

# Private Foundations Act 2017

## Principal Act

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AN ACT TO PERMIT THE ESTABLISHMENT OF PRIVATE FOUNDATIONS IN GIBRALTAR, TO DETERMINE THE LEGAL STATUS OF SUCH FOUNDATIONS, TO RESTRICT THE PURPOSES FOR WHICH SUCH FOUNDATIONS MAY BE USED, TO REGULATE THE CREATION, OPERATION AND MANAGEMENT THEREOF AND TO PROVIDE FOR THE WINDING UP OF ANY FOUNDATION SO CREATED AND FOR MATTERS INCIDENTAL THERETO INCLUDING BUT NOT LIMITED TO THE ESTABLISHMENT AND CONDUCT OF A REGISTER OF PRIVATE FOUNDATIONS.

**PART 1**  
**COMMENCEMENT AND INTERPRETATION**

**Title and commencement.**

1. This Act may be cited as the Private Foundations Act 2017 and comes into operation the day appointed by the Minister by notice in the Gazette and different days may be appointed for different provisions and for different purposes.

**Interpretation.**

2. In this Act, unless the context shall otherwise require—

“accounting records” includes all underlying documentation, such as invoices, receipts and contracts;

“auditor” means an auditor approved under the Financial Services (Auditors) Act 2009, as a statutory auditor;

“Beneficiary” has the meaning given to it in section 32;

“Charter” means a Foundation Charter;

“Class VII License” means a licence issued under section 8 of the Financial Services (Investment and Fiduciary Services) Act and classified as a Class VII licence under Schedule 1 to the Financial Services (Licensing) Regulations 1991.

“Companies Act” means the Companies Act 2014;

“Constitutional Documents” means the documents set out in section 7(1);

“the Court” means the Supreme Court of Gibraltar;

“Disenfranchised Beneficiary” has the meaning given to it in section 34;

“EEA” means the territories to which the EEA Agreement applies;

“EEA Agreement” means the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993;

“EEA State” means a State which is a Contracting Party to the EEA Agreement;

“to endow” means to pass the title in property absolutely and without consideration to a private foundation so that the property becomes the assets of that foundation and shall include whatever act shall be necessary in relation to any particular property effectively and irrevocably to so transfer title;

“Enfranchised Beneficiary” means a Beneficiary who is not a Disenfranchised Beneficiary;

“Foundation” means the legal entity meeting the requirement of section 3;

“Foundation Charter” means the charter prescribed in sections 5 and 8;

“Foundation Council” means all of the councillors of a Foundation;

“Foundation officer” means any councillor or Guardian of a Foundation registered under this Act;

“Foundation Rules” means the rules prescribed in section 9;

“Founder” has the meaning given to it in section 5;

“Guardian” has the meaning given to it in sections 28 and 29;

“initial assets” means the assets endowed by the Founder or Founders and constituting the initial property of the Foundation;

“Minister” means the Minister responsible for financial services;

“officer” means any Foundation officer;

“proper books of account” means such books or accounts as are necessary to exhibit and explain the transactions and financial position of the administration, trade or business of the Foundation and includes books containing entries from day to day of all cash received and cash paid, statements of annual stocktaking, all goods sold and purchased showing sufficient detail to enable those goods, buyers and sellers to be identified, and any contracts, invoices or other underlying documentation significant to the trade, business or administration of the Foundation;

“Beneficiary” has the meaning given to it in section 32;

“Register” has the meaning given to it in section 12;

“Registrar” has the meaning given to it in section 11.

**PART II**  
**ESTABLISHMENT AND CONSTITUTION**

**Definition of a Foundation.**

3.(1) An entity–

- (a) established in accordance with section 5; and
- (b) registered in accordance with Part III,

shall be a Foundation.

(2) A Foundation satisfying subsection (1) shall be–

- (a) a legal entity;
- (b) established in Gibraltar;
- (c) able to hold and deal with property in its own name as an absolute legal owner; and
- (d) able to sue and be sued in its own name.

(3) A Foundation will hold assets which have been effectively transferred to that Foundation either in the Foundation Charter or subsequently for the purposes or objects described in its Foundation Charter and permissible under this Act.

(4) In the absence of fraud, assets effectively transferred to a Foundation shall be the property of that Foundation (with full legal, equitable and beneficial title), shall cease to be the property of the Founder and shall not become the property of any Beneficiary (where applicable) unless distributed in accordance with the Foundation Charter or the Foundation Rules (if any) and this Act.

(5) The assets of a Foundation may consist of present or future assets of any nature.

(6) The assets of a Foundation shall be exclusively managed, including being realized, applied, administered, invested and disbursed in accordance with the Foundation Charter, the Foundation Rules (if any) and this Act for the attainment of the purposes or objects specified in the Foundation Charter and permissible under this Act.



**Purpose or objects of a Foundation.**

4.(1) Subject to subsection (2), a Foundation may be established for any purpose or purposes which are capable of fulfilment and which are not unlawful, immoral or contrary to public policy in Gibraltar.

(2) The permitted purposes and objects of a Foundation shall not include–

- (a) the carrying on of a commercial or trading activity unless that activity is incidental to the attainment of its purpose or objects;
- (b) the carrying on in or from Gibraltar of any activity in respect of which a licence under any other Act is required in the absence of that licence having been granted to the Foundation.

(3) An object of a Foundation may, but need not be, charitable or philanthropic.

(4) Whenever a Foundation is established for or its Foundation Charter subsequently amended to allow for–

- (a) any purpose in respect of which there are no designated Beneficiaries;
- (b) the benefit of a class of Beneficiaries which is not sufficiently certain;
- (c) the benefit of a large class of Beneficiaries; or
- (d) the benefit of a class of Beneficiaries which includes one or more Disenfranchised Beneficiaries,

a person or persons must be appointed to act as Guardian of the Foundation in accordance with the provisions of this Act.

(5) For the purposes of sub-section (4)(b) a class of Beneficiaries shall be sufficiently certain if it can be said with certainty whether any given individual is or is not a member of the class notwithstanding that it may not be possible to ascertain every member of that class.

(6) For the purposes of sub-section (4)(c) a class of Beneficiaries shall constitute a large class of Beneficiaries if it includes more than fifty ascertainable members.

(7) The purpose of a Foundation may be only amended–

- (a) where there is an express power so to amend in the Foundation Charter;
- (b) by order of the Court in accordance with sub-section (8); or

(c) by order of the Court in accordance with section 81.

(8) If there is no power to amend the purpose in the Foundation Charter in accordance with subsection (7), subject to subsection (9), the purpose may be amended by order of the 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 Court, on the application of—

- (i) the councillors;
- (ii) the Guardian; or
- (iii) the Beneficiaries,

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

(9) An application to the Court to amend the purpose under subsection (8) may only be made upon notice to the Beneficiaries and, where there is a Guardian appointed, to the Guardian.

**Establishment of a Foundation.**

5. Any one or more persons (“the Founder”) may, by–

- (a) endowing the Foundation with its initial assets;
- (b) subscribing his name, as Founder, to a Foundation Charter; and
- (c) otherwise complying with the requirements of section 13 of this Act,

establish a Foundation.

**Irrevocability of Endowments.**

6. Any endowment made under section 5 shall be irrevocable.

**Constitutional Documents of a Foundation.**

7.(1) The Constitutional Documents of a Foundation comprise–

- (a) the Foundation Charter; and (where applicable)
- (b) the Foundation Rules.

(2) The Minister may by regulations prescribe–

- (a) a standard Foundation Charter; and
- (b) standard Foundation Rules.

(3) A standard Foundation Charter or standard Foundation Rules prescribed by regulations made under subsection (2)–

- (a) apply in relation to a Foundation only to the extent that the Founder adopts them; and
- (b) may be adopted in whole or in part, subject to any exceptions or modifications.

**Foundation Charter.**

8.(1) The Foundation Charter shall state–

- (a) the name of the Foundation;
- (b) the name and address of the Founder and where the Founder is a legal person the number and place of registration of that legal person;
- (c) the purpose or objects of the Foundation;
- (d) the endowment of the assets which shall constitute the initial assets of the Foundation;
- (e) that the governing law of the Foundation shall be the law of Gibraltar;
- (f) the power of the Founder or any other person to amend the Foundation Charter including (if applicable) the power to amend the objects of the Foundation;
- (g) the manner in which the Beneficiaries of the Foundation (if any) are to be designated;
- (h) whether the Foundation is established for an indefinite period or a definite period and where it is established for a definite period, that period;
- (i) the address of the registered office in Gibraltar of the Foundation; and
- (j) the address in Gibraltar for service of documents on the Founder (if different to the Registered Office).

(2) The Foundation Charter shall be a deed executed by the Founder in accordance with the law of Gibraltar.

