WHITE PAPER

2016 Amendments to the Voluntary Organisations Act, 2007

Dated 26th April, 2016

Contents

WHITE PAPER

2015 Amendments to the Voluntary Organisations Act, 2007

A. Amendments to the Voluntary Organisations Act.

1. Scope and Executive Summary

The scope of the amendments to the Voluntary Organisations Act (the "**VOA**") and related legislation is principally to address the difficulties which have arisen in the interpretation and application of the Act and ancillary legislation in the light of practice since its coming into force in 2007. Important amendments relate to the resolution of issues which arose with the Church Authorities in Malta in relation to religious organisations, the introduction of *public benefit* as one of the tests for the treatment as a voluntary organisation ("**VO**"), a more detailed treatment of the definition of "non-profit making", rules on mandatory enrolment and notifications, rules on the prevention of money laundering and terrorist financing in the non-profit sector, clearer rules on the ability of VOs to engage in trade and the strengthening of the powers of the Commissioner in relation to defaulting organisations. These amendments are supplemented by consequential amendments to others laws in particular the Civil Code, mainly its Second Schedule and the Public Collections Act.

These amendments have been considered increasingly necessary by the Commissioner for Voluntary Organisations and the Council for the Voluntary Sector in view of practical experiences over the last years and also by the Financial Intelligence Analysis Unit (the "**FIAU**") in view of the review of Malta by Moneyval and the importance of action to avoid being negatively assessed in the national interest.

These amendments are, of course, of interest to the general voluntary sector and reflect various themes and address many issues as explained below.

2. The Features of Voluntary Organisations

One of the major amendments which is being proposed relates to the constitutive elements of any VO. Currently, a VO is one which is created or established (a) for any lawful purpose; (b) as non-profit making; and (c) is voluntary.

2.1 Lawful Purpose

The use of the word 'lawful' in the VOA was intended to keep options as wide as possible, to avoid nit picking on purposes as we sometimes see overseas. Objective value was seen in any social grouping around a purpose to be achieved through volunteering without any private interest. However, it is now evident that this is perhaps too wide as it may imply that an organisation with *only a lawful purpose but which is not socially positive* is eligible for enrolment, when the intent was always that there must be some socially positive element in the organisation being encouraged and supported through legislation. The current wording has been found to be too wide and could cater for organisations with little benefit to the general public or community and which only benefit a very limited group of persons. This could lead to lesser willingness on the part of the Government, including the tax authorities, to grant broad benefits, such as tax exemptions to all VOs, the reduction of the qualitative profile of VOs and the possible exposure of the public to demands by less meritorious organisations, leading also to possibly some abuse of privileges.

The amendments now clarify that an organisation may only be enrolled if it is established for *any social purpose which qualifies as a public purpose or for public benefit* (as long as it is not set up for any private interest or benefit) which takes it into more restricted territory compared to when only "lawful" purposes were required. This means that there will be some non-profit organisations which will not be eligible nor required to enrol[1]. It should be appreciated that although the vast majority of organisations established for a social purpose benefit the community at large, "*public benefit*" (defined) is a consistent concept with that of "social purpose" as defined in the VOA, so the impact of this policy shift will not be great. It does, however, reposition the focus of this law.

Going forward we will be aligning the concepts in other laws to the VOA and we will be able to assume more clearly that if a VO is enrolled, then it automatically implies public benefit, which was not the case to date.[2]

[1] Basically because they fall outside the scope of public benefit. This is how our tax law operates as well. Unless there is public benefit or character in a non-profit organisation the State does not support through incentive based tax rules. For example Article 12(1)(e) of the Income Tax Act (Cap. 123, Laws of Malta) provides for a straight tax exemption on the income of "*any institution, trust, bequest or foundation, of a public character, and of any other similar organisation or body of persons, also of a public character, which is engaged in philanthropic work and either qualifies for exemption under this paragraph in accordance with rules made for this purpose by the Minister responsible for finance under article 96 or is named by the said Minister as engaged in philanthropic work for the purposes of this paragraph and there is not in respect of it a declaration by the said Minister that it has ceased to be so named."* The tax laws will be rationalised once these amendments are adopted in accordance with the policy stated in Budget documents for the last few years.

[2] Of course, this sharpens the debate on whether an organisation, which declares itself to be "non profit" (but is not public benefit) can make public collections without the need of any other authorisation. The reply is that as it will not be able to enrol, it will have no exemption from the requirements under the Public Collections Act, and so will have to apply to the Commissioner of Police for a permit to make a public collection – as would be the case for any other organisation which is not an enrolled VO wishing to do so;

A *political purpose* has now been SPECIFICALLY EXCLUDED from the definition of 'social purpose' in the Voluntary Organisations Act. *Political purpose* is defined as the promotion of the interests of a political party or a political candidate. Political parties are regulated by the Financing of Political Parties Act. This will avoid the overlap of two regulatory regimes which may result in conflict and ambiguity.

2.2 Non-Profit Making

The VOA was intended to establish the national standard and meaning for the non-profit concept which applies here and in other laws for other reasons, even unrelated to voluntary organisations. A new Schedule is being proposed which has the same function and now applies in varying degrees to different organisations depending on whether these are:

- enrolled VOs (for which the rules in the Schedule are BINDING *Rules*)*;* or
- non-enrolled VOs (for which they are to serve as *principles*, which administrators will be expected to respect).

The rules in the Schedule will aid in the interpretation of the provisions of other laws when such other laws make use of the concept of non-profit making[3] for the purposes of such other laws and, in such case, they are only *guidelines*, which are non-binding in a technical sense, but should influence the interpretation.

2.2.1 New Schedule*:* The principles, guidelines and rules which regulate the non-profit making element are now outlined in a new First Schedule to the Act. This concept has so many facets that it is very difficult to address in a simple definition as is the case today.

This Schedule does not apply retrospectively and enrolled VOs have two years to come in line with its provisions, which should not be a problem as it is drafted in clearer and more encompassing terms than at present. In case of any doubt, they may even request a ruling from the Commissioner.

2.2.2 Permitted Private Interest: The principle purpose of the Schedule is to ensure that any material private interest[4] in any VO is avoided in view of the public support and trust vested in such organisations

[3] Examples – the Education Act (Cap. 327, Laws of Malta); the Import Duties Act (Cap. 337, Laws of Malta);

[4] See First Schedule to the VOA, clause 9 : The reservation by the founder of any right whether for himself and, or for his immediate family over the assets of the voluntary organisation shall be valid provided that this is reasonable and does not prejudice the non-profit making status of the organisation.

on the basis of their public purpose and non-profit making qualities. However, it is proposed for a VO to have within its objects or powers the grant of minimal (being very ancillary to the main purpose) private interests, or the reservation of certain interests - such as a usufruct on the funds endowed to charity for the lifetime of the grantor. These reservations of private interest are usually conditions of the donor and this flexibility will encourage the donor to proceed with the endowment. The endowment will however be subject to specified conditions, one of which is, for example, that the funds which are to be used for a private interest *are not raised through a public collection or from the general public* but are raised only from the founder himself.

