Commerce and Employment

States of Guernsey

Discussion Paper

Options for Reforming Guernsey's Insolvency Regime

Purpose and type of consultation

The purpose of this discussion paper is to seek feedback from businesses, stakeholders, consumers, industry associations, practitioners and any other interested parties on potential reform of Guernsey's system of commercial insolvency and personal bankruptcy.

The Commerce and Employment Department (the "Department") is seeking feedback, comments and suggestions on:

- A range of policy options for reforming Guernsey's bankruptcy and insolvency regimes,
- General options for reform of personal bankruptcy, and
- More detailed proposals on the reform of company insolvency.

Closing date: 31 December 2014

The Commerce and Employment (C&E) Board:

- Would like to invite and receive comments from all interested stakeholders, financial services businesses, customers, and consumers about the proposals outlined in this consultation paper.

- Aims to work closely with stakeholders and industry to ensure Guernsey adopts the most appropriate reforms to protect and enhance its economy, to ensure equitable outcomes for debtors and creditors and to support the financial services industry.

See section 7 "How to respond" for full details of how to respond to this consultation.

7 How to Respond

This section sets out the complete list of consultation questions and provides information on how to respond to this consultation. The Department is also interested in seeking general comments and feedback on areas where insolvency and bankruptcy laws could be usefully reformed and what issues you may have experienced in practice and how you suggest dealing with those issues. Please feel free to respond to some or all of the questions, or only those on a particular topic.

7.1 Consultation Questions

4.1 Reform of Personal Bankruptcy

4.1.3 Issues Common to Désastre and Saisie (Page13)

Question 1: Do you have any comments on how effective désastre proceedings are and are there any areas where this procedure should be altered?

RESPONSE:

There is some support for the view that the Désastre procedure is an effective means of enforcing Court judgments. It is noted that it is not an insolvency process per se. There is no view expressed that the Désastre process should be altered or abolished.

Rules could be produced clearly setting out the procedure and making provision for recovery of the arresting creditors costs as a priority (together with other priority debts). However, there is broad support for there being an effective means of rehabilitation for debt problems for individuals.

Question 2: Do you have any comments on how effective saisie proceedings are and are there any areas where this procedure should be altered?

RESPONSE:

Few comments have also been made of Saisie proceedings. There is some support for retention of the procedure as a means of realising a debtor's real property. The process has been described as unnecessarily lengthy and expensive and some support is expressed for the reform and simplification of the Saisie procedure. It is not clear that the current process is in fact human rights compliant and scope should be considered with regard to notices to be provided of the process to other registered charge holders.

More detailed analysis of the Saisie procedure at this stage is not considered as part of the insolvency regime. It is a secured debt enforcement process.

The insolvency regime must respect the security interests which should survive into insolvency procedures.

4.1.4 *Loi ayant rapport aux debiteurs et a la renunciation* (Page 13)

Question 3: Do you have any personal or professional experience of the 1929 procedure and or applications made under that legislation? If so, the Department would welcome your comments and feedback on the regime generally.

RESPONSE:

Few practitioners have had experience of the 1929 legislation. Those who have had experience indicate a far from straightforward procedure with the processes little understood. There is a broad consensus that the legislation is out of date.

Question 4: Should the 1929 legislation be retained, amended or repealed and replaced?

RESPONSE:

There is a broad consensus that the 1929 legislation should be repealed and replaced by a more modern regime incorporating an effective means of rehabilitation for individuals. One suggestion is to adopt a regime modelled upon the English bankruptcy legislation with HM Sheriff discharging the role of the Trustee in Bankruptcy, with the ability to delegate appointment or services to support if additional resource is necessary.

Question 5: If it is to be retained or amended please explain how the legislation can be improved and made more effective.

RESPONSE:

There is a broad consensus that a Bankruptcy Law is required, being a simplified version of the English bankruptcy legislation.

Question 6: If you think that the 1929 legislation should be repealed and replaced, what key features do you think should be present in a new Law?

RESPONSE:

There is also a broad consensus that the process should involve an office-holder, such as HM Sheriff, and for the individual debtor to have the opportunity to become rehabilitated. Adoption of concepts based on English law is largely supported. The suggested key features include:-

- **A petition process: both debtors and creditors**
- **Annulment of a bankruptcy order**
- **Discharge from bankruptcy**
- **Administration of the estate by the office-holder**

It is recognised that the biggest obstacle to this will be the creation of the new office (and its administration/funding).

4.1.5.1 Low value debt relief order (Page 14)

Question 7: Do you think there is a need for a low value debt relief process in Guernsey?

RESPONSE:

It is widely considered that there is a great need for low value debt relief process in Guernsey.

Whilst this may not affect or benefit many people, it is significantly important for the small number of the population who desperately need such a relief.

However, there are issues that would need to be addressed. For example, there would need to be an arbiter (such as the Viscount in Jersey). Some concern was expressed about addressing difficulties caused by hidden assets and antecedent recoveries.

The Citizens Advice Bureau is particularly interested in this. In Jersey, the CAB is closely involved and may well be a facilitator of applications. The CAB in Guernsey would be interested in such participation.

Question 8: Should the Department consider proposals along the lines of those under consideration in Jersey or are there alternatives that might be better suited to

RESPONSE:

There is broad consensus that the Jersey proposals are sensible and adopt more sensible limits (assets at £25,000 and liabilities of £2,000) than those in England. The view has been expressed that the disposable income test proposed in Jersey appears too low. The need for an arbiter is emphasised: Guernsey does not have the equivalent of the Viscount.

This role is perhaps best with an extension of H.M. Sheriff's responsibilities.

4.1.5.2 Individual Voluntary Arrangement ("IVA") Procedure (Page 15)

Question 9: Do you agree that a simple statutory scheme based on the concept of the UK IVA procedure would be a valuable addition to Guernsey's personal insolvency law?

