



The Foundations (Guernsey) Law

Consultation Document

Commerce and Employment Department
11 April 2011

Introduction

In December 2006, the States of Guernsey approved a States Report prepared by the Commerce and Employment Department regarding a review of Trust Law in Guernsey. Included in the proposals for reform of Guernsey's Trusts Law were recommendations on the introduction of foundations. The introduction of foundations legislation would provide additional choice and flexibility for the fiduciary sector, and its clients, whilst allowing Guernsey to continue to meet international standards through high standards of transparency and compliance.

The States resolved, in principle, that foundations should be introduced and directed the Commerce and Employment Department to provide a further States report on the detail of how a Guernsey foundation would operate in addition to preparing the relevant legislation. Working with the Law Officers Chambers the Department has prepared draft legislation for consultation. The Department intends to finalise the legislation and provide a further States Report for presentation later this year.

The purpose of this consultation document is to receive feedback on the draft Foundations Law and to ask for industry feedback on certain key questions.

This consultation document is arranged as follows:

1. Part One – What are foundations? This section provides some general comments on how foundations operate. Consultees are asked to provide some general feedback to the Department on the potential markets for Guernsey Foundations?
2. Part Two – Major Policy Questions. This section includes a discussion on a number of key issues which have been identified while the legislation has been drafted on which the Department would like specific feedback in order to resolve some key policy questions for the legislation.
3. Part Three –The Layout of the Law. This section contains a broad discussion on the layout of the draft legislation and provides further background on the legislation. Feedback from this section will assist in finalising the States Report.

4. Part Four – Further Reading. This section list a number of further sources that consultees may find useful background reading. It also provides links to the legislation in other jurisdictions which may provide useful comparison.
5. Part Five – Summary.
6. Appendix 1 - contains a consolidated list of all consultation questions.
7. Appendix 2 – contains the draft Foundations (Guernsey) Law.

Part One - What are foundations?

Private Foundations have existed in Europe since at least 1926. They were introduced to provide a civil law equivalent to common law trusts. Since the 1990s a number of common law jurisdictions introduced foundations legislation, for example Panama in 1991 and the Bahamas in 2004. The Foundations (Jersey) Law came into force on 17 July 2009.

There is no single legal definition of a foundation however it may be described as a legal entity which is created when a person provides assets for a specific purpose. The foundation holds the assets for purposes set out in its constitutive documents and is administered according to contractual rather than fiduciary principles – principles that make them acceptable to people who are uneasy with using trusts. The foundation is a distinct legal entity but unlike a company, it has no shareholders.

Foundations are structures that can be used in similar circumstances to traditional family trusts but are familiar to clients and intermediaries with a civil law background. As foundations, unlike trusts, are legal entities they will, in accordance with Guernsey's legal tradition, be entered onto a public register which will be administered by the Guernsey Registry.

Foundations generally have the following common features:

- Have legal personality and in many jurisdictions are inscribed on a public register.¹

¹ There are some jurisdictions where purely private foundations are not required to register with the authorities, but instead are formed by notaries public who certify the creation of the foundation. This option was considered but the Department considered that registration with certain details being publicly available was appropriate for Guernsey.

- Are formed by a founder who provides the initial assets of the foundation known as the endowment.
- Holds assets for the purposes set out in its constitutive documents and is administered according to contractual rather than fiduciary principles.
- Are run by a council (or board) which is responsible for fulfilling its purpose.
- Has no shareholders and may or may not have beneficiaries depending upon its purpose.
- Beneficiaries have contractual rights to enforce the operation of the foundation in accordance with its constitutive document – rather than propriety rights in its assets, or equitable rights such as are available to beneficiaries of trusts.
- May also have an advisor or protector if its rules so provide.

Market demand

The demand for foundations appears to arise primarily from a need for structures that can be used in similar circumstances to traditional family trusts, but are familiar to clients and intermediaries with a civil law background. There is a demand for foundations which are domiciled in a well regulated, co-operative and transparent jurisdiction.

Consultees are asked to consider whether they would use Guernsey foundations and how many of their clients they consider would be interested in establishing Guernsey foundations.

Question 1: Is there a market demand for foundations in Guernsey?

Question 2: How many of your clients, or prospective clients, would be interested in setting up a Guernsey foundation?

Question 3: Can a Guernsey foundation be used for other financial services?

PART TWO: Major Policy Questions

This section highlights the major issues where key policy decisions need to be taken in the draft Law. In determining the best way of implementing a Guernsey Foundations Law the Department, in discussions with the Law Officers have identified a number of issues where different policy options could be legitimately pursued. In this section some of the more major issues are specifically highlighted and the policy options are explored. Consultees are asked to provide feedback on the policy options and explain whether they are content with the approach taken by the Department or would prefer a different policy solution.

One of the key goals of the Department is to create legislation which would be treated as a foundation in a civil law jurisdiction. There has been academic criticism of foundations legislation in some competitor jurisdictions as being too similar to companies to be viewed as genuine foundations by a civil law court². That creates a risk that these entities could be treated as companies rather than as foundations in some civil law jurisdiction which would create uncertainty and undermine the rationale for using a Guernsey foundation. Addressing these concerns has led to the Guernsey legislation being significantly different to that which has been introduced elsewhere by competitor jurisdictions. Many of the consultation questions in this section are a result of that policy decision and should be viewed in that context.

Consultees are asked to consider the implications of each of the issues raised. A summary of the questions to be considered by those participating in the consultation exercise is included in Appendix 1.

i) Initial Capital

Section 1 (a) of the draft law refers to a Guernsey foundation being created by 'endowing the foundation with its initial capital'. This capital may comprise any property wheresoever created (Section 2)

In civil law countries it is expected that the foundation will be endowed with an initial capital in order to be formed. The foundation cannot be formed without some form of endowment demonstrating that the property of the foundation is held

² See F Nosedá, "The Foundations (Jersey) Law, 2009: A civilian perspective" (2010) the Jersey and Guernsey Law Review, p48

independently of its founder. In comparison, the Foundations (Jersey) Law 2009 does not include such a requirement – and permits the endowment to occur at some point in the future following the formation of the foundation. Permitting a foundation to be formed on registration of the Charter without requiring that charter to nominate the initial capital would be consistent with the approach taken in Jersey (and some other jurisdictions with a common law tradition)

However in civil law jurisdictions it is highly unusual for a foundation to be formed without the allocation of an initial endowment. It could be considered that there can be no foundation created until property has been identified that can be given to the foundation. The lack of initial capital may be a barrier to Guernsey foundations being recognised as foundations in civil law jurisdictions and instead treated as something more akin to a company.

At the present time the Department has concluded that on balance it is preferable for there to be a requirement that the foundation be endowed with its initial capital at the time of formation but is seeking the views of the industry on whether that is appropriate.

Question 4: Is it necessary for a Guernsey foundation to have an initial capital?

ii) **Reservation of powers to the founder**

Certain foundations are created where the founder may wish to exert a degree of control, or influence, over the activities of the foundation upon formation. This is usually facilitated by the founder reserving certain powers at the time of formation. However there are limits to the extent to which a founder can reserve powers and the foundation to remain valid.

In a civil law tradition the foundation is created to serve a purpose nominated by the founder. Once created the foundation is to be independent and free of influence or control of the founder in how it goes about achieving its purpose.

In this sense foundations differ from companies in that they not only have separate legal personality from their shareholders, but they are also expected to be completely independent. However several civil law jurisdictions do permit the founder to reserve certain powers without invalidating the foundation itself.

The Department has taken the view that reservation of certain powers is appropriate. Section 11 of the draft law sets out the powers which may be reserved to the founder without invalidating the foundation. These powers allow the founder to revoke, vary or amend the terms of the constitution; revoke, vary or amend the purpose of the foundation; and the power to revoke the foundation – provided that these powers are detailed in full in the foundation charter.

Different jurisdictions allow the reservation of powers to the founder but the length of time that this is permissible for varies. In Liechtenstein this is for the life of the founder and in Switzerland it is limited for 20 years.

Corporate Founders In Liechtenstein, its new foundation law provides that a corporate founder may not reserve any founder's rights to revoke or modify a foundation. Austria has adopted the same approach.

Switzerland has taken the view that, as a concession, a corporate founder may retain founder's rights for a maximum of 20 years.

Unrestricted reservation of powers could be considered contrary to the purposes of a genuine civil law foundation. The Department has considered that the founder ought to be able to reserve powers, however that reservation should be limited in time as follows:

- For a natural person powers may be reserved during the founders lifetime,
- For a corporate founder, powers may be reserved for a period of 30 years.

At the expiry of those periods the reservation ceases to be effective and the founder may not exercise any of those reserve powers.

Question 5: Should reservation of powers to the founder be permissible?

Question 6: Should corporate founders be entitled to reserve power?

Question 7: Are the periods of reservation appropriate?

Question 8: Should different periods be nominated, if so how long should those periods be and why ?

Question 9: Should reservation of powers for a corporate founder be permissible ? If so, for how long ?

iii) **General Fiduciary Duties**

The term 'fiduciary duty' is well understood in the context of common law. It is generally accepted that a person who owes a fiduciary duty owes a higher duty than ordinarily exists such as a duty to take reasonable care. Generally a person who owes a fiduciary duty to someone has a duty to put the interest of the person to whom the duty is owed above everything else.

In the terms of a foundation it is quite clear that the governing body of the foundation – the council – should properly owe a fiduciary duty to the foundation itself. However there remains a question of the extent to which that fiduciary duty ought to be owed to beneficiaries.

According to F Nosedo in his article 'the Foundations (Jersey) Law, 2009: A Civilian Perspective' which was published in the Jersey and Guernsey Law Review in 2010, the fact that the Jersey Foundation law negates any form of fiduciary duty within a foundation structure, reinforces the perception that Jersey applies two standards : one for trusts (high) and another for foundations (low).

The approach taken in the draft law is as follows:

- The draft law envisages two potential types of beneficiary, enfranchised and disenfranchised beneficiaries. Enfranchised beneficiaries have certain rights to information about the foundation while disenfranchised beneficiaries are not

entitled to information. If a foundation has disenfranchised beneficiaries then the foundation must appoint a guardian.

- The foundation council owes a fiduciary duty to the foundation itself. The council does not owe a fiduciary duty to the beneficiaries as those beneficiaries may not have any interest in the foundation, and indeed may not even be aware of the fact that they are beneficiaries.
- Where appointed, the guardian owes a fiduciary duty to the founder and to the beneficiaries to enforce the constitution. The guardian also has power to bring an action against the Council in the name of the foundation to ensure that the Council carries out its functions in accordance with the constitution

The Department believes that this provides an appropriate balance between ensuring that the Council can independently exercise its judgement to manage the foundation while providing appropriate protection to the beneficiaries.

Question 10: Is this allocation of fiduciary duties appropriate?

Question 11: Should the foundation council also owe a duty to the beneficiaries? If so what should be the scope and content of that duty?

iv) **Section 21 – duty to preserve and enhance the value of foundation property**

Section 21 of the Draft Law creates a statutory duty for the Council to preserve and enhance the value of the property. This duty is of course subject to the terms of the Constitution and the Law itself. This concept has been drawn from the Trusts (Guernsey) Law 2007. During the preparation of the draft there has been a question over whether or not this concept is appropriate for a foundation. It may be that these trust concepts such as this (and the issue of class interests set out below) are not appropriate for foundations. Feedback is sought on whether or not section 21 is appropriate for inclusion in the draft Law.

Question 12: Do you consider that section 21 is appropriate for inclusion in the Law? Please explain your reasons?

v) Section 26 - Power to Sue and Compromise

Section 26 is also inspired by Trust Law concepts where it is necessary to make it clear that a trustee has certain powers to bring legal action on behalf of the trust. In the draft Law section 26 provides that the foundation council may sue in the name of the foundation. However it can be argued that as a foundation is a separate legal person then section 26 is not strictly necessary as the foundation can bring an action in its own name much the same as a company.

Question 13: Is section 26 necessary? Even if it is not strictly necessary does it provide useful clarification?

vi) Section 40 – Power of Accumulation and Advancement

Section 40 has been drawn from section 48 of the Trusts (Guernsey) Law, 2007. In the context of trusts, section 48 permits the trustee to apply the property of the trust for the maintenance or advancement of a beneficiary who is a minor. It also allows the trustees to distribute the assets of the trust to the guardian where the beneficiary is a minor or under some type of legal disability.

Given that foundations are fundamentally different from trusts the Department would like feedback on whether or not section 40 is necessary or appropriate.

Question 14: Is section 40 appropriate in the context of foundations legislation?

