GUIDELINES TO SECTION 21 COMPANIES,
TRUSTS, VOLUNTARY ASSOCIATIONS AND
NONPROFIT ORGANISATIONS
PART A:
SECTION 21 COMPANIES

1. NATURE, REQUIREMENTS FOR FORMATION, AND FORMALITIES TO BE OBSERVED

1.1 A company is a juristic (i.e. artificial) person. This means that it exists in law as a separate entity, distinct from its members or officers or any third party. It means also that its assets and liabilities (and its profits and losses) are its own and do not belong to, say, its members; that it can sue and be sued in its own name; and that it has perpetual succession, ie: changes in its membership or in its board of directors do not effect its continuing existence.

1.2 The formation and activities of companies in South Africa are regulated by the Companies Act No 61 of 1973 ("the Companies Act").

1.3 A company is a two-tier structure, the lower tier comprising one or more natural or juristic persons called members or shareholders; and the other comprising one or more directors. In theory at least a company is controlled by its members or shareholders, who have the right, by resolutions adopted at General Meetings of the company, to exercise all the powers of the company. In practice, however, the day to day running of a company is in the hands of its directors, who are elected by, answerable to and are often drawn from the ranks of the members. If the members are unhappy with the conduct or policies of the directors, their remedy is to dismiss and replace them.

1.4 Section 21 of the Companies Act provides for the incorporation of "Associations not for Gain", commonly referred to as Section 21 companies. These companies do not have a share capital. In other words, a Section 21 Company cannot issue shares and cannot pay dividends to its members; instead it is "limited by guarantee", which means that its members undertake to pay a purely nominal amount (usually only a few rand) in the event of the Company failing or being placed in liquidation.
2. REQUIREMENTS FOR REGISTRATION

2.1 Like all other types of company provided for in the Companies Act, a Section 21 company must be registered with, and obtain a certificate of incorporation from, the Registrar of Companies in Pretoria. In this regard, a Section 21 company must comply with a number of prerequisites, which include the following:

2.1.1 Because a Section 21 company is deemed to be a public company in terms of the Section 19 of the Companies Act, it must have at least 7 members.

2.1.2 The liability of its members in the event of the company failing financially is "limited by guarantee" (see above).

2.1.3 The company must be formed for a "lawful purpose".

2.1.4 The main object (as set out in the company's founding documents, called the Memorandum and Articles of Association) must involve:

"promoting religion, arts, sciences, education, charity, recreation, or any other cultural or social activity or communal or group interests".

2.1.5 The company's memorandum of association must contain provisions to the following effect:

2.1.5.1 All income and property of the company must be applied solely towards the promotion of its main object, and no amount or asset may be awarded or distributed to its members or directors in the form of profits or dividends or in any other way.

2.1.5.2 If any surplus (or "profit") remains on the winding up of the company, this surplus must be transferred to another institution having similar purposes, or otherwise in accordance with the instructions of the High Court.

These are the so-called non-profit provisions. However these provisions do not prohibit a Section 21 company from making a profit, nor do they prohibit all and any payments to the company's members or directors; a Section 21 company may pay its members
"reasonable remuneration" for services actually rendered to the company, e.g: if the members or directors are employees of the company, or render professional services to it.

3. **POWERS OF A SECTION 21 COMPANY**

With certain exceptions (the principal one being the prohibition against distribution of profits), a Section 21 company has the same wide powers to carry out its main object and purposes as any other company. These powers include the power to purchase movable and immovable property, to invest company funds in any way, to borrow money, to open and operate banking accounts, to employ staff, etc.

4. **REQUIREMENTS FOR INCORPORATION**

In order to be incorporated, and once incorporated, a Section 21 company is obliged to comply with the extensive provisions of and formalities provided for in the Companies Act. These include the following:

4.1 The phrase "Association incorporated under Section 21" must be included in or subjoined to the company's name. The approval of the Registrar must by given for the desired name of the company; this is obtained by "reserving" a name in advance of incorporation.

4.2 In order to be registered a company must provide the Registrar with, *inter alia*, the original and two notarially certified copies of its memorandum and articles of association in the prescribed form. The memorandum sets out the name of the company, the names and addresses of its founding members, its purpose and main object, and its powers. The articles of association deal with such matters as the appointment of members and directors, the conduct of meetings and annual general meetings, the powers of the directors, etc. The records filed with the Registrar are public documents and may be read by any person on payment of the prescribed fee.

