

REPUBLIC OF VANUATU

BILL FOR THE FOUNDATION (AMENDMENT) ACT NO. OF 2018

Explanatory Note

The Bill amends the Foundation Act No. 37 of 2009.

A foundation can be created by both citizens and non-citizens and therefore the risks of money laundering, terrorist financing and financial loss is always high.

With the current provisions of the Act, it is difficult to monitor and supervise many foundations in Vanuatu especially in cases where the guardians, councillors and secretary of these foundations are body corporates and not natural persons. In these cases enforcement actions are particularly difficult given that the ultimate beneficial owners of the companies that are appointed as guardians, councillors or secretary cannot be easily identified which makes due diligence checks on these persons quite difficult.

Furthermore, the Vanuatu Financial Services Commission (“the VFSC”) has faced difficulties in monitoring and supervising many foundations in Vanuatu where the Board of councillors of those foundations do not ordinarily reside in Vanuatu. In these cases, the VFSC cannot conduct any onsite inspections locally and cannot personally question any of the councillors to determine whether or not they are fit and proper persons to run the foundation. Additionally, where all of the councillors live abroad, it is difficult to enforce the provisions of the Act against them as it would be a costly exercise to have them tried in another jurisdiction.

The amendments proposed will require all the guardians, councillors and secretary to be natural persons and not body corporates and will also require half of the Board of councillors of foundations to ordinarily reside in Vanuatu. This will improve and facilitate the VFSC’s ongoing robust monitoring and supervision of foundations in Vanuatu.

The amendments proposed also introduces penalty notices which will empower the Commissioner to deal with all suspected breaches in a fast and efficient manner.

Minister of Finance and Economic Management



REPUBLIC OF VANUATU

**BILL FOR THE
FOUNDATION (AMENDMENT)
ACT NO. OF 2018**

Arrangement of Sections

1	Amendment	2
2	Commencement.....	2

REPUBLIC OF VANUATU

BILL FOR THE FOUNDATION (AMENDMENT) ACT NO. OF 2018

An Act to amend the Foundation Act No. 38 of 2009.

Be it enacted by the President and Parliament as follows-

1 Amendment

The Foundation Act No. 38 of 2009 is amended as set out in the Schedule.

2 Commencement

This Act commences on the day on which it is published in the Gazette.

SCHEDULE

AMENDMENTS OF FOUNDATION ACT NO. 38 OF 2009

1 Section 2 (Definition of “Commission”)

Repeal the definition.

2 References to “Commission”

Delete all references to “Commission”, substitute “Commissioner”

3 Section 2

Insert in its correct alphabetical position:

““Commissioner” means the Commissioner of the Vanuatu Financial Services Commission appointed under section 9 of the Vanuatu Financial Services Commission Act [CAP 229];”

4 After paragraph 7(1)(a)

Insert

“(aa) that the guardians, councillors and the secretary of the foundation are natural persons; and

(ab) that at least half of the councillors of the foundation reside in Vanuatu for at least 6 months within each calendar year; and”

5 Subsections 13(2), 15(2) and 21(2)

Repeal the subsections.

6 Paragraph 14(1)(b)

Repeal the paragraph.

7 Subsection 15(3)

Repeal the subsection, substitute

“(3) A person is not qualified to be appointed as secretary of a foundation if the person is the sole councillor of the foundation.”

8 Paragraph 22(2)(b)

Delete “; or”, substitute “.”

9 Paragraph 22(2)(c)

Repeal the paragraph.

10 After section 29C

Insert

“29D. The Commissioner may remove a key person of a foundation

- (1) The Commissioner may direct in writing a foundation to remove a guardian, councillor or the secretary of the foundation if he or she is satisfied that the guardian, councillor or the secretary of the foundation is not a natural person.
- (2) Before directing the foundation to remove a person under subsection (1), the Commissioner must give written notice to:
 - (a) the person; and
 - (b) the foundation,giving each of them a reasonable opportunity to make submissions on the matter.
- (3) A direction takes effect on the day specified in the direction.
- (4) If the Commissioner directs a foundation to remove a person, the Commissioner must give a copy of the direction to the person and the foundation.
- (5) If the foundation fails to comply with a direction under this section, the foundation is guilty of an offence punishable on conviction by a fine not exceeding VT75 million.”

11 Paragraph 41(2)(d)

Delete “43”, substitute “44”

12 After paragraph 43(1)(a)

Insert

- “(aa) at least half of the councillors of the foundation have not resided in Vanuatu for at least 6 months within each calendar year; or”

13 After section 55A

Insert

“55B. Penalty Notice

- (1) The Commissioner may serve a penalty notice on a person if it appears to the Commissioner that the person has committed an offence under any provision of this Act.
- (2) A penalty notice may be served personally or by post.
- (3) The Minister may by Order prescribe penalties which a person is required to pay under this section, which must not exceed:
 - (a) VT 200,000 for an individual; or
 - (b) VT 1 million for a body corporate;within 30 days after the date on which the notice was served.
- (4) If the amount of penalty referred to in subsection (3) is paid, that person is not liable to any further proceedings for the alleged offence.
- (5) Payment made under this section is not to be regarded as an admission of liability for the purpose of, nor in any way affect or prejudice, any proceeding arising out of the same occurrence.
- (6) The Commissioner may publish a penalty notice issued to a person in such manner as the Commissioner determines.
- (7) If a penalty notice has been served on a person, a prosecution in respect of the alleged offence may only be commenced if the penalty remains unpaid 30 days after the penalty was due, and the Court may take account of any unpaid penalty when imposing a penalty in respect of the offence.
- (8) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.”