(3) The Foundation Charter may be amended only if—

- (a) the Foundation Charter so provides; or
- (b) an application is made to the Court under section 48.

#### **Foundation Rules.**

9.(1) The Foundation Rules shall—

- (a) prescribe the functions of the councillors;
- (b) detail the procedures for the appointment, resignation and removal of councillors if these are to be different to the provisions of this Act in respect thereof;

- (c) where a Guardian must be appointed under section 4(4), detail the procedures for the appointment, resignation and removal of Guardians if these are to be different to the provisions of this Act in respect thereof;
  - (d) make such provision as the Founder thinks fit (if any) for the remuneration of councillors and any Guardian;
  - (e) prescribe the manner in which property of the Foundation may be distributed, accumulated or applied;
  - (f) detail whether, and if so how, further property may be endowed upon the Foundation; and
  - (g) prescribe the manner in which property of the Foundation shall be distributed on a winding up of the Foundation.
- (2) The Foundation Rules may–
- (a) provide for the addition and removal of Beneficiaries either revocably or irrevocably;
  - (b) impose obligations upon Beneficiaries as a condition of benefit;
  - (c) make the interest of a Beneficiary–
    - (i) liable to termination;
    - (ii) subject to a restriction on alienation or dealing; and
    - (iii) subject to diminution or termination in the event of the Beneficiary becoming bankrupt or similar process of law;
  - (d) provide for the appointment, removal and period of office of an auditor;
  - (e) specify the circumstances in which it may be necessary to appoint a Guardian and detail the procedures for the appointment, resignation and removal of any such Guardian if these are to be different to the provisions of this Act in respect thereof;
  - (f) subject always to the provisions of this Act detail the circumstances, if any, in which the Foundation may be migrated and the conditions to be satisfied in respect thereof;
  - (g) detail the circumstances and manner in which the Foundation Rules may be amended; and
  - (h) contain any other matter that the Founder thinks fit.

- (3) The Foundation Rules may be amended only if–
- (a) the Constitutional Documents so provide; or
  - (b) an application is made to the Court under section 48.

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

#### **Effect of Foundation Charter and Foundation Rules.**

10. Subject to the provisions of this Act, the Foundation Charter and Foundation Rules shall, when registered, bind the Foundation.

### **PART III REGISTRATION**

#### **Registrar of Foundations.**

11. There is established the office of the Registrar of Foundations (“the Registrar”), which shall be held by the Registrar of Companies appointed under section 420(1) of the Companies Act.

#### **Register of Foundations.**

12.(1) The Registrar shall establish and thereafter maintain a Register of Foundations (“the Register”).

(2) The Register shall contain a record of all Foundations registered under section 13 and all overseas foundations registered as Gibraltar Foundations under section 65 and shall, in respect thereof, contain–

- (a) the name and registered number of the Foundation;
- (b) the date of registration;
- (c) the name and address of the councillors;
- (d) the name and address of the Guardian, if any;
- (e) the details of the registered office; and

- (f) any and all other documents filed with the Registrar under or for the purposes of this Act.

(3) The information set out in subsections (2)(a) to (2)(e) above shall be available for public inspection.

### **Registration of a Foundation.**

13.(1) Every Foundation shall be registered in accordance with this section.

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

- (a) the Foundation Charter;
- (b) details of the endowment;
- (c) a notarised declaration signed by the councillors to the effect that the initial assets of the Foundation have been placed at their disposal and are available to them without condition for the purposes of the Foundation;
- (d) a declaration signed by the Founder or his agent confirming that the details contained within the Foundation Charter are correct and an accurate reflection of the purposes of the Foundation;
- (e) the names and addresses of the councillors, together with their written consent so to act;
- (f) the name and address of the Guardian together with his written consent so to act;
- (g) the address and telephone number of the registered office in Gibraltar;
- (h) any fee specified by the Registrar; and
- (i) such other documents or information as the Registrar may require.

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

- (a) register the Foundation in the Register by inscribing its name therein;
- (b) allocate a registration number to the Foundation; and
- (c) provide to the Foundation, at its registered office, a Certificate of Establishment stating–

- (i) the date of registration of the Foundation;
- (ii) the name of the Foundation;
- (iii) the registration number of the Foundation; and
- (iv) the address of the registered office of the Foundation.

(4) Each Certificate of Establishment shall be signed and sealed by the Registrar.

(5) The Certificate of Establishment shall be conclusive evidence of the registration of the Foundation.

(6) A Certificate of Establishment shall cease to be valid in the circumstances described in sections 16(1) and 85(10)(c).

(7) A Certificate of Establishment or a copy thereof issued and sealed by the Registrar shall be received in evidence in all legal proceedings.

(8) The Registrar—

- (a) when registering a Foundation; and
- (b) when issuing a Certificate of Establishment in relation to the Foundation;

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 Act have been complied with.

#### **Annual return.**

14.(1) Every Foundation shall deliver to the Registrar successive annual returns each of which is made up to a date not later than the anniversary of the Foundation's registration.

(2) An annual return shall be in the form prescribed by the Registrar from time to time and shall state—

- (a) the address of the registered office of the Foundation; and
- (b) such particulars with respect to the persons who at the date of the return are the councillors and the Guardians of the Foundation as are required by this Act to be contained with respect to councillors and Guardians.

(3) An annual return shall be delivered to the Registrar within 28 days after the date to which it is made up.



**General provisions as to annual returns.**

15.(1) If a Foundation fails to comply with section 14 the Foundation shall be guilty of an offence and liable on summary conviction to a fine at level 3 on the standard scale and for continued contravention, to a daily fine of an amount of one half of the amount at level 3 on the standard scale.

(2) The Minister may by regulations make provision in respect of the operation of section 14, in particular with regard to the fees chargeable for the delivery of annual returns to the Registrar.

**Change in registered particulars.**

16.(1) If during the continuance of a Foundation—

- (a) there is a change in any particular of the Foundation referred to in section 13(2) including any change to the Foundation Charter; or
- (b) a person becomes or ceases to be a councillor or a Guardian,

notice of the change signed by any one or more of the councillors 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 Establishment, upon the issue of which the existing Certificate of Establishment shall cease to be valid.

(2) In default of compliance with subsection (1)—

- (a) the Foundation shall be guilty of an offence and liable on summary conviction to a fine at level 3 on the standard scale and for continued contravention, to a daily fine of an amount of one half of the amount up to level 3 on the standard scale;
- (b) the Registrar may impose such financial penalty as the Minister may, by regulations under this section, prescribe; and
- (c) the change may not be relied on by the Foundation or by any Foundation officer or former Foundation officer thereof so as to affect adversely the rights of any third person.

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

**Effect of non-compliance.**

17. In default of compliance with its obligation to deliver an annual return in accordance with section 14 for a period of 6 months the Registrar may send a registered letter to the Foundation advising it of the default and requesting that the default be remedied within one month of the date thereof in default of which the Registrar may apply to the Court for an order to wind up the Foundation pursuant to section 84.

**Registered office.**

18. A Foundation registered under this Act must at all times have a registered office in Gibraltar, to which all communications and notices may be addressed.

**Foundation Name.**

19.(1) The name of a Foundation must end with the word “Foundation” or its abbreviation “Fdn.”.

(2) No Foundation shall be registered by a name—

- (a) which includes the word “limited” or an abbreviation of the word “limited” or word or words which are a translation of or convey a similar meaning to that word in the language or practice of an EEA State;
- (b) which includes the word “company” or an abbreviation of the word “company” or the word or words which are the translation of or convey a similar meaning to that word in the language or practice of an EEA State;
- (c) which includes the word “partnership” or an abbreviation of that word or words which are a translation of or convey a similar meaning to that word in the language or practice of an EEA State;
- (d) which is the same or similar to the name of an existing Gibraltar company, partnership, Foundation or other Gibraltar body, except where the company, partnership, Foundation or other body having that name in existence is in the course of being dissolved or wound up and signifies its consent in such manner as the Registrar requires;
- (e) the use of which, by the Foundation, would in the opinion of the Registrar constitute a criminal offence;
- (f) which in the opinion of the Registrar is offensive;
- (g) which in the opinion of the Registrar is undesirable;
- (h) which contains the words “Chamber of Commerce”; or

- (i) which contains the words “Bank”, “Collective Investment Scheme”, “Co-operative”, “Building Society”, “Insurance”, “Stock Exchange” or “Trust”.

(3) Except with the consent of the Registrar no Foundation shall be registered by a name which–

- (a) contains the words “Royal” or “Imperial” or “Empire” or “Windsor” or “Crown” or “rock” or “empire” or in the opinion of the Registrar suggests, or is calculated to suggest, the patronage of Her Majesty or of any member of the Royal Family or connection with Her Majesty's Government or the Government of Gibraltar or any department thereof;
- (b) contains the words “Municipal” or “Chartered” or in the opinion of the Registrar suggests, or is calculated to suggest, connection with any municipality or other local authority or with any society or body incorporated by Royal Charter.

