

Consultation Paper:

# The introduction of a Creditors' Winding up regime

JULY 2021

## Consultation on the draft amendments to the Companies (Jersey) Law 1991

### Summary:

The Government of Jersey is seeking to amend the Companies (Jersey) Law 1991 (the “**Companies Law**”), to introduce a process whereby a creditor can apply to the court for an insolvent company to be placed into a creditors’ winding up and for a liquidator to be appointed to conduct the winding up. The Government has had the advantage of views from industry representatives and the Viscount of the Royal Court ahead of the publication of this consultation, which views have informed the drafting of the relevant amending legislation: the Draft Companies (Amendment No. 8) Regulations 202\_ , and the Draft Companies (General Provisions) (Amendment No.6) Order 202\_ (the “**Draft Amendments**”). This consultation now seeks views on the draft legislation.

### Date published:

19 July 2021

### Closing date:

6 September 2021

### Supporting documents attached:

Draft Companies (Amendment No.8) Regulations 202\_  
Draft Companies (General Provisions) (Amendment No.6) Order 202\_

### How will we use your information?

The information you provide will be processed in accordance with the Data Protection (Jersey) Law 2018 for the purposes of this consultation. For more information, please read our privacy notice at the end of this document.

The States of Jersey may quote or publish responses to this consultation including (*sent to other interested parties on request, sent to the Scrutiny Office, quoted in a published report, reported in the media, published on [www.gov.je](http://www.gov.je) listed on a consultation summary etc.*) but will not publish the name and addresses of individuals without consent. Confidential responses will still be included in any summary of statistical information received and views expressed. Under the Freedom of Information (Jersey) Law 2011, information submitted to this consultation may be released if a Freedom of Information request requires it, but no personal data may be released.

Do you give your permission for your comments to be quoted?

1. No
2. Yes, anonymously
3. Yes, attributed

Name to attribute comments to:

Organisation to attribute comments to, if applicable:

## **Ways to respond**

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Alternatively, Jersey Finance will be collating an industry response and these responses should be sent to:

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This consultation paper has also been directly provided to:

- Association of Restructuring and Insolvency Experts – Channel Islands (Jersey Branch) (“**ARIES**”)
- Institute of Directors – Jersey Branch
- Jersey Business
- Jersey Chamber of Commerce
- Jersey Consumer Council
- Jersey Finance Limited
- Jersey Society of Chartered and Certified Accountants
- The Law Society of Jersey
- The Viscount of the Royal Court of Jersey
- Citizens Advice Jersey
- Jersey Bankers Association

## INTRODUCTION

Jersey is recognised as a leading international centre for financial services, offering flexibility in a well-regulated environment, and with a wide body of experienced professionals able to assist. The Government of Jersey keeps the Companies Law under review to ensure that it is best able to provide solutions for those acting within its framework.

Accordingly, the Government, representatives of the Jersey Law Society's Financial and Commercial Law Sub-Committee, ARIES, and the Viscount, have been in discussions concerning the development of Jersey's corporate insolvency law. It has been identified that it would be of benefit to introduce, alongside existing procedures, a means by which a creditor of a company can apply to the Royal Court for an insolvent company to be wound up with a liquidator appointed to conduct the winding up.

It has been expressed that it is often the case that creditors have already been in discussion with a failing company and an insolvency practitioner for some time, to try and settle on an agreed plan for an orderly winding up. If the creditors are not in control of the appointment of the liquidator and the conduct of the winding up, this work may be futile. It is also clear that professional insolvency practitioners usually have direct access to significant resources to deal with complex insolvencies. They can commit resources as and when needed leading to efficiency and speed, which is especially useful in the early stages of a liquidation. A liquidator could also be appointed who has the relevant sector experience and expertise, where that is particularly needed.

It is suggested that the new procedure should draw on the existing processes within the Companies Law and the Bankruptcy (*Désastre*) (Jersey) Law 1990 (the "**Bankruptcy Law**"), as well as looking to the procedures in place in other jurisdictions. By following established concepts and processes, the procedure will be familiar to practitioners, investors and intermediaries and will be grounded on tried and tested and widely understood procedures across jurisdictions, reflecting the reality of complex cross jurisdictional commerce today and enhancing certainty in relation to exit and contingency planning.