Rigid interpretation of the current definition has led to a situation in which the founders or administrators of an educational foundation who, for example, deliver a lecture during one of the foundation's training events within their area of professional expertise, cannot be remunerated at all for such lecture as this could be interpreted as being in breach of the non-profit making rule. Moreover, if the VO also includes a very limited *private interest* (irrespective of whether this is an economic interest), such as the ability to limitedly support a donor or his family or employees, in case of unforeseen circumstances such as serious ill-health, accident or financial failure, the organisation currently may not be enrolled. It was felt that this was taking the rules too far and one of the aims of this new Schedule is to create a bit of practical balance.

The drafters ensured that as these are exceptional cases, the Commissioner *must approve such private interest in writing* prior to enrolment and may even impose conditions to safeguard the public benefit nature of the organisation. This will also protect persons genuinely involved in voluntary organisations from deceitful comments which are not substantiated by the facts.

2.2.3 Remuneration

The Schedule also contains new principles on remuneration, which for ease of reference are divided between those applying to *donors, founders, promoters, members, volunteers* and those applying to *administrators*.

(a) *Donors, founders, promoters, members, volunteers*: these may be remunerated when they are engaged or employed under a written contract or when they provide goods or services to the organisation. However, even in such cases, strict conditions and limitations apply and these have been included in the proposed amendments to ensure that there is no breach of the non-profit making rules. Therefore, for example, such remuneration must not be substantial and must generally be in accordance with market

conditions, and in any case, not material relative to the overall income and expenditure of the organisation.

(b) *Administrators:* these may also be remunerated when they are engaged or employed under a written contract. If they are not engaged or employed, such administrators may only receive reasonable remuneration (now defined as also including an *honorarium* to address problems of interpretation which have arisen in the past).

A new test - reflecting an over-arching concept - relating to "market conditions" and "market levels" has been inserted. This will act as a benchmark when assessing the price paid by VOs for the purchase of goods and services. Persons involved in VOs cannot be paid exorbitant rates for services rendered so as to bypass the non-profit making rule. It is the administrators or the general meeting of a VO which should ensure that such conditions and levels are complied with and must also record, in sufficient detail in the minutes, the basis on which they are satisfied of such compliance.

This "market conditions" or "market levels" restriction does not apply if the founder, settlor (in the statute or in any other written instrument signed by him), members (by resolution in general meeting) or the court (on application of the administrators) decide otherwise, and the decision is recorded and motivated as aforesaid, as that will then meet the test of transparency while allowing for some degree of flexibility, especially where international organisations are concerned as recruitment may need to include persons from other countries where market conditions are higher than those in Malta[5].

Administrators who do not observe the provisions of the Schedule shall be guilty of a breach of duty and may also, in certain cases, be liable to refund the VO any remuneration received by them which is in excess of the permitted level[6].

2.3 Voluntary

The definition of 'voluntary' has been amended to emphasise that if the affairs of the VO are supported by services rendered on a voluntary basis, such services must be *truly voluntary*. Therefore, for example, if a member of a religious order carries out functions pursuant to his or her vocation as part of his or her

[5] See First Schedule, VOA, Clause 13;

[6] See Article 19 of the First Schedule. "Any administrator who fails to observe the provisions of this Schedule shall be guilty of a breach of duty and shall be liable to refund the organisation: (*a*) if permitted to receive remuneration, any such remuneration received by any administrator in excess of the permitted level; (*b*) if not permitted to receive remuneration, all sums received apart from expenses." See also article 20 of the First Schedule. "When an administrator agrees to pay other persons sums which are not permitted to be paid or are in excess of permitted levels as stated herein, he shall be jointly and severally liable with them to refund such sums to the voluntary organisation."

vocational duties, without being remunerated, such services are not treated as voluntary, which then implies that members of an Order or Community making up a religious foundation do not qualify the organisation as a voluntary organisation.

3. The Independence and Autonomy of the Administrators

VOs must not only be independent and autonomous of the Government, but the administrators must also *not* be subject to the control or direction of *any person* or act in *any person's interest* when fulfilling their functions under the VOA. They must be guided only by the stated purpose of the organisation as stated in the statute.

The requisite that VOs must be independent and autonomous has been clarified as this gave rise to some over-restrictive interpretations. The rule does not mean that *any suggestion or even direction* given to an administrator impinges on his independence and authority and the amendments clarify which directions are acceptable. The fact that the administrators of a pious foundation or ecclesiastical entity, for example, may be under a vow of obedience does not impinge on their independence and autonomy. This kind of "control" is not, and should not, be a problem for an entity to be a VO. In any organisation, administrators have their duties, powers and responsibilities and control and supervision over them impinges on the way the organisation operates; but that does not affect its autonomy and independence which is not an absolute concept. The same with founder reserved powers in a foundation. However, this permitted 'control' must not be such as to contradict the public purpose of the organisation.

Organisations which are controlled *by the Government* or by *religious organisations* are not VOs. Both have been defined so that these are now objective tests. The amendments clarify those situations which are *not* tantamount to an organisation being controlled by the Government - for example, when a person holding a public office also occupies the position of an administrator within a VO in his *personal capacity*, notwithstanding the fact that he is appointed and remains bound to protect the public interest, even in consultation with the Government, or if a VO enters into funding agreements or joint venture agreements with the Government, which do not give *effective control* of the organisation to the Government, but which contractually allow the Government to supervise compliance with terms. If, under the statute of an organisation, the successor incumbent *of the same public office* takes up the post of administrator on the retirement of an administrator, this shall be considered to imply that the administrator is **not** holding the position of an administrator in his *personal* capacity, thus implying that the purpose is

being promoted by the agenda underlying the office and not the individual involved, which contradicts the required autonomy.

These amendments identify those *religious organisations* which shall *not* be considered to be VOs and consequently shall not be regulated by the VOA. These shall be regulated by the applicable religious law. The Church has its own *ethos* and internal regulation under Canon Law and such religious organisations obey the Curia and the Archbishop, and the persons involved are not volunteers. These also include organisations which are *controlled by a religious organisation* - these are neither entitled nor obliged to enrol under the VOA.

However, organisations merely *established by* religious organisations (but not controlled) may enrol or even be obliged to enrol under the VOA and, to be eligible for State funding earmarked for VOs, they need to be enrolled like all other VOs and are subject to the same rules.

The position of those religious organisations which are already enrolled shall not be affected. These continue to be considered to be VOs for as long as their enrolment is in effect. Maintaining the enrolment is very much within their control. It is on the basis that they submit to the legal rules under the VOA that they are eligible to any benefits under the law.

4. Enrolment

Perhaps the most significant change introduced by these amendments is the establishment of different categories of enrolment. The basic principle today is that any organisation has a right and option to enrol as a VO as long as it complies with the prescribed rules on form and content. Going forward, some organisations are given the *option* to enrol, others *must* be enrolled while others may be *exempt* from enrolment. The amendments also identify those organisations which *may not* be enrolled. The different categories are formulated on the basis of policy choices consistent with the principles in the VOA.

Therefore, the different categories of enrolment are:

4.1 Voluntary enrolment

When there are no actions relevant to the public, such as public collections, and a voluntary organisation may be of little social impact, it is up to the administrators to decide whether to enrol the organisation in terms of the VOA. Enrolment, however, implies adherence to all the provisions of the Act.

4.2 Mandatory enrolment[7]

Transparency and accountability are essential in the public interest in the case of some voluntary organisations. These organisations *must* be enrolled. These may be *broadly categorised* as such on the *basis of their actions* (whether actual or intended) or those on the *basis of their turnover or capital grant, or on the basis of their statute clauses or general meeting resolution*. The amendments also include definitions of *income* which address practical realities in organisations so as not to allow the law to become unnecessarily burdensome.