4.3 The company must appoint auditors. The Registrar must be informed of such appointment and the auditor's address on the prescribed form, and must be informed promptly of a change of auditor.
4.4 The company must appoint a registered address (at which all correspondence and court process, if any, may be delivered), inform the Registrar thereof, and keep the Registrar informed of any change in this address.

4.5 A register of members of the company must be kept in the prescribed form. The register must contain the addresses of the members and the date they became members. The register must be kept at the Company's registered address (or at its place of business or that of its agent, in which case the Registrar must be informed) and must be available for inspection by any member of the public for at least two hours each day during ordinary business hours.

4.6 The Company must keep a register of directors, which register must reflect certain prescribed information about each director. The rules which apply to this register are much the same as apply to the register of members.

4.7 The company must keep the Registrar informed in the prescribed manner of the names of the directors and certain other information about them, and of any changes of director or changes in this information.

4.8 The directors' names (and the name and registration number of the company) must appear on every letter, catalogue or circular sent, distributed or published by the Company. If a director is not a South African citizen, his/her nationality must appear in brackets after his/her name.

4.9 The directors of the company must ensure that proper minutes in the prescribed form are kept of all directors' meetings. Likewise, an attendance register in respect of all directors' meetings must be kept.

4.10 The company must keep financial and accounting records in the prescribed form, and must prepare annual financial statements and lay these before the annual general meeting of the members. The annual financial statements must be lodged with the Registrar.

4.11 Every company must lay a directors' report before the annual general meeting. Generally speaking this report deals with the state of health of the company, and more specifically
must comply with the provisions of Section 299 of the Companies Act.

The above list is merely a sample of the formalities that must be complied with and the obligations placed on the company and its officers in terms of the Companies Act. In many cases the failure to comply with the provisions of the Companies Act may render the directors or the company liable to criminal prosecution.

5. **MEMBERS OF COMPANIES**

5.1 The members of a Section 21 company may be natural or juristic persons (or representatives or nominees of other institutions, such as government departments), and may be foreign citizens.

5.2 As indicated above, one of the principal rights of members is to appoint and dismiss directors.

6. **DIRECTORS OF COMPANIES AND THEIR DUTIES**

6.1 The Companies Act absolutely disqualifies certain persons from being appointed as director of a company, and permits others to be directors only with the authority of the High Court. Examples of persons subject to absolute disqualification are:

6.1.1 A body corporate or other juristic person, e.g: a company or close corporation.

6.1.2 A minor.

6.1.3 A person of unsound mind.

6.1.4 An unrehabilitated insolvent.

6.1.5 Any person who has ever been convicted of an offence involving dishonesty, e.g: theft, fraud, etc.

6.2 Directors may not act beyond the objects of the company (as set out in the memorandum of association), or beyond the limitations placed on their powers by the Companies Act or by the common law, or, without the approval of the members in general meeting, beyond the powers conferred on them by the memorandum and articles of association. It is possible to
incorporate in the memorandum and articles of association of a company restrictions on the powers of directors, for example prohibiting them from selling or encumbering the company's immovable property without the authorisation of the members, or without the authorisation of some third party.

6.3 A director stands in what is called a "fiduciary" relationship to the company. This means that the director:

6.3.1 Must use his/her position and exercise his/her powers in a *bona fide* manner in the interests of the company.

6.3.2 Must not place him- or herself in a position in which his/her personal interests conflict with his/her duties to the company.

6.4 A director may not act arbitrarily, capriciously or for an improper purpose. A director must exercise an independent discretion and may not fetter his/her discretion or blindly follow the instructions of another.

6.5 If a director fails to exhibit in the performance of his/her duties that degree of skill which may reasonably be expected from a person of his/her knowledge and experience, the director may be liable to the company for any loss it may suffer as a result.

6.6 However, a director is not liable for mere errors of judgment and is not required to have special business acumen or expertise, or singular ability or intelligence. But a director may not shelter behind culpable ignorance or failure to understand the company's affairs, or be indifferent or a mere dummy.

6.7 Unless required to do so in terms of his/her contract with the company, a director is not bound to give continuous attention to the affairs of the company. A director's duties are of an intermittent nature to be performed at periodical board meetings. A director is not bound to attend all such meetings, though he/she ought to attend whenever reasonably able to do so.