Question 15: What useful purpose does section 40 serve?

vii) Section 41 – jurisdiction of the Court

The Royal Court has jurisdiction in respect of Guernsey registered foundations. In addition the draft law confers power on the Royal Court for non-Guernsey foundations where a foundation official is

resident in Guernsey, or where the foundation owns Guernsey property.

Question 16 : Is it appropriate for the Royal Court to have jurisdiction over foreign foundations which may be administered in Guernsey?

viii) Section 50 – Following Foundation Property

Section 50 of the draft law deals with the situation where a foundation official has breached the official's fiduciary duty and dealt with the foundation property. For example the foundation official may have converted that property to his or her own use and then sold the property for his or her own benefit. Section 50 permits that property to be traced and recovered unless it is no longer identifiable or where the property is in the hands of a bona fide third party purchaser who did not have notice that the property was owned by the foundation.

In the context of a trust this makes sense because trust property is legally vested in the trustees who owe a duty to administer that property for the benefit of the beneficiaries. A foundation, being a legal person, will hold property in its own right. As a result it will be more difficult for a council member to convert foundation property to his or her own use.

Section 50 does provide additional protection to the foundation and the beneficiaries by permitting property to be recovered in certain circumstances. However no equivalent provision exists in legislation which creates other legal persons such as, for example, the Companies (Guernsey) Law, 2008. In the case of a company the remedy is against the director where they can be held personally liable for breaching their fiduciary duty towards the company.

The Department is of the view that while section 50 does provide some additional protection the views of the industry are sought on whether section 50 is necessary.

Question 17: Is section 50 necessary, and if not what level of protection ought to be provided?

ix) Section 52 – Prescription

Section 52 of the draft law is also drawn from the Trusts (Guernsey) Law, 2007. It specifies the relevant limitation periods during which legal action can be brought against a foundation official. Section 52 provides, inter alia, that there is no limitation period for action against a foundation official for fraud, or to recover property converted to the official's use. The issue of conversion is primarily a trust concept where the trustee holds the trust assets in their own name. A foundation is more like a company and holds its own property so section 52(1)(b) may not be relevant.

Question 18: Is section 52 appropriate in the context of a foundation?

Question 19: If section 52 were removed should any period of prescription be provided?

x) Taxation

One issue on which the Department would seek additional feedback is the question of how foundations ought to be taxed. There are two broad options: taxation along the lines of trusts or alternatively taxation as companies. As bodies corporate there is an argument that foundations could be taxed as companies, although in theory due to the limitations on commercial activities they should not generate taxable profits.

The alternative is to tax them in the same manner as the taxation of trusts. The Department's preference is that foundations ought to be treated as trusts for the purposes of Guernsey's tax law but will consider the issue further depending on feedback from this consultation. However any decision on taxation treatment will be a matter for the Treasury and Resources Department.

Question 20: What is the most appropriate basis for taxation of Guernsey foundations?

xi) Schedule 1, section 10 – effect of non registration

This provision provides that if the foundation is not properly registered then it is deemed to be a Guernsey trust. Similar to the position with a company, a failure to properly register means that the foundation simply does not exist.

This provides a default position if the foundation is not properly formed but the endowment has been made to the councillors. In the absence of this section it could be argued that a constructive trust would exist in any event however this section provides some additional certainty.

Question 21: Is it appropriate for the foundation to be deemed a Guernsey trust if it has not been registered correctly?

Part Three – General Comments

Structure of the Law

In the civil law tradition it is usual for there to be a short primary law with the bulk of the provisions being regulations made under the Law. That is not the usual approach in common law jurisdictions. In order to ensure that Guernsey's legislation is generally familiar to civil law jurisdictions it has been drafted with the major provisions in the body of the law itself but for certain administrative provisions dealing with formation etc, to be contained in separate schedules.

Other general issues which may be of interest are as follows:

- The Law attempts to use terminology which will be familiar in civil law jurisdictions such as "founder" and "councillor". The law also avoids using terminology from company or trusts law. This has been done to avoid any confusion as to the nature of a foundation. Using company or trusts law concepts risk blurring the distinction between those entities and Guernsey foundations being treated as companies or trusts in foreign jurisdictions.
- The Registrar of Companies will be responsible for administering the Register of foundations. The administrative processes used in the draft law are similar to those which apply for the formation of companies

which will permit the Registry to use existing procedures when administering the Law minimising any increased costs.

- The Department has the discretion to prescribe a standard constitution for foundations but will not do so unless there is specific industry demand for a standard formation document.
- Guernsey foundations will not be permitted to carry out commercial activities unless those are necessary or ancillary to their primary purpose.
- Guernsey foundations will be managed by a council of at least 2 councillors, one of whom must be a licensed fiduciary. It is also possible for a body corporate to be a founder. The councillor may not hold office as a guardian at the same time. In addition the directors disqualification provisions of the Companies Law will apply to foundation councillors,
- Foundations may only be formed by corporate service providers.
- Foundations must have a registered office in Guernsey at which they are obliged to keep all relevant records including proper accounting records.
- The Law provides for the founder to state in the foundation constitution that beneficiaries rights to information may be restricted. This is consistent with the practise in many other civil law jurisdictions. However in order to ensure that the rights of beneficiaries are protected, where a foundation has disenfranchised beneficiaries the foundation must appoint a guardian who owes a duty to those beneficiaries.

The Department is interested in all comments on the draft Law and will take into account all comments when finalising the final States Report and legislation.

PART FOUR – Further Reading

There have been a number of academic articles published in the past few years which outline international developments in foundations law and practice. Those articles provide additional background which may be of use in responding to this consultation. In addition this section provides links to foundations legislation in several other jurisdictions which may be of assistance in providing the broader context of the draft Law.

Articles

1. Nosedo, F, "Liechtenstein's New Foundation Law: a Retrograde Step?" (2009) *Private Client Business*, volume 13 p 187
2. Nosedo, F, "The International Foundation Scene in Trepidation – Opportunities and Pitfalls for Newcomers", (2009) *Private Client Business*, vol 2, page 107
3. Nosedo, F, "The Foundations (Jersey) Law 2009: A civilian perspective, not so vanilla and possibly a tad wacky", (2010) *Guernsey and Jersey Law Review*, page 48

Comparative Legislation

1. Bahamas Foundations Legislation available at:
http://www.bfsb-bahamas.com/legislation/foundations_act.pdf
2. Jersey Foundations Law available at:
<http://www.jerseylaw.je/default.aspx>

Summary

The Commerce and Employment Department intends to finalise the draft law and present it to the States by no later than the September States meeting. Assuming the States approve the draft legislation it will then need to be presented to the Privy Council for approval. The Department encourages any interested party to respond to this consultation. All responses will be considered by the Department in finalising the legislation

Feedback

The Commerce and Employment Department invites comments from interested parties in relation to the questions outlined in the document and summarised in Appendix 1.

Please provide responses, preferably by email, by 23 May 2011 to:

foundations@commerce.gov.gg

or by hard copy to:

Foundations (Guernsey) Law Consultation
Guernsey Registry
PO Box 451
Fountain Street
St Peter Port
GY1 3GX

For further information please telephone Tom Carpenter on tel 01481 723355.

Appendix 1: Summary of questions

Question 1: Is there a market demand for foundations in Guernsey?

Question 2: How many of your clients, or prospective clients, would be interested in setting up a Guernsey foundations?

Question 3: Can a Guernsey foundation be used for other financial services?

Question 4: Is it necessary for a Guernsey foundation to have an initial capital?

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Appendix 2 – Draft Foundations (Guernsey) Law

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The Foundations (Guernsey) Law, 2011

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4. Power to prescribe a standard constitution.
5. Charter.
6. Rules.
7. Purpose.
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9. Foundation Council.
10. Guardian.
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Appointment, resignation and removal

14. Appointment of new or additional councillors.
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17. Resignation or removal of guardian.
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20. Duty not to profit from office.
21. Duty to preserve foundation property.
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- 34. Beneficiaries.
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3. Registrar of Foundations.
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13. Effect of transfer.
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18. Registration or transfer not to prejudice continuity of foundation's existence.
19. Terminology used in other jurisdictions.
20. Interpretation of this Chapter

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- 21. Power of revocation.
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- 24. Winding up of foundation by Royal Court.
- 25. General provisions as to winding up of foundations.
- 26. Personal liability for certain defaults in event of bankruptcy.
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The Foundations (Guernsey) Law, 2011

THE STATES, in pursuance of their Resolutions of the 15th December, 2006³ and [...], have approved the following provisions which, subject to the Sanction of Her Most Excellent Majesty in Council, shall have force of law in the Island of Guernsey.

PART I

CREATION AND CONSTITUTION

Chapter I

Creation

Creation of a foundation.

1. Any one or more persons ("**the founder(s)**") may by -
 - (a) endowing the foundation with its initial capital (see section 2),
 - (b) subscribing his name, as the founder, to the Constitution of the foundation (see section 3), and
 - (c) otherwise complying with the requirements of this Law in respect of registration (see Chapter II (Establishment and Registration)),

³

Article VIII of Billet d'État No. XXI of 2006.

create a Guernsey foundation which is a persona ficta upon establishment, separate and independent from its founder (see Schedule 1, paragraph 5).

Capital Endowment.

2. (1) The initial capital of a foundation may comprise any property wheresoever located.

(2) A founder does not have any interest in a foundation by virtue only of endowing it with its initial capital.

(3) Following the endowment of the initial capital, further capital may be endowed upon the foundation by any person if the Constitution so permits (see section 3).

(4) No person shall be deemed to have any interest in a foundation, or be deemed to be a founder of a foundation simply by endowing it with further capital in accordance with subsection (3).

Constitution.

3. (1) The Constitution of a foundation comprises -

(a) the Charter (see section 5), and

(b) subject to section 6(4), the Rules (see section 6),

(2) The founder must subscribe to the Constitution, by signing it in his own name, either personally or by his agent signing on his behalf (in accordance with section 12).

Power to prescribe a standard constitution.

4. (1) The Department may by regulations prescribe a standard Constitution.
- (2) A standard Constitution prescribed by regulations of the Department -
 - (a) applies in relation to a foundation only to the extent that the founder adopts it, and
 - (b) may be adopted in whole or part, subject to any exceptions or modifications.

Charter.

5. (1) The Charter shall contain -
 - (a) the name of the foundation (see section 13),
 - (b) the purpose of the foundation (see section 7),
 - (c) a description of the initial capital of the foundation (see section 2),
 - (d) the duration of the foundation (if it is to subsist for a limited period only),
 - (e) a declaration from the founder, or his agent, that the founder wishes the councillors to comply with the terms of the Charter, and
 - (f) any other matter(s) that the founder thinks fit.
- (2) The Charter may contain any matter that is otherwise required or permitted to be in the Rules in accordance with section 6.

(3) The Charter may be amended only if -

- (a) the Charter so provides, or
- (b) the Royal Court so orders under Schedule 1, paragraph 6(4).

Rules.

6. (1) The Rules shall -

- (a) prescribe the functions of the councillors (and see section 9),
- (b) detail the procedures for the appointment, resignation and removal of councillors and any guardian, and
- (c) make such provision the founder thinks fit (if any) for the remuneration of councillors and any guardian, and
- (d) detail the name and address of the default beneficiary (see section 37) failing which the default beneficiary shall, unless Her Majesty's Receiver-General directs otherwise, be the Crown.

(2) The Rules may -

- (a) prescribe the manner in which property of the foundation may be distributed, accumulated or applied,
- (b) detail whether, and if so how, further property may be endowed upon the foundation,
- (c) provide for the addition or removal of a person, or a class of people, as beneficiary or for the exclusion from benefit of a beneficiary either

revocably or irrevocably,

(d) impose obligations upon beneficiaries as a condition of benefit,

(e) make the interest of a beneficiary -

(i) liable to termination,

(ii) subject to a restriction on alienation or dealing, or

(iii) subject to diminution or termination in the event of the beneficiary becoming bankrupt or any of his property becoming liable to arrest, saisie, or similar process of law,

and

(f) contain any other matter that the founder thinks fit.

(3) The Rules may be amended only if -

(a) the Constitution so provides, or

(b) an application is made to the Royal Court by or on behalf of the founder or a foundation official whereupon the Court may, in its absolute discretion and on such terms and conditions as it thinks fit, by order authorise the rectification of any error or formal defect therein.

(4) To the extent to which matters required to be in the Rules pursuant to subsection (1) are contained within the Charter, such matters need not also be detailed in the Rules, and if all of the matters in subsection (1) are contained in the Charter, the foundation need not have any Rules.

Purpose.