RESPONSE:

There is a broad consensus that a scheme based on the concept of the UK IVA procedure would be valuable. However responses noted various considerations and difficulties. The cost of administering such a procedure would need to be considered as there would not be the volume of work that exists in England, the costs associated with the IVA procedure will be higher. This may well have an impact on the debtor/creditors.

Not all support the adoption of the IVA procedure. One response noted the relatively low level of personal debt and personal debt default in Guernsey and the fact that in many cases in England an IVA is unnecessary.

4.1.5.3 Other Potential Additions or Amendments (Page 15)
Question 10: Should any or all of the above features be introduced into Guernsey Law?
RESPONSE: **There was a consensus that all of the previous features be introduced into Guernsey law.**
Question 11: What are your views on introducing a simple personal bankruptcy regime based on the UK Insolvency Act 1986?
RESPONSE: **There was a consensus that a simplified version of the English bankruptcy regime be introduced in Guernsey. The need for simplicity was an overriding consideration of all of responses.**
Question 12: Are there other more appropriate jurisdictions that Guernsey could look to for useful precedents for bankruptcy legislation?
RESPONSE: **One response suggested looking to the BVI. Another response suggested looking at other similar sized jurisdictions. Others suggested that consideration of the procedure in larger jurisdictions should also be considered: for example, there are aspects of Australian law which could have valuable application here such as Australian debt agreements and personal insolvency agreements. Other responses thought that there was no need to look further than England and the familiarity of that system which would result: to look elsewhere would complicate matters.**
Question 13: What other features should the Department consider in addition to those listed above? How would your suggestions further improve Guernsey's personal insolvency regime?
RESPONSE: **The key feature would be simplicity.** **Other suggestions might include suspension of discharge should a debtor fail to cooperate and punitive measures in the event of dishonesty or blameworthiness.**

4.2 Reform of Commercial Insolvency

4.2.2 Other legislation (Page 16)

Question 14: Have you had any experience in working with the insolvency provisions in the Partnerships, Limited Partnerships, Foundations or Limited Liability Partnerships Laws? What has been your experience and do you consider those regimes generally effective?

RESPONSE:

Two respondents have experience of insolvency involving Limited partnerships. In both cases, the General Partner was placed into Administration or Liquidation, as the GP was insolvent due to its unlimited exposure to the liabilities of the LP. In one case, the Court was asked to confirm the appointment over the insolvent LP, though the implication of the Partnership Agreements and LP law is that the GP acts as the liquidator.

The insolvent winding up or Administration of the GP also appears to result automatically under LP Agreements in the dissolution of the GP – even if the intention of the Administration Order is survival. Clarification in law on this would be useful.

Question 15: What reforms, if any, do you consider necessary to these insolvency regimes?

RESPONSE:

There was consensus amongst those that had experience in this area that Corporate Insolvency legislation and rules should also cover LPs, Foundations, LLPs and any other corporate – like vehicles.

As far as insolvency is concerned, they are not too dissimilar from companies or unincorporated entities and should have similar processes and rules including winding up processes and provisional liquidation, and perhaps an administration.

Question 16: If you consider the current regime which covers these entities to be sufficient, why do you consider that reform is unnecessary?

RESPONSE:

Not applicable.

4.2.3 Single or Separate Regimes (Page 17)

Question 17: Please explain which option you would prefer; a single insolvency law, separate personal and commercial insolvency laws or separate personal, company and other insolvency provisions.

RESPONSES:

Consensus is that all commercial insolvency legislation is in one place rather than spread over various pieces of legislation. So a single Insolvency law would be applied to Companies, PCCs, ICCs, Foundations, LPs, LLPs, Partnerships etc.

The Personal Insolvency Law would be a separate law and follow the corporate insolvency law.

Question 18: Do you consider there to be any particular advantage or disadvantage which makes you prefer one option over the other? Please explain why that advantage or disadvantage is material.

RESPONSES:

Separate Personal and Corporate regimes will be more achievable in the shorter term.

Having one law fits all for Cos, LLPs, LPs, Foundations etc, will leave less ambiguity. Rules can if necessary be provided in relation to the subtle differences in structure.

4.2.4 Rules (Page 19)

Question 19: Do you consider that the development of insolvency rules would be necessary and appropriate in the Guernsey context?

RESPONSE:

Consensus is that a certain amount of Rules will be helpful as they provide clarity to process. However they should not be as lengthy or prescriptive as in UK legislations.

One suggestion is that alongside Rules, professional guidance should be made available and required to be followed by professionals offering Insolvency services. Statements of Insolvency Practice (SIP's) in the UK offer guidance on procedural matters which Insolvency Practitioners are required to follow (e.g. SIP8 procedure at creditors meetings, SIP7 receipts and payments accounts, SIP2 investigations, SIP 9 Remuneration).

Such SIPs would need to be authoritative, perhaps issued and monitored by the GSCCA or ARIES. ARIES in co-operation with the GSCCA and the Law Society could create Guernsey SIP's based upon ten relevant and simplified UK SIP's which would be treated as best practice.

It is also noted that some matters in relation to the Royal Court could be managed by Court issued guidance notes: For example, format and content of applications, Commissioner hearing instructions, what should be comprised in the report to Creditors for the Commissioner's hearing.

Question 20: Apart from the issues as indicated in 4.2.4, are there any other issues that ought to be dealt with through insolvency rules rather than in the primary legislation?