6.8 A director, in consenting to take office as such, assumes a position involving duties which cannot be shirked by leaving everything to others. Except in so far as they are allowed to do so under the articles of association, directors cannot delegate their duties or simply leave a
task, which they are all under a duty to do, to one of their number, however reasonable and safe it may seem to the directors to do so.

7. PERSONAL LIABILITY OF DIRECTORS AND MEMBERS

7.1 The general rule is that the members, directors and officers of a company are not liable for the company's debts.

7.2 There are certain exceptions to this rule in the Companies Act in relation to directors, two of which are:

7.2.1 If a director signs or authorises to be signed on behalf of the company any one of a specified category of documents containing an undertaking to pay money, for example a cheque or an order for goods, and the full name of the company is not recorded clearly on such document, the director will be personally liable unless the amount reflected in the document is paid by the company.

7.2.2 Where it appears that the business of the company was or is being carried on recklessly or with the intention of defrauding creditors, a Court may declare that a person who was knowingly a party to such conduct is personally liable for the debts of the company.

7.3 A director or officer may become liable to a third party (e.g: a firm with which the company does business) in a number of circumstances, such as when a director acts beyond his/her authority in contracting with the third party, or when the director informs the third party that the company can pay for goods bought when the director knows that this is not the case.

7.4 In terms of Section 66 of the Companies Act:

"If any public company (which includes a Section 21 company) … carries on business for more than 6 months while it has less than 7 members, every person who is a member of the company during the time that it so carries on business after those 6 months and is cognisant of the fact that it is so carrying on business, shall be liable for the payment of the whole of the debts of the company contracted during that time and may be sued for (such debts) without any other member being joined in the action"
It is therefore imperative that the members of a Section 21 company ensure that there are at all times at least 7 members.

8. **WINDING-UP OF A COMPANY**

A company may be wound-up voluntarily (by resolution of its members), or by application to the High Court by (for example) a creditor or a member. Winding-up requires the appointment of a liquidator, who is responsible for collecting and selling the assets of the company, paying its debts (if possible) and distributing any surplus.
1. PURPOSES AND TYPES OF TRUSTS

1.1 A Trust exists when the creator(s) of the Trust, called the founder(s), has handed over or is bound to hand over to another, called the Trustee(s), control of property (including money) which, or the proceeds of which, is to be administered for the benefit of some person or for some impersonal object or purpose.

1.2 The terms of a Trust (namely the objects or purposes of the Trust, how the Trustees are to be appointed, their powers, the use to which they must put the Trust property, etc.) are usually set out in a document called the Trust Deed.

1.3 A Trust is flexible in that it can be used to serve an indefinite variety of purposes. A Trust may be created whereby the Trustees are obliged to use the property entrusted to them for a specified, limited purpose and only in certain clearly defined circumstances (eg: for the education of a minor until he or she becomes an adult). However, a Trust may also be created whereby the Trustees have a wide discretion to use the Trust property for a general purpose (eg: for the provision of health care services to disadvantaged persons). This latter type of Trust is called a discretionary Trust.

1.4 In order for a valid discretionary Trust to be created, the object or purpose of the Trust must be lawful and sufficiently certain. Certainty is achieved if, for example, the beneficiaries or classes of beneficiaries under the Trust (eg: all disadvantaged persons in a certain area) are specified with sufficient clarity.

1.5 Trusts are regulated by the Trust Property Control Act, No 57 of 1988 ("the Trust Act").
2. **PERSONS WHO MAY APPOINT TRUSTEES**

2.1 Depending on the terms of the Trust Deed, a Trust may be properly established with only one Trustee; there is no upper limit in law to the number of Trustees who may be appointed.

2.2 A Trustee may be appointed by, among others (and depending on the terms of the Trust Deed), the founder, the other Trustees, by statute, by a public official with the title Master of the High Court ("the Master") or by the High Court itself.

2.3 The founders have the power to designate the original or initial Trustees, as well as how their successors are to be chosen. The Trust Deeds of discretionary Trusts usually specify how successors to the initial Trustees are to be appointed. If the position of Trustee in a Trust becomes vacant or cannot be filled for any reason, the Master has the power in terms of the Trust Act to appoint a Trustee.

3. **QUALIFICATIONS AND FORMALITIES FOR APPOINTMENT AS TRUSTEES**

The following rules regarding the qualifications for being appointed, and for remaining in office as a Trustee, may be distilled from the Trust Act and the common law:

3.1 A married woman no longer requires her husband's consent to become a Trustee. A minor may be a Trustee, but only with the guardian's consent.