7. A foundation may be established for any purpose, save that it cannot carry out any commercial activities except those necessary for, and ancillary or incidental to, its purpose.

Amendment of purpose.

8. (1) The purpose of a foundation may be only amended -

- (a) where there is an express power so to amend in the Charter,
- (b) by order of the Royal Court in accordance with subsection (2), or
- (c) by order of the Royal Court in accordance with Schedule 2, paragraph 22.

(2) If there is no power to amend the purpose in the Charter in accordance with subsection (1), subject to subsection (3), the purpose may be amended by order of the Royal Court where -

- (a) the purpose has been, as far as may be, fulfilled,
- (b) the purpose cannot be carried out, or not according to the directions given and to the spirit of the endowment,

- (c) the purpose provides a use for part only of the property of the foundation,
- (d) the property of the foundation, and other property applicable for a similar purpose, can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the endowment, be applied to a common purpose,
- (e) the purpose was laid down by reference to a class of persons or to a matter which has for any reason since ceased to be -
 - (i) suitable, or
 - (ii) practicable in administering the endowment, regard being had to the spirit of the endowment,
- (f) in the case of a charitable purpose, the purpose has ceased to be charitable (by being useless or harmful to the community or otherwise), or
- (g) the purpose has ceased in any other way to provide a suitable and effective method of using the property of the foundation, regard being had to the spirit of the endowment,

And in these cases the property, or the remainder of the property, as the case may be, shall be held for such other charitable or non-charitable purpose as the Royal Court, on the application of -

- (i) Her Majesty's Procureur,

(ii) the Council, or

(iii) the participants,

may declare to be consistent with the original intention of the founder or the spirit of the endowment.

(3) An application to the Royal Court to amend the purpose under subsection (2) may only be made upon notice to the participants (see section 33).

Foundation Council.

9. (1) A foundation must have a Council, comprised of at least two councillors.

(2) One of the councillors must be a Guernsey licensed fiduciary resident in Guernsey.

(3) For the avoidance of doubt the founder or a body corporate may be appointed as a councillor.

(4) A councillor -

(a) must be so named in the Register (in accordance with Schedule 1, paragraph 4)

(b) must keep accurate accounts and records of his councillorship, and

- (c) is a foundation official and must comply with the provisions of Part II (Foundation Officials).

(5) A person must not be appointed as a councillor, or be so referred to in the Register, unless he has consented in writing to being a councillor of the foundation.

(6) The appointment of a person as a councillor has no effect if the person has been, or is also, a guardian of the foundation.

Guardian.

10. (1) If, in respect of a foundation, –

- (a) there is a purpose in respect of which there are no beneficiaries, or
- (b) there are disenfranchised beneficiaries (see section 36),

the foundation must have a guardian in relation to that purpose or those beneficiaries (see sections 15 and 17 for the appointment and removal of a guardian and section 18 for the role of councillors in the absence of a guardian).

(2) Notwithstanding subsection (1) the foundation may have a guardian if the Charter so provides.

(3) The appointment of a person as guardian has no effect if the person has been, or is also, a councillor of the foundation.

(4) For the avoidance of doubt, the founder or a body corporate may be appointed as guardian.

(5) A guardian -

- (a) must be so named in the Register (in accordance with Schedule 1, paragraph 4),
- (b) may not be appointed as a councillor of the foundation (during his guardianship or at any time thereafter),
- (c) must keep accurate accounts and records of his guardianship for so long as his guardianship subsists and for 6 years thereafter, and
- (d) is a foundation official and must comply with the provisions of Part II (Foundation Officials).

(6) A person must not be appointed as a guardian, or be so referred to in the Register, unless he has consented in writing to being the guardian of the foundation.

Reservation or grant of certain powers to founder.

11. (1) The founder may not reserve any powers to himself other than those set out below -

- (a) a power to revoke, vary or amend the terms of the Constitution, in whole or in part,
- (b) a power to revoke, vary or amend the purpose of the foundation, in whole or in part,

- (c) a power to revoke the foundation,

provided that the power to revoke, vary or amend, as the case may be, is detailed in full in the Charter.

- (2) The powers detailed in subsection (1) may only be reserved -

- (i) for the duration of the founder's life, if he is a natural person,
or
- (ii) for 30 years from the date of establishment, if it is a legal
person,

thereafter any such powers so reserved shall lapse, notwithstanding the terms of the Constitution.

(3) If there is more than one founder, any powers reserved or granted under subsection (1) must be exercised by the founders unanimously unless the Charter provides otherwise.

Agents.

12. An agent may only act on behalf of the founder or any councillor in exercising any of the founder's or councillor's functions if –

- (a) the agent is a Guernsey licensed fiduciary, and
- (b) when acting on behalf of the founder or councillor, as the case may be, the agent is acting in his capacity as a licensed fiduciary.

Establishment and registration.

13. The provisions of Schedule 1 shall have effect.

PART II
FOUNDATION OFFICIALS

Chapter I
Appointment, resignation and removal

Appointment of new or additional councillors.

14. (1) Where -

- (a) the Constitution of a foundation contains no provision for the appointment of a new or additional councillor,
- (b) any such provision has lapsed or failed, or
- (c) the person with power to make any such appointment is not capable of exercising the power,

a new or additional councillor may be appointed by -

- (i) the existing councillor,
- (ii) the last remaining councillor,
- (iii) the personal representative or liquidator of the last remaining councillor,

(iv) the Registrar, or

(v) the Royal Court.

(2) Subject to the terms of the Constitution, a councillor appointed under this section has the same functions, and may act in all respects, as if he had been originally appointed a councillor.

(3) A councillor with power to appoint a new or additional councillor who fails to exercise the power may be removed from office by the Royal Court.

Appointment of new guardian.

15. (1) Where the guardian of a foundation no longer holds office and -
- (a) the Constitution of a foundation contains no provision for the appointment of a new guardian,
 - (b) any such provision has lapsed or failed, or
 - (c) the person with power to make any such appointment is not capable of exercising the power,

a new guardian may be appointed by -

(i) the founder or his agent, or

(ii) the Royal Court.

(2) A guardian appointed under this section has the same functions, and may act in all respects, as if he had been originally appointed the guardian.

Resignation or removal of councillors.

16. (1) Subject to the Constitution of the foundation, a councillor may resign his office by delivering a written notice of resignation to his co-councillors.

(2) A councillor may be removed from office on the coming into effect of, or the exercise of a power under, a provision in the Constitution of the foundation under or by which he is removed from or otherwise ceases to hold his office.

(3) Subject to subsection (4), to the terms of the Constitution and to an order of the Royal Court, a resignation takes effect -

(a) on delivery of the notice, or

(b) on such later date or on the happening of such later event as may be specified therein.

(4) A resignation -

(a) given to facilitate a breach of duty, or

(b) which would result in there being -

(i) less councillors than the number required by section 9(1), or

- (ii) without a councillor as required by section 9(2),

has no effect.

- (5) A councillor ceases to be a councillor of a foundation immediately on -

- (a) his removal from office by the Royal Court,
- (b) his resignation or removal taking effect.

Resignation or removal of guardian.

17. (1) Subject to the terms of the Constitution, a guardian may resign his office by delivering a written notice of resignation to the councillors.

(2) A guardian may be removed from office on the coming into effect of, or the exercise of a power under, a provision in the Constitution under or by which he is removed from or otherwise ceases to hold his office.

(3) Subject to subsection (4), to the terms of the Constitution and to an order of the Royal Court, a resignation takes effect -

- (a) on delivery of the notice, or
- (b) on such later date or on the happening of such later event as may be specified therein.

(4) A resignation given to facilitate a breach of the guardian's fiduciary duty has no effect.

(5) A guardian ceases to be the guardian of a foundation immediately on –

(a) his removal from office by the Royal Court,

(b) his resignation becoming effective.

(6) Where a councillor of a foundation has reason to believe that the guardian -

(a) is unwilling or is refusing to act,

(b) is bankrupt or otherwise unfit to act, or

(c) is incapable of acting,

the councillor shall apply to the Royal Court for the removal of the guardian and the appointment of a replacement.

Position of continuing councillors on reduction in number of councillors or in the absence of a guardian.

18. (1) Subject to the Constitution of the foundation, where –

(a) the number of councillors falls below the number required by section 9(1),

- (b) the foundation is without a councillor as required by section 9(2), or
- (c) there is no guardian of the foundation, and a guardian is required by virtue of section 10 or the terms of the Charter,

the necessary additional councillors or the guardian shall be appointed as soon as practicable by the remaining foundation officials in accordance with the terms of the Constitution, or where the Constitution is silent, in accordance with the provisions of this Law.

(2) Until the necessary appointments are made in accordance with subsection (1), the existing councillor shall act only to preserve the property of the foundation.

Chapter II

Duties

General fiduciary duties.

19. (1) The councillors have a duty, in the exercise of their functions, to the foundation to act in good faith and en bon père de famille.

(2) The guardian has a fiduciary duty to the founder and the beneficiaries to enforce the Constitution.

(3) For the avoidance of doubt, in the exercise of his duty under subsection (2), a guardian may bring an action against the Council in the name of the foundation unless the Constitution provides otherwise.

(4) A foundation official shall execute and administer the foundation and shall

exercise his functions under it -

- (a) in accordance with the provisions of this Law, and
- (b) subject to those provisions -
 - (i) in accordance with the terms of the Constitution, and
 - (ii) only in the advancement of purpose.

Duty not to profit from office.

20. (1) Subject to subsection (2), foundation officials shall not -

- (a) derive, directly or indirectly, any profit from their appointment,
- (b) cause or permit any other person to so derive any such profit, or
- (c) on their own account enter into any transaction with the foundation, or relating to the property of the foundation, which may result in any such profit,

except -

- (i) as expressly provided by the terms of the Constitution,

(ii) as permitted by the provisions of this Law, or

(iii) with the approval of the Royal Court.

(2) A guardian is entitled to be paid, and shall be reimbursed, by the councillors from the property of the foundation for all expenses and liabilities properly incurred in connection with the foundation.

Duty to preserve foundation property.

21. A councillor shall, subject to the terms of the Constitution and to the provisions of this Law preserve and enhance, so far as is reasonable, the value of the foundation property.

Duty to give information.

22. (1) A councillor shall, at all reasonable times, at the written request of -

(a) the guardian,

(b) any enfranchised beneficiary (see section 35) or

(c) subject to the terms of the Constitution, the founder,

provide full and accurate information as to the state and amount of the foundation property within 3 months' from the date of such request.

(2) Where the terms of the Constitution prohibit or restrict the provision of any information described in subsection (1), the founder may apply to the Royal Court for an order authorising or requiring the provision of the information.

(3) When applying to the Royal Court for an order under subsection (2) the founder must show that the provision of the information is necessary or expedient -

- (a) for the proper disposal of any matter before the court,
- (b) for the protection of the interests of any beneficiary, or
- (c) for the proper administration or enforcement of the foundation.

Duty to maintain accounting records.

23. (1) It is the duty of the councillors to ensure that a foundation shall keep the following or a copy thereof at its registered office -

- (a) all documents filed with the Registrar,
- (b) its accounting records, which shall be -
 - (i) sufficient to show and explain the foundation's transactions,
 - (ii) such as to disclose with reasonable accuracy, at any time, the foundations' financial position at that time, and
 - (iii) such as to enable the foundation officials to ensure that the foundation's accounts are prepared properly and in accordance with any relevant enactment for the time being in force,

and the accounting records shall in particular contain day to day entries of all sums of money received and expended by the foundation, the matters in respect of which the receipt and expenditure takes place and a record of the assets and liabilities of the foundation.

(2) The guardian shall be entitled to inspect the documents referred to in subsection (1) upon 2 working days' notice in writing to the councillors.

Duty of councillors to act together.

24. (1) Subject to the terms of the Constitution, all the councillors of a foundation shall join in the execution of the foundation.

(2) Subject to the terms of the Constitution, no function conferred on the Council shall be exercised unless all the councillors agree on its exercise.

(3) Where the terms of the Constitution empower the Council to act by majority, a councillor who dissents from a decision of the majority may require his dissent to be recorded in writing.

Impartiality of councillors.

25. (1) Subject to the terms of the Constitution and to subsection (2), where a foundation has more than one beneficiary or purpose, the Council shall be impartial and shall not execute the foundation for the advantage of one at the expense of another.

(2) Subsection (1) does not prejudice the exercise of a discretion conferred on the Council by the terms of the Constitution.

Chapter III

General powers of councillors

Power to sue and compromise.

26. (1) The Council may sue in the name of the foundation.

(2) The Council may compromise or settle any action or claim brought by or against the foundation or in any way relating to the foundation or the foundation property.