RESPONSE:

In general responses would like rules to be less prescriptive than other jurisdictions and restricted to key matters including:

- **Establishment of creditors' committee and its role and function**
- **Liquidators/Administrators reports and accounts**
- **Statutory Demands**
- **Notice, notifications and advertising requirements**
- **Winding-up petitions**
- **Appointment, resignation, removal and death of liquidators**
- **Statement of Affairs**

- **Proofs of debt & procedure for notice, quantification, adjudication and appeal**
- **Rights of secured creditors/priority of claims**
- **Distribution of assets**
- **Meetings of creditors and contributories, including notices, quorum, rules for inquorate meetings**
- **Liquidator remuneration**
- **Examination rules**
- **Declarations of Solvency**
- **Minimum qualifications and experience of office holders**
- **Dissolution following liquidation or Administration**
- **Unclaimed dividends and undistributed assets**
- **Retention and destruction of records**
- **Audit will only be required if required by majority of shareholders at EGM (Solvent Liquidations) and doing so will not change the solvency of the company. Never required on insolvency unless directed by the Court or the Creditors' committee.**
- **The basis of fees. The order of priority of claims. The status of creditor claims (secured, preferential, etc). Notice and notification for Administration and Liquidation applications.**
- **Meetings and reports. Function of any creditors' committee.**

4.3 Creating an Official Receiver (Page 20)

Question 21: Have you had any experience in dealing with offices in other jurisdictions performing the functions of an "Official Receiver"? What was your experience and do you consider that the office was useful in managing insolvency processes?

RESPONSE:

Some respondents have experience of the Official Receiver in the UK. Interaction when working on UK compulsory liquidations and UK bankruptcies. Useful when coordinating investigations across different insolvent cases with common directors.

The primary benefit is as liquidator of last resort. Usually in compulsory liquidation or bankruptcy, the liquidator or trustee does the bulk of the work and has responsibility for the liquidation and bankruptcy.

A key advantage to creditors is that they do not need to be concerned with the funding of the winding-up. That is a problem for the Official Receiver.

Question 22: Do you consider that the office of an "Official Receiver" is necessary in the Guernsey context? Please explain why you do or do not consider it necessary.

RESPONSE:

There would be a benefit of having a liquidator/trustee of last resort, but it is unclear whether there is demand for such a costly role. Respondents recognized that a public role might require significant funding to ensure sufficient expertise is available to the role.

Suggestions include extension of the Public Trustee's office or H.M. Sheriff's office might be considered for this position and/or an insolvency practitioner's rota for people who offer liquidation services.

It would be useful for keeping a register of bankrupts and a register of persons subject to IVA's, CVAs and Low Value Debt Relief.

It would be useful for taking disqualification action against directors.

Question 23: Do you have any alternative proposals for funding an office of Official Receiver? Please explain what options you consider are available for funding such an office.

RESPONSE:

A few suggestions were provide:

- **An increase in Court fees to cover the role. However, it is not clear what mechanism would take court fees and direct them to an OR budget.**
- **A panel of insolvency professionals who are required to undertake the role of liquidator/trustee of last resort. Such a mechanism would be difficult in practice, as there would be practitioners unwilling or unable to offer such service, and some assignments can be quite onerous.**
- **A licensing system for Insolvency Practitioners – but it is thought that this would not generate sufficient funds**
- **OR is funded from estate assets – however this would depend on the extent OR is used when assets are available in an estate**
- **OR could be responsible for Bona Vacantia assets or otherwise un-owned funds held through confiscations, penalties, etc. Funding would come from those.**
- **A combination of some or all of the above.**

Question 24: Are there any other functions which could be properly exercised by an Official Receiver? Please explain what those functions are.

RESPONSE:

- **Official Receiver could receive and manage assets which are bona vacantia, proceeds of crime arrested funds.**
- **Possible combination of roles with Public Trustee**

4.4 Register of Insolvency Practitioners (Page 22)

Question 25: Do you consider that the registration and licensing of insolvency practitioners is necessary? If so please explain why and what benefit it might bring to Guernsey. Should appointment as a liquidator be restricted to lawyers and accountants?

RESPONSE:

There is a mixed response here, with one response strongly in favour of a register.

The majority consensus is that registration and licensing of Insolvency Practitioners is not required.

For Court appointments, the Court already requires CVs and it is unlikely now that the Court would accept anyone other than and experienced or suitably qualified practitioner. Likewise, the Advocate's making applications are very unlikely to risk the court rejecting a nominated appointee on grounds of qualifications and experience.

The Court's process of choice needs to be put into the Rules as such considerations must apply to our of court appointments. It cannot be right that anybody can liquidate a company as this is open to abuse. A director can wind-up his own company. There is no requirement to be independent (except as defined by the ethical guides of ICAEW or ACCA or other professional bodies) or to have any liquidation experience or qualifications at present. This can lead to the process being conducted incorrectly and creditor left disadvantaged.

In particular, a Members' Voluntary Liquidation (MVL) in Guernsey does not need to be solvent. Accordingly, a director/shareholder can appoint himself or anyone liquidator and could wind-down the business without any consultation with creditors.

This would become increasingly important if there is to be an IVA or CVA procedure in Guernsey, where one of the vital elements is an independent, appropriately qualified, experienced and regulated Insolvency Practitioner to act as Nominee and Supervisor of the arrangement. Without this, the process would be subject to abuse.

The "Minimum requirements" in the Rules approach has been adopted in Cayman and other jurisdictions.

Serious consideration should be given to including a Rule to the effect that at least one locally based Insolvency Practitioner is always appointed to an Insolvent estate, though a joint appointee from off-island can be made.

5 Corporate Insolvency – Changes to the Companies Law

5.2.1 Objectives (Page 23)

Question 26: Do you consider that objectives or statutory duties clauses are of value?

RESPONSE:

Yes, all respondents consider that objectives and statutory duties clauses are necessary.

Question 27: What objectives do you consider appropriate for administration and liquidation?

RESPONSE:

Administration: Generally the objectives set in the existing law. Additionally objectives might include: payment to one or more class of creditors; or better outcome than liquidation. Investigate the failure of the company.

Liquidation - insolvent: safeguard and optimize the realization of the assets of the company and distribute to creditor according to the order of priority, after liquidation costs. Investigate the failure of the company.

Liquidation: Solvent: safeguard and optimize the realization of the assets; establish and pay all creditors, including settling or resolving contingent matters; distribution of remaining assets to shareholders according to the share structures/partnership shares, etc.

The objectives of liquidation similar to those set out in the New Zealand provisions on page 24 of the Consultation paper would seem appropriate for Guernsey.