The regime will be available to any creditor, but it is anticipated that it will be of particular benefit in a corporate insolvency situation.

## BACKGROUND

### Current ways in which a company can be brought to an end

There are currently four principal ways in which a company can be brought to an end in Jersey:

1. *Désastre*: Bankruptcy Law:

A creditor with a liquidated debt of over a prescribed sum, currently £3,000, can apply to the court for a declaration that the assets of a company can be placed *en désastre*. All assets of the debtor vest in the Viscount who administers the process leading to an eventual distribution of any assets. The Viscount is entitled to levy a fee prior to this distribution.

2. Summary Winding Up: Companies Law, Articles 145 to 154A:

The directors of the company sign a statement of solvency (to the effect that the debts of the company can be discharged in full within six months of the start of the summary winding up) and a special resolution is passed to wind up the company. The directors may carry out the

winding up, or the shareholders may appoint a liquidator to administer the affairs of the company. Control of the process is by way of the shareholders rather than any creditors. As noted this is a process normally used for a solvent winding up of a company.

### 3. Creditors' Winding Up: Companies Law, Articles 156 to 186:

The name is something of a misnomer as this process is not in fact led by the creditors. Where it is not possible for the directors to sign a statement of solvency, or it has proved to be the case that it is not possible to discharge the debts of the company in the six months following a summary winding up (that is, the company is insolvent), the members of the company can pass a special resolution to wind up the company. The shareholders and the creditors each nominate a liquidator; if there is a conflict the choice of the creditors prevails. Control of the process is then by way of the creditors rather than the shareholders. The liquidator will charge a fee for acting as liquidator.

### 4. Court Winding Up: Companies Law, Article 155:

The court may order the winding up of a company on the grounds that it is just and equitable to do so, or it is expedient in the public interest to do so. It is not necessary for the company to be insolvent, although it may be. Examples of the circumstances where this process might be used is where there is a complete breakdown in relations between majority shareholders in a small company which has led to deadlock; the purpose for which the company was created has been achieved in full or has become impossible to achieve; or where there has been a justifiable loss of confidence in the management of the company due to fraud, dishonesty or serious mismanagement. Although this is meant to be a remedy of last resort, this route has been more frequently used in recent years with the words "just and equitable" given a flexible and wide interpretation (particularly in circumstances where it is desirable to keep a business going for a time) due to the flexibility of the orders the court can make and the absence of other options in this regard. The application is made by the company, a director or shareholder or, in certain circumstances, by the JFSC or the Minister for Economic Development, Tourism, Sport & Culture and a liquidator is appointed by, and is answerable to the court (and not directly to the creditors).

It is also possible for a company to come to an end on the happening of a specific event or at the expiration of a certain time period (if that is the type of company concerned), or to be struck off by the Registrar for failure to file an annual return.

### **Qualification requirements for a liquidator**

The current qualification requirements for a liquidator (other than the Viscount who may act as a liquidator by virtue of his or her office) are specified in Part 5 of the Companies (General Provisions) (Jersey) Order 2002 (the "**Order**"), pursuant to Article 188 of the Companies Law.

In short, a liquidator must be an individual and a member of the:

- a. Institute of Chartered Accountants in England & Wales; and/or
- b. Institute of Chartered Accountants of Scotland; and/or
- c. Association of Chartered Certified Accountants; and/or
- d. Institute of Chartered Accountants in Ireland.

There are also restrictions on directors, shareholders, and similar connected persons of the relevant company acting as liquidator of the relevant company.

### **Other Jurisdictions**

A remedy like that proposed, is available to creditors in several other jurisdictions including, but not limited to, the UK, Guernsey, the Isle of Man, Bermuda, the British Virgin Islands, the Cayman Islands, Mauritius and Singapore. It is apparent that the UK provisions have been the basis for the legislation adopted in many of the various other jurisdictions. The process appears to work well elsewhere, and it is considered desirable, as stated above, to reflect certain common and well-tested principles in the proposals to ensure familiarity for those involved in cross-border insolvencies and to enhance contingency planning in financial transactions.