(3) For the avoidance of doubt, the provisions of this section do not apply to any action brought by a guardian in accordance with section 19.

Delegation by the councillors.

27. (1) Subject to the terms of the Constitution, a councillor shall not delegate his functions unless permitted to do so by the provisions of this Law.

(2) Except where the terms of the Constitution specifically provide to the contrary, a councillor may -

(a) delegate the management of foundation property to, and appoint, investment managers whom the councillor reasonably considers to be competent and qualified to manage the investment of the foundation property,

(b) appoint professional persons to act in relation to the affairs of the foundation or to hold any foundation property, and

(c) authorise any such manager or person to retain any commission or other payment usually payable for services of the description rendered.

(3) A councillor who, without any breach on his part of section 19(1) (general

fiduciary duties), makes or permits the continuation of a delegation or appointment under subsection (2), is not liable for any loss to the foundation arising from the delegation or appointment.

Corporate councillors.

28. (1) A corporate councillor may –

- (a) act in connection with a foundation by a resolution of the corporate councillor or of its board of directors or other governing body, or
- (b) by such a resolution appoint an officer or employee, or a committee of officers or employees, or both, to act on its behalf in connection with the foundation.

(2) The rights in action of the corporation councillor against its officers and employees are not assets of the foundation.

Non-disclosure of deliberations.

29. (1) Notwithstanding sections 22 (duty to give information) and 35 (enfranchised beneficiaries), a councillor is not, subject to the terms of the Constitution and to any order of the Royal Court, obliged to disclose documents which reveal -

- (a) his deliberations as to how he should exercise his functions as councillor,
- (b) the reasons for any decision made in the exercise of those functions,
- (c) any material upon which such a decision was or might have been based,

(2) The person applying to the Royal Court for an order under this section for the disclosure of any document must show that the disclosure is necessary or expedient -

- (a) for the proper disposal of any matter before the Court,
- (b) for the protection of the interests of any beneficiary or purpose, or
- (c) for the proper administration or enforcement of the foundation.

Chapter IV

Liability

Liability for breach of duty.

30. (1) Subject to the provisions of this Law and to the terms of the Constitution, a foundation official who commits or concurs in a breach of his duty arising under section 19 (general fiduciary duties) is liable for -

- (a) any loss or depreciation in value of the foundation property resulting from the breach, and
- (b) any profit which would have accrued to the foundation had there been no breach.

(2) A foundation official may not set off a profit accruing from one breach of duty against a loss or depreciation in value resulting from another.

(3) A foundation official is not liable for a breach of duty committed by another

foundation official unless -

- (a) he becomes or ought to have become aware of the breach or of the intention of the other foundation official to commit the breach, and
- (b) he actively conceals the breach or intention, or fails within a reasonable time to take proper steps to protect or restore the foundation property or to prevent the breach.

(4) The terms of a Constitution may not -

- (a) relieve a foundation official of liability for a breach of duty arising from his own fraud, wilful misconduct or gross negligence, or
- (b) grant him any indemnity against the foundation property in respect of any such liability.

(5) For the avoidance of doubt, and without prejudice to any other provision of this Law a term of a Constitution is invalid to the extent that it purports to -

- (a) relieve a foundation official of liability for a breach of duty arising from his own fraud, wilful misconduct or gross negligence, or
- (b) grant him any indemnity against the foundation property in respect of any such liability.

Power to relieve foundation officials from personal liability.

31. The Royal Court may relieve a foundation official wholly or partly of liability for a breach of duty, where it appears to the Court that the official -

- (a) has acted honestly and reasonably, and
- (b) ought fairly to be excused -
 - (i) for the breach of duty,
 - (ii) for omitting to obtain the directions of the Court in the matter in which the breach arose.

Liability for the debts of the foundation.

32. For the avoidance of doubt, a foundation official is not liable for the debts or liabilities of the foundation, save to the extent that such debts or liabilities have been incurred by that foundation official in breach of his duty. -

**PART III
PARTICIPANTS**

General

Participants.

33. The participants of the foundation are -

- (a) the founder -
 - (i) for the duration of his life, if he is a natural person, or

- (ii) for 30 years from the date of establishment, if it is a legal person,
- (b) the enfranchised beneficiaries (see section 35)
- (c) the default beneficiary (see section 37),
- (d) in relation to any purpose or disenfranchised beneficiary (see section 36), the guardian, and
- (e) any other person so identified by the Constitution.

Beneficiaries

Beneficiaries.

- 34.** (1) "A **beneficiary**" is a person entitled to benefit from a foundation -
- (a) so identified in the Constitution by name, or
 - (b) whose identity is ascertainable from the terms of the Constitution by reference to –
 - (i) a class (see section 39), or
 - (ii) a relationship to another person, whether or not living at the time of the creation of the foundation or at the time by

reference to which, under the terms of the Constitution, members of a class are to be determined.

(2) The Constitution may provide for the addition or removal of a person as beneficiary or for the exclusion from benefit of a beneficiary either revocably or irrevocably.

(3) The Constitution may impose an obligation on a beneficiary as a condition of benefit.

(4) A founder or councillor of a foundation may also be a beneficiary thereof.

(5) The Constitution should state –

(a) whether a beneficiary is entitled to information about the foundation ("**an enfranchised beneficiary**" see section 35), or

(b) whether a beneficiary is not entitled to information ("**a disenfranchised beneficiary**" see section 36) and,

(c) the details of the default beneficiary (see section 6(1)(d) and section 37).

(6) Where the Constitution is silent as to whether a beneficiary is enfranchised or disenfranchised, the beneficiary is an enfranchised beneficiary.

Enfranchised beneficiaries.

35. (1) An enfranchised beneficiary is entitled to -

- (a) copies of the Constitution,
- (b) disclosure of records and accounts of the foundation, on written request to the councillors,
- (c) make an application to the Court to request an order to prohibit –
 - (i) a change to the purpose under section 8 (amendment of purpose),
 - (ii) the revocation of the foundation (see Schedule 2, paragraph 21), or
 - (ii) the dissolution of the foundation (see Schedule 2, paragraph section 23 (termination and dissolution)).

(2) Subject to the terms of the Constitution, subsection (1) does not entitle a beneficiary to the information detailed in section 29 (non disclosure of deliberations).

Disenfranchised beneficiaries.

36. Subject to the terms of the Constitution, a disenfranchised beneficiary is not entitled to any information about the foundation.

Default beneficiary.

37. (1) A foundation must have a default beneficiary to whom all the foundation assets shall pass on the revocation, dissolution or termination of the foundation (see Schedule 2).

(2) If –

(a) no default beneficiary is named in the Constitution, or

(b) such default beneficiary no longer exists,

any property or assets of the foundation existing at the revocation, dissolution or termination of the foundation shall, unless Her Majesty's Receiver-General directs otherwise, become *bona vacantia* belonging to the Crown.

Disclaimer of beneficial interest.

38. (1) Subject to the terms of the Constitution, a beneficiary may disclaim his interest in a foundation or any part of it, whether or not he has received any benefit from it.

(2) A disclaimer shall be in writing and, subject to the terms of the Constitution -

(a) may be temporary, and

(b) may, if the disclaimer so provides, be revoked in the manner and circumstances specified thereby.

(3) A disclaimer is not effective until received by a councillor.

Class interests.

39. Where a foundation is made in favour of a class of persons then, subject to the terms of the Constitution, -

- (a) the class closes when it is no longer possible for any other person to become a member of the class, and
- (b) where the interest of the class relates to income, and no member of the class exists, the income shall be accumulated and retained until a member of the class exists or the class closes.

Power of accumulation and advancement.

40. (1) Subject to the terms of the Constitution and to any prior interest or charge affecting the foundation property, the councillors may -

- (a) where a beneficiary is a minor (whether or not his interest is vested), apply the income attributable to his interest, or any part of that income, to or for his maintenance, education or other benefit,
- (b) advance or apply for the benefit of a beneficiary part of the foundation property prior to the happening of the event on which he is to become absolutely entitled thereto.

(2) Subject to the terms of the Constitution -

- (a) any foundation property advanced or applied under this section shall be brought into account in determining the beneficiary's share in the foundation property, and
- (b) no part of the foundation property so advanced or applied shall exceed the beneficiary's vested, presumptive or contingent share in the foundation property.

(3) The receipt of a guardian of a beneficiary who is a minor or a person under legal disability is a sufficient discharge to the councillors for a payment made to the beneficiary or for his benefit.

PART IV

PROVISIONS OF GENERAL APPLICATION

Chapter I

Jurisdiction and powers of Court

Jurisdiction of court.

41. (1) The Royal Court sitting as an Ordinary Court ("**the Royal Court**") has jurisdiction in respect of –

- (a) a Guernsey foundation, and
- (b) any other foundation –
 - (i) a foundation official of which is resident in Guernsey,
 - (ii) any property of which is situated or administered in Guernsey.

Application of Guernsey law to questions of validity.

42. (1) Subject to the terms of the Constitution, all questions arising in relation to a Guernsey foundation or any disposition of property to or upon such a foundation, including (without limitation) questions as to –

- (a) the capacity of the founder,

- (b) the validity, interpretation or effect of the Constitution or any variation or termination thereof,
- (c) the validity of any endowment to the foundation,
- (d) the administration of the foundation, whether it is conducted in Guernsey or elsewhere, including (without limitation) questions as to the functions, appointment and removal of councillors and guardians,
- (e) the existence and extent of any functions in respect of the foundation, including (without limitation) powers of variation, revocation and appointment, and the validity of the exercise of any such function,
- (f) the distribution of the foundation property,

are to be determined according to the law of Guernsey without reference to the law of any other jurisdiction.

For these purposes "**the law of Guernsey**" does not include the Guernsey rules of private international law, except those set out in this section.

(2) Subsection (1) -

- (a) does not validate any endowment of property to the foundation by the founder, which is neither owned by the founder nor the subject of a power of disposition vested in the founder,

- (b) does not affect the recognition of the law of any other jurisdiction in determining whether the foundation is the owner of any property,
- (c) is subject to any express provision to the contrary in the terms of the Constitution,
- (d) does not, in determining the capacity of a persona ficta, affect the recognition of the law of its place of establishment,
- (e) does not affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property,
- (f) subject to subsection (3), does not validate any ~~trust or~~ disposition of real property situate in a jurisdiction other than Guernsey which is invalid under the law of that jurisdiction, and
- (g) subject to subsection (3), does not validate any testamentary disposition which is invalid under the law of the testator's domicile at the time of his death.

(3) No Guernsey foundation, and no disposition of property to or upon such a foundation, is void, voidable, liable to be set aside, invalid or subject to any implied condition, nor is the capacity of any foundation official or participant to be questioned, nor is any foundation official, participant or third party to be subjected to any obligation or liability or deprived of any right, claim or interest, by reason that -

- (a) the laws of any other jurisdiction prohibit or do not recognise a Guernsey foundation, or

(b) the foundation or endowment thereto -

(i) avoids or defeats or potentially avoids or defeats rights, claims, interests, obligations or liabilities conferred or imposed by the law of any other jurisdiction on any person -

(A) by reason of a personal relationship to a founder or any beneficiary, or

(B) by way of foreign heirship rights, or

(ii) contravenes or potentially contravenes any rule of law, judgment, order or action of any other jurisdiction intended to recognise, protect, enforce or give effect to any such rights, claims, interests, obligations or liabilities.

(4) Notwithstanding any legislation or other rule of law for the time being in force in relation to the recognition or enforcement of judgments, no judgment or order of a court of a jurisdiction outside Guernsey shall be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that -

(a) it is inconsistent with this Law, or

(b) the Royal Court, for the purposes of protecting the interests of the beneficiaries or in the interests of the proper administration of the foundation, so orders.

(5) This section applies -

- (a) whenever the foundation or endowment thereto was created or made,
- (b) notwithstanding any other provision of this Law.

(6) In relation to a Guernsey foundation comprising of personal property or any disposition of such property to or upon such a foundation, the law of Guernsey relating to légitime and the rights of a surviving spouse apply only where the founder is domiciled there at the time of his death.

Approval of particular transactions.

43. Where in the management or administration of a foundation a transaction is, in the opinion of the Royal Court, expedient, but cannot be effected because the necessary power is not vested in the councillors by the terms of the Constitution or by law, the Royal Court, on the application of any person mentioned in section 47(2) -

- (a) may confer on the councillors, generally or in any particular circumstances, the necessary power, on such terms and conditions as the court thinks fit, and
- (b) may direct the manner in which, and the property from which, any monies authorised to be expended, and the costs of any transaction, are to be paid or borne.