(4) In determining for the purposes of sub-section (2)(d) whether one name is the same as another–

- (a) there are to be disregarded–
  - (i) the definite article, where it is the first word of the name;
  - (ii) the words “Private Foundation” or the abbreviations “Fdn” where they appear at the end of a name;
  - (iii) type and case of letters, accents, spaces between letters and punctuation marks; and
- (b) “and” and “&” are to be taken as the same.

### **Change of Name.**

20.(1) Subject to the terms of the Foundation Charter and to the provisions of this Act, a Foundation may, by resolution of the councillors, amend its Foundation Charter to change its name at any time.

(2) The change of name shall not affect any rights or obligations of the Foundation, or render defective any legal proceedings by or against the Foundation, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

### **Power to require Foundation to change name.**

21.(1) Where a Foundation has been registered by a name which–

- (a) does not comply with section 19; or
- (b) is, in the opinion of the Registrar, for any other reason objectionable,

the Registrar may in writing direct the Foundation to change its name within such period as he may specify.

(2) Section 19(4) applies in determining under sub-section (1) whether the name is the same as or too similar to another.

(3) If it appears to the Registrar that misleading information has been given for the purpose of a Foundation's registration with a particular name, or that undertakings or assurances have been given for that purpose and have not been fulfilled, he may within 5 years of the date of its registration with that name in writing direct the Foundation to change its name within such period as he may specify.

(4) Where a direction has been given under sub-section (1) or (3) and the Foundation does not comply with that direction within the time specified therein the Registrar may assign a new name to the Foundation and shall enter such assigned name in the Register.

(5) If the Registrar assigns a new name to the Foundation under this section he must issue a new Certificate of Establishment in respect of the Foundation and serve it on the Foundation at its registered office.

#### **Use of “Limited”, “company” etc.**

22. Any Foundation which represents itself in any way to any person by the use of words or expressions prohibited by paragraph (a), (b) or (c) of section 19(2) is liable on summary conviction to a fine up to level 4 on the standard scale and in the event of default continuing to a daily penalty of one twentieth of the amount of level 4 on the standard scale.

### **PART IV PARTIES**

#### **Powers and obligations of Founder.**

23.(1) The Founder may not reserve any powers to himself other than those set out below—

- (a) a power to vary or amend the terms of the Constitutional Documents, in whole or in part;
- (b) a power to vary or amend the purpose of the Foundation, in whole or in part;

- (c) a power to remove or appoint councillors from or to the Foundation Council of the Foundation;
- (d) a power to remove or appoint a Guardian from or to the Foundation,

and in each such case the reserved power shall be effective only if detailed in full in the Foundation Charter.

- (2) The powers detailed in subsection (1) may only be reserved–
  - (a) for the duration of the Founder’s life, if he is a natural person; or
  - (b) for 30 years from the date of establishment, if it is a legal person,

and thereafter any such powers so reserved shall lapse, notwithstanding the terms of the Constitutional Documents.

(3) Where in respect of a Foundation there is more than one Founder, the powers of the Founders under this Act or the Constitutional Documents may only be exercised by all the Founders acting jointly, unless the Constitutional Documents otherwise provide.

(4) The rights of a Founder in respect of the formation of a Foundation do not devolve upon his successors in title or assigns.

(5) Nothing in this section shall preclude the powers set out in sub-sections (1)(a) and (1)(b) from vesting in the councillors or the Guardian during the periods set out in sub-section (2) but for the avoidance of doubt such powers may not be reserved to any person not being a Founder, a councillor or a Guardian of the Foundation.

(6) Nothing in this section shall preclude the powers set out in sub-sections (1)(d) and (1)(e) from vesting in any person nominated in the Constitutional Documents during the life of the Founder or upon his death.

(7) A person who endows assets to a Foundation after its establishment shall not thereby acquire the position or status of a Founder.

(8) Nothing in this section or under this Act shall prohibit a person who is the Founder of a Foundation from being appointed Guardian or councillor of that Foundation and to the extent that that person is appointed Guardian or councillor of that Foundation he shall enjoy the same powers as any other Guardian or councillor appointed as Guardian or councillor of that Foundation in accordance with the Constitutional Documents of that Foundation and the provisions of this Act.

(9) Nothing in this section or in this Act shall prohibit a person who is a Founder of a Foundation from being a designated Beneficiary or a member of the designated class of Beneficiaries of the Foundation.

**Appointment and qualification of councillors.**

24.(1) A Foundation registered under this Act must at all times have a Gibraltar resident body corporate holding a Class VII license on its Foundation Council and subject to the above–

- (a) a Gibraltar resident body corporate holding a Class VII license may be the sole councillor of the Foundation Council;
- (b) a Foundation shall not have a maximum number of councillors on its Foundation Council.

(2) Any reference in any enactment or in any agreement between the Government of Gibraltar and the government of any other country, state or jurisdiction and whether relating to the exchange of information relating to taxes or otherwise, to a “member of the foundation council” of a Foundation established under this Act shall be deemed to be a reference to a councillor of that Foundation.

(3) A designated Beneficiary of a Foundation or a member of the designated class of Beneficiaries of a Foundation may be a councillor of that Foundation.

(4) Nothing in this section or in this Act shall prohibit a councillor of a Foundation registered under this Act to act as councillor of any other Foundation whether registered under this Act or otherwise.

(5) Every councillor must be named in the Register of Foundations and must comply with the provisions of the Constitutional Documents of the Foundation and the provisions of this Act.

(6) A person or body corporate shall not be capable of being appointed councillor of a Foundation unless–

- (a) he complies with all applicable requirements under this Act; and
- (b) he has delivered to the Registrar for registration a consent, in writing and duly signed, to act as councillor of that Foundation.

(7) Prior to the registration of a Foundation under the provisions of this Act the power to appoint councillors in contemplation of registration shall vest only in the Founder.

(8) Once a Foundation has been registered under this Act the power to appoint councillors shall vest in the persons identified in the Constitutional Documents of the Foundation as having the power to appoint councillors.

(9) Where the Constitutional Documents of the Foundation fail to identify the persons with the power to appoint councillors or the person so appointed cannot act the said power shall vest in the following persons in order of priority—

- (a) the councillors for the time being of the Foundation Council of the Foundation;
- (b) the personal representative or liquidator of the last remaining councillor; or
- (c) the Court.

(10) Any person with the power to appoint new or additional councillors who fails to exercise the power when required to do so under this Act or the Constitutional Documents may be held by the Court to have forfeited that power.

(11) A councillor appointed in relation to a Foundation registered under this Act who intends to cease acting as a councillor in relation to that Foundation shall—

- (a) give notice in writing of his intention to the Foundation; and
- (b) lodge with the Registrar a declaration that he has given such notice,

and such notice shall be given and declaration lodged no later than 7 days before the councillor intends to cease to so act.

(12) Where a person is appointed as councillor of a Foundation, the provisions of this Act shall apply to that person until—

- (a) the expiration of a period of 7 days after the date on which a declaration is lodged under sub-section (11);
- (b) the Foundation ceases to be a Foundation registered under this Act;
- (c) the Foundation is wound up or dissolved, as the case may be, in accordance with the provisions of this Act;
- (d) the death or bankruptcy of the councillor; or
- (e) the occurrence of any other event which disqualifies the person from acting as councillor.

(13) A resignation—

- (a) given to facilitate a breach of duty; or
- (b) which would result in a breach of sub-section (1),

has no effect.

(14) Nothing in this section shall be construed as making a person appointed as councillor of a Foundation liable in any legal proceedings (whether civil or criminal) for any act or omission of the Foundation.

#### **Duties, etc. of councillors.**

25.(1) A councillor shall act in accordance with the Foundation Charter and the Foundation Rules of the Foundation.

(2) A councillor shall take all such steps and do or cause to be done all such things as may be necessary to properly administer the Foundation to achieve the objects of that Foundation.

(3) A councillor, in exercising his powers and discharging his duties under the Constitutional Documents and this Act shall—

- (a) act honestly and in good faith with a view to the interests and purposes of the Foundation;
- (b) exercise the care, diligence and skill which a reasonably prudent person would exercise in comparable circumstances and where acting in a professional capacity exercise the care, diligence and skill which a professional councillor of a Foundation would exercise in comparable circumstances;
- (c) not derive, directly or indirectly, any profit from his appointment;
- (d) not cause or permit any other person to so derive any such profit; or
- (e) not on his own account enter into any transaction with the Foundation, or relating to the property of the Foundation, which may result in any such profit.