5.2.2 Company Voluntary Arrangements (Page 24)

Question 28: Are the current arrangements and reconstruction provisions effective? How could they be improved?

RESPONSE:

Administration:

It is generally considered that the Administration process is adequate though costly in relation to the requirement for Court hearings.

This could be improved by an out of court process for Administrations, and potentially a Deed of Company Arrangement (DOCA) (i.e. a work-out / restructuring by agreement).

In Addition, distributions from an Administration would be helpful addition to that process.

Scheme of Arrangement

The Scheme of Arrangement process in Guernsey requires too much Court oversight and as a consequence is unnecessarily costly. An appropriately qualified, experienced insolvency practitioner should be able to use his discretion on certain matters in reaching an agreed Scheme, and decide when Court applications are essential.

Question 29: Would the introduction of a simple Company Voluntary Arrangement regime be beneficial?

RESPONSE:

There is general consensus that a CVA would be a useful rescue tool for an Insolvency Practitioner, as an alternative to administration.

However, those with experience of the UK CVAs consider they are not generally successful though statistics would be helpful.

There may also be insufficient demand for a CVA regime in Guernsey which might mean practitioners are not going to be able to or wish to provide the supervisory service this requires.

For a CVA regime to be successful, it must be overseen by an appropriately qualified, experienced and regulated Nominee/Supervisor. If the role of Nominee/Supervisor is available to anyone, then this process could be subject to abuse (e.g. a connected party to the company acting as Nominee/Supervisor).

UK practitioners are also required to follow Statements of Insolvency Practice (SIP's), including SIP3 on Voluntary Arrangements.

In the UK, a CVA is often instigated by an Administrator who is appointed out of court. The Administration gives the company the benefit of a moratorium and allows time for a CVA to be formulated and put in place.

Guernsey does not have such a process at present and it would be most useful in an Administration where trading survival is a serious prospect.

5.2.3 Appointment of Administrator, etc (Page 25)

Question 30: Do you consider that it is appropriate for the directors of a company to be permitted to appoint an administrator without an order from the Court?

RESPONSE:

Nearly all respondents agreed with this concept, noting reasons such as the current court application process can be costly and long winded, an immediate protection for the company may be required, director's views may conflict with shareholders views / competing interests and it would be helpful in the circumstances of an insolvent business which is to be traded on whilst a sale is sought.

It was noted that this should be time limited and that some safeguards will be required for creditors, particularly secured creditors.

It was also noted that a policy decision will be required as to how administration is seen going forward and if the jurisdiction wishes to remain "creditor friendly" or "debtor friendly" and that this would stop insolvency practitioners using the MVL route as a default rescue process when the company does not have the funds to meet Court fees and therefore prevent any real or perceived abuse of creditors who are not consulted in this

process.

One respondent was in favour of retaining the current principle that an administrator can only be appointed in Court but was in favour of a creditors committee although they did not favour this being mandatory.

Question 31: If so, in what circumstances should an out of court appointment not be permitted?

RESPONSE:

Respondents suggested that an out of court administration appointment should not be permitted in the following cases:

- **Where there is an outstanding application for the appointment of an Administrator or Liquidator.**
- **Where a court process has been instigated, such as the presentation by a creditor for a petition to wind up / appoint an administrator.**
- **When it is not in the best interests of the Company and its stakeholders.**

Furthermore, some respondents noted that Administrators must form a professional opinion that the objective of Administration will be achieved, the Company must be insolvent and that the procedure followed in the UK appears to work well.

One respondent stated that it is difficult to envisage who would be entitled to block an out of court appointment at present and that careful consideration is required on this and whether just Guernsey security holders are able to block an appointment or whether this would apply to those outside the Bailiwick holding security over a Guernsey company.

In addition, that leads to a serious question as to the need to review the security interests law and also seems to necessitate the introduction of a charges register.

Question 32: Do you agree that Administrators should be required to report findings or suspicions of misconduct to the relevant authorities so appropriate action can be taken?

RESPONSE:

The majority of respondents agreed with a requirement to report findings.

It was noted by some respondents that:

- **This will enhance Guernsey's reputation.**
- **It will lead to disqualification action against delinquent directors.**
- **The present law means that it is virtually impossible for Administrators to report such misconduct unless they are involved in successful prosecution.**
- **More difficult is determining who the appropriate authority to take action is. At present, the ability to prosecute seems to fall on many parties with none actually doing it.**

Question 33: What other comments would you make on the process of placing a company into administration and are there other areas that could be improved?

RESPONSE:

The following additional comments were mentioned by the Respondents:

- **Needs to be simple, efficient, cost effective and to give Directors options to protect companies as a going concern more quickly than under the current regime.**

- **Whilst often covered by a Court Order there are currently no requirements to report to creditors or stakeholders, which could be introduced in winding up rules.**

- **Specific pre-defined time limits for reporting and completion.**

- **Out of court appointments can be appealed to the Court with directors responsible for costs.**

- **Directors and officers must be required to provide a statement of affairs. Failure to comply must have a workable remedy and there should be adequate penalties.**

- **A proposal should be prepared (for presentation shortly after appointment) outlining the actions to be taken and what the Administrator hopes to achieve.**

- **Where Administration is used to sell a business through pre-packaged sale, a Guernsey Insolvency Practitioner should be required to follow SIP's, as they would in the UK (SIP16). This will ensure best practice procedures and avoid criticism of the sale.**

5.2.4 Creditor's Committee Procedures in Administration (Page 26)

Question 34: How can the interests of creditors be best represented in an Administration?

RESPONSE:

Interests of creditors could be best represented by all or some of following recommendations:

- **A notice being sent to the creditors (especially secured creditors) following the appointment and explaining the process in writing.**

- **A meeting of the creditors should be held shortly after appointment, and the office holder should explain, among others things, the expected dividend and how the office holder is to be paid.**

- **A required reporting framework / more formal reporting should be required, or statutory reporting introduced.**

- **Creditors should be asked to comment on any points that they consider require investigation as they may be aware of wrongdoing, or the location of additional assets and antecedent recoveries.**

- **A creditors committee could be formed and an opportunity to vote on proposed courses of action.**

- **A proper proving process should take place (which may happen during the liquidation period).**

Consideration is also required around the strength of a moratorium, whether administration is to be used as a proper rescue mechanism or not (as moratoria offer a genuine risk of undermining a rescue strategy, particularly across a multi-jurisdictional group where the moratoria in those other jurisdictions are stronger) and if creditors should have any statutory right to information.