Judgment against foundation official to be binding on participants.

44. (1) Any order, judgment or finding of law or fact of the Royal Court in an action against a foundation official founded on breach of duty (under section 19 (general fiduciary duties)) is binding on all participants of the foundation, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability.

(2) Subsection (1) applies in respect of a participant only if -

- (a) he was represented in the proceedings (whether personally, or by his guardian, or as the member of a class, or otherwise), or
- (b) if not so represented, he had notice of the proceedings and a reasonable opportunity of being heard.

"Notice" in paragraph (b) means 14 days' notice or such other period as the Court may direct.

(3) This section is without prejudice to the powers of the Royal Court in respect of representative proceedings and class actions.

Settlement of action against foundation official by alternative dispute resolution to be binding on participants.

45. (1) Where -

- (a) the terms of the Constitution direct or authorise, or the Court so orders, that any claim against a foundation official founded on breach of duty (under section 19 (general fiduciary duties)) may be referred to alternative dispute resolution ("ADR"),
- (b) such a claim arises and, in accordance with the terms of the Constitution or the Court's order, is referred to ADR, and

- (c) the ADR results in a settlement of the claim which is recorded in a document signed by or on behalf of all parties,

the settlement is binding on all participants of the foundation, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability.

- (2) Subsection (1) applies in respect of a participant only if -

- (a) he was represented in the ADR proceedings (whether personally, or by his guardian, or as the member of a class, or otherwise), or
- (b) if not so represented, he had notice of the ADR proceedings and a reasonable opportunity of being heard,

and only if, in the case of a participant who is not yet ascertained or in existence, or who is a minor or person under legal disability, the person conducting the ADR proceedings certifies that he was independently represented by a person appointed for the purpose by a court of law.

"**Notice**" in paragraph (b) means 14 days' notice or such other period as the person conducting the ADR proceedings may direct.

- (3) A person who represents a beneficiary in the ADR proceedings for the purposes of subsection (2)(a) is under a duty of care to the beneficiary.

- (4) For the avoidance of doubt, the ADR proceedings need not be conducted in Guernsey or in accordance with the procedural law of Guernsey.

(5) In this section -

"ADR" includes conciliation, mediation, early neutral evaluation, adjudication, expert determination and arbitration, and

"proceedings" includes oral and written proceedings.

Applications for directions.

46. A foundation official may apply to the Royal Court for directions as to how he should or might act in any of the affairs of the foundation, and the Court may make such order as it thinks fit.

General powers of court.

47. (1) On the application of any person mentioned in subsection (2), the Royal Court may -

(a) make an order in respect of -

(i) the execution, administration or enforcement of a foundation,

(ii) a foundation official, including an order as to the exercise of his functions, the removal of a foundation official (if, for example, he refuses or is unfit to act, or he is incapable of acting or is bankrupt, or his property becomes liable to arrest, saisie, or similar process of law), the appointment, remuneration or conduct of a foundation official, the keeping and submission of accounts, and the making of payments, whether into court or otherwise,

(iii) a participant, or any person connected with a foundation,

(iv) any foundation property, including an order as to the vesting, preservation, application, distribution, surrender or recovery thereof,

(b) make a declaration as to the validity or enforceability of the terms of the Constitution,

(c) rescind or vary an order or declaration under this Law or make a new or further order or declaration.

(2) An application under subsection (1) may be made by -

(a) Her Majesty's Procureur,

(b) a foundation official,

(c) a participant,

(d) the Registrar,

(e) with leave of the Royal Court, any other person.

(3) Where the Royal Court appoints or removes a foundation official under this section -

- (a) it may impose such requirements and conditions as it thinks fit,
- (b) subject to the court's order –
 - (i) a foundation official appointed by the court has the same functions, and may act in all respects, as a foundation official appointed under the terms of the Constitution, and
 - (ii) the appointment only takes effect upon the issue of a new certificate of registration, in accordance with Schedule 1, paragraph 9(1).

Powers of court in event of default.

48. If a person does not comply with an order of the Royal Court under this Law requiring him to do anything, the Royal Court may, on such terms and conditions as it thinks fit, order that the thing be done by another person, nominated for the purpose by the Court, at the expense of the person in default (or otherwise as the court directs), and a thing so done has effect in all respects as if done by the person in default.

Payment of costs.

49. The Royal Court may order the costs and expenses of and incidental to an application to the court under this Law to be paid by the foundation or in such manner and by such persons as the Court thinks fit.

Following foundation property.

50. With prejudice to the personal liability of a councillor, foundation property which has been charged or dealt with in breach of the councillor's duties, or the property into which it has been converted, may be followed and recovered unless -

- (a) it is no longer identifiable, or

(b) it is in the hands of -

(i) a bona fide purchaser for value without notice of the breach of duty, or

(ii) a person (other than the councillor) who derived title through such a purchaser.

Constitution of Royal Court.

51. For the purposes of this Law the Royal Court may be properly constituted by the Bailiff sitting unaccompanied by the Jurats.

Prescription.

52. (1) No period of prescription applies to an action brought against a foundation official -

(a) in respect of any fraud to which the foundation official was a party or was privy, or

(b) to recover from the foundation official foundation property or the proceeds thereof -

(i) held by or vested in him or otherwise in his possession or under his control, or

(ii) previously received by him and converted to his use.

(2) Subject to subsections (1) and (3), the period within which an action founded

on breach of his duty may be brought against a foundation is -

- (a) three years from the date on which the claimant first has knowledge of the breach, or
- (b) where the claimant was at the time of the breach of trust a minor or a person under legal disability -
 - (i) three years from the date on which his guardian first has knowledge of the breach, or
 - (ii) three years from the date on which the claimant ceased to be a minor or a person under legal disability,

whichever first occurs.

(3) Subject to subsection (1), no action founded on breach of duty may be brought against a foundation official after the expiration of 18 years immediately following the date of the breach.

Chapter II

Offences

Offences by legal persons, etc.

53. (1) Where an offence under this Law is committed by a legal person or by an unincorporated body ("**a body**") and is proved to have been committed with the consent or connivance of, or to be attributable to or to have been facilitated by any neglect on the part of, any official, director, manager, member of any committee of management or other controlling authority,

secretary or other similar officer or partner of the body, or any person purporting to act in any such capacity, he as well as the body is guilty of the offence and may be proceeded against and punished accordingly.

(2) Where the affairs of a legal person are managed by its members, subsection (1) applies to a member in connection with his functions of management as if he were a director.

(3) Proceedings for an offence alleged to have been committed under this Law by an unincorporated body shall be brought in the name of that body and not in the name of any of its members, and a fine imposed on the body on its conviction of such an offence shall be paid out of its funds.

(4) For the purposes of this section a person shall be deemed to be a director of a legal person if he is a person in accordance with whose directions or instructions the directors of the legal person or any of them act.

False or misleading information.

54. (1) A person who -

(a) in connection with an application for the registration or migration of a foundation under this Law;

(b) in purported compliance with a requirement imposed by or under any provision of this Law or of any Ordinance, regulations or rules made under it; or

(c) otherwise than as mentioned in paragraph (a) or (b) but in circumstances in which he intends, or could reasonably be expected to know, that the statement, information or document provided by him would or might be used by the Registrar for the purpose of

exercising his functions conferred by or under this Law-

- (i) makes a statement which he knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular,
- (ii) dishonestly or otherwise, recklessly makes a statement which is false, deceptive or misleading in a material particular,
- (iii) produces or furnishes or causes or permits to be produced or furnished any information or document which he knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular, or
- (iv) dishonestly or otherwise, recklessly produces or furnishes or recklessly causes or permits to be produced or furnished any information or document which is false, deceptive or misleading in a material particular,

is guilty of an offence.

(2) A foundation official who fails to provide the Registrar with any information in his possession knowing or having reasonable cause to believe -

- (a) that the information is relevant to the exercise by the Registrar of his functions under this Law; and
- (b) that the withholding of the information is likely to result in the

Registrar being misled as to any matter which is relevant to and of material significance to the exercise of those functions in relation to the foundation or foundation official,

is guilty of an offence.

Penalties.

- 55.** (1) A person guilty of an offence under section 54(2) is liable -
- (a) on summary conviction, to imprisonment for a term not exceeding 3 months, to a fine not exceeding level 5 on the uniform scale, or to both,
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years, to a fine, or to both.
- (2) A person guilty of an offence under any other section or paragraph is liable -
- (a) on summary conviction, to a fine not exceeding level 5 on the uniform scale,
 - (b) on conviction on indictment, to a fine.

Chapter III

Supplementary

Migration, revocation, dissolution and termination.

56. The provisions of Schedule 2 have effect.

Consequential amendments

57. (1) The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000⁴, shall be amended as follows –

(a) after subsection 2(1)(c) insert –

"(d) the formation, management or administration of foundations, and the provision of advice in relation to the formation, management or administration of foundations, including (without limitation) -

(i) acting as corporate or individual foundation official;

(ii) the provision to foundations of corporate or individual foundation officials",

(b) after subsection 4(3)(b)(iii) insert –

"(iv) acting as foundation official for foundations.",

(c) in section 58(1) after the definition of "**former licensed fiduciary**",

⁴ Order in Council No. I of 2001 amended by No. XIV of 2003; No. XVI of 2007; No. VIII of 2008; No. XXV of 2008; Ordinance No. XXXIII of 2003 (the Machinery of Government (Transfer of Functions) (Guernsey) Ordinance, 2003) and Guernsey Statutory Instrument No. 3 of 2008 (the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) (Amendment) Regulations, 2008).

insert –

""**foundation**" means a Guernsey foundation in accordance with the Foundations (Guernsey) Law, 2010"

"foundation official" has the meaning given in section 59 of the Foundations (Guernsey) Law, 2010".

(2) *[Possible further amendments including to the Income Tax law to clarify the tax status – either to be taxed as a company or as a trust]*

General provisions as to subordinate legislation.

58. (1) The States may by Ordinance amend Part I, Part IV, and the Schedules of this Law.

(2) An Ordinance, regulations or rules under this Law -

(a) may be amended or repealed by a subsequent Ordinance, regulations or rules, as the case may be, hereunder, and

(b) may contain such consequential, incidental, supplementary and transitional provision as may appear to be necessary or expedient including, in the case of an Ordinance, provision amending any enactment.

(3) Any power conferred by this Law to make an Ordinance, regulations or rules may be exercised -

- (a) in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified cases or classes of cases,
- (b) so as to make, as respects the cases in relation to which it is exercised
 -
 - (i) the full provision to which the power extends, or any lesser provision (whether by way of exception or otherwise),
 - (ii) the same provision for all cases, or different provision for different cases or classes of cases, or different provision for the same class of case for different purposes,
 - (iii) any such provision either unconditionally or subject to any prescribed conditions.

Interpretation.

59. (1) In this Law, unless the context otherwise requires –

"accounting records" includes all underlying documentation, such as invoices, receipts and contracts,

"address" includes a physical address, telephone numbers and an email address,

"bankrupt", -

- (a) in relation to a person, includes a person -

- (i) whose affairs have been declared in a state of "désastre" by his arresting creditors at a meeting held before a Commissioner of the Royal Court, the Court of Alderney or the Court of the Seneschal,
 - (ii) against whom an interim vesting order has been made in respect of any real property in the Bailiwick,
 - (iii) in respect of whom a declaration of insolvency has been made under the Loi ayant rapport aux Débiteurs et à la Renonciation, 1929⁵,
 - (iv) against whom a declaration of bankruptcy has been made or subject to any equivalent or corresponding measure or procedure in any other jurisdiction, or
 - (v) who is subject to an ~~individual voluntary~~ formal arrangement or compromise with his creditors for the purpose of avoiding bankruptcy, or subject to any equivalent or corresponding measure or procedure in any other jurisdiction, and that arrangement or compromise is in force
- (b) and in addition, in relation to a legal person, includes a legal person-
- (i) in respect of which a liquidator (provisional or otherwise) has been appointed or which (otherwise than for the sole purpose of solvent amalgamation, solvent reconstruction or

⁵ Ordres en Conseil Vol. VIII, p. 310.

solvent winding-up) has passed a special resolution requiring it to be wound up voluntarily,

(ii) is or subject to any equivalent or corresponding measure or procedure in any other jurisdiction, or

(ii) which is otherwise insolvent,

and "**bankruptcy**" shall be construed accordingly,

"**beneficiary**" has the meaning given in section 34,

"**breach of duty**" means a breach of any duty imposed on a foundation official by this Law, including the duties imposed under section 19, or by the terms of the Constitution, and cognate expressions shall be construed accordingly,

"**Charter**" has the meaning given in section 5,

"**Commission**" means the Guernsey Financial Services Commission,

"**Companies Law**" means the Companies (Guernsey) Law, 2008⁶,

"**Constitution**" means the Charter and Rules of a foundation,

⁶ No. VIII of 2008 amended by Ordinance Nos. XXV of 2008; LIV of 2008; VII of 2009; XIV of 2009; Regulations, 2009 (No. 34 of 2009); and (No. 34 of 2010) (No. XI of 2010).