3.2 A corporation or other juristic person (such as a Company), or the nominee of another entity such as a government department, may be a Trustee.

3.3 A Trustee who resides outside South Africa may, at the discretion of the Master, be authorised to act as a Trustee of a Trust registered in this country. The Trust Act would apply to such a person in the exercise of his or her duties as Trustee.

3.4 The Trust Deed may specify further qualifications.

3.5 The Master is empowered to remove a Trustee from office if:

   - He or she has been convicted of a criminal offence, of which dishonesty is an
element; or
- His or her estate is sequestrated, liquidated or placed under judicial management; or
- He or she has been declared by a competent court to be mentally ill or incapable of managing his or her own affairs.

4. **AUTHORISATION BY THE MASTER**

   Although they may be appointed by the persons referred to above, the Trust Act stipulates that Trustees may not act as such without the written authorisation of the Master. This written authorisation is commonly referred to as "Letters of Authority".

5. **ACCEPTANCE OF TRUST**

   A person nominated or appointed as a Trustee must accept his or her appointment. The acceptance is signified by the completion of a form provided by the Master's office and entitled "Acceptance of Trust as Trustee"; this form must be lodged with the Master before consideration will be given to issuing Letters of Authority.

6. **TRUSTEES LEAVING OFFICE**

   6.1 Subject to the requirement that the needs and interests of the Trust and its beneficiaries should not be prejudiced thereby, a Trustee may resign at any time. The Trust Act requires that the Trustee must give notice of resignation to the Master and, if applicable, to ascertainable beneficiaries. In the case of a discretionary Trust with a large number of actual or potential beneficiaries, it would not be necessary for a resigning Trustee to give notice to beneficiaries.

   6.2 A Trustee's position ceases to exist if the Trust is dissolved or otherwise wound-up.

   6.3 A Trustee may be removed from office by the High Court on application of the Master or another person having an interest in the Trust property, if the Trustee's continuing in office will prevent the Trust being properly administered or would be detrimental to the welfare of beneficiaries.
6.4 The Master may remove a Trustee from office if the Trustee fails to perform satisfactorily any duty imposed upon him or her by the Trust Act, or to comply with any lawful request of the Master. The Master's further powers of removal are set out above.

7. **TRUSTEES AND SECURITY**

7.1 The Trust Act provides that a Trustee, as a person occupying an office of confidence, must give security for the proper and faithful administration of the Trust unless exempted by the Master from doing so. Security in this context means financial guarantees that the Trustees will properly carry out their functions.

7.2 Many Trust Deeds drawn for discretionary trusts exempt the Trustees from providing security, and the Master usually goes along with this, although s/he has the power to require security despite the terms of the Trust Deed.

7.3 If security must be given, it is usually in the form of a fidelity bond containing a promise by a reputable insurance company to indemnify the Trust against loss suffered through the default of the Trustee/s.

7.4 The Master will not issue Letters of Authority to a Trustee unless security has been provided or exemption granted.

8. **ADMINISTRATION OF A TRUST: DUTIES OF A TRUSTEE**

8.1 Three main principles govern the administration of the Trust:

8.1.1 The Trustees must give effect to the Trust Deed insofar as it is lawful and effective.

8.1.2 The Trust Act requires the Trustees (in the performance of their duties and the exercise of their powers) to act with the *care, diligence and skill which can reasonably be expected of a person who manages the affairs of another*. This principle has been expressed in various ways: the Trustees must "*use greater care in handling Trust property than they might in dealing with their own property*"; the Trustees must observe "*scrupulous care*".
Except where they are bound by law to act in a certain way, Trustees must exercise an independent discretion. It is fundamental that Trustees avoid self-serving decisions and partiality. In the case of a discretionary trust the only discrimination which would be condoned would be that which favoured the neediest.

Some of a Trustee’s more important duties are set out below:

A Trustee’s first duty on accepting appointment is to obtain a copy of and become familiar with the contents of the Trust Deed.

The Trust Act obliges the Trustees to lodge the original Trust Deed or a notarially certified copy with the Master. In practice, the Trust Deed is lodged with the Master before s/he will issue the Trustees with Letters of Authority.