(4) Nothing in sub-section (3) shall prevent a councillor from being paid or reimbursed from the property of the Foundation for all expenses and liabilities properly incurred in connection with the Foundation including any reasonable fees charged by the councillor either on a fixed basis or a time spent basis for services provided to the Foundation as councillor of the Foundation.

(5) Any fees charged or chargeable by a councillor in his capacity as councillor of a Foundation may be settled by the Founder and such settlement or arrangement shall not be



allowed by the Court, in any matter before it, as evidence that the Founder exercises control over that or any councillor of the Foundation or over the property of the Foundation.

(6) The councillors may make a distribution to a Beneficiary only in accordance with the Constitutional Documents of the Foundation.

(7) Notwithstanding the provisions of the Constitutional Documents a councillor shall not make a distribution from the assets of a Foundation for the purpose of defeating the claim of any creditor of the Foundation.

(8) Except where the Constitutional Documents otherwise provide, the councillors of the Foundation Council shall act unanimously.

(9) Except where the Constitutional Documents otherwise provide, no distribution to a Beneficiary shall be validly made unless it is signed by all the councillors then appointed.

(10) Except in so far as is expressly provided in the Constitutional Documents, a Foundation shall be bound by any document required by this or any other Act to be in writing only where that document is signed by all the councillors then appointed.

(11) The Foundation Council acting unanimously and jointly may by deed delegate to any councillor any power of the Foundation Council to be exercised as provided for in that deed.

(12) The Foundation Council acting unanimously and jointly may by deed delegate to any person any power of the Foundation Council to be exercised over the administration and investment of the assets of the Foundation as provided for in that deed provided always that no power over the disposition, appointment or distribution of assets to a Beneficiary or the application of assets towards the purposes of a Foundation may be delegated to any person under this sub-section.

(13) The Foundation Council shall ensure that a Foundation shall keep the following documents at its registered office for a period of 5 years–

- (a) all documents filed with the Registrar;
- (b) proper books of account.

(14) The Foundation Council shall record in writing information as to the identity of the Founder, councillors, Guardian and Beneficiaries of the Foundation and maintain such information for a period of 5 years.

(15) The Guardian shall be entitled to inspect the documents referred to in sub-section (13) upon 2 working days' notice in writing to the Foundation Council.

(16) Notwithstanding anything in this Act, a councillor is not, subject to the terms of the Constitutional Documents and to any order of the 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; or
- (c) any material upon which such a decision was or might have been based.

(17) A person may apply to the Court for an order for the disclosure of any document, but before making such order the Court must be satisfied that such 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.

#### **Limitation of a Councillor's Liability.**

26.(1) Subject to the provisions of this Act and the terms of the Constitutional Documents a councillor who commits or concurs in a breach of any of the duties imposed by the provisions of this Act shall be liable for—

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

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

(3) A councillor is not liable for a breach of duty committed by another councillor unless—

- (a) he becomes or ought to have become aware of the breach; and
- (b) he actively conceals the breach, fails within a reasonable time to take proper steps to protect or restore the Foundation property or fails to prevent the breach where he was in a position to do so.

(4) The Constitutional Documents of a Foundation may not—

- (a) relieve a councillor of liability for a breach of duty arising from his own fraud or wilful misconduct or a decision taken in bad faith; or
- (b) grant him any indemnity against the Foundation property in respect of any such liability.

**Powers of Foundation Council.**

27. Subject to the provisions of the Constitutional Documents of a Foundation and to the provisions of this Act the Foundation Council of a Foundation shall in respect of the management administration and investment of the property of the Foundation have all the powers of an absolute beneficial owner.

**Appointment of Guardian.**

28.(1) The Constitutional Documents of a Foundation may provide for the appointment of a person or persons to be the Guardian of that Foundation.

(2) Where more than one person is appointed to act as Guardian, such persons shall act jointly unless the Constitutional Documents provide otherwise.

(3) Subject to the terms of the Constitutional Documents, a Guardian shall be appointed in the following manner–

- (a) if appointed on or prior to the registration of the Foundation under this Act he must be appointed by the Founder;
- (b) if appointed after the registration of the Foundation under this Act he may be appointed by the Founder or such other person as may be empowered by the Founder in the Constitutional Documents.

(4) If the appointment of a Guardian is required under section 4(4) or any other provision of this Act and the Constitutional Documents of the Foundation fail to identify the persons with the power to appoint a Guardian or the person so appointed cannot act the said power shall vest in the following persons in order of priority–

- (a) the Foundation Council;
- (b) the personal representative or liquidator of the last remaining councillor;
- (c) the Court.

(5) A Guardian appointed in relation to a Foundation who intends to cease acting as a Guardian in relation to that Foundation shall give notice in writing of his intention to the

Foundation and such notice shall be given no later than 7 days before the Guardian intends to cease to so act.

(6) Where a person is appointed as Guardian of a Foundation, the provisions of this Act shall apply to that person until–

- (a) the expiration of a period of 7 days after the date on which the notice is provided under sub-section (5);
- (b) the Foundation ceases to be a Foundation registered under this Act;
- (c) the Foundation is wound up or dissolved, as the case may be, in accordance with the provisions of this Act;
- (d) the death or bankruptcy of the Guardian; or
- (e) the occurrence of any other event which disqualifies the person from acting as Guardian.

#### **Duties of Guardian.**

29.(1) A Guardian shall act in accordance with the Constitutional Documents of the Foundation.

(2) A Guardian, in exercising his powers and discharging his duties under the Constitutional Documents and this Act shall–

- (a) act honestly and in good faith with a view to the interests of the Beneficiaries and the purpose of the Foundation;
- (b) exercise the care, diligence and skill which a reasonably prudent person would exercise in comparable circumstances and where acting in a professional capacity exercise the care, diligence and skill which a professional Guardian of a Foundation would exercise in comparable circumstances;
- (c) save where he is also a Beneficiary of the Foundation owe a fiduciary duty to the Beneficiaries of the Foundation and where there are no Beneficiaries shall owe a fiduciary duty to the Founder of the Foundation to apply his powers towards the attainment of the purpose of the Foundation;
- (d) not derive, directly or indirectly, any profit from his appointment save, where applicable, in his capacity as Beneficiary of the Foundation;
- (e) not cause or permit any other person to so derive any such profit save, where applicable, in his capacity as Beneficiary of the Foundation; or

- (f) not on his own account enter into any transaction with the Foundation, or relating to the property of the Foundation, which may result in any such profit save, where applicable, in his capacity as Beneficiary of the Foundation.

(3) Nothing in this section shall prevent a Guardian from being paid or reimbursed from the property of the Foundation for all expenses and liabilities properly incurred in connection with the Foundation including any reasonable fees charged by the Guardian either on a fixed basis or a time spent basis for services provided to the Foundation as Guardian of the Foundation.

(4) Any fees charged or chargeable by a Guardian in his capacity as Guardian of a Foundation may be settled by the Founder and such settlement or arrangement shall not be allowed by the Court, in any matter before it, as evidence that the Founder exercises control over that Guardian or over the property of the Foundation.

#### **Limitation of Guardian's liability.**

30. The provisions of section 26 shall apply mutatis mutandis to Guardians as if any reference in that section to a "councillor" or "councillors" or "Foundation Council" was a reference to a Guardian or Guardians.

#### **Powers of Guardian.**

31. Save as provided under this Act a Guardian shall have only the powers vested in him by virtue of the Constitutional Documents of the Foundation.

#### **Beneficiaries.**

32.(1) A Beneficiary is a person who is or may be entitled to benefit from a Foundation—

- (a) so identified in the Constitutional Documents by name; or
- (b) whose identity is ascertainable from the terms of the Constitutional Documents by reference to—
  - (i) a class, 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 Constitutional Documents, members of a class are to be determined.

(2) The Constitutional Documents 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 Constitutional Documents may impose an obligation on a Beneficiary as a condition of benefit.

(4) A Founder, councillor or Guardian of a Foundation may also be a Beneficiary thereof.

(5) The Constitutional Documents should state whether a Beneficiary is an Enfranchised Beneficiary or a Disenfranchised Beneficiary for the purposes of this Act; and

(6) Where the Constitutional Documents are silent as to whether a Beneficiary is enfranchised or disenfranchised, the Beneficiary shall be an Enfranchised Beneficiary for all the purposes of this Act.

#### **Enfranchised Beneficiaries.**

33.(1) An Enfranchised Beneficiary shall be entitled to–

- (a) copies of the Constitutional Documents;
- (b) disclosure of records and accounts of the Foundation, on written request to the Foundation Council;
- (c) make an application to the Court to request an order to prohibit–
  - (i) a change to the purpose under section 4 or section 81, or
  - (ii) the dissolution of the Foundation.

(2) Subject to the terms of the Constitutional Documents, sub-section (1) does not entitle a Beneficiary to the information detailed in section 25(16).