### **PROPOSALS**

It is thus proposed that the Companies Law is amended, by way of Regulations and an Order, to permit a creditor (and not just a shareholder) to bring a winding up application, and for the appointment of a liquidator or provisional liquidator (as the circumstances may require) to be made from a register of private sector insolvency practitioners to be kept and maintained by the Viscount.

#### **The path to a creditors' winding up**

Full detail is found in the draft Regulations and Order, to which reference should be made, but in summary, the process is as follows:

Step 1            The creditor serves a Statutory Demand (by personal service, through the Viscount's Department) on the company for a sum at or over the prescribed minimum (currently proposed at £3,000) unless there is other indisputable evidence of insolvency such as a clear event of default or agreement, when a Statutory Demand will not be required.

***If the company fails to pay the debt due within 21 days of issue of the statutory demand and has not disputed the debt is due and owing within the 21 days or where a statutory demand is not required***

Step 2            Save where the creditor has agreed not to issue an application or the claim is for the repossession of goods, the creditor may, on notice to the company, immediately apply to the court to wind up the company and/or appoint a provisional liquidator. The form of application is likely to be by way of a Representation accompanied by a supporting affidavit.

Step 3            Having reviewed the application, the court approves the commencement of the winding up application and/or appointment of a provisional liquidator and fixes a date for the hearing of the application.

***Assuming the creditor's application is successful***

Step 4            The court orders the winding up of the company and appoints a liquidator(s) and the winding up of the company commences. The liquidator(s) must be registered with the Viscount to be appointed. The liquidator may, or may not, be the same as any provisional liquidator.

Step 5 The liquidator(s) must notify various persons and publicise the appointment, and within 7 days of appointment must call a meeting of the creditors to take place within 21 days of the court order.

After the commencement of the winding up, no action shall be taken or proceeded with against the company save with the leave of the court.

***Assuming the creditor's application is unsuccessful (because the debt is successfully disputed)***

Step 6 The winding up application is dismissed. The issue of costs will be at the discretion of the court although, depending on the circumstances, it may well be the case that the creditor will be required to pay the company's costs of and associated with defending the winding up application.

It is anticipated that a Practice Direction will be issued by the Royal Court in respect of the detail of the court procedures to be followed in respect of an application for a creditors' winding up and to provide guidance on the completion of the necessary papers to be lodged with the court. The court can adjourn the application for further information or otherwise, at any point.

The prescribed minimum liquidated sum is set out in the Order. It is envisaged that it will mirror that adopted for a *désastre* application under the Bankruptcy Law, which is currently £3,000.

- Q1. Do you agree with the suggested method of application for a creditors' winding up, i.e. by way of a Representation supported by an affidavit? If not, please provide details and alternative suggestions.**
- Q2. Do you have any comments on the proposed time periods in the creditors' winding up application process specified more precisely in the draft Regulations, e.g. the time within which a notice must be placed in the Jersey Gazette? If not, please provide details.**
- Q3. Do you have any views on calling the proposed process the same name as the existing process set out in Art.155 of the Companies Law? If you think the new process should be called something else, please provide suggestions.**

**Statutory Demand**

The proposals envisage a more formal demand process by which a creditor will be able to evidence the insolvency of the debtor by showing that they have issued a formal demand – a statutory demand – to the creditor for payment, and that the debt has neither been paid nor disputed, within 21 days thereafter. The form of the demand will be prescribed and will make the consequences of non-payment clear. It is hoped that this process will lead to more certainty by showing that where a debt is not disputed and where a company is not able to pay its debts as they fall due, it is thus deemed to be insolvent. This process assists a creditor who may have no visibility of a debtor's financial position and may find it difficult to prove insolvency. It will also protect the debtor by ensuring that a creditor cannot commence proceedings without due notice to the debtor; a vague threat of legal proceedings will not be sufficient.

That said, it will not be necessary to issue a statutory demand if there is already clear evidence of the debt being due and remaining unpaid, such as a clear event of default, or where it has been agreed that the creditor may make an application.

The creditor is not permitted to issue a statutory demand where the debt is for less than £3,000, the creditor has agreed not to, or where the creditor's claim is one for the repossession of goods.