Question 35: Do you believe it would be appropriate to require an administrator to call a meeting of the company's creditors within a minimum period of time after his or her appointment and to permit the creditors to resolve to establish a creditors' committee?

RESPONSE:

The majority of respondents agreed with these points.

It was also noted by some respondents that the Administrator should present a statement of affairs and proposal for the progress of the Administration, and there must be some guidance on how claims are established as there is no statutory guidance on this for administrators. Furthermore, there should be appropriate guidance on how to manage a creditors' committee (such as that contained in SIP15).

However it was suggested by one respondent that the more sensible middle ground might be to require administrators to hold an initial meeting and present proposals for conduct to the creditors at that meeting thus at least setting out the proposed course of the administration at that stage. Any voting at such meetings ought to be governed by value of claims.

Question 36: If so, what obligations should there be on the Administrator to provide information to provide to the creditors' committee as the administration progresses?

RESPONSE:

The majority of respondents suggested six monthly reporting and feedback included:

- **Receipts and payments account with a progress report should be regularly distributed;**

- **Minimum regular reporting guidelines should be established but more frequent reporting may be at the discretion of the Administrator, depending on the size and complexity of the matter. Also, more frequent reports could be requested by (say)**

two members of the liquidation committee (if introduced under these reforms.).

- **UK requires meetings / reports every 3 - 6 months (although committee can agree to do away with the requirement of meetings). Committee consultation is required for litigation/investigations. Committee approval is required for fees.**

Question 37: What are the appropriate mechanisms for bringing an Administration to conclusion?

RESPONSE:

There was a number of suggestions from respondents for bringing an administration to conclusion:

- **If issues are resolved / company is solvent, return to directors.**
- **If insolvent or objectives of the administration cannot be met, place into liquidation.**
- **Liquidation if there are assets to distribute (although query whether the transfer to liquidation can be 'out of court' to avoid cost).**
- **A fixed duration (only extended by agreement of creditors or Court Order).**
- **Straight to dissolution following administration should be an option although there could be an option for Creditors and Members to object.**
- **There could be a possible exit via CVA.**

It was noted by a respondent that there needs to be more statutory guidance as to what is required to justify a hand back as a company as a "going concern". A definition (i.e., able to satisfy the solvency test for a period of 12 months) ought to be imposed.

5.2.5 Powers of Administrators and Exit from Administration (Page 26)

Question 38: Do you agree that the power to make a distribution of the company's assets and the ability to make a part payment of a debt should be express powers?

RESPONSE:

The majority of respondents agreed with this on the basis that it would avoid the requirement for further Court applications.

It was noted by one respondent that the current provisions, subject to interpretation, would allow for both of these things. That said, the introduction of formal provisions for each would be welcome.

However distributions would be well supported by a proper system for proving claims.

Question 39: Do you believe it is appropriate to allow an insolvent company in administration with no assets to distribute to move straight to dissolution and, if so, what procedural safeguards would be necessary?

RESPONSE:

The majority of respondents agreed with this however the following was also suggested to permit this:

- **A report to be provided by the Administrator to confirm that no antecedent transactions have been identified by the Administrator, there are no assets available and that in his opinion, the company should move straight to dissolution.**
- **Must be agreed by creditors.**
- **Advertising in a local Guernsey newspaper and a paper in daily circulation in the Company's primary country of business and a defined notice period prior to being able to have the company dissolved.**
- **Administrators must also be required to investigate the conduct of past officers and report on such before dissolving. If concerns do arise, investigatory powers are required or there must be a requirement to pass to liquidation.**
- **A move straight to dissolution avoids the requirement for further Court applications.**

It was noted that the Court has allowed an immediate move to dissolution from Administration on one case, following a successful Scheme of Arrangement.
If allowed, the provisions to be able to restore should be extended to cover these companies and the events occasioning release of the administrators from liability would also need extension.

Question 40: What additional powers ought to be granted to an administrator?

RESPONSE:

Respondents suggested the power to apply for recognition of Administration in a foreign jurisdiction and express powers for delivery up of information from directors and officers.

Another respondent noted that the existing powers are very widely drawn and can cover most scenarios that arise with the correct interpretation and/or directions. Clarity is, however, essential in some areas for example the ability to compel delivery of information. Further, see comments above regarding ability/power for administrator to review conduct of past officers.

5.2.6 Voluntary Winding Up (Page 27)

Question 41: What has been your experience with the voluntary winding up process?

RESPONSE:

Overall respondents seemed to have a positive experience finding the process straightforward / flexible. However it was noted that

- **The fact that a company can be placed into insolvent liquidation without creditor involvement / notice or a post appointment creditors meeting is open to criticism.**
- **As there are no restrictions on who can be appointed as voluntary liquidator, it can potentially be open to abuse.**
- **It is often difficult to justify a compulsory liquidation as there is a greater cost, but no greater powers than in a voluntary winding up.**
- **Lack of requirement for an independent liquidator being appointed in a voluntary winding up means that fund administrators and directors are undertaking liquidations of companies with which they have prior fiduciary capacity. The BVI, for example, prohibits parties who have been involved in the administration of the company, or who has been an office holder in the two years prior to a solvent winding up from being appointed as liquidator.**

One respondent was in favour of keeping the current existing regime as far as possible due to its simplicity and efficiency with the exception of hardwiring creditor rights.

Question 42: Do you consider it necessary to insert greater protection of creditor interests into the existing regime?