#### **Disenfranchised Beneficiaries.**

34.(1) A Disenfranchised Beneficiary is any Beneficiary who is not entitled to all of the rights set out in section 33 of this Act.

(2) For the avoidance of doubt the Constitutional Documents of a Foundation may provide for a Beneficiary to enjoy some of the rights set out in section 33 but any Beneficiary who does not enjoy all of the rights set out in section 33 shall for the purposes of this Act be a Disenfranchised Beneficiary.

#### **Disclaimer of interest.**

35.(1) Subject to the terms of the Constitutional Documents, 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 Constitutional Documents—

- (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.

**Power of accumulation and advancement.**

36.(1) Subject to the terms of the Constitutional Documents and to any prior interest or charge affecting the Foundation property, the Foundation Council 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; or
- (b) advance or apply for the benefit of a Beneficiary any 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 Constitutional Documents—

- (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 Foundation Council or any councillor thereof for a payment made to the Beneficiary or for his benefit.

**PART V  
ACCOUNTS**

**Keeping of Accounts.**

37.(1) Every Foundation shall cause to be kept for a period of 5 years proper books of account with respect to—

- (a) all sums of money received and expended by the Foundation and the matters in respect of which the receipt and expenditure takes place; and
- (b) the assets and liabilities of the Foundation.

(2) The books of account shall be kept at the registered office of the Foundation, and shall at all times be open to inspection by the councillors.

(3) Subject to subsection (4), a person who, being a councillor of a Foundation, fails to take all reasonable steps to secure compliance by the Foundation with the requirements of this section, or has by his own wilful act been the cause of any default by the Foundation thereunder, shall be liable, in respect of each offence, on summary conviction to imprisonment for up to 6 months or to a fine up to level 4 on the standard scale.

(4) A person shall not be sentenced to imprisonment for an offence under this section unless, in the opinion of the court dealing with the case, the offence was committed knowingly.

#### **Income and Expenditure account and balance sheet.**

38.(1) The councillors of a Foundation shall cause to be made out at some date not later than 18 months after the registration of the Foundation under this Act and subsequently once for each financial year of the Foundation, an income and expenditure account for the period.

(2) The councillors shall cause to be made out for each financial year of a Foundation a balance sheet as at the date to which the income and expenditure account is made up, and there shall be attached to every such balance sheet a report by the councillors with respect to the state of the Foundation's affairs.

(3) A Foundation's financial year is determined as follows—

- (a) its first financial year—
  - (i) begins with the day of its registration as a Foundation under this Act, and
  - (ii) ends not later than 18 months after the day of its registration as a Foundation under this Act, as the directors may determine;
- (b) subsequent financial years—
  - (i) begin with the day immediately following the end of the Foundation's previous financial year, and
  - (ii) ends 12 months thereafter.



(4) A person who, being a councillor of a Foundation to which this section applies, fails to take all reasonable steps to comply with the provisions of this section, shall be guilty of an offence and liable, in respect of each offence, on summary conviction to imprisonment for up to 6 months or to a fine up to level 4 on the standard scale.

(5) A person shall not be sentenced to imprisonment for an offence under this section unless, in the opinion of the court dealing with the case, the offence was committed knowingly.

#### **Signing of annual accounts.**

39. All annual accounts of a Foundation shall be signed on behalf of the Foundation Council by two of the councillors of the Foundation, or, if there is only one councillor, by that councillor.

#### **Accounting Standards.**

40. All accounts prepared under this Part must be prepared in accordance with UK-adopted international accounting standards, within the meaning given by section 237(1) of the Companies Act 2014.

#### **Councillors' duties as to preparation and filing of documents.**

41.(1) The Foundation Council have a collective duty to ensure that the annual accounts are drawn up and filed with the Registrar in accordance with the requirements of this Part and in accordance with UK-adopted international accounting standards, within the meaning given by section 237(1) of the Companies Act 2014.

(2) The Foundation Council shall, in respect of each financial year, deliver to the Registrar a copy of the Foundation's annual accounts.

#### **Regulations.**

42. The Minister may by regulations make provision in respect of the operation of this Part, in particular with regard to the fees chargeable for the delivery of accounts to the Registrar.

## **PART VI JURISDICTION AND POWERS OF THE COURT**

#### **Jurisdiction of court.**

43. The Court has jurisdiction in respect of—

- (a) a Gibraltar Foundation; and
- (b) any other Foundation—

- (i) a councillor or Guardian of which is resident in Gibraltar,
- (ii) any property of which is situated or administered in Gibraltar.

**Application of Gibraltar law to questions of validity.**

44.(1) Subject to the terms of the Constitutional Documents, all questions arising in relation to a Gibraltar Foundation or any disposition of property to or upon such a Foundation, including (without limitation) questions as to—

- (a) the capacity of a Founder, councillor, Beneficiary, Guardian or object of a power;
- (b) the validity, interpretation or effect of the Constitutional Documents or any variation or termination thereof;
- (c) the validity or effect of any endowment to the Foundation;
- (d) the administration of the Foundation, whether it is conducted in Gibraltar or elsewhere, including (without limitation) questions as to the functions, powers, obligations, liabilities, duties and rights of the Foundation Council, councillors and Guardians (including rights and duties relating to the 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 and appointment, and the validity of the exercise of any such function;
- (f) the nature and extent of any beneficial rights or interests in the property of the Foundation; and
- (g) the distribution of the Foundation property,

are to be determined according to the law of Gibraltar without reference to the law of any other jurisdiction and for these purposes "the law of Gibraltar" does not include the Gibraltar 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 in accordance with choice of law rules applicable under the law of Gibraltar;
- (b) is subject to any express provision to the contrary in the terms of the Constitutional Documents or the terms of the endowment;

- (c) does not, in determining the capacity of a corporate body, affect the recognition of the law of its place of establishment;
- (d) does not affect the recognition of the law of any other jurisdiction (under the choice of law rules applicable under the law of Gibraltar) prescribing the formalities for the disposition of property;
- (e) subject to subsection (3), does not validate any trust or disposition of real property situate in a jurisdiction other than Gibraltar which is invalid under the law of that jurisdiction; and
- (f) subject to subsection (3), does not validate any testamentary disposition which is invalid under the law of the testator's domicile or any other law applicable to such testamentary dispositions (under the choice of law rules applicable under the law of Gibraltar) at the time of his death.

(3) No Gibraltar 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 councillor, Guardian or Beneficiary to be questioned, nor is any Foundation councillor, Guardian, Beneficiary 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 Gibraltar 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 Gibraltar 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 Act; or
- (b) the 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 Act.

(6) The provisions of this section and of this Act shall be subject to any EU Regulation, EU Directive or international convention by which Gibraltar is bound, or may become bound, which in relation to particular matters, contains rules as to jurisdiction or the recognition or enforcement of judgments.

#### **Approval of particular transactions.**

45. Where in the management or administration of a Foundation a transaction is, in the opinion of the Court, expedient, but cannot be effected because the necessary power is not vested in the Foundation Council by the terms of the Constitutional Documents or by law, the Court, on the application of any person set out in section 48(2)–

- (a) may confer on the Foundation Council, 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 an officer of the Foundation to be binding on Beneficiaries.**

46.(1) Subject to sub-section (2), any order, judgment or finding of law or fact of the Court in an action against a councillor or Guardian founded on breach of duty under section 25 or 29 is binding on all the Beneficiaries 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 Beneficiary 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) he had notice of the proceedings and a reasonable opportunity of being heard and in this paragraph "notice" means 14 days' notice or such other period as the Court may direct.

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

#### **Applications for directions.**

47. A councillor or Guardian may apply to the 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.**

48.(1) On the application of any person mentioned in subsection (2), the Court may—

- (a) make an order in respect of—
    - (i) the execution, administration or enforcement of a Foundation,
    - (ii) an officer of the Foundation, including an order as to the exercise of his functions, the removal of an officer (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, or similar process of law), the appointment, remuneration or conduct of an officer, the keeping and submission of accounts, and the making of payments, whether into court or otherwise,
    - (iii) a Beneficiary, 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 Constitutional Documents;
  - (c) make an order authorising the rectification of any error or formal defect in the Constitutional Documents; and
  - (d) rescind or vary an order or declaration under this Act or make a new or further order or declaration.
- (2) An application under subsection (1) may be made by—
- (a) the Foundation Council;

- (b) a councillor;
- (c) a Guardian;
- (d) the Registrar;
- (e) with leave of the Court, any other person.

(3) Where the Court appoints or removes an officer of the Foundation under this section it may impose such requirements and conditions as it thinks fit.

(4) Subject to the Court's order an officer appointed by the court has the same functions, and may act in all respects, as an officer appointed under the terms of the Constitutional Documents.