If the court finds there is no clear evidence of insolvency, the applicant will be at risk of being penalised in costs and the court will make whatever order is necessary as to the application.

- Q4. Do you agree that only creditors with a debt of £3,000 or more should be able to instigate winding up proceedings? If not, why not?**
- Q5. Do you agree with the suggested requirement for the issue of a statutory demand?**
- Q6. Do you think that the process provides sufficient comfort to a creditor that company assets will not be dissipated? If not, please explain why.**
- Q7. It is envisaged that a statutory demand is served in most cases. However, where there is other clear evidence of insolvency or consent, it is not required. Do you agree with this proposal? Is this wording too imprecise?**

#### **Appointment of a Provisional Liquidator**

A provisional liquidator may be appropriate where there is real concern that between the presentation of the application to the court to wind up the company and the making of a winding up order by the court, the company's affairs will not be properly conducted or its assets will be dissipated. It is therefore envisaged that an application for the appointment of a provisional liquidator can be made to the court at any time after an application is made for a creditor's winding up and the court, if minded to appoint a provisional liquidator, will grant the provisional liquidator powers as it deems fit. In practice, the basic powers usually awarded to a provisional liquidator are:

- To safeguard the assets of the company;
- To preserve the company books and records;
- To investigate the affairs of the company;
- To prevent mismanagement or misconduct on the part of the company's directors; and/or
- To sell any perishable assets to preserve their value.

The appointment of a provisional liquidator will have the effect of freezing any action or proceeding against the company or its property unless permission from the court has been obtained. As with the appointment of a liquidator, a secured creditor's rights of enforcement remain unaffected by the appointment of a provisional liquidator.

- Q8. Do you consider that the ability to appoint a provisional liquidator is desirable? Please provide reasons.**
- Q9. Are there any other factors or safeguards that should be taken into account or powers that should be given to a provisional liquidator? Should the creditor or the company be able to apply to remove a provisional liquidator?**



## **Security**

A secured creditor will continue to be able to enforce its security if a company is placed into a new creditors' winding up. The existing moratorium that applies to the existing creditors' winding up regime (Article 159 of the Companies Law) would apply to the new creditors' winding up regime. It is not intended to extend the moratorium for the purposes of the winding up.

**Q10. Do you think any additional points need to be covered in respect of secured creditors?**

## **Registration of Liquidators**

As noted above, the qualifications of a person seeking appointment as a liquidator of a public company or a company being wound up pursuant to the existing provisions in the Companies Law are currently specified at Article 7 of the Companies (General Provisions) (Jersey) Order 2002.

The proposals envisage widening the categories of professionals to include a UK licensed insolvency practitioner, and also impose additional experience requirements. Furthermore, a person who wishes to act as a liquidator or provisional liquidator will be required to apply to the Viscount for registration on the "Register of Approved Liquidators". This is to ensure that only suitably qualified persons with requisite experience are appointed. To obtain registration with the relevant bodies, the practitioner must also be a fit and proper person.

The amendments envisage that those individuals who wish to become an Approved Liquidator must:

- Be a Jersey resident.
- Have the necessary experience (to be determined by the Viscount and set out in Guidance); and
- Be licensed in the United Kingdom to act as an insolvency practitioner by one of the recognised professional bodies as set out in the Insolvency Act 1986 (as amended); or
- Be a member of one of the professional bodies set out in the Order.

It is proposed that an Approved Liquidator must be licensed in the United Kingdom, to ensure a sufficient nexus with the regulatory body and in light of the particular requirements for a member to comply with appropriate codes of conduct. It is understood that the recognition process for non-UK qualified practitioners by the UK bodies is a relatively simple process provided the necessary qualifications and experience are evidenced.

**Q11. Do you have any comments relating to the eligibility criteria for approved liquidators that wish to be appointed in Jersey? If so, please provide details.**

**Q12. Do you agree that a company director or shareholder should not be permitted to act as a liquidator for a company that is subject to a creditors' winding up application, unless specifically permitted by the court?**

In addition to the above, to become an Approved Liquidator, an individual must have in place a general bond of £250,000 plus a specific bond of between £5,000 and £5,000,000 for each case, to protect against fraud and dishonesty by the liquidator. The bond would be additional to any professional indemnity insurance that is held by the Approved Liquidator and/or their employer.