The amendments introduce the concept of mandatory enrolment for *foreign organisations* which operate in Malta in any manner. Such organisations must also be established for a public purpose or public benefit and must also be non-profit making and voluntary to be caught by the rule.

The *responsibility* to ensure compliance with the provisions of the VOA rests with the administrators. However the responsibility to report to the Commissioner is also extended to any accountant, reviewer or auditor if the obligation to enrol arises on the basis of turnover.

4.2.1 Anti-abuse provisions

An interesting proposal is that an organisation is still subject to mandatory enrolment if *it is in substance a VO*, having many of the qualities of VOs as identified in the Act and benefitting from any privileges, benefits and exemptions granted to VOs. This ensures transparency and accountability when such organisations *seek public support*. It also avoids abuse as organisations may purposely introduce elements or leave an essential element or clause out of their statute so as not to be able or be bound to enrol.

Such organisations must either comply with the provisions of the VOA and enrol with the Commissioner or else must ensure that the statute and other materials make it clear that the organisation is not a VO (*so as to avoid any confusion on the part of the public*). If it is not possible for the organisation to rectify its position, the Commissioner may be asked to give a ruling that the organisation is:

- not obliged to enrol until a solution is found (the consequence being that the organisation would not be able to carry out certain identified activities); or

[7] This was introduced due to the MONEYVAL Report which suggested that Malta requires to take some actions on anti-money laundering issues with regard to the specific non-profit sector. This Report may be accessed on http://www.fiumalta.org/library/SiteImages/PDF/moneyval/FourthRnd/4thRound-Evaluation%20Report-Report.pdf;

- permitted to enrol without full compliance with the provisions of the VOA as that is a unilateral subscription to the principles of the VOA and demonstrates the good faith of the organisation.

The amendments also deal with the *timeframes for enrolment and the consequences which arise from the lack of mandatory enrolment*. The organisation will, for example, not be able to benefit from any grant, sponsorship or any other financial aid or policy if it does not enrol.

4.3 Exemption from enrolment

Those organisations which are exempt from enrolment (whether temporarily or permanently) are identified in a new Schedule to the Act. These include international VOs established by international treaty or the local branch of such international VOs. The second category is organisations which are registered with the Kunsill Malti ghall-Isport in terms of the Sports Act. The reason for the latter exclusion is not to create overlap between the two applicable laws in case of sports organisations, but leaving voluntary enrolment optional and open for these organisations, which they will do if they want to extend their benefits from those under the Sports Act to those under the VOA. This is the situation today and this needed to be stated so as not to change the situation when the mandatory enrolment requirement is introduced.

4.4 Notification of a Voluntary Organisation

These amendments also introduce the concept of Notification of a VO and the Commissioner is now to maintain a List of Non-Enrolled Voluntary Organisations. Identified organisations must notify the Commissioner of their existence and their principle purpose. The purpose of such notification is not to grant the Commissioner or the organisation any rights or obligations but rather to inform the public of their existence. The List of Non-Enrolled Voluntary Organisations is publically available. This is again motivated by the wish not to allow VOs to remain under the radar in the light of comments about Malta's regulation of VOs and the opportunity for the use of VOs for money laundering and financing of terrorism.

4.5 Clarifications

Some clarifications regarding enrolment have also been made. For example, the Commissioner does not refuse the enrolment of an organisation only because of the potential of duplication of efforts by other organisations with similar purposes as this was a concern expressed by several organisations. The VOA

recognises the importance of the co-ordination of efforts so as to encourage VOs with similar purposes to work together – such co-ordination in no way prevents VOs from achieving their purposes.

5. Benefits, Privileges and Funds

It is only *enrolled* organisations which may receive or be the beneficiaries of grants, sponsorships or other financial aid *from the Government* and from funds which it has made available to the voluntary sector. The Government is now required to distinguish between funds which are available to *VOs with activities in Malta*, whether Maltese or foreign, and funds which are available to support *overseas activities of VOs*, whether such organisations are Maltese or foreign. In the former case only enrolled organisations may benefit from such funds. In the latter case, the recipient organisations *must meet broadly equivalent registration and transparency standards* in their own state of registration as VOs which are enrolled under this Act.

The amendments now give the Attorney General the authority to request the revocation of any grant, sponsorship or other financial aid which is earmarked for VOs and which is not granted to an enrolled VO. This role was given to the Attorney General not only because of his independence but also because of the role he plays in the Second Schedule to the Civil Code to protect the achievement of the purposes of social purpose organisations[8]. It is no longer possible for such benefits, privileges or grants to be extended to non-enrolled VOs by means of the Minister's written consent and this ensures that there is no political interference in this sector.

6. The Commissioner

The Commissioner's monitoring function has been increased. This monitoring is of a generic nature and seeks to address the development of the voluntary sector in general and the standards being applied in that sector by particular organisations. It is principally intended to ensure that the voluntary sector, which is dominated by fiduciary obligations towards public benefit purposes having social needs, is not abused and does not become a tool for criminality such as fraud or other abuse. Such monitoring and regulation is tolerated in the common interest for the good that can come out of the added supervision and protection of standards. This is why the Commissioner may investigate the affairs of any VO at any time and may demand, in writing, any relevant information relating to the operation of a VO or any person involved in the activities of a VO.

[8] Refer to articles 38 and 43 of the Second Schedule to the Civil Code (Cap. 16, Laws of Malta);

In cases of manifest abuse, fraud or other risk to the general public, for example, the Commissioner may now publish information about a VO without any prior notice to the organisation. The Commissioner no longer needs to apply to the Administrative Review Tribunal to request authorisation to publish such statement.

In the extreme case, it is possible for the Commissioner to investigate actions on behalf of the Government to combat abuse including by blocking the operation of a VO through suspension orders or cancellation orders.

6.1. Suspension and Cancellation Orders

The articles regulating the issuance of Suspension Orders and Cancellation Orders have been amended. The current articles require the Commissioner for VOs to apply to the Administrative Review Tribunal for this to order the suspension of the activities or the cancellation of the enrolment of a VO. This application to the Tribunal is proving to be too bureaucratic and too time-consuming to address abuses by VOs, thereby increasing the danger to the public. The Commissioner currently may not act against a VO which breaches the VOA until the Tribunal orders the suspension of the activities of the enrolled VO or the cancellation of its enrolment. Therefore, non-compliant VOs are being protected by bureaucracy.

The Commissioner is now being given the authority to issue suspension orders and cancellation orders himself with the VO being given the right to appeal to the Tribunal. The Commissioner may also – in specific cases – directly issue suspension orders (in certain cases also for the *permanent suspension* of designated activities) in the case of VOs which are not enrolled.

7. Trading

VOs may not trade. There are, however, some exceptions which are listed in the VOA which allow VOs to trade pursuant to their public purposes such as selling tickets to a museum or a theatre and so on. The law lists these in article 38 of the VOA.