RESPONSE:

All of respondents agreed on this point and noted the following recommendations:

- **There should be a clear distinction between a solvent and insolvent winding ups.**
- **Statutory consultation with creditors if the company is insolvent is vital. Consider mandatory reporting requirements to creditors in the situation of an insolvent voluntary winding up and the requirement to call a meeting of creditors. The creditors are stakeholders and should be engaged in the process and should be asked to provide input on areas requiring investigation.**
- **Creditor lists should be made available to all creditors to allow greater transparency.**

- **In the UK, creditors would be required to ratify the basis of fees, after approval of the shareholders. This should be a requirement in Guernsey and would enhance the reputation of insolvency (presumably in the case of an insolvent winding up).**

- **annual and final reports with receipts and payments accounts should be provided to creditors as well as shareholders in insolvent winding-up.**

The ability to convert a liquidation to a compulsory on application by a creditor is a useful existing tool. In practice, there seem to be few examples of this being used and better regulation of appointment takers should ensure better protection for creditors.

Question 43: What other reforms could be usefully made to the voluntary winding up procedure?

RESPONSE:

The following is recommended:

- **If the Company is insolvent and has some assets, consider updating creditor reporting regime or involvement by way of a committee.**

- **There should be a requirement for the Liquidator to provide his / her consent to the appointment.**

- **When a final meeting is held and there are insufficient shareholders available for the meeting to be quorate, there should be clear legislation so that Liquidator can conclude the liquidation in the absence of a quorum.**

- **There should be clear procedures in legislation for dealing with unclaimed dividends.**

- **Statutory requirement for directors to prepare and sign declarations of solvency or statements of affairs with legal liability.**

- **Notice should be given to creditors if it is an insolvent liquidation.**

- **If insolvent, liquidators should have the power to disclaim onerous contracts e.g. property leases, where the liquidators have no financial interest At present, a liquidator may be required to keep a case open whilst he awaits a landlord's agreement to a surrender. This can add significant time and cost to a case.**

- **In the UK, if a company in solvent liquidation is subsequently found to be insolvent, a meeting of creditors must be convened and the company formally transferred to insolvent liquidation. The liquidator must resign and be replaced, and the directors are then subject to investigation and possible disciplinary action as a consequence of swearing an incorrect declaration of solvency.**

- **Introduction of a proof of debt procedure.**

- **Law should allow closure of a winding-up notwithstanding an inquorate final meeting, as is permitted in UK legislation.**

5.2.7 Improving the Statutory Demand Procedure (Page 27)

Question 44: Do you consider that the amendments suggested in this section would be effective in improving the process of enforcing debts by companies?

RESPONSE:

Whilst respondents' views have not been averse to developing similar or equivalent "set aside" provisions adopted by other jurisdictions, there have been some reservations expressed regarding its necessity and application.

The proposal shares similarities with rule 6.4 of the United Kingdom's Insolvency Rules 1986 ("IR 1986"), which permits individuals to submit an application to set aside a statutory demand; however, there is no equivalent for corporate entities. A company seeking to challenge winding up proceedings on the basis of a statutory demand in the United Kingdom would need to:

- **Apply for an injunction to restrain a presentation or advertisement of a petition (r.4.6A IR 1986);**
  or, alternatively

- **Oppose the creditors' application for a winding up order against the company.**

The Court has jurisdiction to intervene where one of the following limbs are applicable:

1. **Debt is genuinely disputed on substantial grounds;**
2. **There is a genuine cross claim/right of set off;**
3. **There is a reasonable excuse for not paying the debt ; or**
4. **The Court has no jurisdiction**

The minority view is that any disputes pertaining to the debt should be addressed by the Court in the event that a winding up application is brought, rather than as a pre-cursor to it. Notwithstanding, from a practical viewpoint, the opposite majority view is supportive of the proposals by incorporating a provision to allow debtor companies to challenge the purported debt at an earlier stage would be more time and cost effective.

Furthermore, the onus is on the debtor to respond expediently to the statutory demand and precludes the Court from adjudicating on the matter, if the debtor fails to file an application to aside within the prescribed period. With respect to the timetabling of when an application should be filed, it is suggested that amending the proposed wording to read must, rather than may, be filed within 7 days of service (set out at page 28 of the consultation paper).

Question 45: What other changes could be made to make the Statutory Demand process work more effectively?

RESPONSE:

The following points were submitted by respondents (although are not majority views in any way):

- **Permit service of Statutory Demands electronically.**
- **The value of the debt should be increased to £10,000+ akin to the petty debt limit, unless there is an unsatisfied petty debt judgment in which case the remedy could be statutory demand followed by liquidation.**

5.2.8 Proof of Debt Procedure (Page 28)

Question 46: How should insolvency law go about establishing and ranking claims against an insolvent company?

RESPONSE:

There was a consistent theme shared amongst the respondents that a precise framework to establish and rank creditors' claims against an insolvent company is essential to reform. Liquidators should be granted specific powers to be able to address the inherent issues when seeking to assess creditors' respective claims.

After considering systems that are effective in other jurisdictions, one approach could be to adopt the current regime under UK jurisprudence, either by way of incorporating an additional section in the Companies (Guernsey) Law 2008 or by drafting new legislation specific to Insolvency proceedings in Guernsey.

Present practice in the UK is governed by the combination of the Insolvency Act 1986 and the Insolvency Rules 1986. In combination, the Act and Rules create a statutory scheme that mandates how insolvency practitioners (IP's) must apply assets they can realise to meet claims by creditors. The scheme places creditors into one of six distinct classes and assets realised by an IP must be used to satisfy the claims of each class in descending order.