**Q13. Do you agree that the concept of a proposed bond for approved liquidators is an appropriate means of security in addition to professional indemnity insurance?**

To enable Approved Liquidators to make use of specialist skills that may not necessarily be available in the Island, it is proposed that a non-Jersey resident liquidator may be appointed as a joint liquidator or joint provisional liquidator of a company, but only alongside an Approved Liquidator. A liquidator or provisional liquidator who is not an Approved Liquidator will not be permitted to act alone and will be subject to approval by the court and supervision within the jurisdiction.

**Q14. Do you agree with this approach in relation to liquidators from outside the jurisdiction? Should these liquidators be required to register in a separate part of the register? Should they have a minimum qualification and experience level?**

It is suggested that Approved Liquidators will be required to renew their registration with the Viscount annually and that in addition to providing evidence of professional and residential qualifications, insolvency practitioners must provide the Viscount with details which confirm that they satisfy the specified criteria.

**Q15. Do you agree that liquidators wishing to appear on the Register of Approved Liquidators should be required to register annually? If not, how frequently do you think they ought to apply to register?**

It is proposed that a fee, yet to be determined but anticipated to be in the region of £800, will be payable annually by each individual wishing to be registered as an Approved Liquidator upon registration and re-registration. If the new creditors' winding up procedure is supported, there may be a limited impact on the current income of the Viscount which it is anticipated would be offset by the projected income from the proposed registration fees.

**Q16. Do you agree that the proposed sum of £800 is appropriate? If not, please provide an indication of the fee level you consider would be more appropriate with reasons.**

This amendment will apply to circumstances where a liquidator is appointed to deal with a public company and also a liquidator appointed in accordance with the existing provisions of Chapter 4 of Part 21 of the Companies Law (current creditors' winding up process) and not only to liquidators or provisional liquidators appointed under the new procedure. It is suggested that it should in fact apply to all liquidators appointed to conduct a winding up of a company – including for a summary winding up of a private company – and whilst this is not currently reflected in the drafting, this is considered to be a positive suggestion which, subject to adverse responses to this Consultation Paper, the Government is likely to follow.

**Q17. Do you agree that the requirement to register as a liquidator and/or provisional liquidator and be placed on the Register of Approved Liquidators should apply to the appointment of all liquidators appointed under the Companies Law and/or Bankruptcy Law howsoever appointed? If not, why not?**

**The winding up**

The role of the liquidator (or provisional liquidator, where applicable) will reflect that of a liquidator currently appointed under the Companies Law and/or Bankruptcy Law and they will have a similar

span of powers available to them. In general terms, the liquidator's role is: 1) to realise the assets of the company; and 2) to distribute the proceeds amongst the creditors in a strict order of priority. The liquidator has a duty to dispose of assets at the highest possible price to maximise the amount available to creditors. A liquidator may also issue proceedings in their own name, or that of the company, to recover assets for the benefit of the insolvent estate. The liquidator has a duty to investigate the conduct of the company's officeholders and has the power to take action against those officeholders (or former officeholders) for the benefit of creditors, for example, where a liquidator can show the directors did not try to minimise losses even when they knew the company could not avoid being subject to an insolvency process recover.

Directors remain in office after a liquidator is appointed but their powers to control the company's affairs or act in the company's name cease once the winding up order is made. Directors are under a duty to co-operate with the liquidator (or provisional liquidator), to deliver up any books, papers, and records in their possession, and to provide such information as requested regarding the company's business, affairs, and dealings. The full detail of the powers and duties of a Liquidator is set out in the Law (as amended by the Regulations and Order) and should be referred to for the full effect.

**Q18. Do you think the liquidator (or provisional liquidator) should have any additional powers? If so, please specify.**

A liquidator and/or provisional liquidator is entitled to be paid for the work that they do in carrying out their duties and functions administering the company, realising assets, and paying creditors. Under the proposed regime, the remuneration of the liquidator will be fixed by the court. Generally speaking, the level of remuneration will depend on the complexity of the case, any extra responsibility that is required of the liquidator or provisional liquidator, how effectively the liquidator and/or provisional liquidator is carrying out or has carried out their duties, and the value and nature of the assets that the liquidator has to deal with. The Court will have a supervisory jurisdiction over the liquidator's remuneration and a creditor can apply to court for a determination of a question arising in the winding up.

