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**Report on Laws Affecting Civil Society in Vanuatu -  
2004**

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## **1. INTRODUCTION**

### *Geography*

Vanuatu is a Melanesian Pacific Island country with about 199,400 people scattered over 1,476,000 hectares (14769 sq km), on some 70 inhabited islands. About 98% of the population are the indigenous people called Ni-Vanuatu; the remaining 2% consists of Vietnamese, French, Australians, Chinese and Pacific Islanders etc. There are three official languages namely Bislama (pidgin), English and French, and there are also more than a 100 local languages.

### *The Legal System*

Vanuatu was a condominium territory jointly administered by Britain and France from the year 1906 to 30 July 1980. Each of the administering countries made laws for its own nationals and optants (nationals of other countries who opted to be subject to either British or French laws) and together they made laws for indigenous New Hebrideans and for all other residents. Upon independence on 30 July 1980, the laws of Vanuatu were as follows and in this hierarchy:

- **Constitution of Vanuatu** - the supreme law;
- **Acts of Parliament of Vanuatu**; - the legislation
- **Joint Regulations in existence on 30 July 1980 from the laws made by the French and British that applied to all residents in Vanuatu prior to independence**- which continue in force until repealed by the Vanuatu Parliament ( s. 95(1) Constitution );
- **British and French laws in existence on 30 July 1980** - including Acts of Parliament, subsidiary legislation and English common law and equity, which continue in force until repealed by the Vanuatu Parliament ( s.95(2) Constitution );
- **Customary laws of Vanuatu** (s.95 (3) Constitution).

These are the laws that affect the existence of NGOs in Vanuatu.

## **2. PROVISIONS OF THE GENERAL LAWS**

### **A. Consistency and Clarity of Laws**

The various laws relating to the establishments and dissolution of non government associations are simple and easy to follow. This is not only true of legislation generally open for registration of NGOs but also of special laws for religious bodies, trade unions or professional membership bodies. The fact that the various laws also rarely regulate the establishment, operations and governance of the NGOs, but rather leave this to the hands of the NGOs to make their own rules or regulate their internal procedures as embodied in a constitution or memorandum of association, contributes to the simplicity of the legislations.

In considering the pieces of relevant legislation as a whole and their workability for the advantages of NGOs, the laws are quite limited in its effectiveness in this area. The legislation affecting the operations of NGOs is fragmented in the way they deal

with the rights and entitlements of NGOs. This impedes the efficient administration of NGOs not only by the statutory enacted administrative bodies but also for the NGO governing bodies. The fact that each legislation operates independent of each other leaves room for inconsistencies in the decision making and treatment of NGOs as well as doubles the work for the administrative body in both the Government and the NGO sector.

However, under the current legislative framework, it is still reasonable to assume that NGOs can still operate independent of government at least in relation to its day to day operation, thus achieving the objectives of existence.

## **B. Constitution**

The Constitution of Vanuatu ("the Constitution") being the supreme law guarantees the fundamental rights and freedoms of individuals including the right to freedom of assembly and association. It is from this freedom that the right to found associations is based.

Article 5 (1) of the Constitution states:

*"The Republic of Vanuatu recognises that subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the ground of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health ....*

*(g) freedom of assembly and association.*

As is stated above the freedom of association may be only restricted for reasons of rights and freedoms of others, legitimate public interest in defence, safety, public order, welfare and health.

An example of a restriction imposed by law on the freedom of assembly and association is stipulated in the Public Order Act [Cap 84] ("the Public Order Act"). The Public Order Act defines an organisation as *"includes an association or combination or persons."*<sup>1</sup> The Public Order Act states that the President, on the advice of the Prime Minister, has the power to declare by proclamation, an organisation unlawful if he is satisfied that a substantial number of its members have been involved in the commission or instigation of offences under the Public Order Act or have incited others to commit the same. Any member who continues to act on behalf of the association shall be guilty of an offence.<sup>2</sup>

## **(C) Types of Organisation**

There are a variety of NGO organisations in Vanuatu. They range from informal organisations that have no legal status separate and distinct from the relationship between its members to organisations that adopt quite formal legal structures. All types of NGOs acquire the status of legal entity upon registration under the relevant

<sup>1</sup> Section 15 of the Public Order Act [Cap 84]

<sup>2</sup> Ibid

Act which they ascribe to. However organisations are still allowed to exist and operate without being juridical entities.

The following are the types of NGOs that are found in Vanuatu:

1. Unincorporated association: Most of these organisations are community based and are commonly formed in the villages by groups of men, women and youth either for sports, agriculture or religious purposes etc. An unincorporated society is not a legal entity and its creation rests on an agreement, written or oral between its members; usually its governing instrument is its constitution or rules. It has no legal personality and therefore no capacity, independent of its members to enter into legal relations with other bodies.

Political parties in Vanuatu are unincorporated associations as there is no legislation governing the existence and operation of political parties. The Supreme Court of Vanuatu in the case of *Vohor v Adeng* [1996] VUSC 14; Civil Case No 075 of 1996 (27th August, 1996) stated that "*A political party.... is an unincorporated Association and, as such, is not in the ordinary sense, a trader.*"

2. Charitable Association:

Most of the registered NGOs in Vanuatu take the form of Charitable Association. Its governing instrument is its Constitution and its executive power rests with the Committee or members who are appointed in accordance to the provisions of the Constitution. The incorporated association becomes a legal personality upon registration pursuant to the Charitable Associations (Incorporation) Act [Cap 140] ("the Charitable Act") and therefore has capacity to enter into legal relations with other bodies. The rules to these NGOs are the governing instrument.<sup>3</sup> The register currently registers 87 charitable associations.