"corporate councillor" means a councillor which is a body corporate (wherever incorporated),

"corporate councillor" means a councillor which is a body corporate (wherever incorporated),

"Council" has the meaning given in section 9,

"default beneficiary" has the meaning given in section 37,

"Department" means the States of Guernsey Commerce and Employment Department,

"disenfranchised beneficiary" has the meaning given in section 36,

"disposition" includes any means by which property or any interest therein is created, transferred, dealt with, extinguished or charged, and related expressions shall be construed accordingly,

"endowment" means the dedicating of property to a foundation,

"enfranchised beneficiary" has the meaning given in section 35,

"foreign heirship right" means any right, claim or interest arising under the law of a jurisdiction other than Guernsey in, against or to the property of any person arising, accruing or existing in consequence of, or in anticipation of, that person's death, other than a right, claim or interest created by will or expressed in any other voluntary

disposition by that person or resulting from an express limitation in the disposition of the property to that person,

"formalities", in relation to a disposition of property, means the documentary and other actions required generally by the law of the jurisdiction in question for any such disposition of any such property,

and ~~but~~ includes any special formalities required by reason of the party effecting the disposition being a minor, a person under legal disability or a corporation,

"foundation official" includes the councillors, and guardian,

"founder" has the meaning assigned by section 1(1), ,

"functions" includes rights, powers, discretions, obligations, liabilities and duties,

"guardian", in relation to a minor, includes a parent,

"Guernsey licensed fiduciary" means a person who is a licensed fiduciary under the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000⁷,

"he", **"him"** and **"his"**, in relation to a corporation, include **"it"** and **"its"**,

⁷ Order in Council No. I of 2001; amended by No. XIV of 2003; No. XVI of 2007; No. VIII of 2008; No. XXV of 2008; and Ordinance No. XXXIII of 2003 and Guernsey Statutory Instrument No. 3 of 2008.

"Her Majesty's Procureur" includes Her Majesty's Comptroller,

"interest", in relation to a beneficiary, means his interest under a foundation,

"minor" means, subject to the terms of the Constitution, a person who has not attained the age of 18 years,

"Part A of the Register" has the meaning given in Schedule 1, paragraph 4((2)(a),

"Part B of the Register" has the meaning given in Schedule 1, paragraph 4(2)(b),

"participants" has the meaning given in section 33,

"personal relationship" includes every form of relationship by blood, adoption, marriage or cohabitation regardless of whether the law of any jurisdiction recognises the validity, legitimacy or existence of the relationship, and includes a former personal relationship which has in law or in fact terminated.

A personal relationship also exists between two persons if a personal relationship exists between each of them and a third person,

"personal representative" means the executor or administrator of the estate of a deceased person,

"profit" includes gain or advantage,

"property" -

- (a) means immeubles and meubles of any description, wherever situated, and any share, right or interest therein, and includes tangible or intangible property and any debt or thing in action,
- (b) in relation to rights and interests, includes rights and interests whether vested, contingent, defeasible or future,

"provisions of this Law" includes the provisions of any Ordinance or Regulations hereunder,

"purpose" means any purpose whatsoever, whether or not involving the conferral of any benefit on any person, and includes, without limitation, the holding or ownership of property and the exercise of functions,

"Register" has the meaning given in Schedule 1, paragraph 4((1),

"Registrar" has the meaning given in Schedule 1, paragraph 3(1),

"Royal Court" means the Royal Court sitting as an Ordinary Court, constituted in accordance with section 78,

"Rules" has the meaning given in section 6,

"States" means the States of Guernsey.

(2) The States may by Ordinance amend this section.

(3) For the purposes of this Law, a body corporate is resident in the place in which it has its registered office.

(4) Any reference in this Law to an enactment is a reference thereto as from time to time amended, re-enacted (with or without modification), extended or applied.

Savings.

60. (1) Nothing in this Law -

- (a) affects the functions under any provision of law of Her Majesty's Sheriff or of any guardian or attorney,
- (b) subject to section 42, validates an otherwise invalid endowment of property to a foundation,
- (c) derogates from any right of a minor to repudiate a transaction on attaining full age,
- (d) disapplies or derogates from any rule of law or custom relating to the formalities required for the disposition of immeubles in Guernsey.

(2) Nothing in this Law derogates from the powers of the Royal Court which exist independently of this Law -

- (a) to set aside, vary or reduce any transfer or other disposition of property, testamentary or otherwise,
 - (b) to make an order relating to matrimonial proceedings,
 - (c) to make an order relating to the avoidance of fraud on creditors.
- (3) Nothing in this Law derogates from the provisions of –
- (a) article 29 of the Law entitled "Loi sur les Successions, 1840"⁸,
 - (b) the Law entitled "Loi supplémentaire à la Loi des Successions, 1890"⁹,
 - (c) section 12 of the Married Women's Property Law, 1928¹⁰.
- (4) Nothing in this Law affects a personal representative acting as such.

Citation.

61. This Law may be cited as the Foundations (Guernsey) Law, 2011.

Commencement.

62. This Law shall come into operation on the 28th day after the date of its registration on the records of the Island of Guernsey.

⁸ Ordres en Conseil Vol. I, p. 51, Vol. II p. 59

⁹ Ordres en Conseil Vol. II, p. 323.

¹⁰ Ordres en Conseil Vol. VIII, p. 213.

CONSULTATION DRAFT

SCHEDULE 1

Chapter II

Establishment and Registration

Name of foundation.

1. (1) The name of a foundation -
 - (a) shall be stated in its certificate of establishment (see paragraph 7),
 - (b) shall contain the words "Guernsey Foundation" or the abbreviation "GFdn.",
 - (c) shall not be the same as a name already appearing in the Register,
 - (d) shall not be such as to constitute a criminal offence or be offensive, misleading or inappropriate,
 - (e) shall not include any word such as "Imperial", "Royal", "Queen" or "Crown" which implies or might be taken to imply royal or government connection, support or patronage, unless Her Majesty's Procureur has given written permission for the use of that word.
- (2) The Royal Court, if satisfied that -
 - (a) the name of a foundation is such as to induce the public to confuse

the foundation with some other person or body previously established in Guernsey or elsewhere, or

- (b) any provision of subparagraph (1) is not complied with,

may order that, within such time and subject to such terms, conditions and penalty as the Court thinks fit, the name of the foundation shall be changed.

(3) If an order of the Royal Court under subparagraph (2) is not complied with in any respect the foundation shall be liable to be wound up by order of the Royal Court under Schedule 2, paragraph 24(1) (winding up by the Royal Court).

Registered office of foundation.

2. (1) Every foundation shall at all times have a registered office in Guernsey.

(2) All legal process and other notices or documents served at the registered office shall be deemed properly served on the foundation.

(3) The Registrar shall be notified of any change in the registered office in accordance with paragraph 9 (change in registered particulars).

Registrar of Foundations.

3. (1) There is established the office of the Registrar of Foundations ("**the Registrar**"), which shall be held by the Registrar of Companies whose office was created under section 495 of the Companies Law.

(2) For the avoidance of doubt, the functions assigned to the Registrar under this Law are functions within the meaning of section 499(1)(f) of the Companies Law, and the provisions of the Companies Law pertaining to the Registrar's functions under that Law, together with the

associated penalties and offences, apply mutatis mutandis to the Registrar's functions under this Law.

Register of Foundations.

4. (1) The Registrar shall establish and thereafter maintain a Register of Foundations ("**the Register**").

(2) The Register shall contain a record of -

(a) all foundations registered under paragraph 6 containing -

(i) the name and registered number of the foundation,

(ii) the name and address of the councillors appointed in accordance with section 9(2),

(iii) the name and address of the guardian, if applicable, and

(iv) the details of the registered office,

("Part A of the Register"),

(d) all declarations and other documents filed with the Registrar under or for the purposes of this Law ("**Part B of the Register**").

(3) Part A of the Register only shall be part of the public records of the Island of Guernsey.

Establishment of a foundation.

5. (1) A foundation shall only be established if it complies with the requirements of this Schedule and Part I of the Law.

(2) A foundation may not be established if -

(a) it purports to do anything contrary to the law of Guernsey,

(3) A foundation is established by the Registrar registering it on the Register and allocating it a registration number (see paragraph 6).

(3) Upon establishment -

(a) a foundation is a persona ficta, separate from its founder, foundation officials and beneficiaries with a continuous existence until its removal from the Register, and

(b) the persons named in the application as foundation officials are deemed to have been appointed to their respective offices

with effect from the date of registration as stated in the certificate of registration (see paragraph 7).

Registration of a foundation.

6. (1) Every foundation shall be registered and shall continue to be registered in accordance with this paragraph.

(2) A person wishing to effect the registration of a foundation shall file with the Registrar -

- (a) the Charter (see section 5),
- (b) a declaration signed by the founder or his agent that the details contained within the Charter are correct and an accurate reflection of the purposes of the foundation,
- (c) the names and addresses of the proposed councillors, together with their written consent so to act,
- (d) the name and address of the proposed guardian (if appropriate) together with his written consent so to act,
- (e) the address and telephone number of the registered office in Guernsey,
- (f) any fee specified by the Registrar, and
- (g) such other documents or information as the Registrar may require.

(3) Upon receipt of the fee, documents and information specified in subparagraph (2), and provided that the Registrar is satisfied that the requirements of this Part are satisfied, the Registrar shall -

- (a) register the foundation in the Register by inscribing its name therein, and
- (b) allocate a registration number to the foundation,

and thereupon the foundation shall be registered for the purposes of this Law.

(4) The Royal Court may, in its absolute discretion and on such terms and conditions as it thinks fit, on an application by or on behalf of the founder or a foundation official, by order authorise the rectification of any error or formal defect -

- (a) in the entries relating to the foundation in the Register, or
- (b) in any declaration or other document filed with the Registrar in relation to the foundation under or for the purposes of this Law.

(5) The Registrar –

- (a) when registering a foundation in the Register under this paragraph, and
- (b) when issuing a certificate of registration in relation to the foundation under paragraph 7 or paragraph 9,

may rely upon the documents filed with him in all respects and shall not be bound to enquire further as to whether, in relation to the foundation, the formalities prescribed by this Law have been complied with.

(6) The Registrar may, in his discretion, determine that all registrations be subject to an annual renewal procedure.

(7) If the Registrar determines that there shall be an annual renewal procedure,

he must specify what information and fee (if any) are to be provided as part of that renewal.

Issue of certificate of registration.

7. (1) On the registration of a foundation, the Registrar shall issue a certificate of registration to the foundation at its registered office.

(2) The certificate must—

(a) state -

(i) the name and registered number of the foundation,

(ii) the registered office of the foundation,

(iii) the date of its establishment,

(iv) the duration of the foundation (if applicable),

and,

(b) be signed by the Registrar.

(3) The certificate is, unless it has ceased to be valid, conclusive evidence of compliance with the requirements of this Law as to registration and of all matters stated in it.

(4) A certificate of registration shall cease to be valid in the circumstances described in Schedule 2, paragraph 23 (termination and dissolution).

(5) A certificate of registration, or a copy thereof issued and sealed by the Registrar, shall be received in evidence in all legal proceedings.

Pre-establishment contracts and obligations.

8. A contract or obligation that purports to be made by or on behalf of a foundation at a time when the foundation has not been established has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the foundation or as agent for it, and he is personally liable on the contract accordingly until such time that the contract is ratified by the Council on behalf of the foundation.

Change in registered particulars.

9. (1) If during the continuance of a foundation -

- (a) there is a change in any particular of the foundation referred to in paragraph 6(2) or
- (b) a person becomes or ceases to be a foundation official,

notice of the change signed by any one or more of the foundation officials shall, within a period of 21 days from the date of the change, be filed with the Registrar, and, where the change is to the foundation's name or registered office, the change shall not be effective until the Registrar has issued a new certificate of registration, upon the issue of which the existing certificate shall cease to be valid.

(2) In default of compliance with subparagraph (1) -

- (a) the foundation and foundation official shall be guilty of an offence,

- (b) the Registrar may impose such financial penalty as the Department may, by regulations under this paragraph, prescribe, and
- (c) the change may not be relied on by the foundation or by any foundation official or former foundation official thereof so as to affect adversely the rights of any third person.