It is a rule of the common law that, on taking office, Trustees must immediately ascertain the nature of the Trust property (i.e.: all the assets of the Trust) and its condition and location; the Trust Act requires Trustees to register and identify each individual Trust asset and to indicate clearly what property the Trustees hold in their capacity as Trustees. Although Trustees are not obliged in law to make an inventory of the Trust property they hold or administer, it is advisable for such an inventory to be compiled and regularly updated.

The law requires Trustees to take control of the property and assets given them by the founder/s of the Trust, and if possession is subsequently lost, it must be recovered.

Trustees have a duty to collect diligently debts owed to them in respect of Trust property.

The Trustees should invest money which accrues to the Trust Fund which is not required for immediate payment, without delay. It is improper for a Trustee to borrow Trust money.

It is the Trustees’ duty to see that a reasonable return is obtained on Trust capital.
8.2.8 In terms of the Trust Act, the Trustees must open a separate account at a banking institution or building society and deposit in it Trust money which is not yet invested.

8.2.9 The Trust Act requires Trustees to furnish the Master with a physical address for the service of any notice or court process, and to advise the Master by registered post within Fourteen (14) days of any change in that address.

9. TRUSTEES’ POWERS

The Trust Deeds for many discretionary Trusts accord the Trustees the widest possible powers (similar in most respects to the powers of Companies) to enable them to achieve the Objects of the Trust. These powers may include the power to sell, let, mortgage and encumber Trust property, both movable and immovable; to invest Trust funds; to borrow money; to open and operate banking accounts; and to employ staff.

10. OWNERSHIP OF TRUST PROPERTY

Trustees become owners of the Trust property. However, they are owners only in a legal and not a personal sense. They are owners in their capacities as Trustees, and the Trust property does not form part of their personal estates; in using and disposing of the property, they must comply with the Trust Deed and all applicable laws.

11. THE ROLE OF THE MASTER OF THE HIGH COURT

In practice, the Master’s supervision of a Trust is limited to close control over the authorisation and/or appointment of Trustees. However, the Trust Act gives the Master wide powers of supervision and enquiry over the Trustees’ conduct of the Trust’s business; the Master is empowered, inter alia, to call on Trustees at any time to account for the administration and disposal of the Trust’s assets, and may remove Trustees and appoint others in their place, as described above.

12. REMUNERATION OF TRUSTEES

12.1 The Trust Act provides that a Trustee is entitled to the remuneration provided for in the Trust Deed or, where no such provision is made, to a reasonable remuneration.
12.2 *Reasonable remuneration* is not defined in the Act. What constitutes reasonable remuneration in any particular situation is a question of fact.

12.3 In order to facilitate the granting of income tax exemption and other tax privileges, the Deeds of many discretionary trusts provide that Trustees are not entitled to be paid for the work done or the time spent as Trustees, e.g. for attending Trustees' meetings or fulfilling their other duties as Trustees. However, such Trust Deeds provide that Trustees are entitled to be reimbursed for expenses incurred on behalf of the Trust (e.g. the expenses of travelling to Trustees' meetings) and for work actually done on behalf of the Trust (e.g. in the case of an executive Trustee, a reasonable salary would be permissible).
PART C:
VOLUNTARY ASSOCIATIONS

1. INTRODUCTION

There are various types of Voluntary Association under South African law. The Association discussed in this memorandum is the universitas or Association incorporated under Common Law.

2. CHARACTERISTICS OF A VOLUNTARY ASSOCIATION

2.1 It has separate legal personality, i.e.: it exists apart from the individuals and/or corporations who make up its members.

2.2 It has perpetual succession, i.e. changes in the identity of its members do not affect its existence.

2.3 It is capable of owning property apart from its members.

2.4 The object which an Association pursues must be lawful, and other than primarily the acquisition of gain or profit for itself or its members.

3. FORMATION AND CONSTITUTION

3.1 A Voluntary Association is founded on a contractual basis. It will be incorporated under Common Law if the individuals who propose forming it have the serious intention to associate and are in agreement on the essential characteristics and objectives of the Association. This agreement is usually manifested by the approval and adoption of a written constitution. The constitution of an Association constitutes the contract which is entered into by its members.

3.2 This contract is the crucial factor in the existence of a Voluntary Association. It not only determines the nature and scope of the Association's existence and activities, but also, where necessary, prescribes and demarcates the powers of, inter alia, the executive
committee, secretary and general meeting; in addition, it expresses and regulates the rights of members and provides for certain procedural matters.