3. A company limited by guarantee: A NGO can be formed as a Guarantee Company pursuant to the Vanuatu Companies Act [Cap 191] ("the Companies Act") , whose governing instruments are the memorandum and articles of association. A guarantee company becomes a legal entity once it is registered. It is therefore able to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary to achieve its objectives.

There are also special laws on churches and religious bodies, trade unions and professional associations.

4. Other organisations:

a) Religious Bodies

Religious Bodies have the choice to be either registered as a Charitable Association or as a Religious Body under the Religious Bodies Registration Act No. 9 of 1995. A religious body attains legal status upon registration and therefore has the capacity to enter into contract, to institute and defend proceedings.

b) Unions

Trade Unions in Vanuatu are made possible by the Trade Unions Act [Cap 161] {the "Trade Union Act"). They become legal persons upon approval of their founding documents by the Registrar of Trade Unions.

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<sup>3</sup> Charitable Associations (Incorporation) Act [Cap 140]

#### c) Foreign Organisations

Although the laws of Vanuatu make no special provisions for foreign organisations that are founded on international agreement, there are a few foreign organisations from the Pacific region such as the Foundation for the People of the South Pacific as well as international organisations such as the Australia Volunteer International (AVI) and Volunteer Services Overseas (VSO). They may operate in Vanuatu upon submission to the Ministry of Foreign Affairs of their founding act and other proof of fulfilment of their internationally agreed upon obligations. These foreign organisations operate under a Memorandum of Understanding ("MOU") with the Government of Vanuatu. These MOU's usually contain the rights and obligations normally afforded local NGO bodies. Some of the foreign organisations may come under any existing MOU between it's Head Organisation or their Home Government, with the Government of Vanuatu (where available) and can commence operation prior to receiving its own separate MOU.

#### d) Establishments

These are the educational institutions, sports faculties, health care establishment which are private establishments whose founders are private groups such as schools formed by Church organisations. All of which are public persons upon registration pursuant to their relevant legislation. For example non government educational institutions are registered under the Education Act 2001 and thereafter become legal entities.

#### e) Membership Organisations

The membership organisation of professional bodies such as medical practitioners and legal practitioners exist solely for the benefit of their members. They are statutory bodies whose activities are governed and regulated by the enacting statutes.

The laws of Vanuatu do not make any distinction between NGOs acting for the public benefit and NGOs acting for the mutual benefit of their members. The distinction however is apparent in the tax laws whereby the NGOs providing for public benefit are given special tax exemptions than those providing for mutual benefit of its members.<sup>4</sup>

### **D. Purposes**

The underlying rule for any NGO's purpose is that it is not for financial profit. Its general purpose may fall under one of the following purposes which include objects of a religious, educational, cultural, scientific or sporting nature or for general social welfare and any other object - the main purpose of which is not for financial profit.

### **E. Registration or Incorporation Requirements**

Registration is not mandatory for all NGOs, activities are allowed before the registration is complete. NGOs acquire the status of legal entity on the date of registration.

#### Charitable Associations

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<sup>4</sup> Section 2 of the VAT Act 1998.

Pursuant to the Charitable Associations (Incorporation) Act [Cap 140], ("the Charitable Act") an organisation shall become a body corporate upon registration with the Registrar of the Vanuatu Financial Services Commission.<sup>5</sup>

The minimum number required to register a charitable association is at least six committee members.<sup>6</sup> The application for registration must be made by not less than half of the committee members of the organisation.<sup>7</sup>

An application must be in the prescribed form as stipulated under Schedule 1 of the Charitable Act which requires information on the name of the association, the registered office, the names and addresses of members, the objects of the association as well as a statement of assets and liabilities of the association although there is no certain amount of base capital required to form an NGO.<sup>8</sup>

This application must be lodged with the Registrar of Companies whom the Minister of Finance has to be the Registrar of Charitable Association. The application documents must be accompanied by a copy of the Articles of Association as well as other documents setting up the association such as a constitution.

An obvious reason for rejection of an application for registration has been and would be the failure to comply with the registration requirements under the Charitable Act. Once any non-compliance is rectified then the application is again lodged with the Registrar accompanied by a total fee of VT10, 000.<sup>9</sup>

An appeal from the refusal of grant of incorporation by the Registrar lies to the Minister of Finance. The decision of the Minister in considering the appeal is final, whether it is a refusal of the appeal or an Order for the Registrar to grant a Certificate of Incorporation. The Minister may impose conditions where she/he deems fit if she/he decides to grant the Certificate of Incorporation.

#### Company Limited by Guarantee <sup>10</sup>

Pursuant to the Vanuatu Companies Act, the requisite number of founding members for a company limited by guarantee is at least seven.<sup>11</sup> A company limited by guarantee is not to create issue or be registered with any shares<sup>12</sup>. Founding members can either be ni-Vanuatu or foreigners and there no provisions in the Companies Act against non-natural legal persons being founding members. An application for a permit for incorporation must be lodged with the Minister of Finance who has the power to grant or refuse a permit without giving any reason for his decision.<sup>13</sup> The most obvious reason for a rejection of a permit application would be failure to comply with the statutory requirements regarding registration. However, if

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<sup>5</sup> Section 2 (3) of the Charitable Associations (Incorporations) Act Cap 140

<sup>6</sup> Ibid s. 2 (1)

<sup>7</sup> section 4 (1)

<sup>8</sup> Schedule 1 (Section 4)

<sup>9</sup> Pursuant to Charitable Associations (Incorporation) (Fees) Order 24 of 1982 The fee breakdown is as follows: Certificate of incorporation VT5,000, Certificate of incorporation VT5,000.