The VO may conduct other commercial activities if these are only marginal to the income of the VO. The marginality or otherwise of an activity is determined by the administrators, although the Commissioner may impose conditions to ensure respect for the principles of the VOA. In other cases, the VO must establish an appropriate legal entity to carry out the acts of trade. One important amendment establishes that the appropriate legal entity which may be set up by a VO for trading purposes may now only take the

form of a limited liability company and this has been designated as there was confusion as to what the term meant. The purposes and objects of the limited liability company must be consistent with the purposes of the VO which has established it, unless carrying out acts of trade *unrelated* to the purposes of the VO through a company is expressly permitted in the statute of such VO, thereby extending its purposes to *setting up organisations which can trade, outside its own purposes, so as to raise funds for the social purpose of the VO*. The company must, however, entrench the non-profit making principles in accordance with the VOA into the company structure and articles as otherwise companies would simply be vehicles to circumvent the limitations on private interests resulting from the definition of "non-profit making".

8. Money Laundering and Funding of Terrorism

International monitors have insisted that Maltese law on VOs be enhanced to cater for the prevention of money laundering and terrorist financing through VOs. These amendments tackle the suggestions made. It is the *administrators* who must ensure that the dispositions of law relating to the prevention of money laundering and terrorist financing are adhered to (and their monitoring, verification and control, and record-keeping duties have been identified in some detail). The organisation must have appropriate internal procedures to encourage staff and volunteers to report known or suspected financial crime or abuse. Staff and volunteers must also be provided with adequate training.

The *Commissioner's* function in this regard has been enhanced and he must now review periodically new information on the voluntary sector's potential vulnerabilities to money laundering and the funding of terrorism. He is also to assist VOs in protecting themselves from such abuse by raising their awareness about such risks and informing them of available measures to protect themselves.

New articles have also been introduced in relation to the *Financial Intelligence Analysis Unit* which may now access the Register for Voluntary Organisations so as to fulfil its responsibilities under the Prevention of Money Laundering Act.

9. Temporary Organisations

The articles regulating temporary organisations in the VOA were not fully appreciated and understood and the amendments now aim to simplify them so as to encourage their use. In fact, a specimen constitutive instrument of a temporary organisation has been added as a Schedule to the Act to make it easier to establish a temporary organisation as this is now tantamount to just filling in a form.

Temporary organisations may be established in certain specific cases and they are beneficial because they do not have all the implications of a fully fledged organisation. They are rather an exception which was created to facilitate small, short-term goals and they should not be used repetitively and long-term.

In fact, the articles seek to hinder the same persons, or some of them, from repeatedly setting up a temporary organisation for the same or similar purposes so as to mask the extent of their activities. It is only if the administrators, on being asked by the Commissioner, refuse to form a VO of extended duration that the Commissioner is granted the power to refuse to accept the enrolment of a temporary organisation as in this case it would be made clear that the promoters are expressly seeking to avoid the application of the main clauses of VOA itself.

Any person who wants to raise funds from the public *for the benefit of a specific individual who suffers from a particular social, physical or other need must* now establish and enrol a temporary organisation. The introduction on this mandatory rule addresses the problem we see in Malta of people individually making public calls for money in the press or on other media FOR SPECIFIC INDIVIDUALS without being regulated at all.

This is not a social purpose and often a private purpose shrouded in a socially relevant discussion. It is the intent of the policy makers to discourage people from effectively raising non-repayable funds in a formal manner through the media for personal needs. The correct way is to organise ourselves to help specific individuals through lightly regulated structures which also have a sufficient level of formality, transparency, accountability and supervision to ensure that what happens once funds are raised at least confirms and reflects what is stated in the process of fund raising.

Such a temporary organisation shall be considered to be for a social purpose even though it may have just one beneficiary: funds raised are only to be used for such individual's needs. It is now required that any excess funds are to be disposed of in favour of another enrolled voluntary organisation with similar purposes. There is also the possibility of converting the temporary organisation into a voluntary organisation of extended duration. The purposes of this voluntary organisation would be to achieve the relevant social purpose *in general for public benefit* and not limitedly to one specific beneficiary. It is also required that there be at least three administrators, and the individual needing the funds or, if a minor, his or her parents, may not be administrators.

10. Other amendments

10.1 The Malta Council for the Voluntary Sector

10.1.1 The Council's Structure: the structure of this Council has been modified with one member being appointed by the Minister to represent the Government, five being appointed to represent the voluntary sector following a public call by the Minister *for nominations*, and six being appointed directly by the voluntary sector *through elections* to represent different public purposes or public benefits within such sector. Members of the Council are now to be appointed for a period of *three* years (rather than the current two year period) and may be re-appointed for further periods of three years.

10.1.2 Resignation and Disqualification of Members: the articles regarding the resignation and disqualification of members on the Council have also been amended and expanded upon and it is now specifically stated that a person is not qualified to hold office as a member of the Council if he has a financial interest or any other interest in any enterprise or activity which is likely to affect the discharge of his functions as a member of the Council. Any direct or indirect interest of any member of the Council in any contract made or proposed has also been dealt with.

10.1.3 The Council's Role: the objectives and functions of the Council have been enhanced and the Council may now perform its functions either directly or through management sub-committees, boards of council members, or persons appointed for the purpose. A Chief Executive Officer may be appointed and given those powers and functions as may be determined by the Council.

10.2 Offences

The offences included in the VOA were amended and widened so as to address situations which have arisen in the last years and which had not been previously catered for. It is now specifically stated that it is an offence to use the name and identification number of a VO without authorisation especially in the context of public collections.

10.3 The deletion of article 39

This article, which provided for the four year window given to Government controlled non-profit social purpose organisations, is being deleted as the four year period contemplated for its application has now elapsed. Government can no longer enrol its non-profit social purpose organisations.

B. Amendments to the Civil Code

Some amendments and additions have been made to existing provisions of the Civil Code on fiduciary obligations, namely 1124A and 1124B. New provisions have been proposed to reflect recent Court judgements and others have been introduced to cater specifically for fiduciary obligations when organisations, such as VOs which have a purpose and no private beneficiaries, are involved.

Fiduciary obligations to promote and respect the stated purposes and the manner of their enforcement are now addressed in some detail. Some important statements of principle are made in the new provisions, such as that relating to the inapplicability of the rules of prescription to cases where fiduciaries have property belonging to another person in their possession. No amount of time will ever make it theirs. In this regard they are treated similarly to how the Civil Code treats a person who has misappropriated property.

Another clarification solves the problem of when there is an unlawful causa when property is being held by a fiduciary, for example when an AIP Permit is not obtained by a Maltese fiduciary for a non-resident buyer or there is a fiscal violation in the transaction. The Courts for valid long standing legal reasons, refuse to grant a remedy to the beneficiary in such cases resulting in a vacuum in ownership of property and a potential windfall for the fiduciary, contrary to all legal principles in this regard. The new provisions do now allow the Court to provide for interim measures and to give appropriate orders to ensure observance of the law or remedies once the cause of illegality has been addressed by the parties.

Although the issue involved a long standing legal discussion, another point which has been given priority with the disability trusts project in mind, is the legal rules applicable to a substitution of fiduciaries. It is not clear whether this is a transfer or a succession or continuation of the same administration. Transfers, which can refer to title or merely possession, are complex and have notice rules and legal effects vis a vis third parties while succession or continuation deals with things very simply, seeing a mere change of fiduciary but keeping all legal relationships with third parties unaffected. The latter is chosen as it is safer for all parties including beneficiaries, faster and less expensive. The substitute fiduciary is basically treated as if he were the original fiduciary from the very start.