#### **Powers of Court in event of default.**

49. If a person does not comply with an order of the Court under this Act requiring him to do anything, the 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.**

50. The Court may order the costs and expenses of and incidental to an application to the Court under this Act to be paid by the Foundation or in such manner and by such persons as the Court thinks fit.

#### **Following Foundation property.**

51. Without prejudice to the personal liability of a councillor, Foundation property which has been charged or dealt with in breach of a 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) 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.

#### **Prescription.**

52.(1) No period of prescription applies to an action brought against a councillor–

- (a) in respect of any fraud to which the councillor was a party or was privy; or
- (b) to recover from the councillor 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 sub-sections (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 had knowledge of the breach; or
- (b) where the claimant was at the time of the breach 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 again.

#### **Offences by legal persons, etc.**

53.(1) Where an offence under this Act 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 officer, 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 Act 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 Act;
- (b) in purported compliance with a requirement imposed by or under any provision of this Act or of any Act, 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 Act—
  - (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 officer 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 Act; 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 officer,

is guilty of an offence.

#### **Penalties.**

55. A person guilty of an offence under this Act is, unless otherwise provided, liable—

- (a) on summary conviction, to imprisonment for a term not exceeding 6 months, to a fine not exceeding level 5 on the standard scale, or to both;
- (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years, to a fine, or to both.

### **PART VII CAPACITY AND EXECUTION**

#### **Power to contract not restricted by Constitutional Documents.**

56.(1) In favour of a person dealing with a Foundation in good faith, any transaction decided on by the Foundation Council shall be deemed to be one which it is within the capacity of the Foundation to enter into, and the power of the Foundation Council to bind the Foundation shall be deemed to be free of any limitation under the Foundation Charter or Foundation Rules and a party to a transaction so decided on shall not be bound to enquire as to the capacity of the Foundation to enter into it or as to any such limitation on the powers of the Foundation Council, and shall be presumed to have acted in good faith unless the contrary is proved.

(2) Sub-section (1) does not affect the rights of any of the persons in section 48(2) to bring proceedings to restrain the doing of an act which is beyond the powers of the Foundation Council.

(3) Sub-section (1) does not affect any liability incurred by the Foundation Council, or any other person, by reason of the Foundation Council (or such other person or persons), acting outside of their powers.

#### **Contracts prior to formation.**

57.(1) Where a contract purports to be made by a Foundation, or by a Founder or by a person as agent for a Foundation, at a time when the Foundation has not been registered under the provisions of this Act, then subject to any agreement to the contrary the contract shall have effect as a contract entered into by the Founder or the person purporting to act for the Foundation or as agent for it, and he shall be personally liable on the contract accordingly.

(2) If a Foundation enters into transactions before a Certificate of Establishment has been issued by the Registrar and fails to fulfill its obligations in connection therewith within 21 days from being called upon to do so, the Founder shall personally be liable and if more than one jointly and severally liable to the other party to the transaction in respect of any loss or damage suffered by him by reason of the failure of the Foundation to fulfill those obligations.

#### **Bills of exchange and promissory notes.**

58. A bill of exchange or promissory note shall be deemed to have been made, accepted or endorsed on behalf of a Foundation if made, accepted or endorsed in the name of, or by or on behalf or on account of the Foundation by all of the councillors of the Foundation Council.

#### **Execution of deeds.**

59.(1) A deed shall be validly executed on behalf of a Foundation if executed as a deed by all of the councillors of the Foundation Council and for the avoidance of doubt a deed executed by a corporate councillor shall be validly executed by that corporate councillor if executed in accordance with the relevant provisions of the Companies Act.

(2) A Foundation shall not be required to have an official or common seal.

### **PART VIII REGISTRATION OF OVERSEAS FOUNDATION**

#### **Overseas foundation may be registered as a Gibraltar Foundation.**

60. An overseas foundation may apply to the Registrar to be registered as a Gibraltar Foundation in accordance with the provisions of this Part.

#### **Registration must be authorised by foreign law.**

61. An overseas foundation cannot be registered as a Gibraltar Foundation unless—

- (a) the foundation is able under the law of the place in which it is established to be registered as a Gibraltar Foundation, and
- (b) the foundation has complied with the requirements of that law in relation to its registration as a Gibraltar Foundation.

#### **Foundation cannot be bankrupt, etc.**

62. An overseas foundation cannot be registered as a Gibraltar 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 Gibraltar 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 Gibraltar Foundation.**

63.(1) An application for registration as a Gibraltar 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;
- (b) such other information and documents, verified in such manner, as the Registrar may require;
- (c) a declaration of compliance; and
- (d) such fee as may be specified by the Registrar.

(3) The application may propose the date on which registration as a Gibraltar 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 Gibraltar Foundation may only be made by a legal person qualifying under section 24(1).

#### **Migration details.**

64.(1) In this Part “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 Foundation Charter which is to be binding on the foundation immediately after its registration in Gibraltar, which must comply with the requirements of section 8, together with a copy of the foundation's current Foundation Charter or equivalent document;
- (c) a statement of the foundation's current councillors or equivalent officers;
- (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 the provisions of this Act;
- (f) evidence acceptable to the Registrar that—
  - (i) the foundation is not prohibited from being registered in Gibraltar by section 61 or section 62;
  - (ii) on the date of registration, the foundation will cease to be established and registered under the law of any place outside Gibraltar; 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 councillors (or equivalent officers) shall comprise the full name of every councillor (or equivalent officer) and his address (being, in the case of a body corporate or a partnership, the address of its registered office).

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

#### **Effect of registration.**

65.(1) Upon receipt of the application for registration as a Gibraltar 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 Part, the foundation shall be treated in all respects as a Foundation established under this Act;
- (c) the Registrar shall issue a Certificate of Establishment in respect of the foundation which shall–
  - (i) contain the matters detailed in section 13(3)(c),
  - (ii) state the date on which the foundation was first established (in addition to the date on which it was established in Gibraltar),
  - (iii) detail the place in which the foundation was previously registered,
  - (iv) detail the name 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 Gibraltar Foundation was to have effect which date postdates the issue of the Certificate of Establishment, then the foundation shall be established and registered as a Gibraltar Foundation on (and the date stated on the Certificate of Establishment shall be) the proposed date.

#### **Cancellation of registration.**

66.(1) Where an overseas foundation is registered as a Gibraltar Foundation under this Part, 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 Gibraltar Foundation pursuant to the provisions of this Part; and
  - (b) the Foundation continues to be established or registered under the law of any place outside Gibraltar;

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

- (i) any of the persons set out in section 48(2);
- (ii) any of the Foundation’s creditors;
- (iii) any of the Beneficiaries of the Foundation;

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

(3) An order under sub-section (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 sub-section (2) the Foundation's registration in Gibraltar shall (unless the Court orders otherwise) be void *ab initio*.

**Foundations may transfer registration.**

67. A Foundation may apply to the Registrar to be removed from the Register in accordance with the provisions of this Part.

**Foundations cannot transfer registration without power to do so.**

68. Subject to section 66(2), a Foundation must not be removed from the Register under this Part unless the Foundation Council satisfies the Registrar that the Constitutional Documents permit such removal.

**Foundations cannot transfer registration if in bankruptcy, etc.**

69. 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 Gibraltar 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 for the Foundation's compulsory winding up.

**Foundations cannot transfer registration without giving notice to creditors.**

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

**Application for transfer of registration.**

71.(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) evidence acceptable to the Registrar that—
- (i) the removal of the Foundation from the Register is not prohibited by sections 68, 69 or 70,
  - (ii) on the date of the removal of the Foundation's name from the Register the Foundation will be established under the law of another place, and
  - (iii) the Foundation will continue to have legal personality in accordance with the law of the place in question;
- (b) such other information and documents, verified in such manner, as the Registrar may require;
- (c) a declaration of compliance under section 75; and
- (d) such fee as may be specified by the Registrar.

(3) Upon receipt of the documents specified in sub-section (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 legal person qualifying under section 24(1).

**Effect of transfer.**

72. Not less than 28 days after the day on which the Registrar gave notice under sub-section 71(3)—

- (a) the statement in the Foundation's Charter that its registered office is situated in Gibraltar shall be deleted;
- (b) the Foundation's name shall be removed from the Register;
- (c) the Foundation shall cease to be a Gibraltar 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 section, 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.**

73.(1) Where a Foundation is removed from the Register under this Part, 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 Part; and
- (b) the Foundation has not become established under the law of any place outside Gibraltar,

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

- (i) any of the persons set out in section 48(2),
- (ii) any of the Foundation's creditors,
- (iii) any of the Beneficiaries of the Foundation,

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

(3) An order under sub-section (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 sub-section (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.**

74.(1) If the Court is satisfied that the removal of a Foundation from the Register under section 71 would unfairly prejudice a Beneficiary 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 Foundation Council to reconsider the proposal for the removal of the Foundation or any part of the proposal.