**Q19. Do you consider that any further controls on the remuneration of the liquidator are desirable or practical?**

#### **Supervision of the liquidation and costs of the liquidation**

The Viscount will be responsible for maintaining the Register of Approved Liquidators and ensuring that it is available to the public. However, a liquidator and/or provisional liquidator is an officer of the court and subject to its supervision and directions. In circumstances where the Viscount receives representations regarding the alleged poor conduct of an Approved Liquidator (or jointly appointed non-Jersey resident liquidator or provisional liquidator), the Viscount will have the power to request information and documentation from an Approved Liquidator or co-appointed liquidator and to refer an Approved Liquidator or co-appointed liquidator or provisional liquidator to the court for further action, if appropriate. The Viscount will also have the power to suspend or postpone a decision (such as to sell assets) pending consideration. Obviously in all these matters the Viscount will have regard to the need to act swiftly and with regard to the circumstances of the particular liquidation. Detail as to this is set out in the draft Order.

It is likely that, should they be incurred, perhaps through the need to consult third party experts, the Viscount will be able to recover disbursements arising because of such investigations as a cost of the Liquidation.

The Viscount may also examine and take copies of any records kept in relation to the liquidator(s) and/or provisional liquidator(s)'s functions including any records kept by a third party providing financial services by way of business to the company and/or liquidator(s)/provisional liquidator(s). This ensures that the Viscount has access to information held by a company's bank, accountant, auditor etc.

The Viscount will have no power to apply any sanction to a liquidator and may only refer any significant concerns to the court.

In the event the court orders that an Approved Liquidator should be removed from the Register, the Viscount will be required to remove the name of the said Approved Liquidator forthwith. Separately, the Viscount may refuse an application or remove insolvency practitioners from the Register if circumstances change such that they do not meet the qualification (both professional and/or residential) requirements, or do not seek to renew their registration.

**Q21. Do you agree all liquidators and provisional liquidators should be subject to enquiry by the Viscount regardless of whether they are appointed by way of a creditors' winding up, a summary winding up or a court (just and equitable) winding up? If not, please provide details.**

**Q22. Do you have any comments in relation to the recovery of the Viscount's disbursements?**

### **Protection for Third Parties**

A key issue for the Government of Jersey in considering these proposals is the balance to be struck between ensuring a competitive environment for financial services, with the need to protect other parties. Consequently, it is proposed that other creditors, shareholders and directors of the company which is the subject of a creditor's winding up application will have the right to be notified of the impending application and to file an objection to the winding up of a company, for example if a debt is disputed by the company. It is also possible for any creditor or a contributor to apply to the court for the determination of a question arising in the winding up, or for the court to exercise any of its powers in relation to the winding up pursuant to Article 186A the Companies Law.

Consideration has also been given as to whether or not it is possible, or desirable, to permit a shareholder or director to bring an action to recover damages on behalf of a company where it is discovered that the company was not in fact insolvent at the date that the application for a winding up was made, and losses have been sustained as a consequence of the Order. This reflects the position in the Bankruptcy Law and does not apply where the applicant has acted reasonably and in good faith. Industry representatives have suggested that this is not necessary as they cannot envisage when such an action could or should be brought. Respondents are asked to consider whether these provisions should remain within the draft Law.

**Q23. Do you think that if the company was not insolvent at the date the application for winding up was made (whether the process was instigated by way of a statutory demand or otherwise), the company should have a right of action against the applicant to recover damages for or in respect of any loss sustained by the company as a consequence of the application, unless the applicant in making the application, acted reasonably and in good faith?**

**Q24. Do you think the provisions at Article 186A are sufficient to provide protection? Should any other category of person be added? Do you consider that any additional measures should be taken to protect third parties? If so, please provide details.**

Currently the proposed amendments relate only to Jersey registered companies. It is noted that Cayman has a wider scope for their winding up provisions to include foreign companies that are carrying on business in the Cayman Islands or have property located in the Cayman Islands, but this is, at this time, not included. In the event a creditor wished to wind up a foreign company carrying on business in Jersey or which had property located in Jersey, it would be possible to make an application for a *désastre*.