4. PROPERTY OF A VOLUNTARY ASSOCIATION

The constitution of an Association may (and usually does) determine that movable and immovable property be held in the name of the Association.

5. NAME OF THE VOLUNTARY ASSOCIATION

Any Association which is not of a political or religious character may (but is not obliged to) apply to the Bureau of Heraldry for the registration of its name and, upon registration, shall be entitled to the sole and exclusive use of that name (in terms of Section 7 (2) of the Heraldry Act, 1962). A Voluntary Association may change its name in accordance with its own particular procedural rules, which are ordinarily incorporated in the written constitution.

6. MEMBERSHIP OF A VOLUNTARY ASSOCIATION

6.1 As appears above, an Association is made up of individual members, who may be corporations.

6.2 The rules or constitution of an Association determine who is eligible for membership, and whether or not there is a limit to the number of members which the Association may admit.

6.3 A person who qualifies for membership is not necessarily a person entitled to membership. The constitution usually accords the Association or its executive committee a discretion to admit persons as members of the Association, subject to their satisfying the appropriate criteria or qualifications.

6.4 An Association's constitution often makes provision for the payment by members of membership fees.

6.5 If an Association wishes to obtain exemption from the payment of income and other taxes, its constitution will have to contain a number of provisions restricting and qualifying its powers, including a provision that the Association's income and assets may not be
distributed among its members by way of profit distribution or in any other way, but must be used to promote the objects of the Association.

6.6 The Association's constitution ordinarily provides for the election of members to various offices, including chairperson, treasurer, secretary, etc.

6.7 The Association's constitution will ordinarily set out the circumstances in which membership terminates, e.g. by expulsion, the member being declared insolvent, resignation, etc.

7. **POWERS OF A VOLUNTARY ASSOCIATION**

7.1 The constitution determines the powers of an Association. An Association may be accorded, through its constitution, any of the rights and powers that may be accorded to any other corporate body, such as a Company. Such powers will have to be exercised within the framework of the objects of the Association, which are likewise set out in the constitution.

7.2 The powers of an Association may include the following: the power to purchase, mortgage or in any other way encumber and sell immovable and movable property; the power to invest the funds of the Association in any way; the power to enter into contracts, and to sue and be sued, in its own name; the power to employ and remunerate employees, etc.

7.3 There is no power which may be exercised by, for example, a Section 21 Company or a Trust, which cannot be accorded to and exercised by a Voluntary Association.

8. **MANAGEMENT OF A VOLUNTARY ASSOCIATION**

8.1 The proper functioning of an Association requires the appointment of a group of persons with executive powers. The constitution of an Association usually entrusts the management of the Association to an executive committee, and provides for the periodic election of the members of this committee by general meetings of members of the Association.

8.2 The Association's constitution usually accords the executive committee the right to exercise all the powers and duties of the Association, subject to any instructions or directives given to them in the form of a resolution of the members adopted at a general meeting. The
executive committee must comply with the constitution of the Association in the exercise of these powers.

8.3 The constitution of an Association ordinarily provides for the holding of annual and special general meetings of the Association, and for the procedure to be followed at such meetings, including the manner in which the meetings are called, the quorum required and the manner in which the votes are taken.

9. VOLUNTARY ASSOCIATIONS AND LITIGATION

Because a properly constituted Association is recognised as a separate legal entity apart from its members, it may sue and be sued in its own name.

10. MEMBERS’ LIABILITY FOR DEBTS OF A VOLUNTARY ASSOCIATION

Unless the members of an Association expressly agree to this, they are not liable for the debts incurred by the Association in the event of the Association not having sufficient funds to meet such debts.

11. DISSOLUTION OF A VOLUNTARY ASSOCIATION

The constitution of an Association ordinarily provides for the manner in which it may be dissolved. If an Association seeks exemption from income and other taxes, or to obtain a Fund-raising authority, its constitution will have to provide inter alia that, upon dissolution, the net remaining assets of the Association be transferred to another, non-profit association or body having similar objects.

12. REGULATION OF VOLUNTARY ASSOCIATIONS

12.1 Unlike a Trust or a Section 21 Company, an Association is not required under South African law to register with any public official.

12.2 There is at present no South African statute in operation which regulates generally the affairs and the conduct of Associations. Likewise, no public official is accorded the right to investigate or regulate the affairs of such Associations unless they choose to register in
terms of the Nonprofit Organisations Act (see part D below).