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

**Declaration of compliance.**

75.(1) A declaration of compliance is a declaration, signed by all the councillors of the Foundation Council, that all the requirements of this Part in respect of registration as a Gibraltar 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 Part, 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 Gibraltar Foundation, or an application for the removal of a Foundation from the Register (as the case may be), the provisions of this Part have been complied with.

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

**Documents in a language other than English.**

76. Where a document provided to the Registrar under this Part 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.**

77.(1) Registration of an overseas foundation as a Gibraltar Foundation or removal of a Gibraltar 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 Gibraltar 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.**

78. References in this Part to Foundations, Foundation Councils, councillors, Beneficiaries, Certificates of Establishment, liquidations or any other matter concerning a Foundation include references to their equivalents in the law of the place outside Gibraltar from which or to which a Foundation is migrating.

**Interpretation of Part VIII.**

79. In this Part–

“declaration of compliance” has the meaning assigned in section 75;

“migration details” has the meaning assigned in section 64;

“overseas foundation” means a foundation with legal personality registered or established under the law of any place outside Gibraltar;

“place” includes a district or territory,

“registered as a Gibraltar Foundation” means–

ceasing to be registered as a foundation in the place in which it was established or where it is now registered, and

becoming registered as a Foundation in the Register,

and “registration” as a Gibraltar 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 Gibraltar.

## **PART IX REVOCATION, VARIATION AND CONVERSION**

### **Power of revocation.**

80.(1) The Constitutional Documents may provide that any power or exercise of a power under the Constitutional Documents 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 the Foundation Council or a councillor or Guardian in relation to the Foundation before he receives notice of the revocation or variation.

### **General power to vary.**

81.(1) On the application of the Foundation Council, the Court may approve any arrangement which varies or revokes the purposes or the terms of the Constitutional Documents or enlarges or modifies the powers of management or administration of the Foundation Council, 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 Court may dispense with the consideration set out in sub-section (1)(b) if satisfied that the original intention of the Founder cannot be ascertained.

- (3) The Court shall not approve an arrangement under sub-section (1) unless satisfied—
- (a) if there is a Guardian appointed that the Guardian has had the opportunity of being heard; and
  - (b) that any Beneficiary has had an opportunity of being heard.
- (4) The terms of this section are subject to and without prejudice to any provision in the Constitutional Document to the contrary.

**Conversion.**

82. The provisions of Schedule 1 shall have effect for the purpose of enabling a company limited by guarantee or by shares and guarantee which is registered as such under the Companies Act to be de-registered on being registered as a Foundation under this Act.

**PART X  
DISSOLUTION AND TERMINATION**

**Dissolution and termination.**

- 83.(1) Subject to the provisions of this Part, a Foundation shall terminate and be dissolved, by being wound up by the Foundation Council, upon—
- (a) the expiry of its duration (if it is limited in duration);
  - (b) the happening of any event specified in that regard in the Constitutional Documents;
  - (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 Court, on the application of the Foundation Council, the Guardian or the Beneficiaries, or
    - (ii) with the consent of the Guardian and the Beneficiaries.
  - (f) upon the making by the Court of an order under section 84 for the winding up of the Foundation.

(2) Subject to the order of the Court, immediately prior to termination the Foundation property shall be distributed by the Foundation Council within a reasonable time in accordance with the provisions of section 87.

### **Winding up of Foundation by Supreme Court.**

84.(1) The Court may order the winding up of a Foundation on the application of any councillor, Guardian, Beneficiary 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 Constitutional Documents;
- (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 sub-section (e) above, 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 Minister,
  - (ii) the creditor has served a statutory demand on the Foundation demanding payment of the debt pursuant to this sub-section, and
  - (iii) the Foundation does not, within a period of 21 days immediately following the date of service of that statutory 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 section 13;
- (h) a Guardian or an Enfranchised Beneficiary has been denied access to the accounts to which he is entitled under this Act;
- (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 Act, or any regulation made under it;
- (k) the Founder or Foundation Council or a councillor 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 sub-section (1) for the winding up of a Foundation or at any time thereafter, the 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.**

85.(1) When a Foundation is required to be wound up its affairs shall, unless a liquidator has been appointed by the Court under the provisions of this Act, be wound up by the Foundation Council.

(2) From the commencement of the winding up of a Foundation no officer of the Foundation may, except in accordance with the provisions of section 87, claim as a creditor of the Foundation.

(3) For the purposes of this Act, 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 Act, the Foundation is required to be wound up, or
- (b) the date of the order of the Court under section 84(1) for its winding up.

(4) Where there is a contravention of sub-section (2) in relation to a Foundation, the officer of the Foundation shall be guilty of an offence.

(5) Upon the commencement of the winding up of a Foundation or at any time thereafter, the Court may, on the application of any officer or Beneficiary of the Foundation, 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 under this Act all powers of the officers of the Foundation shall cease, and a person who purports to exercise any power of an officer at a time when, pursuant to this sub-section, 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 on 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 sub-section, 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 section 87—
  - (i) discharge the Foundation's debts, and
  - (ii) distribute any remaining assets of the Foundation in accordance with the terms of the Constitutional Documents.

(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 section 86 has come to their attention,
  - (ii) provide all officers of the Foundation 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 a Gibraltar newspaper 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, delete the inscription relating to the Foundation from the Register; and

- (c) the Foundation's Certificate of Establishment shall (with effect from the date on which the inscription relating to the Foundation is deleted from the Register) cease to be valid and the Foundation shall thereupon be dissolved.

(11) Where there is a contravention of any provision of sub-section (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.**

86.(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 officer, Beneficiary, 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 officer who is responsible for the contravention shall (without prejudice to any civil liability or order under sub-section (3)) be guilty of an offence.

(2) In a prosecution for an offence under this section, 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 officers—
  - (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 officer may be guilty of an offence under sub-section (1), the Court may, on the application of any creditor, Foundation officer, Beneficiary or of any person conducting the winding up of the Foundation, declare that the Foundation officer who is responsible for the contravention of any matters detailed in sub-section (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 Court makes a declaration under sub-section (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 sub-section.

(5) In sub-section (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 Court shall not make a declaration under sub-section (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 Foundation Council—
  - (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) Sub-sections (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 section—

(a) the expression “relevant provision” means any provision of section 25 and any other provision for the time being prescribed by regulations of the Minister; 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.**

87. Upon the winding up of a Foundation, the assets shall be distributed in the following order—

(a) firstly, to creditors other than Foundation officers or Beneficiaries, to the extent otherwise permitted by law, in satisfaction of the Foundation's debts;

(b) secondly, to Foundation officers who are creditors, to the extent otherwise permitted by law, in satisfaction of the Foundation debts;

(c) finally, as provided for in the Constitutional Documents of the Foundation and where the provisions of the Constitutional Documents are incapable of being given effect to or carried out the property of the Foundation shall be deemed bona vacantia and shall accordingly belong to the Crown and shall vest and may be dealt with in the same manner as other bona vacantia accruing to the Crown.

### **PART XI MISCELLANEOUS**

#### **Consequential amendments to the Companies Act 2014.**

88. Schedule 2 has effect.

#### **Regulations.**

89. The Minister may make regulations—

- (a) to provide for any matter which is necessary or incidental to give effect to the provisions, or for the administration of this Act;
- (b) to implement or give effect to any European Union or other international obligation, and for such purposes such regulations may amend any provision of this Act.

## SCHEDULE 1

Section 82

**DE-REGISTRATION OF COMPANIES LIMITED BY GUARANTEE OR BY SHARES AND GUARANTEE ON BECOMING A REGISTERED FOUNDATION**

1.(1) Subject to the provisions of this Schedule, a company limited by guarantee or by shares and guarantee which is incorporated and registered under the Companies Act may be de-registered from the Register of Companies on being registered as a Foundation under this Act if–

- (a) a special resolution that it should be so re-registered is passed by the vote of each member entitled to receive notice of an extraordinary meeting of the company (as determined by the Companies Act);
- (b) the requirements of this paragraph and paragraph 2 are complied with in respect of the special resolution and otherwise; and
- (c) the requirements of Schedule 1A to the Companies Act are complied with.

(2) The special resolution referred to in subparagraph (1)(a) shall state the capital contributions of the company limited by guarantee and shall provide–

- (a) that the total amount of the guarantee of the company and (where applicable) the share capital of the company shall become the endowment of the Foundation and that each member of the company shall become a Founder of the Foundation for all the purposes of the Foundation and this Act;
- (b) for the method of converting membership or both shares and membership, as the case may be, into the endowment of the Foundation, specifying the sum contributed to the endowment of the Foundation by each member and (where applicable) shareholder, as the case may be; and
- (c) for the making of such alterations to the memorandum and articles of the company as are necessary to bring them (in substance and in form) into conformity with the requirements of this Act as the Charter and Rules (if applicable) of the Foundation under this Act.