The six classes of creditors established by the statutory scheme are:

1. **Holders of fixed charges and creditors with proprietary interest in assets;**
2. **Expenses of the insolvent estate (including, but not limited to, expenses incurred in the course of an insolvent company to continue to trade and as defined in Rules 2.67 and 4.218 of the Insolvency Rules 1986);**
3. **Preferential creditors;**
4. **Holders of floating charges;**
5. **Unsecured Creditors; and**

6. Shareholders

Whilst there were varying submissions concerning what would be the most appropriate system of ranking claims against an insolvent company. The following points should be given due consideration when the Department drafts a proof of debt procedure:

- **Sufficient notice should be given to creditors to submit a claim for the liquidator's consideration (14 days was proposed by respondents');**
- **Clear and unambiguous guidance should be provided by the Department, setting out the factors a liquidator would consider when determining the validity and value of a claim and the evidence a creditor would be required to provide in support of its claim. Any such system must have built into it some process for valuing and determining prospective or contingent claims;**
- **Liquidators should be granted express powers to accept, reject or require further information to determine validity of claim; and**
- **Where a creditors claim is rejected, a clear appeal procedure setting out grounds upon which to challenge the liquidator's decision.**

Question 47: Are there any other issues which ought to be considered in any reform?

RESPONSE:

The following points have been raised in earlier responses set out above in greater detail, however in synopsis:

- **There is a need to implement a standardised form of proof of debt for compulsory liquidations.**
- **That mitigation of claims and the right of set off should be specifically set out in any new legislation.**

5.2.9 Statement of Affairs and Examination Powers (Page 29)

Question 48: What are your views on the ability of liquidators and administrators to access documents and information about the company?

RESPONSE:

Inherent in the duties of a liquidator is the obligation to conduct investigations into the affairs of an insolvent company to determine the extent of its assets and liabilities. Where liquidators' powers to compel directors and officers to produce the company's state of affairs are restricted, this primary duty cannot be effectively discharged.

Granting liquidators equivalent powers to those already held by administrators with legislative force in relation to its investigative duties is both necessary and unanimously welcomed by respondents. The present position is reliant upon the inherent supervision of the Court with respect to liquidators exercising these types of investigative powers which is neither timely nor cost effective. Section 234-236 of the

UK Insolvency Act 1986 provides a clear and concise framework, which could be utilised in reforming the current Guernsey regime. In particular, any reform should introduce provisions that compel directors and officers to provide a detailed statement of affairs and/or attend on the liquidator where the information provided is not sufficient.

Question 49: Have you any experience that you can share with the Department of acting as a liquidator or administrator which can assist the Department's formulation of policy in this area?

RESPONSE:

Lien over Company Records

Where a service provider exercises a lien over company records, the only recourse is to make an application to the Court. This is particularly onerous when estates have limited resources/ assets. Whilst there are alternative avenues that might be pursued to obtain further information, the results returned are not necessarily adequate.

It is recommended that liquidators and/or administrators should be able to access company records, even where there is a lien over such records.

Sanctions for failure to comply with a Court Order

In its capacity as administrator on two occasions, one respondent commented that existing sanctions for non-compliance with a Court Order for delivery of books and/or a company's state of affairs warrants the Department's further consideration. On both occasions the directors' contravened the respective Orders which, under the current law, at the time of the breach became a criminal matter. However, under the current law it is unclear who has the power to prosecute.

Whilst the current legislation is applicable only to companies in administration, there will remain no real incentive, even if the powers of liquidators are brought in line with those of administrators, for directors and officers to comply with Court Orders if the sanctions are toothless in practice. Without a clear indication of whose responsibility it is to enforce fines or summary convictions the Court will continue to be restricted in its power to compel production of salient documents where the sanction for being in contempt of a Court Order exceeds the statutory penalty.

Abuse of Power

Whilst the general consensus is that the law should be reformed to grant liquidators equivalent powers under section 387, there should be sufficient safeguards to ensure the position is not abused by an office holder (i.e. where the liquidator could become party to the proceedings).

Question 50: Do you agree with the proposals to grant liquidators and administrators greater powers to obtain information and documents about the Company in question?

RESPONSE:

For the reasons set out above there is unanimous support for this proposal.

Question 51: Are there any other areas where additional investigation powers could be of assistance in the efficient and orderly administration and liquidation of Guernsey companies?

RESPONSE:

The availability of a Pauline Action (under Guernsey's customary law) provides victims of fraud recourse to trace back assets through the insolvent company. However, increasing the ambit of Guernsey's claw back provisions in a similar vein to UK jurisprudence would be a sensible approach. In particular, the introduction of legislation which would allow office holders to challenge transactions at undervalue/extortionate credit transactions and charges over properties in a period up to liquidation would be welcomed.

Directors and officers should have greater accountability and to address this, there should be an extension of the scope of administrators and liquidators duties to capture directors/officers and service providers in their investigations and an obligation to submit reports pertaining to their conduct. This would act as a powerful deterrent for refusing or failing to provide assistance. Attention is drawn to the UK's Company Directors' Disqualification Act 1986 for further guidance.

5.2.10 Audited Accounts in a Liquidation (Page 30)

Question 52: Do you agree with this proposal?

RESPONSE:

A liquidator is required to report to the Court (or members in a voluntary liquidation) on the financial position, assets available to meet claims and the liabilities claimed and acts in a fiduciary capacity. All respondents agree that companies in liquidations should be exempt from undergoing an audit and obligations to prepare accounts.

It was also suggested that this exemption should extend to deal with the GFSC requirements of insolvent companies.

Question 53: Can you foresee any circumstances when a company that is being wound up should be required to produce audited accounts?

RESPONSE:

The only circumstance in which the respondents could foresee such a need was where there is a large distribution to investors. In such circumstances it was considered that this may call for external audited accounts, if so requested by shareholders.

5.2.11 Preferences and Antecedent Transactions (Page 30)

5.2.12 Disclaimer of onerous assets (Page 31)

5.2.13 Unclaimed Dividend Issues (Page 31)

Question 54: Do you agree with these proposals? If not, please explain why.

RESPONSE:

With respect to implementing claw back provisions; this has been addressed in response to question 51.