C. Amendments to the Second Schedule to the Civil Code

This Bill also includes substantial amendments to the Second Schedule to the Civil Code, Chapter 16 of the Laws of Malta, (the "Second Schedule"), also enacted in 2007 at the same time as the VOA. This Schedule was originally drafted as part of the VOA but as the proposed draft law emerged as far too complex (as it addressed too many aspects) it was decided to split the legislative project into two laws – the VOA and the Second Schedule.

The purpose of these amendments is to address issues raised following experiences gained, particularly in the non-profit sector, since the coming into force of this Second Schedule in 2007 and also to reflect new developments in this field.

These amendments are to a great extent connected to the VOA which is a law focusing on the social or public benefit PURPOSES of legal organisations. The LEGAL FORM of these organisations, which apart from that of trusts, is either foundations or associations, is then regulated by the Second Schedule of the Civil Code. However, as the VOA does not deal with the same organisations when they involve a private interest, the Second Schedule also regulates foundations and associations when their purpose is private. Some amendments therefore address even this private interest aspect as it is the other alternative.

It has been found necessary to address issues more clearly as, over the past few years since this Schedule was introduced, the differentiation between these two categories (social/public benefit vs private) of the same legal types of organisations (foundations and associations) has been sometimes difficult to understand and has been causing some confusion.

The principal amendments are outlined below.

11. The category of the organisation

Every organisation - irrespective of its legal form – is established to achieve a purpose. This purpose determines the *category* of the organisation, and now the provisions make it clear that the *category* may be either:

(a) *Public Benefit*: this is an organisation which is established *exclusively* for a public purpose on a non-profit making basis, excluding any private benefit, and this includes an organisation which

has *public interest beneficiaries*. These are defined specifically in the amendments and may broadly be described as those organisations which are themselves established exclusively for social purposes. Individuals may also benefit in certain specific cases involving specific social needs, but this is a very restricted exception.

(b) *Private Benefit*: an organisation may be classified as such when it is established for a lawful purpose – not being a public purpose. All organisations NOT established for a social/public benefit or purpose are now clearly classified as *private benefit organisations*.

So now the two categories are clearly marked out by a simple test – are they exclusively social/public purpose or not?

- If they are clearly and exclusively for a social/public purpose, in other countries often called "charities", it is possible for them to take every legal form of foundations (there are two, one with beneficiaries and one with purposes) and any type of association (sports club, band club, hobbies, schools and so on).

- If they are **not** exclusively social/public benefit or purpose, then, whatever their purpose and objects may be, they fall to be governed by the default rules which assume private benefit, direct or even indirect or unattributed (as when they have a mere lawful purpose for commercial transactions), whether they are foundations or associations[9].

When organisations are established by the Government then they are *public organisations* and these are governed by the laws applicable to the State and special laws often used in setting them up. The term "public" here is not to be confused with "public benefit or purpose", as stated above, as it only denotes State control. So far[10] public organisations are not registrable or regulated by this Schedule unless the Government decides to use the legal form of a foundation (often done) or an association (unlikely) in which case this Schedule will also apply.

[9] It is to be noted that some associations like companies, cooperatives and unions are not regulated by this Schedule as they are subject to special laws and although they are all private in nature should not be referred to in this discussion;
[10] The Minister is given the power to regulate the registration of public organisations so as to render their structure and officers, and any other documents he considers appropriate, easily accessible to the public by a search in the Register of Legal Persons;

12. Foreign and International Organisations

12.1 Legal Personality and Applicable Law

The articles regulating foreign and international organisations have been amended so as to clarify:

(a) when these organisations are recognised as legal persons under Maltese law;

(b) which law will regulate such organisations *depending on whether they have legal personality or not.*

It is important to note that the approach regarding trading activities found in Art. 32A of the Second Schedule, where the law discourages public benefit organisations, in particular, from speculating and entering into trading activities directly, apply also to foreign foundations *which operate in Malta* irrespective of the law which regulates such organisations. This is to ensure that a level playing field exists with other similar Maltese organisations.

12.2 Registration

As the law currently stands, foreign and international organisations which carry on activity in Malta on a regular basis are required to register with the Registrar for Legal Persons. It is now being proposed that this obligation shall not apply to *foreign religious organisations*, and this, in confirmation of the freedom of religion guaranteed by the Constitution and also to establish consistency with the rules on local pious foundations and ecclesiastical entities which are not obliged to register as they are governed by religious laws.

The proposed amendments will now give the possibility to foreign or international organisations which are not carrying out any regular activity in Malta to register, and this, to *evidence their recognition* for the purpose of the application of the laws of Malta other than the Second Schedule. This would be relevant when such organisations are shareholders in Maltese entities, for example, and have rights under fiscal laws which tend to refer to nationality or residence which is a different aspect to a branch or operation in Malta, which is the usual trigger for registration under the Schedule. (This is optional).

It is important to note that if the activities of a foreign or international organisation are the subject of laws regulating *credit institutions, insurance undertakings, investment services or funds or the provision of trustee, fiduciary, corporate services or other licensable or regulated activities*, such organisation may only be registered with the prior written consent of the Malta Financial Services Authority. Some exceptions exist under applicable laws.

An amendment to Article 384 of the Companies Act is being proposed whereby the rule stating that all bodies corporate, whatever their type, constituted or incorporated outside Malta which establish a branch or place of business within Malta, must deliver documents to the Registrar of Companies for registration, will now only refer to foreign legal organisations which take the legal form of companies and commercial partnerships. All other foreign legal organisations, such as foundations, will now be required to register under the Second Schedule and this will bring about consistency. Foreign foundations will henceforth not register their branches in terms of the Companies Act but do so in the Register of Legal Persons under this Schedule.

The liability of foreign and international public benefit organisations has also been addressed. The liability of such organisations and that of their administrators is subject to the provisions of the Second Schedule in so far as their activity in Malta is concerned. This is however subject to any provisions of any special law which may be applicable.

13. The Public Registry and the Registrar for Legal Persons

References to the Public Registry in the Second Schedule have been amended to the Registrar for Legal Persons. These amendments show that the Registrar for Legal Persons administers the Registry for Legal Persons which forms part of the Public Registry. The Registry for Legal Persons is accessible to the public (subject to the provisions of the Schedule).

14. Administrators

Every legal person must have at least one administrator who may act on its behalf or have such minimum number of administrators as may be required by law for the particular legal form.

The statute must designate the first administrators, how they are appointed and removed from office and the duration of their appointment, if any. The Title on foundations, itself a special law by definition, now allows for foundations to be set up without administrators as long as the person who has to power to appoint the administrators is expressly stated. This is an important feature for foundations created in wills or foundations created for a future purpose or awaiting an event to happen where the appointment of administrators would be useless given that there would be no activities at all until the event occurs. This should not be a bar to registration of a foundation but to date these types of scenarios were not adequately regulated and the amendments propose an approach.

The powers of the Attorney General have been increased in the case of the appointment of administrators and he may now request the Court to appoint the *required number* of administrators if a legal person does not have the *minimum number* of administrators required by law. This is currently only possible if there is no administrator.

The articles regarding the persons who are *eligible for appointment or election* to the office of administrator have been amended and in addition to the current disqualifications from appointment, the following are also being proposed:

a. Persons who have been interdicted by order of any court in Malta in terms of the Criminal Code, or overseas;
b. Persons convicted of any offence involving money laundering or the funding of terrorism.

