



# CHETTY LAW

Technology and Innovation Law

## LEGAL OPINION

Legal Entity for Wikimedia South Africa chapter

**ATTENTION: The African Commons Project (TACP), Kerryn McKay**

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## 1. BACKGROUND

A dedicated group of volunteers in South Africa, with the support of San Francisco-based Wikimedia Foundation, is planning to create a South African Wikimedia chapter. Wikimedia chapters are independent organisations founded to support and promote the Wikimedia projects within a specified geographical region (country). Like the Wikimedia Foundation, they aim to "empower and engage people around the world to collect and develop educational content under a free license or in the public domain, and to disseminate it effectively and globally". The South African Wikimedia Chapter would be the first of its kind in Africa. In broad terms, a South African Wikimedia chapter aims at:

- Promoting a vibrant multilingual and multicultural content community that generates and disseminates content that is used and understood by the local and global community;
- Facilitating contributions to the commons of African knowledge;
- Facilitating free access to knowledge in home languages to support development;
- Collecting and disseminating information about but not exclusive to South Africa; and
- Creating of and enabling access to free and open knowledge in South Africa.

The South African Wikimedia chapter will operate autonomously from the Wikimedia Foundation, and does not seek to represent locally the Wikimedia Foundation, rather aiming to meet its own goals and establish its own, context-specific initiatives. However the main criteria is that the South African Wikimedia chapter has the same goals as the Wikimedia Foundation, and that in practice the South African Wikimedia chapter will further those goals. The Wikimedia Foundation will have to approve the bylaws of the South African Wikimedia chapter.

Depending on the first initiatives to be implemented, there is the opportunity to seek funding from one or two key local corporations from within the financial services sector that have shown initial interest in the South African Wikimedia chapter initiative. There is also the possibility of gaining funding from Wikimedia Foundation in the foreseeable future.

The official launch of the South African Wikimedia chapter is tentatively planned for the first quarter of 2011.

Arising from an initial consultation with the African Commons Project, and based upon a subsequent kick-off workshop in Johannesburg on 7 and 8 August 2010, this document contains a Legal Opinion on the appropriate Legal Entity for the South African Wikimedia chapter. The entity will be responsible for operationalising the rollout of the South African Wikimedia chapter. This Legal Opinion takes into account :

- the administrative capacity as envisaged by the South African Wikimedia chapter;
- the broader objectives of the Legal Entity in relation to society, community and otherwise; and
- the revenue sources as envisaged by the South African Wikimedia chapter.

## 2. LEGAL QUESTIONS

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This legal opinion addresses the following legal question:

*Which type of legal entity recognised in South African law is most suitable for Wikimedia South Africa in consideration of the vision, objectives and foreseeable governance of Wikimedia South Africa.*

The summary of legal research which follows seeks to speak to the abovementioned legal question and culminates in the summary and recommendations which form the legal opinion.

### 3. DIFFERENT TYPES OF LEGAL ENTITIES

The selection of the appropriate legal entity is generally dependant on a number of factors including the vision and business objectives, the size and complexity of the organization, the envisaged participants, envisaged governance, management and control, funders' requirements, requirements for limited liability and notably, the legally prescribed functions, powers, limitations and duties of the various types of legal entities. It has been suggested that the South African Wikimedia chapter operates as a not-for profit organisation (NPO). Legal entities commonly used by NPOs are the following:

<p><b>VOLUNTARY ASSOCIATION GOVERNED BY COMMON LAW</b></p>	<ul style="list-style-type: none"> <li>- <i>A voluntary organisation is typically used by Community Based Organisations, small Faith Based Organisations and Non-Government Organisations. A voluntary organisation is governed by the Constitution drawn up by a management committee. It is suitable for organisations with small budgets.</i></li> </ul>
<p><b>SECTION 21 COMPANIES UNDER THE COMPANIES ACT NO. 61 of 1973</b></p>	<ul style="list-style-type: none"> <li>- <i>This type of company is typically used by larger operations.</i></li> <li>- <i>A section 21 company must be involved in "promoting religion, arts, sciences, education, charity, recreation, or any other cultural or social activity or communal or group interests".</i></li> <li>- <i>It is suitable for organisations with larger budgets. The members are protected from liability in accordance with company legislation. Companies however, including a Section 21 company must comply with more formalities such as an annual general meeting and compliance obligations and are usually more costly in this regard.</i></li> <li>- <i>A section 21 company must also be registered with the Registrar of Companies.</i></li> </ul>
<p><b>TRUST</b></p>	<ul style="list-style-type: none"> <li>- <i>Trusts are formed by individuals and businesses to manage and distribute assets such as large amounts of money for the benefit of other people. Trusts are suited to organisations that channel funds to other organisations.</i></li> </ul>

#### 4. LEGAL OPINION

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With direct reference to the legal research of Chetty Law and legal expertise, we suggest as follows:

It is already obvious from the aforementioned description and objective of a *trust* that this legal structure is not an option, i.e. the purpose of the South African Wikimedia chapter is not to administer third party assets for the benefit of other people. Furthermore, trusts do generally not have an independent legal personality separate from its members which leads to, among other things, full liability of its members (the trustees). Also, trusts do not possess so-called perpetual succession, which means that the death or dissolution of a member results in the non-existence of the trust. This appears unpractical for the purposes of the South African Wikimedia chapter. For these reasons trusts are not a suitable option for the South African Wikimedia chapter.

Thus, a decision has to be made between a *Voluntary Association (VA)* and a *Section 21 company*. Similar to a trust, VAs do not automatically have perpetual succession and a separate legal personality that results in limited liability and separate assets from those of its members. This said, a carefully drafted VA constitution can create both perpetual succession and limited liability as well as separately held assets.

The most obvious difference between VAs and Section 21 companies is that VAs are subject to far less complex and extensive reporting and disclosure requirements. While this may, on the face of it, be perceived as a major advantage that makes setting up and running a VA quicker, easier and cheaper, it comes at the price of less formal accountability and transparency that often alienates potential funders, business partners and other parties dealing with the organisation. If this is considered a potential problem, however, one can register a VA under the NPO Act, which requires compliance with the ongoing regulatory requirements of the registering authority, which in turn increases formality and accountability but somewhat eliminates some of the main advantages of VAs mentioned above.

Against this background – and as a rule of thumb- the formation of a VA is usually recommended as being suitable for organisations with small budgets, while Section 21 companies are considered more suitable for larger operations. Yet, at this point in time, it is difficult to predict the magnitude of the operations of the South African Wikimedia chapter so that this factor alone cannot help determining the most appropriate legal structure. However, the chapter's reliance on outside funding, partly from corporations within the financial services sector but also from the Wikimedia Foundation, suggests the formation of a Section 21 company as funders often require more formal structures. It is likely that, at the very minimum, funders – especially from the financial services sector - would ask for additional formal structures to be put in place when dealing with a VA, such as a registration under the NPO Act, that, as mentioned before, eliminates many advantages of a VA. Another point that speaks in favour of a Section 21 company is the fact the African Commons Project (TACP), as the hosting institution for the South African Wikimedia chapter, has considerable experiences

with running a Section 21 company and is therefore familiar with the various formalities and reporting requirements in this respect. Lastly, it should also be noted that while the fairly complex and extensive reporting and disclosure requirements for a Section 21 company may appear tedious at times, they help ensuring that an organisation is run properly under due consideration of accepted rules of accountability and transparency. In essence, the rules simply spell out and make compulsory what a diligent management should do in any event.

**For the above reasons we recommend the formation of Section 21 company as a suitable legal entity for the South African Wikimedia chapter.**

## 5. CONTACT DETAILS

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