In relation to preferences and antecedent transactions, it was agreed that section 424 of the Companies Law should be extended to permit liquidators/administrators to:

1. **Pursue transactions at undervalue (in line with s238 Insolvency Act 1986 of the United Kingdom);**

2. **Set aside extortionate credit transaction (in line with s244 Insolvency Act 1986 of the United Kingdom); and**

3. **Avoid floating charges being placed within a certain period (in line with s238 Insolvency Act 1986 of the United Kingdom).**

Question 55: Can you explain any other options for disclaiming onerous assets and otherwise managing any residual assets such as unclaimed dividends?

RESPONSE:

Presently, where liquidators hold no vested financial interest (i.e. property leases), the matter is kept open whilst awaiting a landlord's agreement to surrender. In practice this can cause considerable additional cost. This could be addressed if liquidators' powers were to be extended to permit them to disclaim onerous contracts where it is reasonable, after consideration of all the circumstances, to do so.

Respondents submitted that unclaimed dividends and/or assets should be held on trust by the liquidator for a reasonable period (12 months has been the approach in other jurisdictions) following the dissolution of the Company. During this period, it was submitted that liquidators should be granted powers permitting them to offset the reasonable costs incurred in resolving the position against those assets.

Alternatively (or after the expiration of the 12 month period) implement a system whereby the State takes charge of the ownerless assets. It was suggested that an extension of HM Receiver General's powers akin to the Official Receiver under UK law could be one approach to achieve this.

5.2.14 Registration of Fixed and Floating Charges (Page 32)

Question 56: What has been your experience in obtaining credit for your business?

RESPONSE:

Securing Guernsey situs personalty was considered simple, clear and notably familiar to lenders in this jurisdiction.

In the context of the impact the introduction of a system of registration for fixed and floating charges would have on the Financial Service Industry, it was agreed that this was outside the remit of the respondents' expertise, is outwith the scope of this consultation exercise and warrants more careful consideration from their firms' respective corporate counterparts in the context of a review of Guernsey's security interests laws. The complexity of undertaking the reform of Jersey's security regime is demonstrative of this.

Question 57: Do you consider that a system of registration for fixed and floating charges would be beneficial?

RESPONSE:

Although this question was considered outside the remit of insolvency practitioners' expertise, the introduction of a system of registration was viewed positively.

This was particularly so, if funders were permitted to "secure" assets and priority over other creditors as this would likely increase the options available for businesses to obtain finance. Moreover, promote transparency for businesses and in respect of creditor and funders make the competing interest more readily identifiable.

Question 58: If you do not consider that a system of registration of fixed and floating charges would be beneficial, please explain your reasons?

RESPONSE:

The respondents did not submit anything further on this issue.

5.2.15 Other areas of potential reform (Page 33)

Question 59: What are your comments in general terms on the above areas of potential reform?

RESPONSE:

In synopsis:

i) Expanding the winding up provisions application to PCC and ICC

It would be a welcomed development if the guidance in the legislation was more detailed (i.e. segregation of assets and liabilities in the winding up of Protected Cell Companies).

ii) Timetabling provisions in relation to insolvency proceedings

Respondents agree with the proposal to examine time frames regarding notice periods.

iii) Appointment of an Independent Liquidator in voluntary winding up proceedings.

There was general consensus that the appointment of an independent and experienced liquidator would provide greater transparency and reduce the risk of salient issues being overlooked.

iv) Requirements re: final general meeting

Additional guidance is given on the position regarding a final liquidation meeting where such a meeting was inquorate

v) Extension of the Court's jurisdiction regarding foreign companies

The strong majority of respondents are firmly in favour of granting the Court jurisdiction to wind up foreign companies, which hold businesses in Guernsey. This would be advantageous and ensure perception of the Guernsey being a creditor friendly jurisdiction.

A minority of those who responded question its necessity in Guernsey at the present time.

vi) Appointment of a Receiver

Appointment of a receiver to assess assets at risk of dissolution in relation to security laws was met with reservation. The view taken was that, should reform be deemed necessary, it should be an overhaul of the system in its entirety rather than pursued in a piecemeal fashion. Another view submitted was that receivership is often expedient and cost effective, which presents itself as a more attractive option for creditors.

vii) Clarity re: transfer of uncertified securities in mutual funds after liquidations

As regards transfers of uncertificated securities, it was opined that this is a commercial matter for the liquidator to deal with, with the assistance of the Court if necessary.

Question 60: Are there any other areas of the corporate insolvency regime which you consider would benefit from amendment?

RESPONSE:

Provisions requiring continued use of utilities in Guernsey (similar to s233 of the Insolvency Act '86 in the UK). At present, utility companies are able to hold liquidators and administrators to ransom for pre-appointment debts.

Possible clarification in the law regarding a Guernsey MVL liquidator's ability to apply to Court for directions.

Make it obligatory to advertise publically an MVL appointment.

We would recommend protection of the simplicity of the insolvent MVL subject to improved creditors' rights.

5.3 Conclusion

Question 61: Do you have any other comments or information that you would like to make regarding any aspect of Guernsey's insolvency regime?

RESPONSE:

The insolvency regime in Guernsey is generally considered as being flexible. This is of advantage in cases where the Court is called upon in areas of complexity or where the estate funds are sufficient for such applications.

Many of the changes proposed in the Consultation Paper, and in the collective ARIES response and those of the responses we have seen, will aid that flexibility by introducing greater certainty and procedure in key areas, which will reduce costs associated with a winding-up and bring Guernsey in line with similar jurisdictions.

Question 62: Are there any other areas of the insolvency law regime that require review, what are your recommendations on those particular issues?

RESPONSE:

No further comments.

Question 63: Do you have any further comments on suggestions on the topics raised in this discussion paper?

RESPONSE:

No further comments.

Disclaimer

Please note that consultation responses may be made public*. (Sent to other interested parties on request, quoted in a published report, reported in the media, published on www.gov.gg, listed on a consultation summary etc.)

**Please indicate in your response how the Department should treat your response, the options available include:*

I agree that my comments may be made public and attributed to ARIES L&RC ☒

I agree that my comments may be made public but not attributed (i.e. anonymous) ☐

I don't want my comments made public ☐

Name:	
Address:	