Moreover, in order to ensure that Maltese organisations, and persons involved in them, are given greater remedies to protect their integrity and reputation, the Court may, *either generally or with reference to a particular organisation*, disqualify any person from *holding an office within an organisation* or disqualify any person from *performing identified activities within an organisation*. The Court's power to rehabilitate a person has been retained.

15. Local Representative

The articles regarding local representation have been amended. It is now clear that a local representative has the *judicial representation* of the particular organisation in Malta to avoid having to appoint curators to receive service of judicial acts against a Maltese organisation which does not have any administrators in Malta. The local representative also has limited *legal representation* that is, limited to the signing of forms at the Registry of Legal Persons and the enrolment of documents with a Notary Public.

16. Existing Foundations

16.1 Formality on Establishment

The rules regulating *existing foundations* (that is foundations which existed before the 1st April, 2008) have been expanded and important provisions have been drafted to regulate such foundations depending on whether these were established by public deed or not, and this because over the past years since the window for regularising existing foundations closed, several foundations not established by public deed have emerged:

a. *Established by public deed:* an existing foundation which was established by public deed and which is *not* registered in terms of the Second Schedule has full legal capacity and all the powers of a registered legal person. It is the exclusive owner of all its property and is liable for its own obligations.

b. *Not established by a public deed:* an existing foundation which was *not established by a public deed* and which is *not* registered in terms of the Second Schedule, only has the capacity to achieve its stated purposes and ancillary matters and is subject to certain restrictions. It is the exclusive owner of all its property, and this, to ensure that no one else can claim it as their own.

16.2 Liability

The *liability of the administrators* of the existing foundation depends on whether this was established by public deed or not. After the 1st April, 2008, the administrators of an existing foundation - *which has not been established by a public deed and which fails to register* - are jointly and severally liable between themselves and with the organisation for the obligations entered into by the foundation.

In the case of an existing foundation *which has been established by public deed and which is not registered*, the administrators are jointly and severally liable for the obligations entered into by the foundation but only *from the 1st April 2008 till the date of registration of the foundation* with the Registrar for Legal Persons. The administrators shall not be liable for obligations entered into by the existing foundation prior to the 1st April 2008 unless they have personally assumed such obligations in writing.

The purpose of these amendments is to encourage these existing but unregistered foundations and their administrators to come in line, be documented by a public deed and then be registered in the Register for Legal Persons. It is surprising how many existing foundations have not yet complied with the requirement of the Second Schedule to register within 4 years of the coming into force of the Schedule. More publicity is needed as there appears to be lack of awareness of this requirement.

17. Foundations

17.1 Drafting changes from 'private' foundation to 'beneficiary' foundation

As there was some confusion in practice on the difference between private foundations and beneficiary foundations, various articles of the law have been amended. The term "private foundation" is now used limitedly for a TYPE of beneficiary foundation where the beneficiaries are private individuals or entities.

When the beneficiaries are other non-profit organisations which have an exclusive public benefit or social purpose, such as the Church for example, then the organisation should not be called a "private foundation" but is really a beneficiary foundation with a public benefit.

Private foundations are similar to trusts, which are also fiduciary arrangements, and are afforded a higher degree of confidentiality as they operate similarly to wills, addressing private family matters relating to estates and so on. Public benefit organisations do not require and should not be entitled to confidentiality. So the distinction is now made to make the classification clear and rules have been clarified on what documents and information have to be registered in the Register for Legal Persons and become publicly accessible, and what is registered and does not become publicly accessible, but is only accessible to stated parties and with stated consents. In private foundations some basic information is, however, subject to disclosure at time of registration through the introduction of some new forms[11] on which third parties dealing with the private foundation can rely.

Furthermore, to ensure standards consistent with international commitments, the Malta Financial Services Authority has the right to obtain all and any information, about beneficiaries, for example, even in the case of private foundations.

17.2 Anti-abuse provisions

New provisions have been introduced to ensure that persons using foundations do not use one form of foundation and gain benefits of legal rules not intended. A typical example is the way the old rules operate on the *term* of foundations. When foundations promote a private interest they should not be for a period in excess of 100 years – now extended to 125 years to parallel the amendments on trusts recently enacted. When foundations have a purpose they can be perpetual. Now the rule makes it clear that the option on perpetuity applies only to exclusively public benefit foundations. A purpose foundation *which is NOT a public benefit foundation* will henceforth not be valid for more than 125 years, unless an article in the Schedule expressly permits otherwise[12].

There are several differences which are not dependant on the legal form chosen (purpose vs beneficiary) but on whether they are exclusively public benefit or not. These amendments ensure that the provisions on these differences apply properly based on substance rather than legal form.

[11] Please refer to the Note of Initial Registration, Article 31, Second Schedule to the Civil Code, Cap. 16, Laws of Malta;
[12]Please refer to the proposed article 29(7), Second Schedule to the Civil Code, Cap. 16, Laws of Malta;

Tables have been included in the amendments which indicate how the articles of the Second Schedule are to be modified in the case of:

(i) *a purpose foundation which is not established as a public benefit foundation* (the modifications prevail over the legal form of the foundation in deference to its non-public benefit purposes); and

(ii) *a beneficiary foundation which is established exclusively for public interest beneficiaries* (the modifications prevail over the legal form of the foundation in deference to the nature of its beneficiaries, it being a public benefit foundation in substance).

17.3 The Contents of the Statute

Some of the contents which must be included in the deed of foundation have been amended. These include:

(i) an indication of whether the foundation is a *public benefit foundation* or a *private foundation.* This is relevant as there has been some lack of clarity on the accessibility of documents to the public as this depends on the type of foundation involved.

(ii) an indication of the manner in which administrators are appointed and removed from office and the duration of their appointment, if any, which term may be for life. (If the duration of the appointment of the administrators is not stated in the deed of foundation, administrators are deemed to have been appointed indefinitely until they retire or are removed.)

(iii) if there are no administrators in office at the time of establishment or registration, the statute must include an indication of the person who has the power to appoint the administrators.

(iv) where there exist more than one board or committee, as is often the case with boards of advisors or supervisory councils, the deed of foundation shall, for the avoidance of doubt, specify which board or committee is to be the board of administration.

17.4 Endowments

The article regulating endowments made to foundations has been amended and a distinction is made between *additional endowments* and *new endowments*. Additional endowments are made under the same

terms, for the same beneficiaries or for the same purposes as stated in the statute of the foundation and the grantors of such additional endowments acquire no status or powers in relation to the foundation.

A new endowment is different because the donor becomes a founder with the original one and is considered to enjoy the status and all the powers of a founder in the foundation in relation to such endowment or the foundation as a whole.

Additional and new endowments to *public benefit foundations* are irrevocable notwithstanding any term to the contrary. In other foundations which are not public benefit, the founders have options to make endowments revocable.

17.5 Amendments to the statute of a foundation

The proposed amendments indicate the manner in which changes are to be made to the statute of a foundation and the procedure varies depending on whether a form has been prescribed for the notification of such changes to the Registrar for Legal Persons. If there is a form, any changes to the statute do not require a public deed but are simply made by the filing of the applicable form in the Register.

If, on the other hand, no form has been prescribed, such changes must be made by resolution, private writing (which are to be enrolled in the records of a Notary Public) or notarial deed and shall then be registered in the Register by the Notary publishing or enrolling the deed.