<sup>10</sup> A company limited by guarantee is defined in the Companies Act as a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up.

<sup>11</sup> section 2 of the Companies Act [Cap 191]

<sup>12</sup> section 2(3) of the Companies Act [Cap 191]

<sup>13</sup> section 16 of the Companies Act [Cap 191]

the Minister rejects any permit, the decision is not subjected to be questioned in any court proceedings whatsoever.<sup>14</sup>

The general procedure for registration of a company limited by guarantee is as follows: An application for a permit for incorporation is lodged with the Minister of Finance using the prescribed form in the Act; Preparation and execution of the memorandum and article association in accordance to the requirements of the Act; Lodgement of an endorsed permit from the Minister of Finance together with the memorandum and articles of association with the Registrar of Companies.<sup>15</sup> There is then the registration and issuing of the Certificate of Registration by the Registrar of Companies. Upon the granting of the certificate of registration, a Guarantee Company achieves the status of legal entity and is able to enter in to contracts under its own name as well as sue and sued just like any other legal entity.<sup>16</sup> The documents lodged with the Registrar are available for viewing by the public for the payment of a prescribed fee.

The Companies Act in section 29 makes special provisions for companies limited by guarantee that are *“formed for promoting commerce, art, science, religion, charity or any other useful object, and intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members”*<sup>17</sup> These guarantee companies are granted with a licence to exempt them from adding the word **“limited”** to its name. This licence can be repealed by the Minister of Finance after granting an opportunity to the company to oppose any decision to revoke this particular exemption licence.

#### Trade Unions

The minimum number of membership of a Trade Union before they can be registered in pursuant to the Trade Union Act is twenty. The application is done by the committee of management and the application must be signed by at least 7 members. The general registration procedures are as follows: An application is lodged with the Registrar who will determine whether or not the forms and rules of the trade union comply with the provisions of the Trade Union Act and also that the name is not identical to any registered Trade Union. Upon satisfaction of the statutory requirements, the Registrar can register the Trade Union. A refusal by the Registrar to register a trade union can be appealed to the Supreme Court of Vanuatu within 1 month of the date of the refusal. In hearing such an appeal the Supreme Court has all the powers as it has in hearing a civil suit.<sup>18</sup> The fee for registration is VT5, 000.<sup>19</sup>

NGO umbrella organisations are permitted. There are no special provisions for umbrella organisations under law. They are to be registered just like other NGO organisations. There are a few umbrella organisations in Vanuatu like Vanuatu Non-Government Organisation (VANGO) and the Vanuatu National Council of Women (VNCW), operating in this umbrella capacity. Both are registered together with other NGOs as Charitable Associations pursuant to the Charitable Act. International umbrella NGOs operate pursuant to a MOU with the Government of Vanuatu.

<sup>14</sup> section 409 of the Companies Act [Cap 191]

<sup>15</sup> section 10 of the Companies Act [Cap 191]

<sup>16</sup> section 20 of the Companies Act [Cap 191]

<sup>17</sup> section 29 of the Companies Act [Cap 191]

<sup>18</sup> Section 11 of the Trade Unions Act [Cap 161]

<sup>19</sup> Trade Unions Fees Regulation, Order 46 of 1983



## **F. NGO Register**

There is a no designated NGO register which registers all NGOs in Vanuatu. Each NGO is required to comply with the legal structure of the particular legal structure that it subscribes to. A Religious Organisation for example has to comply with the registration requirement specific to religious bodies as prescribed under the Religious Bodies Act and also registers with the designated Registrar of the Religious Bodies. Evidently, there are registers for all registered NGOs but there is no central register which collates all NGOs.

The only register that records incorporated NGO's that do not belong to any specific legal framework is the Vanuatu Financial Services Commission ("VFSC") register. This is a registry for all NGOs that are registered as Charitable Associations under the Charitable Association Act. The Associations under this Act must be for charitable purposes.

The VFSC register displays only the names of the associations as entered into the registry. Information on this register as well as all of the association's documents are available for viewing by any member of the public upon the payment of the prescribed inspection fee of VT500.<sup>20</sup>

The statutory rules for Charitable Associations' operations under the Charitable Act seldom being enforced, thus there is rarely any a disciplinary action taken against a charitable association. Defunct associations are purged from the register once the Registrar is informed by letter by the Charitable Association that it has ceased to exist. There is no formal list kept by VFSC of the defunct companies, although the computer program for registration can generate a list of the Charitable Associations that have been purged from the records of currently existing Charitable Associations.

## **G. General Powers**

Incorporated organisations are entitled to exercise the general rights and powers of juridical entities such as the right to sue and the right to be sued, owning properties and entering into contracts. The only limit for an incorporated organisation would be operating within the ambit of their organisations' objectives.

Unincorporated NGOs have those powers that are provided in its governing instrument but only in their members individually. Proceedings can be brought by any member of the organisation in both incorporated and unincorporated organisations.