(3) Upon receipt of notice under subparagraph (1) or as soon as is reasonably practicable thereafter, the Registrar shall make the appropriate entry in the Register.

Effect of non-registration.

10. (1) In default of registration or continuing registration of a foundation in accordance with paragraph 6 the foundation shall be deemed to be a Guernsey trust.

(2) This paragraph is without prejudice to the provisions of Schedule 2 of this Law (migration, revocation, dissolution and termination.).

SCHEDULE 2

MIGRATION, REVOCATION, DISSOLUTION AND TERMINATION

Part I

Migration

Registration of overseas foundation as a Guernsey foundation

Overseas foundation may be registered as a Guernsey foundation.

1. An overseas foundation may apply to the Registrar to be registered as a Guernsey foundation in accordance with the provisions of this Part (see paragraph 20 (interpretation of this Schedule)).

Registration must be authorised by foreign law.

2. An overseas foundation cannot be registered as a Guernsey foundation unless -
- (a) the foundation is able under the law of place in which it is established to be registered as a Guernsey foundation, and
 - (b) the foundation has complied with the requirements of that law in relation to its registration as a Guernsey foundation.

Foundation cannot be bankrupt, etc.

3. An overseas foundation cannot be registered as a Guernsey foundation if-
- (a) the foundation is bankrupt,

- (b) a receiver or administrator has been appointed, in relation to any property of the foundation,
- (c) an application has been made to a court, whether in Guernsey or elsewhere -
 - (i) to put the foundation into liquidation, to wind it up or to have it declared insolvent,
 - (ii) for the approval of a compromise or arrangement between the foundation and a creditor, or
 - (iii) for the appointment of a receiver or administrator in relation to any property of the foundation,

and (in each case) the application has not been finally disposed of.

Application for registration as a Guernsey foundation.

4. (1) An application for registration as a Guernsey foundation shall be made to the Registrar.

(2) The application shall be in a form prescribed by the Registrar and shall include or be accompanied by -

- (a) the migration details (see paragraph 5),

- (b) such other information and documents, verified in such manner, as the Registrar may require, and
- (c) a declaration of compliance (see paragraph 16), and
- (d) such fee as may be specified by the Registrar.

(3) The application may propose the date on which registration as a Guernsey foundation shall take effect, provided that that date is not later than 3 months after the date of the application.

(4) An application for registration as a Guernsey foundation may only be made by a Guernsey licensed fiduciary.

Migration details.

5. (1) In this Chapter "**migration details**" means -

- (a) a copy of the foundation's certificate of establishment in the place in which it is established or registered,
- (b) a copy of the Charter which is to be binding on the foundation immediately after its registration in Guernsey, which must comply with the requirements of section 5 of this Law, together with a copy of the foundation's current Charter or equivalent document (see subparagraph (3)),
- (c) a statement of the foundation's current foundation officials (see subparagraph (2)),

- (d) a statement of the address of the foundation's registered office in the place in which it is established or registered,
- (e) the proposed name under which the foundation is to be registered, which name shall comply with Schedule 1, paragraph 1,
- (f) evidence acceptable to the Registrar that –
 - (i) the foundation is not prohibited from being registered in Guernsey by paragraph 2 (registration must be authorised by foreign law) or 3 (foundation cannot be bankrupt),
 - (ii) on the date of registration, the foundation will cease to be established and registered under the law of any place outside Guernsey, and
 - (iii) the foundation has legal personality in the place in which it is established or registered.

(2) The statement of the foundation's current foundation officials shall comprise the full name of every foundation official and his address (being, in the case of a body corporate or a partnership, the address of its registered office or, if none, its principal office).

(3) The Charter which is to be binding on the foundation immediately after its registration in Guernsey may be different from its current Charter if the amendments are valid and have been validly made under the law (including the rules of private international law) of the place outside Guernsey from which the foundation is migrating.

Effect of registration.

6. (1) Upon receipt of the application for registration as a Guernsey foundation -
- (a) the Registrar shall register the foundation in the Register by -
 - (i) inscribing its name therein, and
 - (ii) allocating a registration number to the foundation,
 - (b) subject to the provisions of this Chapter, the foundation shall be treated in all respects as a foundation established under this Law,
 - (c) the Registrar shall issue a certificate of registration in respect of the foundation which shall –
 - (i) contain the matters detailed in Schedule 1, paragraph 7,
 - (ii) state the date on which the foundation was first established (in addition to the date on which it was established in Guernsey),
 - (iii) detail the place(s) in which the foundation was previously registered,
 - (iv) detail the name(s) with which the foundation was previously registered, and

- (v) be conclusive evidence that the foundation is duly registered.

(2) If the application proposed a date on which registration as a Guernsey foundation was to have effect which date postdates the issue of the certificate of registration, then the foundation shall be established and registered as a Guernsey foundation on (and the date stated on the certificate shall be) the proposed date.

Cancellation of registration.

7. (1) Where an overseas foundation is registered as a Guernsey foundation under this Chapter, the foundation shall, as soon as possible, file with the Registrar any certificate or other document issued under the law of the place in which the foundation has ceased to be established and registered evidencing the fact that the foundation has ceased to be established and registered under that law.

(2) If the Court is satisfied that -

- (a) an overseas foundation has been registered as a Guernsey foundation pursuant to the provisions of this Chapter, and
- (b) the foundation continues to be established or registered under the law of any place outside Guernsey,

the Court may, in its absolute discretion on the application of -

- (i) the foundation or any of its participants or creditors, or
- (iii) the Registrar,

make an order for the removal of the foundation's name from the Register.

(3) An order under subparagraph (2) may be made subject to such terms and conditions and such penalty as the Court thinks fit.

(4) On the making of an order under subparagraph (2) the foundation's registration in Guernsey shall (unless the Court orders otherwise) be void *ab initio*.

Transfer of registration of foundations to overseas

Foundations may transfer registration.

8. A foundation may apply to the Registrar to be removed from the Register in accordance with the provisions of this Chapter.

Foundations cannot transfer registration without power to do so.

9. A foundation cannot be removed from the Register unless the councillors satisfy the Registrar that the Constitution permits such removal.

Foundations cannot transfer registration if in bankruptcy, etc.

10. A foundation cannot be removed from the Register if -

- (a) the foundation is bankrupt,
- (b) a receiver or administrator has been appointed, in relation to any property of the foundation,

(c) an application has been made to a court, whether in Guernsey or elsewhere -

(i) to put the foundation into liquidation, to wind it up or to have it declared insolvent,

(ii) for the approval of a compromise or arrangement between the foundation and a creditor, or

(iii) for the appointment of a receiver or administrator in relation to any property of the foundation,

and (in each case) the application has not been finally disposed of.

(d) possession or control has been taken of any of the foundation's property or affairs by or on behalf of creditors issued by it,

(e) an application has been made to the Court under Part IV, Chapter III, for the foundation's compulsory winding up.

Foundations cannot transfer registration without giving notice to creditors.

11. A foundation cannot be removed from the Register unless, before it applies to the Registrar under paragraph 12 for removal, it gives written notice to all its creditors stating that it intends to so apply.

Application for transfer of registration.

12. (1) An application for removal from the Register shall be made to the Registrar.

(2) The application shall be in a form prescribed by the Registrar and shall include or be accompanied by -

- (a) confirmation from Her Majesty's Procureur and the Director of Income Tax that they have no objection to the removal of the foundation from the Register,
- (b) evidence acceptable to the Registrar that -
 - (i) the removal of the foundation from the Register is not prohibited by paragraphs 9 (cannot transfer registration without power to do so), 10 (cannot transfer registration if in bankruptcy) or 11 (cannot transfer registration without giving notice to creditors),
 - (ii) on the date of the removal of the foundation's name from the Register the foundation will be established under the law of the place in question, and
 - (iii) the foundation will continue to have legal personality in accordance with the law of the place in question.
- (c) such other information and documents, verified in such manner, as the Registrar may require,
- (d) a declaration of compliance (see paragraph 16), and
- (e) such fee as may be specified by the Registrar.

(3) Upon receipt of the documents specified in subparagraph (2), the Registrar shall give notice of the proposed transfer in such manner and for such period as he thinks fit.

(4) An application for removal from the Register may only be made by a Guernsey licensed fiduciary.

Effect of transfer.

13. Not less than 28 days after the day on which the Registrar gave notice under paragraph 12(3) -

- (a) the statement in the foundation's Charter that its registered office is situated in Guernsey shall be deleted,
- (b) the foundation's name shall be removed from the Register,
- (c) the foundation shall cease to be a Guernsey foundation with effect from the date on which its name was removed from the Register,
- (d) the Registrar shall file in the Register a notice stating that the foundation's name has, pursuant to the provisions of this paragraph, been removed from the Register for the purpose of the foundation becoming established under the law of the place specified in the notice, and
- (e) the Registrar shall publish the fact that the foundation has been removed from the Register in such manner and for such period as he thinks fit.

Cancellation of transfer.

14. (1) Where a foundation is removed from the Register under this Chapter, the foundation shall, as soon as possible, file with the Registrar any certificate or other document issued under the law of the place in which the foundation has become established evidencing the fact that the foundation has become established under the law thereof.

(2) If the Court is satisfied that -

- (a) a foundation's name has been removed from the Register pursuant to the provisions of this Chapter, and
- (b) the foundation has not become established under the law of any place outside Guernsey,

the Court may, in its absolute discretion on the application of -

- (i) the foundation or any of its participants or creditors, or
- (ii) the Registrar,

make an order for the restoration of the foundation's name to the Register.

(3) An order under subparagraph (2) may be made subject to such terms and conditions and such penalty as the Court thinks fit.

(4) On the making of an order under subparagraph (2) the removal of the foundation's name from the Register shall (unless the Court otherwise orders) be void *ab initio*.

Power of Court to make orders as to transfer of registration.

15. (1) If the Court is satisfied that the removal of a foundation from the Register under paragraph 13 (effect of transfer) would unfairly prejudice a participant or creditor of the foundation or any other person to whom the foundation is under any obligation or liability, the Court may, on the application of that person made at any time before the date on which the removal of the foundation takes place, or within such further time as the Court may in any particular case allow, make such order as it thinks fit in relation to the removal, including, without prejudice to the generality of the foregoing, an order -

- (a) directing that the removal of the foundation shall not take place, or shall only take place subject to such terms and conditions as the Court thinks fit,
- (b) modifying the proposal for the removal of the foundation in such manner as may be specified in the order,
- (c) directing the foundation or its councillors to reconsider the proposal for the removal of the foundation or any part of the proposal.

(2) An order under subparagraph (1) may be made subject to such terms and conditions and subject to such penalty as the Court thinks fit.

General

Declaration of compliance.

16. (1) A declaration of compliance is a declaration, signed by a custodian, that all the requirements of this Chapter in respect of registration as a Guernsey foundation, or the removal of a foundation from the Register (as the case may be), have been fulfilled.

(2) The Registrar, when performing his functions under this Chapter, may rely upon a declaration of compliance in all respects and accordingly is not bound to enquire further as to whether, in relation to an application for registration as a Guernsey foundation, or an application for the removal of a foundation from the Register (as the case may be), the provisions of this Chapter have been complied with.

(3) A person who without reasonable excuse makes a declaration of compliance under this Chapter which is false, deceptive or misleading in a material particular is guilty of an offence.

Documents in a language other than English.

17. Where a document provided to the Registrar under this Chapter is not in English, a certified translation of it in English must also be provided.

Registration or transfer not to prejudice continuity of foundation's existence.

18. (1) Registration of an overseas foundation as a Guernsey foundation or removal of a Guernsey foundation from the Register for the purpose of transferring the registration does not prejudice or affect the identity or continuity of the foundation's legal personality which shall be uninterrupted by the process of transfer.

(2) For the avoidance of doubt, upon registration as a Guernsey foundation or removal from the Register –

- (a) all property and rights to which the foundation was entitled immediately before registration or removal remain its property and rights,
- (b) the foundation remains subject to all criminal and civil liabilities, and all contracts, debts and other obligations, to which it was subject immediately before registration or removal,

- (c) all actions and other legal proceedings which immediately before registration or removal could have been instituted or continued by or against the foundation may be instituted or continued by or against it after registration or removal, and
- (d) a conviction, ruling, order or judgment in favour of or against the foundation before registration or removal may be enforced by or against it after registration or removal.

Terminology used in other jurisdictions.

19. References in this Chapter to foundations, foundation officials, participants, certificates of establishment, liquidations or any other matter concerning a foundation include references to their equivalents in the law of the place outside Guernsey from which or to which a foundation is migrating.