12.3 The result is that considerably less formality attends the formation and running of an Association, than is the case with Trusts or Section 21 Companies.

12.4 However, this lack of formality and regulation may be a disadvantage in the case of an Association which intends soliciting donations in order to carry out some charitable object. Many funding organisations prefer donating to an entity or corporation which is required to be registered, and which is subject to regulation by statute and a public official. Hence the tendency of many Associations to register under the Nonprofit Organisations Act.
PART D: 
NONPROFIT ORGANISATIONS

1. THE NONPROFIT ORGANISATIONS ACT, 1997

1.1 The Nonprofit Organisations Act, 1997 came into operation on 1 September 1998.

1.2 Clause 2 of the Nonprofit Organisations Act (“NOA”) records that the objects of the NOA include the following:

1.2.1 Creating an environment in which nonprofit organisations can flourish.

1.2.2 Establishing an administrative and regulatory framework within which nonprofit organisations can conduct their affairs.

1.2.3 Encouraging nonprofit organisations to maintain adequate standards of governance, transparency and accountability, and to improve those standards.

1.2.4 Creating an environment within which the public may have access to information concerning registered nonprofit organisations.

1.3 Chapter 2 of the NOA provides for the establishment of a Directorate for Nonprofit Organisations, and the appointment of a Director. Among the duties of the Directorate are the preparation and issue of model constitutions for nonprofit organisations, and the preparation and issue of codes of good practice for nonprofit organisations.

1.4 Chapter 3 of the NOA provides for the registration of nonprofit organisations. Registration is voluntary (Section 12(1) of the NOA).

2. SHOULD NGOs REGISTER AS NONPROFIT ORGANISATIONS?

2.1 The NOA defines a nonprofit organisation as meaning:
"A trust, company or other association of persons established for a public purpose, and the income and property of which are not distributable to its members or office bearers except as reasonable compensation for services rendered."

2.2 The effect of this definition is that the three entities previously discussed in this Memorandum, namely a discretionary trust, a Section 21 company and a voluntary association, qualify as nonprofit organisations.

2.3 The benefits or advantages of registration with the Directorate include the following:

2.3.1 Section 11 of the NOA provides that the Minister for Welfare and Population Development “may prescribe benefits or allowances applicable to registered nonprofit organisations …” Although no such “benefits or allowances” have yet been prescribed, it is possible that future benefits may include tax exemption, government grants, etc.

2.3.2 Section 15(1) of the NOA provides that when the Directorate registers a nonprofit organisation, that organisation must be issued with a certificate and a registration number. That registration number may well give comfort to both local and foreign donors, in that it signifies that the organisation in question is recognised by a public authority (namely the Directorate) as being a nonprofit body, and is subject to the oversight of that public authority.

2.3.3 Section 16(1) of the NOA provides that the issue of a certificate of registration to a nonprofit organisation “is sufficient proof that the organisation is a body corporate”. Therefore, to the extent that, say, a voluntary association is in doubt as to whether it is in fact a body corporate or juristic person, its registration as a nonprofit organisation will confirm that that organisation is a body separate in law from its members, namely that the principle of limited liability applies. [It is worth noting in passing that a Section 21 Company and a properly established voluntary association are in any event bodies corporate, whereas a trust, strictly speaking, is not a body corporate. Although the drafters of the NOA may not have appreciated this, the purported effect of Section 16(1) is to override the considerable body of common law relating to the status of a trust.]

2.3.4 It is important to note that registration as a nonprofit organisation does not as yet
confer any special tax privileges, such as exemption from income tax, transfer duty, VAT, etc. A nonprofit organisation seeking such tax privileges will still have to approach the Commissioner for the South African Revenue Services, through the Tax Exemption Unit, and apply for approval as a public benefit organisation.

2.3.5 Section 33 of the NOA repeals Chapters 1 and 3 of the Fundraising Act, 1978. The effect of that repeal is that it is no longer necessary for any organisation, whether registered as a nonprofit organisation or not, to obtain fundraising authority and a fundraising number from the Director of Fundraising (who is now the Director of Nonprofit Organisations).

3. REQUIREMENTS FOR REGISTRATION

3.1 In terms of Section 12(2) of the NOA, the constitution or founding document of a nonprofit organisation which wishes to register must:

3.1.1 State the organisation’s name.

3.1.2 State the organisation’s main and ancillary objectives.

3.1.3 State that the organisation’s income and property are not distributable to its members or office-bearers, except as reasonable compensation for services rendered.