In the case of unincorporated organisations, it has been demonstrated in the case of *Vohor v Adeng* [1996] VUSC 14; Civil Case No 075 of 1996 (27th August, 1996) where the Supreme Court of Vanuatu held that "*it is necessary for the Court to intervene in the internal governance of an unincorporated society such as a political party.*" The Chief Justice in his judgement went on further to say that "*people who join an unincorporated Association ... and subscribe to its Constitution and by-laws should be taken to intend to be bound by them and should be entitled to invoke the Courts in appropriate circumstances to have their disputes settled and the limitations, if any, to be placed on the right is, no doubt, to be worked out on case to*

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<sup>20</sup> Charitable Associations (Incorporation) (Fees) Order 24 of 1982

*case basis. A Court can therefore interfere in the internal workings of an unincorporated association ..."*

This is not the first time that the Vanuatu Courts have dealt with disputes between individual members of unincorporated associations, such as Political Parties. Certainly the cases of *Mataskelekele -v- Abbil* (1991); *Kalpukas -v- Lini* Civil Case 127 of 1991; *Korman & Jimmy -v- Mensul* Civil Case No 106 of 1995 indicate that Courts in Vanuatu are willing to assist in resolving disputes with such organisations in which members have deliberately adopted formal rules to govern their relations.

It is apparent that beneficiaries of NGO's have the right to go to Court to seek action against an NGO. Following the Court's approach in the above cases, one can expect that the Court would only be more vigilant in cases of registered NGOs whose governing instruments are registered pursuant to law.

#### **H. Membership Organisations**

Membership organisations like professional bodies of lawyers and the health practitioners are established by enacting legislation, respectively, the Legal Practitioners Act [Cap 119] ("the Legal Practitioner's Act") and the Health Practitioner's Act [Cap 164] ("the Health Practitioner's Act"). The legislation regulates the standards of practice of its members.

Each of these professional bodies has its own disciplinary body responsible for the discipline, exclusion or removal of any member of their profession. The Disciplinary Body of the Legal Practitioners has the same power as the Supreme Court. The disciplinary proceedings of the Disciplinary Body for legal practitioners are set out in much detail in the subsidiary legislation – Legal Practitioner's Regulation [Cap 119]. An appeal from the decision of either the Legal Practitioner's Disciplinary Body or the Health Practitioner's Disciplinary Body lies to the Supreme Court of Vanuatu.

### **III. GOVERNANCE**

Vanuatu law does not contain any elaborate provisions for the governance of NGOs. As previously indicated, each type of NGO is governed according to the provisions of the legislative framework that it ascribe to.

Unincorporated NGOs will naturally be governed by the rules found in their individual governing instruments. The governing instrument specifies how members are elected/ appointed, rules of voting, duties and responsibilities. The members remain responsible for all debts and liabilities of the organisation.

NGOs that are registered as incorporated bodies are governed by the rules set out in their constitution regarding the issue of governance. These rules can be enforced at the suit of a member of the incorporated body. The governing body is the Committee (or Board depending on the name specified in the governing instrument) whom the assets of the organisation is vested and has the power to enter into contracts. Like unincorporated organisations the rules on voting powers, duties, and responsibilities of the Committee are stipulated in the governing instrument, the constitution.

In respect of companies limited by guarantee, both the provisions of the Companies Act as well as the articles of association govern the operation of the NGO. It has a separate legal identity from its members. The Companies Act sets out in much detail

the responsibilities and duties of the directors as well as the quorum and voting powers and the extent of the directors' personal liability. A director's liabilities are outlined in the Companies Act [Cap 191]. A director is also liable at common law for breach of fiduciary duties as well as breach of due skill and care.

It is the duty of the director of a Company to disclose, at a director's meeting, any interest he has on any Company contracts, intended contracts or contracts which the director later become interested. Failure to declare such interest results in the director being fined for not more than VT50, 000.

The director (and anyone in the Company) may also be liable for fraudulent dealings such as actions with the intention to defraud creditors of the company. The company or any person in the company is also personally liable for reckless dealings such as making false or inaccurate information regarding the company's shares and debentures. Such a person is fined for no more than VT100, 000 or a term of imprisonment for no more than 6 months.

#### **IV. DISSOLUTION, WINDING UP AND LIQUIDATION OF ASSETS**

The Act under which an NGO subscribes to determines how its dissolution may be conducted, unless the NGO is unincorporated.

##### Unincorporated organisations

Unincorporated organisations are governed by the governing instruments whether it be the constitution or memorandum of agreement entered into by the members of the organisation. If the dissolution is not dealt with in the governing instrument then usually the members may meet and orally agree to dissolve their association.

The Courts of Vanuatu in case laws such as *Vohor v Adeng* [1996] VUSC 14; Civil Case No 075 of 1996 (27th August, 1996) and *Kalpokas v Vohor* [1998] VUSC 55; Civil Case No 122 of 1997 (14th September, 1998), have demonstrated the willingness of the Courts to intervene and enforce principles of equity in the affairs of the unincorporated associations where it is warranted. In this case, it is anticipated that an involuntary dissolution may be implemented by members lodging petitions of the majority to dissolve the unincorporated society.