Interpretation of this Schedule.

20. (1) In this Schedule –

"declaration of compliance" has the meaning assigned in paragraph 16,

"migration details" has the meaning assigned in paragraph 5,

"overseas foundation" means a foundation with legal personality registered or established under the law of any place outside Guernsey, and

"place" includes a district or territory,

"registered as a Guernsey foundation" means -

- (a) ceasing to be registered as a foundation in the place in which it was established or where it is now registered, and
- (b) becoming registered as a foundation in the Register,

and "**registration**" as a Guernsey foundation shall be construed accordingly.

"**removed from the Register**" means removed from the Register for the purposes of becoming registered as a foundation with legal personality under the law of a place outside Guernsey

Chapter II

Revocation and variation

Power of revocation.

21. (1) The terms of the Constitution may provide that a foundation and any power or exercise of a power under the Constitution may be expressed to be capable of -

- (a) revocation, in whole or in part, or
- (b) variation.

(2) No revocation or variation prejudices anything lawfully done by a councillor in relation to the foundation before he receives notice of the revocation or variation.

(3) Subject to the terms of the Constitution, if the foundation is revoked in whole or in part, the councillors shall hold the foundation property or that part of the foundation property which is the subject of the revocation, as the case may be, as trustees in trust for the default

beneficiary absolutely (see section 37).

- (4) A foundation may only be revoked upon –
 - (a) an application to the Registrar, who must be satisfied that the Constitution permits the foundation to be so revoked, and
 - (b) 28 days' notice to the founder, enfranchised beneficiaries, the foundation officials and any creditors of the foundation.
- (5) If the conditions of subparagraph (4) are satisfied then -
 - (a) the foundation's name shall be removed from the Register,
 - (b) the foundation shall cease to be a persona ficta,
 - (c) the Registrar shall file in the Register a notice stating that the foundation's name has, pursuant to the provisions of this paragraph, been removed from the Register by the revocation of the foundation, and
 - (d) the Registrar shall publish the fact that the foundation has been removed from the Register in such manner and for such period as he thinks fit.

General power to vary.

22. (1) Where foundation is for a charitable or non-charitable purpose, the Royal

Court, on the application of the foundation officials, may approve any arrangement which varies or revokes the purposes or the terms of the Constitution or enlarges or modifies the powers of management or administration of the councillors, if it is satisfied that the arrangement -

- (a) is now suitable or expedient, and
- (b) is consistent with the original intention of the founder and the spirit of the endowment.

(2) The Royal Court may dispense with the consideration set out in subparagraph (1)(b) if satisfied that the original intention of the founder cannot be ascertained.

(3) The Royal Court shall not approve an arrangement under subparagraph (1) unless satisfied that any participant has had an opportunity of being heard.

Chapter III

Dissolution and termination

Termination and dissolution.

23. (1) Subject to the provisions of this Chapter, a foundation shall terminate and be dissolved, by being wound up by the councillors, upon –

- (a) the expiry of its duration (if it is limited in duration),
- (b) the happening of any event specified in that behalf in the Constitution,
- (c) the foundation no longer having any property or assets,

- (d) the bankruptcy of the foundation,
- (e) the completion, failure or lapse of its purpose –
 - (i) by order of the Royal Court, on the application of the councillors or participants, or
 - (ii) with the consent of the participants.
- (f) upon the making by the Royal Court of an order -
 - (i) under paragraph 7 (2) (cancellation of registration) directing the winding up of the foundation, or
 - (ii) under paragraph 24 (1) (winding up by Royal Court) for the winding up of the foundation.

(2) Subject to the order of the Royal Court, immediately prior to termination the foundation property shall, subject to subparagraph (2), be distributed by the councillors within a reasonable time in accordance with the provisions of paragraph 27.

Winding up of foundation by Royal Court.

24. (1) The Royal Court may order the winding up of a foundation on the application of any foundation official, participant or creditor thereof or on the application of the Registrar if in its opinion -

- (a) it is not reasonably practicable to carry on the foundation in conformity with the Constitution,
- (b) it was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty,
- (c) it is, or is being conducted in a way that is, immoral or contrary to public policy,
- (d) its terms are so uncertain that its performance is rendered impossible.
- (e) the foundation is bankrupt,
- (f) without prejudice to the generality of paragraph (e), the following conditions are satisfied -
 - (i) the foundation is indebted to a creditor in a sum exceeding £750 or such other sum as may be prescribed by the Department,
 - (ii) the creditor has, by Her Majesty's Sergeant, served a signification on the foundation demanding payment of the debt, and
 - (iii) the foundation does not, within a period of 21 days immediately following the date of service of that demand, pay the debt or give security for it to the creditor's satisfaction,

- (g) there has been, in relation to the foundation, a failure to comply with any provision of an order of the Royal Court under paragraph 13(3) (name of a foundation),
- (h) the guardian has been denied access to the accounts to which he is entitled under paragraph 23(2),
- (i) the affairs of the foundation are being conducted in such a way as to defraud creditors (whether of the foundation or of any other person) or in an unlawful manner,
- (j) there has been persistent default by the foundation in complying with the requirements or conditions imposed by or under this Law, or any regulation made under it,
- (k) the founder or councillors have in connection with the formation of the foundation, been guilty of fraud, misfeasance, breach of fiduciary duty or other misconduct in relation to the foundation, or
- (l) it is just and equitable to do so.

(2) Upon the making of an order under subparagraph (1) for the winding up of a foundation or at any time thereafter, the Royal Court may make such other orders in relation to the winding up as it thinks fit, including one for the appointment of one or more liquidators to wind up the foundation's affairs and distribute its assets, and to apply to the Registrar for removal of the foundation from the Register.

General provisions as to winding up of foundations.

25. (1) When a foundation is required to be wound up its affairs shall, unless a liquidator has been appointed by the Royal Court under paragraph 24(2) or under subparagraph (5), be wound up by the councillors.

(2) From the commencement of the winding up of a foundation no foundation official may, except in accordance with the provisions of paragraph 27 (distribution of assets), claim as a creditor of the foundation.

(3) For the purposes of this Law, the winding up of a foundation is deemed to commence on the earlier of the following -

- (a) the date of the occurrence of the event upon which, under the provisions of this Law, the foundation is required to be wound up, or
- (b) the date of the order of the Royal Court under paragraph 24(1) for its winding up.

(4) Where there is a contravention of subparagraph (2) in relation to a foundation, the foundation officials shall be guilty of an offence.

(5) Upon the commencement of the winding up of a foundation or at any time thereafter, the Royal Court may, on the application of any foundation official or participant, or assignee thereof or any creditor, make such orders in relation to the winding up as it thinks fit, including one for the appointment of one or more liquidators to wind up the foundation's affairs and distribute its assets.

(6) On the appointment of a liquidator (whether under this paragraph or under paragraph 24) all powers of the foundation officials cease, and a person who purports to exercise any power of a foundation official at a time when, pursuant to this subparagraph, those powers have

ceased shall be guilty of an offence.

(7) From the commencement of the winding up of a foundation the foundation shall cease to carry any activities except to the extent necessary for its beneficial winding up, and where in relation to a foundation there is a contravention of this subparagraph, the foundation and each councillor thereof shall be guilty of an offence.

(8) All expenses properly incurred in the winding up of a foundation, including the liquidator's remuneration, are payable from the foundation's assets in priority to all other debts.

(9) From the commencement of the winding up of a foundation, the persons winding up the foundation's affairs, in the name of and for and on behalf of the foundation -

(a) may, to the extent necessary for the beneficial winding up of the foundation, prosecute, defend or settle any civil or criminal action,

(b) shall dispose of the foundation's property and realise its assets, and

(c) shall, in accordance with the provisions of paragraph 27 (distribution of assets) -

(i) discharge the foundation's debts, and

(ii) distribute any remaining assets of the foundation in accordance with the terms of the Constitution.

(10) As soon as a foundation's affairs are fully wound up -

(a) the persons who conducted the winding up shall -

(i) prepare an account of the winding up, giving details of the conduct thereof and the disposal of the foundation's property, and stating whether or not any state of affairs described in paragraph 26 (personal liability for certain defaults) has come to their attention,

(ii) provide all foundation officials with a copy of the said account, and

(iii) within a period of seven days beginning on the date of completion of the winding up, file with the Registrar, and publish in La Gazette Officielle or in such other manner as may be prescribed by the Registrar, notice of completion of the winding up,

(b) the Registrar shall, as soon as is reasonably practicable after such filing, delete the inscription relating to the foundation from the Register, and

(c) the foundation's certificate of registration shall thereupon cease to be valid and the foundation shall thereupon be dissolved.

(11) Where there is a contravention of any provision of subparagraph (10)(a) in relation to a foundation, the persons who conducted the winding up shall each be guilty of an offence.

(12) The persons conducting the winding up of a foundation may seek the Court's

directions as to any matter arising in relation to the winding up, and upon such an application the Court may make such order as it thinks fit.

Personal liability for certain defaults in event of bankruptcy.

26. (1) In any case where -

- (a) a foundation has been wound up and is unable to pay its debts, and
- (b) there has been in relation to the foundation a contravention of any relevant provision which -
 - (i) has contributed to the inability of the foundation to pay its debts,
 - (ii) has materially misled or deceived any foundation official or participant ~~partner~~ or creditor as to, or has resulted in substantial uncertainty as to, the assets, liabilities, client money or investment instruments of the foundation, or
 - (iii) has substantially impeded the orderly winding up of the foundation's affairs,

any foundation official who is responsible for the contravention shall (without prejudice to any civil liability or order under subparagraph (3)) be guilty of an offence.

(2) In a prosecution for an offence under this paragraph, it shall be a defence for the person charged to show that -

- (a) he took all reasonable steps to secure compliance by the foundation with the relevant provisions, or
- (b) he had reasonable grounds for believing and did believe that a competent and reliable person, acting under the supervision or control of or appointed by the foundation officials -
 - (i) was charged with the duty of ensuring that those provisions were complied with, and
 - (ii) was in a position to discharge that duty.

(3) Where circumstances exist such that a foundation official may be guilty of an offence under subparagraph (1), the Royal Court may, on the application of any creditor, foundation official, participant or of any person conducting the winding up of the foundation, declare that the foundation official who is responsible for the contravention of any matters detailed in subparagraph (1) (b) shall be personally liable, without limitation of liability, for the debts of the foundation or such part thereof as may be specified by the Court.

(4) Where the Royal Court makes a declaration under subparagraph (3) in relation to any person, it may -

- (a) give such directions as it thinks fit for the purpose of giving effect to the declaration, and
- (b) direct that the liability of that person under the declaration shall be a charge on -

- (i) any debt due from the foundation to him, to any person on his behalf, to any person claiming as assignee from or through him or to any person acting on behalf of such an assignee, or
- (ii) any charge on any foundation assets or any interest in any such charge held by or vested in him or any such person,

and the Court may also from time to time make such further orders as it thinks fit for the purpose of giving effect to any charge imposed under this subparagraph.

(5) In subparagraph (4) the expression "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, charge or interest was created, issued or transferred but does not include an assignee for valuable consideration given in good faith and without notice of any of the grounds upon which the declaration might have been made.

(6) The Royal Court shall not make a declaration under subparagraph (3) in respect of a person if it considers that -

- (a) he took all reasonable steps to secure compliance by the foundation with the relevant provisions, or
- (b) he had reasonable grounds for believing and did believe that a competent and reliable person, acting under the supervision or control of or appointed by the councillors -
 - (i) was charged with the duty of ensuring that those provisions were complied with, and

(ii) was in a position to discharge that duty.

(7) Subparagraphs (3), (4), (5) and (6) are without prejudice to any other penalty, remedy or proceedings, whether civil or criminal, in respect of the contravention.

(8) For the purposes of this paragraph -

(a) the expression "relevant provision" means any provision of section 23 and any other provision for the time being prescribed by regulations of the Department, and

(b) a person shall be considered to be responsible for a contravention of a relevant provision if the contravention -

(i) was committed with his consent or connivance, or

(ii) was attributable to or facilitated by any neglect on his part.

Distribution of assets upon winding up.

27. Upon the winding up of a foundation, the assets shall be distributed in the following order -

(a) firstly, to creditors other than foundation officials or participants, to the extent otherwise permitted by law, in satisfaction of the foundation's debts,

(b) secondly, to foundation officials who are creditors, to the extent otherwise permitted by law, in satisfaction of the foundation debts,

- (c) finally, subject to the provisions of the Constitution, to the default beneficiary (see section 37).

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