3.1.4 Make provision for the organisation to be a body corporate and have an identity and existence distinct from its members or office-bearers.

3.1.5 Make provision for the organisation’s continued existence notwithstanding changes in the composition of its membership or office bearers.

3.1.6 Ensure that the members or office bearers have no rights in the property or other assets of the organisation solely by virtue of their being members or office bearers.

3.1.7 Specify the powers of the organisation.

3.1.8 Specify the organisational structures and mechanisms for its governance.
3.1.9 Set out the rules for convening and conducting meetings, including quorums required for and the minutes to be kept of those meetings.

3.1.10 Determine the manner in which decisions are to be made.

3.1.11 Provide that the organisation’s financial transactions must be conducted by means of a banking account.

3.1.12 Determine a date for the end of the organisation’s financial year.

3.1.13 Set out a procedure for changing the constitution or founding document (in the case of a Section 21 company that procedure would have to be consistent with the Companies Act).

3.1.14 Set out a procedure by which the organisation may be wound-up or dissolved (again, in the case of a Section 21 Company, the Companies Act would also apply).

3.1.15 Provide that, when the organisation is being wound up or dissolved, any asset remaining after all its liabilities have been met, must be transferred to another nonprofit organisation having similar objectives.

3.2 Section 13(1) of the NOA provides that a nonprofit organisation applies for registration by submitting to the Director:

3.2.1 The prescribed form, properly completed.

3.2.2 Two copies of its constitution or founding document.

3.2.3 “Such other information as may be required by the Director so as to assist the Director to determine whether or not the nonprofit organisation meets the requirements for registration.” In other words, the applicant organisation will have to furnish evidence that the organisation is a trust, company or other association, that it is established for a public purpose (namely a purpose aimed at serving the public good, or the needs and interests of a section of the public), and that the organisation’s income and property
are not distributable to its members or office bearers except as reasonable compensation for services actually rendered.

3.3 The Director of Nonprofit Organisations must make a decision concerning registration within Two (2) months of receiving the application (Section 13(2) of the NOA). If the Director refuses to register an applicant organisation, such organisation has a right of appeal.

4. **THE EFFECT OF REGISTRATION AS NONPROFIT ORGANISATION**

4.1 Every registered nonprofit organisation must maintain accounting records in the manner provided for in Section 17 of the NOA.

4.2 Every registered nonprofit organisation must, in writing, provide the Director with an annual narrative report and annual financial statements, within Nine (9) months after the end of every financial year. In addition, such organisation must provide the Director with the following:

4.2.1 The names and physical, business and residential addresses of its office bearers within One (1) month after any appointment or election of its office bearers even if their appointment or election does not result in any changes.

4.2.2 A physical address in the Republic for the service of documents.

4.2.3 Notice of any change of address at least One (1) month before a new address for service of documents will take effect.

4.3 Every registered nonprofit organisation must appoint an accounting officer, namely a person contemplated in Section 60 of the Close Corporations Act, 1984, and that accounting officer is under a duty (in terms of Section 18(4) of the NOA) to notify the Director if the organisation fails to comply with the financial provisions of the NOA or the organisation’s own constitution or founding documents.

4.4 If a registered nonprofit organisation fails to comply with its own constitution or founding documents, or with the requirements of the NOA, the Director must send a compliance notice in the prescribed form to that organisation, and the Director must also refer the
organisation to the South African Police Service for criminal investigation if the Director is satisfied that any non-compliance may constitute an offence.

4.5 If a registered nonprofit organisation fails to comply timeously with a compliance notice, its registration may be cancelled (Section 21 of the NOA). An organisation can appeal against cancellation of registration (Section 22 of the NOA).

4.6 In terms of Section 25 of the NOA, any member of the public has access to the documentation relating to a registered nonprofit organisation held by the Director, namely the constitution or other founding document of the registered organisation, and all reports (including financial reports) which that organisation is required to submit to the Director from time to time.

4.7 Organisations which are already registered as fundraising organisations under the Fundraising Act, 1978, are regarded as being registered nonprofit organisations, and in order to maintain such registration must, within Two (2) years of 1 September 1998, make formal application in the manner set out above for registration.

5. **CONCLUSION AND RECOMMENDATION**

In my view any body or organisation which qualifies as a nonprofit organisation would be advised to apply for registration as such, given that the benefits far outweigh any possible disadvantages.

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