##### Charitable Associations

The non-profit organisations that are registered under the Charitable Associations Act are dissolved by the cancellation of the certificate of incorporation by the Registrar. The grounds upon which such cancellations can take place are stipulated in section 10 (1) of the Charitable Act as follows:

- (a) an incorporation was obtained by fraud, misrepresentation or mistake;
- (b) any unlawful objects of an association or committee;
- (c) a committee discriminates against any persons, group of persons or class of persons;
- (d) an association or committee is being used for an unlawful purpose;
- (e) a committee or association is not functioning or has become dissolved;
- (f) failed to comply with the provisions of the Charitable Associations (Incorporations) Act.<sup>21</sup>

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<sup>21</sup> Section 10 (1) of the Charitable Associations (Incorporation) Act [Cap 140]

### *Procedure for cancellation*

The Registrar may require members of the Committee by notice in writing to show cause within 30 days as to why its incorporation should not be cancelled.<sup>22</sup> If the Committee fails to respond satisfactorily then the Registrar may cancel the incorporation by notice published in the newspapers. A cancellation will then take effect 42 days from the date of publication of the cancellation notice.<sup>23</sup> The Certificate of Registration must be returned to the Registrar. Failure to do so will result in imprisonment or a fine up to VT20, 000.<sup>24</sup>

Appeals against any cancellation can be made to the Supreme Court within 42 days of the cancellation. The Court may confirm, set aside or vary the order of cancellation or make such order as it may consider just.<sup>25</sup>

Upon dissolution of an NGO under the Charitable Act, the assets which are not disposed of adequately in the governing instrument of the Association will be subjected to the discretion of the Minister of Finance who will make such order as he shall consider proper.<sup>26</sup>

### Company Limited by Guarantee

The statutory provisions for winding up of unlimited companies also apply to guarantee companies. A company may be wound up voluntarily or by the court by the application of the members as contributories, the company Creditors; the official receivers or by the company itself. The property of a company that is wound up by the court is vested in the Liquidator upon a Court order. The Creditors' interests in the company in a case of insolvency are well represented from the time of any Creditor lodging a petition to wind up a company, to making a decision whether or not to appoint a committee of inspections during the process of winding up, to the Creditor's proving of their debts, to the inspection by Creditor's of a Company's books in the possession of the Liquidator. The decisions of the Supreme Court of Vanuatu to wind up a company involuntarily can be challenged in both the Supreme Court and the Court of Appeal of Vanuatu. The relevant sections outlining the details and rules for winding up of companies are contained in sections 217 – 349.

### Other bodies

#### a. Religious Bodies

They may be dissolved by cancellation of their registration on the ground of:

- i) Registration obtained by fraud;
- ii) Any of the objects of a religious body have become unlawful
- iii) A religious body is being used for an unlawful purpose; and
- iv) Failure to comply with the provisions of the Religious Bodies Act.

The religious body is given 30 days to satisfy the Registrar that the licence should not be cancelled. If the Registrar is not satisfied then the licence may be cancelled. Within 30 days of cancellation the religious body must return to the Registrar the certificate of registration. Failure to do so attracts a fine of VT 20, 000 upon conviction.

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<sup>22</sup> section 10 (3): *ibid*

<sup>23</sup> section 10 (4): *ibid*

<sup>24</sup> section 10 (6)

<sup>25</sup> section 11: *ibid*

<sup>26</sup> section 12: *ibid*

b. Other Membership Organisations

Other organisations which exist for the benefit of its members such as trade unions and professional bodies are dissolved according to the provisions stated in their relevant enacting Act.

## **V. REGULATION**

As has previously indicated, there is no centralised regulatory system. It is only when an NGO subscribes to a particular structure then it will be obliged to comply with the regulatory requirements specific to that type.

(i) Registrar of Charitable Associations and of Companies

In the case of registered incorporated organisations, the Registrar must be satisfied that the Associations meet all the requirements in the Charitable Act [Cap 140]. The Associations are required to register the changes to the associations registered office, the resignations, removals and appointment of committee members; changes to the articles, rules or constitution of the association. These are public documents which can be viewed for the payment of a prescribed fee. Failure to comply may ultimately result in the cancellation and return of the Certificate of Registration by and to the Registrar of Associations. Failure to return the certificate attracts a fine of VT 20,000. There has been no incident of an involuntary cancellation of an organisation's certificate by the Registrar of Charitable Associations.

For Companies Limited by Guarantee, the Registrar ensures that the Guarantee Company complies with the requirements under the Companies Act [Cap 191]. Following registration a company must submit annual return at least once a year within 42 days (or more upon the Registrar's approval) of the annual general meeting for the year. The return shows information of address of the registered office of the company; in a case in which the register of members are kept elsewhere than at that office, the address of the place where it is kept; in a case in which any register of holders of debentures of the company or any duplicate of any such register or part of any such register is, under the provisions of this Act, kept elsewhere than at the registered office of the company, the address of the place where it is kept; details of the directors and secretary of the company. Failure to file the annual returns within the stipulated time period subjects the company and every person responsible for a default fine not exceeding VT 1,000.

The Director of Inland Revenue and Customs

The Director of Inland Revenue and Customs has some general regulatory function such as assessing whether or not tax relief is granted to Not-for-Profit organisations as well as assessing the activities of the Not-For-Profit organisations. Where there are NGOs who are involved in taxable activities that are more than 4 million vatu, the only report is a VAT Return form which is filed monthly. Failure to submit the VAT Return form results in an additional imposition of 10% and a 2% added for each month during which the failure continues. The VAT Return form of any organisation is not publicly available information.

Enforcement Agencies -The Courts and the Police

The Courts have demonstrated (see Compliance section above) their willingness to get involved in the affairs of the NGO to ensure that members adhere to the governing instruments to which they have bound themselves to. The Police interfere only when members/organisation commit public order offences or allegation or commission of criminal activities such as theft, fraud and misappropriation.