(3) A copy of the special resolution referred to in subparagraph (1)(a) shall be forwarded to the Registrar within 30 days.

2.(1) An application for the company to be de-registered as a company on registration as a Foundation under this Act, framed in the form prescribed by the Registrar from time to time and signed by a director or by the secretary of the company, shall be lodged with the Registrar, as follows–

- (a) it shall be lodged not earlier than the day on which the copy of the special resolution forwarded under paragraph 1(3) is received by him; and
- (b) it shall be accompanied by the documents referred to in subparagraph (2) and the fee prescribed by the Minister from time to time.

(2) The documents required to be lodged with the Registrar for the purposes of subparagraph (1)(b) are—

- (a) a printed copy of the memorandum and articles as altered in pursuance of the special resolution to be the Charter and Rules containing—
  - (i) the name of the company and the name under which registration as a Foundation is to be sought, which name shall comply with the provisions of this Act,
  - (ii) the proposed registered office of the Foundation,
  - (iii) the date on which it is proposed to register as a Foundation under this Act,
- (b) a certificate of good standing in respect of the company issued by the Registrar of Companies;
- (c) evidence to the satisfaction of the Registrar that no proceedings for insolvency have been commenced against the company in Gibraltar;
- (d) evidence to the satisfaction of the Registrar that any mortgage or other charge recorded in respect of that company has been discharged in accordance with the Companies Act or the consent in writing to the de-registration of every registered mortgagee or chargee has been obtained;
- (e) where the councillors of the Foundation are to be different to the directors of the company—
  - (i) the names and addresses of the proposed councillors together with their written consent so to act; and
  - (ii) letters of resignation from the directors of the company; and
- (f) the name and address of the Guardian together with his consent so to act.

3. The Registrar shall retain the application and other documents lodged with him under paragraph 2.

4. The Registrar on being satisfied that the requirements of paragraphs 1 and 2 are satisfied shall notify the Registrar of Companies that, on receipt of confirmation from the Registrar of Companies that the company has complied with all applicable requirements under Schedule 1A of the Companies Act, the company shall register as a Foundation under this Act.
5. The Registrar on receipt of confirmation from the Registrar of Companies that the company has complied with all applicable requirements under Schedule 1A of the Companies Act shall notify the Registrar of Companies of the date and time at which the registration of the company as a Foundation under this Schedule is to take effect and shall on that date and that time register the company as a Foundation under this Schedule.
6. On the date and immediately before the time notified to the Registrar of Companies under paragraph 5 the memorandum of the company, duly altered as specified in the special resolution, and the articles of the company, duly altered as specified in the special resolution, shall take effect as the Charter and Rules of the Foundation and any appointment of councillors and Guardian shall take effect thereon.
7. The confirmation given by the Registrar of Companies referred to in paragraph 5 is conclusive evidence that the requirements of the Companies Act in respect of de-registration and of matters precedent and incidental to it have been complied with, and that the company was authorised to be de-registered in pursuance of that Act and was duly so de-registered.
8. For the avoidance of doubt it is hereby declared that a Foundation registered under this Act as a result of the procedures contained in this Schedule is on the date and time referred to in paragraph 5 a continuation of the undertaking of the de-registered company by virtue of the procedures referred to in in this Schedule.

## SCHEDULE 2

Section 88

**CONSEQUENTIAL AMENDMENTS TO THE  
COMPANIES ACT 2014**

1.(1) After section 67 of the Companies Act 2014 there shall be inserted the following section–

**“De-registration of company limited by guarantee or by shares and guarantee on registration as a foundation.**

67A. The provisions of Schedule 1A shall have effect for the purpose of enabling a company limited by guarantee or by shares and guarantee to be de-registered on being registered as a foundation under the Private Foundations Act 2017.”.

(2) After Schedule 1 to the Companies Act 2014 there shall be inserted the following Schedule:

**“SCHEDULE 1A****DE-REGISTRATION OF CERTAIN COMPANIES ON BECOMING  
FOUNDATIONS**

1.(1) Subject to the provisions of this Schedule, a company which is registered as limited by guarantee or by shares and guarantee may be de-registered on being registered as a foundation under the Private Foundations Act 2017 if–

- (a) a special resolution that it should be so re-registered is passed by the vote of each member entitled to receive notice of an extraordinary meeting of the company;
- (b) the requirements of this paragraph and paragraph 2 are complied with in respect of the special resolution and otherwise; and
- (c) the requirements of Schedule 1 of the Private Foundations Act 2017 are complied with.

(2) A public company shall not be de-registered under section 67A or this Schedule.

(3) A company which carries on in or from within Gibraltar a business which is–

- (a) licensed under the Financial Services (Investment and Fiduciary Services) Act,
- (b) authorised under the Financial Services (Banking) Act or the Financial Services (Markets in Financial Instruments) Act 2006, or

- (c) licensed or authorised in accordance with a Community requirement

shall not be de-registered under section 67A or this Schedule..

(4) The special resolution referred to in subparagraph (1)(a) shall state the share capital or the total amount of the guarantee or both, as the case may be, of the company limited by guarantee or by shares and guarantee and shall provide–

- (a) that the total amount of the guarantee of the company and (where applicable) the share capital of the company shall become the endowment of the foundation and that each member of the company shall become a founder of the foundation for all the purposes of the foundation and the Private Foundations Act 2017;
- (b) for the method of converting membership or both shares and membership, as the case may be, into the endowment of the foundation, specifying the sum contributed to the endowment of the foundation by each member or shareholder or both, as the case may be; and
- (c) for the making of such alterations to the memorandum and articles of the Company as are necessary to bring them (in substance and in form) into conformity with the requirements of the Private Foundations Act 2017 as the Charter and Rules (if applicable) of the foundation under that Act.

(5) The special resolution referred to in subparagraph (1)(a) is subject to section 206 (copy to be forwarded to the Registrar within 30 days).

(6) A cancellation of shares in pursuance of this Schedule shall not be deemed to be a reduction of share capital within the meaning of this Act.

(7) For the purposes of this paragraph “share capital” shall include–

- (a) the nominal value of the allotted shares of every class in the company, whether or not paid up and whether or not paid up in cash or otherwise; and
- (b) any amount in the share premium account (as defined by section 125(1)) of the company.

2.(1) An application for the company to be de-registered on registration under the Private Foundations Act 2017 as a foundation, framed in the prescribed form and signed by a director or by the secretary of the company, shall be lodged with the Registrar, as follows–

- (a) it shall be lodged not earlier than the day on which the copy of the special resolution forwarded under section 206 is received by him; and



- (b) it shall be accompanied by the documents referred to in subparagraph (2) and the prescribed fee.

(2) The documents required to be lodged with the Registrar for the purposes of subparagraph (1)(b) are–

- (a) a printed copy of the memorandum and articles as altered in pursuance of the special resolution for the company to become a foundation containing–
  - (i) the name of the company and the name under which registration as a foundation is to be sought,
  - (ii) the proposed registered office of the foundation,
  - (iii) the date on which it is proposed to register under the Private Foundations Act 2017, and
- (b) a certificate of good standing in respect of the company issued by the Registrar;
- (c) evidence to the satisfaction of the Registrar that no proceedings for insolvency have been commenced against the company in Gibraltar;
- (d) evidence to the satisfaction of the Registrar that any mortgage or other charge recorded in respect of that company has been discharged in accordance with the Act or the consent in writing to the de-registration of every registered mortgagee or chargee has been obtained; and
- (e) where the councillors of the Foundation are to be different to the directors of the company letters of resignation from the directors of the company.

3. The Registrar shall retain the application and other documents lodged with him under paragraph 2.

4. The Registrar–

- (a) on being satisfied that the requirements of paragraphs 1 and 2 are satisfied, and
- (b) having received notice in writing from the Registrar of Foundations appointed under the Private Foundations Act 2017 that, on receipt of confirmation from the Registrar that the requirements of this Schedule have been met in respect of the body, the body shall be registered as a foundation under Schedule 1 of that Act,

shall confirm to the Registrar of Foundations that the requirements of this Schedule have been complied with by that company and shall de-register the body as a company registered under this Act with effect from the date and the time which the Registrar of Foundations notifies to

the Registrar as the date and time at which the registration of the body under Schedule 1 to the Private Foundations Act 2017 is to take effect.

5. For the avoidance of doubt it is hereby declared that a foundation registered under Schedule 1 of the Private Foundations Act 2017 as a result of the procedures contained in–

(a) this Schedule; and

(b) Schedule 1 of the Private Foundations Act 2017,

is on the date and time referred to in paragraph 4 a continuation of the undertaking of the company de-registered by virtue of the procedures referred to in this Schedule.”.