17.6 Accessibility of registered documents

The amendments also indicate which documents are accessible to the public and which are confidential. In the case of *private foundations*, all documents, statements or declarations submitted to the Registrar, are *not accessible to third parties* without the prior written consent of the administrators or the supervisory council of the foundation or with the permission of the Court.[13] Transactions which are subject to registration in the Public Registry according to law are however not subject to confidentiality.

In the case of private foundations, the applicant for the registration of the foundation must, together with the other documents, submit a Note of Initial Registration and the information included in such note is accessible to the public, and this, notwithstanding the confidentiality afforded to private foundations. Persons dealing with the administrators of a private foundation in relation to foundation property need not

[13] The founder may expressly waive such confidentiality;

enquire into the terms of the foundation or obtain the consent of the beneficiaries or any other person. They may rather rely on declarations made by the administrators with regard to any matters and the administrators are empowered to furnish any person with whom they are dealing in the interest of the foundation, a certificate containing specified information without being in breach of any confidentiality obligations in terms of the Second Schedule.

17.7 Amending the purpose of the foundation

A founder or if permitted by the statute, any other body or person, may amend or add to the deed of a purpose foundation. After the death of the founder, the Court may authorise such amendment or addition to the deed of a purpose foundation, on the application of any administrator, the supervisory council, any interested party, or the Attorney General.

17.8 Termination

A foundation may not be terminated prior to the term for which it is established, although a beneficiary foundation may be terminated on the demand of all the beneficiaries of the foundation provided they are all in existence, have been ascertained and none of them is interdicted or a minor. If the founder is still alive his consent shall be required for termination by the beneficiaries. After the death of the founder, the Court shall have the power to dissolve and wind up any beneficiary foundation when requested by all the beneficiaries of the foundation. Termination does not affect or invalidate acts already lawfully carried out or interrupt lawful acts in progress. It does not affect lawful commitments made and not yet fulfilled.

The amendments address how the assets of a purpose foundation are to be disposed of and any disposal of assets pursuant to the statute of the foundation must be made on the following basis:

(i) in the case of a purpose foundation established for a public benefit, to another purpose foundation also established for a public benefit;

(ii) in the case of a purpose foundation established for any other purpose, in accordance with the deed of foundation.

The amendments also clarify how a disposal of assets is to be made by the Court. (This varies depending on whether the foundation is established for the public benefit or has a combination of purposes being partly private benefit and partly public purposes).

18. Associations

18.1 The Statute:

Amendments have also been made to the articles regulating associations, particularly the contents of the statute[14] and the liability of members. Administrators may be appointed in any manner whether by *notice* in writing, by *elections* among the members, by *designation* to an office by the administrators or as the statute may establish.

In the case of *public benefit associations*, the majority of the administrators are to be appointed *by means of elections* among the members in general meeting and a majority of the administrators are subject to confirmation by the general meeting of the members at least once every five years.

18.2 Applicable law and Liability of Members

Amendments have been introduced which regulate the manner in which associations are regulated depending on whether they are established for the *promotion of a private interest* or are *established as public benefit organisations.*

In the case of associations established as *private benefit organisations*, the liability of the members of an association towards third parties (with whom the association has contracted) is also dealt with in detail. Such members are liable in proportion to their share in the profits and losses or in proportion to their benefit or interest in such association, whichever is the higher. When the share of the profits or the benefit or interest is not determined on the basis of a designated proportion, the liability of members is based on the proportion which their monetary contribution bears to the total contributions of the members.

The liability of members of *associations established as public benefit organisations* towards third parties is dealt with separately and varies depending on whether the association is registered with the Registrar for Legal Persons or not.

18.3 The Register of Members

The Register of Members of persons who join or leave an association is not registered with the Registrar for Legal Persons but any court or any authority, including the Commissioner for Voluntary Organisations (in the case of a voluntary organisation), may require information about members. In the

[14] The *category* of the association must, for example, be included in the statute when the association established for the public benefit. Also, if no *term* is specified in the statute of the association, the association shall be considered to be indefinite in duration;

case of a public benefit organisation in the form of an association, the Register may be registered with the Registrar for Legal Persons and shall be available to the public in all cases. (It is also accessible to any member.)

19. Hybrid Organisations

The articles regulating hybrid organisations have been shifted from article 28 of the Second Schedule to article 6 which deals with *existing organisations*. This is being done to make it clear that articles regulating hybrid organisations are to be considered of a *transitory nature*. Foundations should not have members but several Maltese structures referred to as "foundations" do have members under their statutes. Conversely associations must have members with participation and democratic rights.

It is not lawful to register a foundation or an association under the Second Schedule which is established as a hybrid organisation and the statute of a hybrid organisation must be amended to clearly elect the form of a foundation or an association prior to registration.

20. Unregistered Organisations

The articles relating to unregistered organisations have also been amended.

As the law currently stands, the *purposes* of such organisations must be construed *restrictively*. While it is still being expressly stated that unregistered organisations have the legal powers to achieve the *stated purposes* for which they are constituted, references to such powers being limited *strictly* to what is necessary for such organisations to achieve their expressly stated purposes, have been removed as this has lead to unreasonable restrictions in interpretation, negatively affecting the intent of the provisions.

The amendments also clarify *how the property acquired by an unregistered organisation is held, given that an unregistered organisation does not have legal personality*. This depends on whether the unregistered organisation is established for:

(a) a private benefit - owned by the promoter unless otherwise expressly stated;
(b) partly for a private benefit and partly for a social or other public purpose – owned by the private benefit *subject to* the performance by the promoters or administrators of the social or other public purpose until this is achieved, exhausted or becomes impossible. Alternatively a sufficient part of

the property may be appropriated or endowed to a registered public benefit organisation with a similar purpose; or

(c) established solely for a social or other public purpose - the property is held by the promoters or administrators *as fiduciary owners* only for the purpose stated in the statute or any special law which may be applicable to it.

The amendments also clarify how property devolves on the *dissolution* of an unregistered organisation. This again depends on whether the unregistered organisation is established as a *public benefit* organisation or a *private benefit* organisation as the outcomes are different, for obvious reasons.

The liability of any member, donor, or beneficiary involved in any unregistered *public benefit organisation*, has also been addressed. Such persons are not liable for the obligations of such organisation except:

(i) to the extent that they expressly agree to be so liable;

(ii) if such obligations were entered into by them at a time when they knew or ought to have known that the organisation was going to be wound up due to insolvency;

(iii) if they are guilty of fraud or bad faith in entering into any obligations on behalf of the organisation.

21. Continuation of Organisations

The redomicilation of organisations other than limited liability companies, which is regulated by the Continuation of Companies Regulations (S.L. 386.05), is becoming more and more relevant, even in the context of non-profit organisations which also enjoy the same rights of free movement within the European Union. A new article on the continuation in Malta of a foreign organisation has been included in the Second Schedule. Following this amendment, an organisation formed and incorporated or registered under the laws of a state within the European Union or European Economic Area other than Malta may, subject to certain conditions, request to be registered as being continued in Malta. Such an organisation must be registered in Malta in the *same legal form* which it has under the law of the foreign country or jurisdiction. If a similar form does not exist, a form as similar as possible must be selected. After re-domiciliation, Maltese law will govern the organisation.

The new article also establishes that an organisation registered under the Second Schedule may also continue in any state within the European Union or European Economic Area when it is authorised to do so by its statute.