## **VI. FOREIGN ORGANISATIONS**

### **A. Registration**

There are many foreign organisations carrying out activities in Vanuatu although they are not required to register pursuant to any legislation. As previously indicated, they operate pursuant to a Memorandum of Agreement with the Government of Vanuatu.

Where there is a bilateral or multilateral agreement which exists between the organisation's home government or its head organisation, like New Zealand High Commission or UNESCAP, with the Government of Vanuatu, an NGO can operate immediately under this Bilateral/Multilateral Agreement, until they receive their own MOU with the Vanuatu Government. The mandate, activities and entitlements such as tax exemptions of these foreign organisations are set out in the MOU. There are no special rules for the registration, regulation or dissolution.

Any foreign organisation which does not come under an existing bilateral/multilateral agreement may choose to either register under the Charitable Act or the law which their organisation's activity fall under.

### **B. Foreign Grants**

Foreign grants that are received by NGOs from a source outside Vanuatu are not subjected to any special rules by the Government of Vanuatu.

To apply for foreign grants is a long process full of bureaucratic discretion as well as it is time consuming. The government procedures and policies imposed on grants from foreign organisation depend on the amount sought by an NGO. The maximum amount applied for dictates whether or not the Ministries are involved and the maximum amount varies amongst donor agencies.

If the amount sought is at the minimum level then the NGO directly deals with the bilateral/multilateral donor agency from the initial application to the receipt of the funds if successful. Once it exceeds a certain amount, then it must go through the Government of Vanuatu. This procedure is set out below.

The NGO must obtain the endorsement of the relevant Ministry whose objectives are analogous to the activity of the NGO. For example, the Vanuatu National Council of Women (an umbrella organisation for women organisations) needs the endorsement of the Ministry of Women Affairs. For an NGO whose activities do not fall under any specific Ministry, like the Vanuatu Non Government Organisation (VANGO) which has general activities as an umbrella organisation, the endorsement of the Chief Executive Officer of the Ministry of Internal Affairs is required. The ministry of Internal Affairs is has the NGO portfolio.

Following the endorsement of the relevant Ministry, the applications are submitted to the Department of Economic and Sector Planning (DESP) which is part of the Ministry of Finance. The DESP checks that the purpose for which the grant is sought is in line with the national objectives for development for the year. For unusually large amounts, a Committee comprising of the Cabinet Ministers decide on the issue of compliance with national objective further. If the application is approved then it is passed on to the Ministry of Foreign Affairs which is the channel of communication

with bilateral/multilateral donor agencies. Once a donor is found, the funds are released from the donor to the Finance Sector of the Ministry of Finance, which will in turn release the funds to the NGO.

Most NGOs desire that this process be removed and that NGOs have direct access to donor organisations avoiding the bureaucracy which can be time consuming.

## **VII. MISCELLANEOUS**

### **a. Mergers and Split Ups**

There are no special laws governing mergers and split ups of NGOs in Vanuatu. Again each NGO conducts merges and split ups according to the legal provisions of the Act that it subscribes to.

The Charitable Act requires that changes to the registered office; registration, removals and appointments of committee members and the changes in the articles, rules or constitution or association shall be lodged with the Registrar within 30 days from the date such changes took place. Similarly, changes resulting from mergers and split ups such as changes to the governing body and the rules must be registered with the Registrar of the Charitable Associations.

As for Company Limited by Guarantee, the provisions of the Companies Act regulate mergers and split ups. Likewise for any other organisation registered pursuant to a particular Act, the provisions of the Act regulate mergers and split ups. Of course with unincorporated bodies, it is the governing instrument which dictates the mergers and split ups.

### **b. Dealings in Property**

There are no special rules for dealings in property by NGOs in Vanuatu. The general law dealing with property (the Property Law Act) shall be followed in this regard.

However in relation to the vesting of assets and liabilities of the NGOs registered under the Charitable Act, the Committee which is formed upon the registration of the association is vested with all assets and liabilities belonging to the association. Section 8 (1) & (2) of the Charitable Act provides that the assets and liabilities held for the benefit of the Association named in the certificate including any interest in land referred to in its application shall vest in its Committee. The Committee is to register any interest in land by lodging a copy of the certified application accompanied by a Certificate of Incorporation with the Director of Lands.

### **c. Investment Abroad**

As there are no laws regulating the activities of an NGO organisation, there are no restrictions preventing NGOs registered in Vanuatu from making investments abroad.

### **d. May NGO's engage in political or legislative activities?**

There is nothing to stop NGOs from engaging in legislative or public policy advocacy or even in endorsing candidates for public office. In practice however, there has not been any political activities by NGOs which directly lobby with respect to the elections of a particular candidate or a party.

The recent Memorandum of Understanding signed on 24 August 2004, between the Government of Vanuatu and the Vanuatu NGOs is the first official step towards the

Vanuatu Government and NGOS making decisions acknowledging and involving the participation of the NGOs in the development of Vanuatu.

## **VIII. TAX LAWS**

Vanuatu has no taxes on income, capital gains, inheritance or other forms of direct taxation. Hence the only form of tax that is available in Vanuatu is indirect taxes on consumption, such as the VAT, import and custom duties. These are the taxes that therefore affect the NGOs in Vanuatu.

