Commissioner has no effective role as it will have to pass on most important issues for decision to the Ministry. The Ministry superimposes its power totally over the Board. Clause 2 (1) states under eligibility criteria that the NGO's mission etc must be in conformity with the development policies prescribed by the Board. This gives the Board overbroad powers to control NGOs/CSOs and not to recognize those whose policies do not conform to that of the government, thereby infringing on their independence and autonomy.

5. Guidelines appear to be particularly unfriendly to International NGOs

As Development Assistance levels are generally dropping and most donors are now increasingly moving towards "common basket" support mainly to government, it is the INGOs/CSOs that have been the main channel of support to local NGOs/CSOs. We need to look at the guidelines again regarding registration fees, import duty waiver, taxation, etc.

Recommendation 3

The new Regulatory Framework should be based on the *Draft National Policy for Strategic Partnership with NGOs/CSOs (2004)*

The NGO Policy document is a policy consensus between Civil Society and Government for promoting "durable partnerships" arrived at over the course of five years. There are also other documents doing the rounds including some that have reached the stage of a draft bill for NGOs/CSOs.

The current draft of the NGO Policy recommends the provision of a single registry for all NGOs/CSOs at the Registrar–General's Department; accreditation from the MMDE; providing NGOs/CSOs access to various benefits; Government support of funding efforts by NGOs/CSOs; and accountability on the part of recipient organizations. The draft also recommends the establishment of a "National Commission for NGOs/CSOs (NCNGO) whose membership would include both Government and NGO representatives, as well as other "stakeholders." The NCNGO would undertake the accreditation of NGOs/CSOs on behalf of MMYE, and provide various forms of support and encouragement to the sector, as well as advice to the Government on NGO-Government relationships, working closely with MMYE. NGOs/CSOs will provide annual reports of their activities and finances to the NCNGO and the MMYE may access these. As part of an effort to decentralize NGO oversight and registration, NGOs/CSOs would also register in the districts within which they work. NGOs/CSOs would also be encouraged to coordinate their activities with one another and the various levels of government throughout the country. There is provision for involving "Development Partners" in the planning and development processes to ensure maximum, coordinated, and efficient use of resources.

If the NGO Policy is used as a basis for an NGO Bill for Ghana, it will constitute one of the few instances where laws are passed on the basis of people's lived experiences (as all laws should be), in this case the lived experiences of NGO operatives and Government officials who deal with them. Fifty years after independence, we must be capable of generating the key building blocks of any piece of legislation from within Ghana and ensure that the legislation is directed at solving the particular social problems that the country encounters. This is what the NGO Policy seeks to do. This is not what the Trust Bill seeks to do.

In developing the new law, NGOs/CSOs will work with Government to provide differential treatment, in the details, for NGOs/CSOs and CBOs and possibly for different types of NGOs/CSOs and CBOs. NGOs/CSOs are very different out there and it is necessary to prove a legislative framework that is liberating and facilitative of their enterprise. Small CBOs are currently over-regulated under the law (as they will be under the Trust Bill), whilst big ones are under-regulated. A legislative framework that takes account of the diversity (in size and in function) of the sector will be far more useful that a one-size-fits-all legislative framework.

D. Conclusion

Without NGOs/CSOs, the current development trajectory of Ghana and her development partners will fail. NGOs/CSOs are now so important a sector that they are mentioned by name in Acts of Parliament. The Ghana Growth and Poverty Reduction Strategy I and II also recognize the critical role of NGOs/CSOs in Ghana's development. Public Sector Reform recognizes NGO/CSOs policy role in governance and so does the MCA process and many other policy documents. Also, at the continental level, AU gives prominent place to NGO/CSOs as reflected in, for example, the Constitutive Act and the NEPAD document. Ghana is considered a role model for democracy and governance from which other countries are learning. To enact a law regulating NGOs/CSOs without their participation and input would be a real setback and impact negatively on the country's reputation.

NGOs/CSOs in Ghana have morally, legally and in practice, earned their space. It is the role of CSO in the successful implementation of APRM process that has put Ghana at the forefront in terms of good governance in the conclusion. NGOs/CSOs will work to preserve that space and to improve upon it by being non-profit, non-partisan, distinct, and credible.

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