22. Amalgamation of Organisations

The Amalgamation of Organisations Regulations, Subsidiary Legislation 16.09, have been deleted as their provisions have now been incorporated in the Second Schedule to the Civil Code. The provisions of the Companies Act apply *mutatis mutandis* to the amalgamation of two or more associations.

23. Defunct Organisations

New articles have been introduced to cater for defunct organisations and the Registrar for Legal Persons may now strike off the Register any registered organisation which he has reasonable cause to believe is not in operation and this following the procedure outlined in the proposed amendments.

Defunct organisations may be restored through a new procedure included in the amendments and provisions in this regard have been included so as to protect any creditor or any person (who appears to the Court to have an interest) who may be aggrieved by the fact that the name of the organisation has been struck off the Register.

24. Segregated Cells

Significant amendments have been made to the articles regulating segregated cells, several of which in connection to a major policy initiative relating to families with members with disability.

24.1 Administration

A cell is administered by the administrators of the organisation. The administrators may, if authorised by the statute, establish *an administrative committee* and they may delegate any of their powers to such administrative committee. This delegation does not restrict the powers of the administrators of the organisation in relation to the cell and does not include the legal and judicial representation in relation to the assets and liabilities of the cell.

24.2 Transfer of Cells

It is now possible for the cell of one organisation (the *transferring organisation*) to be *transferred* to another organisation (the *recipient organisation*). The patrimony of the cell shall still constitute a distinct

patrimony and the creditors of the recipient organisation will not have recourse to the assets of the transferred cell or the transferring organisation. The rights and obligations of third parties will not be affected but shall continue as rights and obligations of the recipient organisation with respect to the transferred cell.

24.3 The Constitution of a Cell into a new Organisation.

It is also possible to *convert a cell into a new organisation*. This cell must take the same legal form as that of the organisation in which it is established. *Continuity* is ensured as the administrators of the cell are to be the administrators of the new organisation, which shall have the same purposes and beneficiaries as those of the cell. The rights and obligations of the organisation (with respect to the cell) and any third parties continue unaffected as rights and obligations of the new organisation. The creditors of the cell are also given the opportunity to object if the new organisation creates limitations on the liabilities of the organisation or its administrators or members as opposed to those prevailing with reference to the cell. Moreover, all interested parties are to be notified by the administrators of the constitution of the cell as a new organisation.

Creditors of a cell may object to the transfer of a cell or the constitution of a cell into a new organisation by means of a sworn application. The Court will (a) either uphold the objection or (b) allow the transfer or constitution of the new organisation upon sufficient security being given.

A registered organisation may also be converted into a cell of a multi-cell organisation.

These amendments are principally motivated by the projects launched by the Government relating to fiduciary structures, like trusts and foundations, for the benefit of persons with a disability. In that context, these amendments will allow for disability foundations to be created in multi-cell format and can be available to many families at reduced cost and with greater protection. These new amendments will add important flexibility in that when a family using a multi-cell foundation wishes to (a) leave a foundation and go to another one, for any reason, or (b) leave a foundation and set up its own family foundation, this is now possible and easily achieved as it is regulated by specific rules. This facility, of course, applies generally and it is equivalent in substance to a change in trustee for the same beneficiaries and purposes, transactions already recognised in the law of trusts and already subject to statutory exemptions. As there is no substantive change in beneficial interest, these mere changes of administrators do not give rise to any capital gains tax or stamp duty.

25. Other amendments

25.1 Definitions

To support the general and specific themes underlying the proposed amendments and to correct some current difficulties in interpretation, new definitions have been introduced in the Second Schedule including definitions on:

(a) constitutive instrument, statute and deed of foundation so as to avoid some inconsistency in use and very rigid interpretations;

(b) international organisations and religious organisations;

(c) public purpose, which is now wider than a "social purpose" as it also includes any other purpose or benefit which promotes or serves the general public or general interest or a sector of the general public;

(d) a "social purpose" includes a political purpose (also defined) for the purposes of the Second Schedule (this is excluded in the VOA). Political parties are regulated by the Second Schedule as the rules in the Second Schedule deal with FORM and every political party has a legal form. It has been made clear that this law is to be interpreted consistently with the law on the financing of political parties and in case of conflict that law will prevail as it is a special law.

25.2 Liability

The liability of persons who act in the name of a legal person which does not exist has been amended. These amendments were introduced to avoid abuse by persons apparently dealing on behalf of a legal organisation.

If a third party in good faith deals with a person who acts in the name of a legal organisation which has not come into existence, when the organisation comes into existence and is controlled by or is for the benefit of such person, any dealings with the third party are treated as having been undertaken by the organisation without the necessity of any ratification. The organisation may then be indemnified by the person who acted in its name towards the said third party.

This amendment adds to existing provisions which make such person liable in any case[15].

25.3 Accounts

The rules on accounts which are to be kept by organisations have been amended, and this, to address the need for greater transparency in line with both local and international expectations.

A distinction has been made between public benefit organisations and private benefit organisations. Until specific rules are prescribed, public benefit organisations must comply with the provisions applicable to enrolled voluntary organisations irrespective of whether such organisations are enrolled or not.

Guidelines issued by the Malta Financial Services Authority relating to trustees apply to private foundations, and in the case of foundations which carry out commercial transactions, identified provisions of the Companies Act apply *mutatis mutandis.*

D. Amendments to Other Laws

Following the amendments being proposed to the Voluntary Organisations Act and the Second Schedule to the Civil Code, a number of consequential amendments to other laws are also being proposed. Such other laws are the following:

(a) the **Public Collections Act**:

One view is that this law has served its purposes and should be amended or abrogated.

Giving the police the functions of operating public collections through the issuing of a permit is burdening the police unnecessary. Consequently this raises a question as to who is competent authority that should take over such bureaucratic matters. Nonetheless, it is not within the mandate of the Commissioner for Voluntary Organisations to handle public collections mainly for three reasons:

1. enrolled voluntary organisations do not need a permit to carry out public collections;
2. non-enrolled organisations are prohibited from making public collections; and
3. When not voluntary, organisations do not fall within his remit.

[15] Reference in this case is to be made to Article 4(7), Second Schedule to the Civil Code, Cap. 16, Laws of Malta.

Eliminating this law will create a vacuum in certain areas such as private companies or individuals making public requests for money. Under Company law this may be caught by rules on offers of securities but outside that ambit, there are no guidelines at all. The introduction of revised rules on temporary organisations in the VOA seeks to catch the cases of public collections for individual cases forming part of umbrella *charitable or social/public benefit purposes.* Political parties are exempt from the Public Collections Act so on that front the debate is neutral. Beyond these cases there are other possibilities.

(b) the **Notarial Profession and Notarial Archives Act**;

(c) the **Arbitration Act**;

(d) the **Companies Act**.

Moreover, these amendments will also require consequential amendments to regulations, particularly to the Civil Code (Second Schedule)(Notifications and Forms) Regulations, S.L. 16.08.

INVITATION FOR PUBLIC COMMENT

All persons interested in making any comments or suggestions on the draft legislation attached to this White Paper are to write to the Ministry:

Ministry for Social Dialogue, Consumer Affairs and Civil Liberties
Barriera Wharf
Valletta VLT 1971

All comments should reach the Ministry by not later than 6th July 2016.