### **A. Value Added Tax (VAT)**

There is no tax exemption for donors who contribute towards not for profit organisations. Any donations of money, such as gifts of money, are not subject to VAT [1], unless it is a grant of money. A donation is clearly distinguished from a grant in that it carries no conditions and is not given in return for good and services or rights for example, rights to membership of an organisation. Donations include bequests and donated cash prizes.<sup>27</sup>

VAT is also not imposed on goods which are listed in the Import Duties (Consolidation) Act [CAP. 91], to be exempted from import duties. The list of goods includes goods relating to charities. "Charity" however is not defined under the VAT Act nor is it defined in the Import Duties (Consolidation) Act [Cap 91]. (See below).

#### *Zero Rating*

The Third Schedule of the Act also provides that the Director of Customs makes the decision on zero rated supplies of goods and services.<sup>28</sup> Zero rated means that VAT is charged at a rate of 0% on a sale.

The most common category of goods which are zero rated are exports of goods, which is an activity that Not-for-Profit organisations are rarely involved. However, some NGOs may have overseas members for whom they will be providing goods and services to such as news letters, clothes to such as missionaries etc. The supply is zero rated, VAT is not charged. The member must not be resident in Vanuatu at the time the services are performed.<sup>29</sup>

#### Imported Products and Customs Excises

The Imported Duties (Consolidation) Act [Cap 91] (the "Imported Duties Act") lists the goods that are exempted from Import Duties. These goods are categorised under the heading "*Charitable Reliefs for Non-Profit Making Groups and Organisations*"<sup>30</sup> and they are as follows: charities, churches, privately funded schools (not wholly or mainly funded by the government) as well as community groups.<sup>31</sup> Although there is no specific definition in the Imported Duties Act of what "*charitable*" or "*non-profit organisation*" mean, the underlying requirement in each of the listed organisations suggest that an organisation for charitable relief or non-profit organisation is one that is set up for the purpose of relief of poverty, advancement of education or religion or any other matter beneficial to the community.

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<sup>27</sup> Section 2, VAT Act 1998

<sup>28</sup> Third Schedule, VAT Act 1998

<sup>29</sup> Third Schedule, VAT Act 1998

<sup>30</sup> Schedule 3, Section 3 of the Imported Duties(Consolidation) Act [Cap 191]

<sup>31</sup> Section 3 of the Imported Duties (Consolidation) Act [Cap 191]



The authority for determining exemption under the Imported Duties Act is the Director of Inland Revenue and Taxation. The Minister responsible for Social Development can also write a letter to the Director of Inland Revenue and Taxation requesting that relief for a community group.

International NGOs are also exempted from VAT and Import Duties if this is provided for in the MOU signed between the Government and that particular organisation.

## **B. Donor/Donations**

There is no tax exemption for donors who contribute towards not for profit organisations. However donations are subjected to taxation such as VAT. Donations of money are not subject to VAT<sup>32</sup> i.e. Gifts of money are now subject to VAT. A donation is clearly distinguished from a grant in that it carries no conditions and is not given in return for good and services or rights for example, rights to membership of an organisation. Donations include bequests and donated cash prizes.

### *Donated Goods and services*

The supply of donated goods and services to a Not-for-Profit organisation is exempted from VAT.<sup>33</sup> Donated goods and services is defined under the Act as goods and services that are gifted to a non-profit body and are intended for use in carrying on or carrying out of the purposes of that non-profit body. VAT is also not charged on goods imported for charities, although there is no definition of what charity or charitable purposes is in the VAT Act.

The sale of donated goods and services by a non-profit body is exempt from VAT. For example book sale or cake stall are exempt from VAT if the goods sold are donated. Similarly funds are not taxable if they are raised for example by a club through washing cars or mowing lawns, where those services are performed by volunteers.

A grant made to an organisation by the government will generally be regarded as payment for services performed by that organisation for its members, the community or a particular interest group. Government grants will therefore also be subject to VAT and registered recipients of grants will have to account to 1/9<sup>th</sup> of their value the VAT office.

## **C. Commercial/Business/Economic Activities**

NGOs can engage in commercial activities so long as these activities do not become the main activities. An organisation may engage in profit making activities if such activities are connected with and for the furtherance of the objectives of the association.

The most common commercial activities carried out by NGOs in Vanuatu are as follows:

### *Rental Property*

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<sup>32</sup> section 2 of the VAAT Act 1998

<sup>33</sup> section 10(3)(a) of the VAT Act 1998

VAT is not paid on rental properties used for residential accommodation. Rent tax is also not paid where the amount received from such rental does not exceed the amount of VT300, 000 per annum.

#### *Market Stalls*

Sales in retail outlets of donated goods such as second hand clothing and household items are exempt from VAT if the shops are run by non-profit bodies.

#### *Fees charged by churches*

Any set fee charged for membership of a church for provisions of particular services such as weddings, funerals, baptisms, access to reading rooms etc will be subject to VAT if the church is registered.

Overall in regards to taxes, an economic activity may not be the main activity of the NGO but if it becomes predominant then the NGO must pay the required taxes or is ordered to cease such activities or must become a business.

### **Reporting**

The only tax reporting required is the VAT Returns forms which are lodged at the end of every taxable month with the VAT office of the Inland Revenue Department. Cash contributions are not subjected to VAT or any form of taxation; however contributions from the Government of Vanuatu to an NGO, 1/9<sup>th</sup> must be accounted for with the VAT office.

It is apparent that the determination of the tax exemption status of an NGO is not dependent on the legal structure the organisation adopts; rather it is the purposes of the organisation and the types of activities it pursues.

### **IX. COMPLIANCE**

Generally, the statutory rules applicable to NGOs are understood by most groups as they are quite simple to follow in regards to the registration of NGOs. The Registrar is able to discipline an association due to failure to comply with their obligations under the relevant Act. The non-compliance that commonly occurs and is rectified is the filing of returns within the specified time limit. However, to date there is no known disciplinary action taken against any NGO organisations by the Registrar. There have been no studies undertaken on NGO compliance with the law.

Given that there are no special tax exemptions on any donor's contribution to an NGO as well as tax exemption for NGO for membership benefit NGOs, there is no perception that NGOs are used for tax avoidance. There is no evidence to indicate that Politicians are involved in NGO for direct financial gains. What is common however, are politicians funding the unincorporated NGOs activity with the expectation that the members of the NGO will support the politician as a candidate during election.

The Courts in Vanuatu have held that where an organisation fails to comply with its own rules or its constitution or has failed to observe the rules of natural justice then a member can bring a court action against the association. *Kalkot Mataskelekele -v- Iolu Abbil and Donald Kalpokas* Civil Case 99 of 1991 and the corresponding Appeal as Civil Appeal Case No. 7 of 1991.

A potential form of regulatory intervention with NGO activities are the tax authorities who carry out random auditing of the NGOs registered for VAT and even those that are not registered. Tax authorities randomly evaluate the activities of NGOs for VAT purposes by random checks to ascertain whether the NGO's activities correspond to the purposes or objectives of the organisation as stipulated in their governing instruments. The NGOs however rarely get audited by the VAT officers.

The other form of regulatory intervention that generally all NGOs are likely to encounter is the police investigating pursuant to a complaint to the police by a person from the NGO organisation complaining of alleged criminal activity (ies).

## **X. GOVERNMENT FUNDING AND PROCUREMENT**

There are no laws to regulate the applications or entitlements of NGOs for government funds, all types of NGOs whether for public or membership benefit may request for government funding. There are government policies however, in place which regulate the distribution of government funds and funds which come available under bilateral or multilateral agreements between the Vanuatu Government and other countries or organisations (see Overseas Organisation above)

There are no government funds within the Government's annual budget which are set aside specifically for incorporated NGOs. What is provided for under government's budget is the Rural Economic Development Initiative Funds otherwise known as the REDI funds which is open to all types of NGOs incorporated and unincorporated, local and overseas NGOs. The REDI Funds is divided equally amongst the 6 provinces in Vanuatu (Sanma, Malampa, Penama, Shefa, Tafea and Tolba) with the current REDI fund amount being 2 million vatu per province annually.

The general procedure for application for funds is for an NGO to lodge a completed REDI Funds application form with the Department of Provincial Affairs' REDI Unit. The REDI Unit makes the decision on whether or not to grant an application. The Department of Provincial Affairs is under the Ministry of Internal Affairs. The REDI Unit works closely with the DESP of the Ministry of Finance to ensure that NGOs do not receive double portions for any one project.

## **XI. PRIVATISATION**

There are no laws that say that NGOs cannot get shares in Government enterprises.

## **XII. CONCLUSION**

What is needed is a harmonisation of the different aspects of the laws that affect NGOs into an independent piece of legislation specifically addressing the setting up, management and entitlements of NGOs in Vanuatu. This legislation is needed to strengthen their structure and to have clear machinery for the operation of NGOs.

Currently there is no clear protection for NGOs operations and much is left to chance – the wide discretionary power of authorities (with capacity for arbitrariness) and also the relaxed manner in enforcing statutory requirements on NGOs obligation to file returns.

The current laws affecting NGOs are fragmented in the sense that each piece of legislation has its own criteria of what an NGO is. Having these separate

determinations with no reference to other relevant NGO legislation, means that there is room for inconsistencies as well as inefficiency in the administration of the NGOs.

The NGO's heavily rely on the donation or funds from donors for their operation. Thus there is a need to make allowance for NGO's to operate economic activities to assist in financing its operations and even to the extent of self-sufficiency. The separation of public benefit NGOs from membership NGOs can be a differentiating point for NGOs who operate economic activities to survive and those that carry out economic activities for profit making. Currently, economic activities other than further of NGO activities, of public benefit NGOs are subjected to taxation, which impedes the potential for raising money for survival by NGOs. As stated earlier the tax benefits of NGOs are awarded according to the function of the organisation rather than their status as either public or membership benefit NGO. The independent piece of legislation should ensure that public benefit NGOs should be fully exonerated from any tax for the survival.

There is a strong desire from NGOs to be freed of the bureaucracy in accessing funds from bilateral and multilateral donors. To ensure the autonomy of NGOs and their efficiencies, a removal of the governmental procedures would benefit the NGOs. At the same time, legislation should put into place mechanisms to impose statutory obligations on NGOs to account and audit any funds injected to any NGO as well as ensure accountability and transparency in the NGO activities.

Where there are obligations there should also be effective enforcement. Part of the reasons for non-compliance by NGOs in keeping to their statutory obligations is the lack of enforceability by the necessary authority. As such it is vital that the legislation should establish a body responsible for determining the status of NGOs, the enforcement of NGO's statutory obligations and rights under law.

The legislation and any machinery it sets up for NGOs in Vanuatu, will have to give due consideration to the limited resources of NGOs from the drafting of the legislation to financing the implementation of the legislation. Any legislation that affects the interests of NGOs would have to be initiated and driven by the NGOs, if this is to become a reality. A further crucial consideration is the nature of the relationship between the NGOs and the Government of Vanuatu, which can determine the time for the legislation to come into force.