**Q25. Do you agree that the proposed winding up provisions should relate only to Jersey registered companies, or should the winding up provisions be extended to include foreign companies carrying on business in Jersey or with property in Jersey?**

The proposed amendments envisage that the appointment of the liquidator will take effect from the date of the order but that the creditor or liquidator will be able to recover costs incurred in presenting the representation as part of the liquidation.

**Q26. Do you have any comments on the relevant commencement date for the winding up or connected timings?**

#### **Time period for consultation**

The Government of Jersey welcomes any comments in response to this Consultation by close of business on Monday 6 September 2021.

**Q27. Overall, are you satisfied with the proposed creditors' winding up application process? Please provide any additional comments particularly if there are some points of disagreement.**

## **Summary of Questions set out in the Consultation Paper**

The Government of Jersey welcomes general comments on the proposals to amend the Companies Law to enable a creditor to bring a winding up petition against a company and, in particular, on the following specific questions:

- Q1. Do you agree with the suggested method of application for a creditors' winding up, i.e. by way of a Representation supported by an affidavit? If not, please provide details and alternative suggestions.**
- Q2. Do you have any comments on the proposed time periods in the creditors' winding up application process specified more precisely in the draft Regulations, e.g. the time within which a notice must be placed in the Jersey Gazette? If not, please provide details.**
- Q3. Do you have any views on calling the proposed process the same name as the existing process set out in Art.155 of the Companies Law? If you think the new process should be called something else, please provide suggestions.**
- Q4. Do you agree that only creditors with a debt of £3,000 or more should be able to instigate winding up proceedings? If not, why not?**
- Q5. Do you agree with the suggested requirement for the issue of a statutory demand?**
- Q6. Do you think that the process provides sufficient comfort to a creditor that company assets will not be dissipated? If not, please explain why.**
- Q7. It is envisaged that a statutory demand is served in most cases. However, where there is other clear evidence of insolvency or consent, it is not required. Do you agree with this proposal? Is this wording too imprecise?**
- Q8. Do you consider that the ability to appoint a provisional liquidator is desirable? Please provide reasons.**
- Q9. Are there any other factors or safeguards that should be taken into account or powers that should be given to a provisional liquidator? Should the creditor or the company be able to apply to remove a provisional liquidator?**
- Q10. Do you think any additional points need to be covered in respect of secured creditors?**
- Q11. Do you have any comments relating to the eligibility criteria for approved liquidators that wish to be appointed in Jersey? If so, please provide details.**
- Q12. Do you agree that a company director or shareholder should not be permitted to act as a liquidator for a company that is subject to a creditors' winding up application, unless specifically permitted by the court?**
- Q13. Do you agree that the concept of a proposed bond for approved liquidators is an appropriate means of security in addition to professional indemnity insurance?**

- Q14.** Do you agree with this approach in relation to liquidators from outside the jurisdiction? Should these liquidators be required to register in a separate part of the register? Should they have a minimum qualification and experience level?
- Q15.** Do you agree that liquidators wishing to appear on the Register of Approved Liquidators should be required to register annually? If not, how frequently do you think they ought to apply to register?
- Q16.** Do you agree that the proposed sum of £800 is appropriate? If not, please provide an indication of the fee level you consider would be more appropriate with reasons.
- Q17.** Do you agree that the requirement to register as a liquidator and/or provisional liquidator and be placed on the Register of Approved Liquidators should apply to the appointment of all liquidators appointed under the Companies Law and/or Bankruptcy Law howsoever appointed? If not, why not?
- Q18.** Do you think the liquidator (or provisional liquidator) should have any additional powers? If so, please specify.
- Q19.** Do you consider that any further controls on the remuneration of the liquidator are desirable or practical?
- Q21.** Do you agree all liquidators and provisional liquidators should be subject to enquiry by the Viscount regardless of whether they are appointed by way of a creditors' winding up, a summary winding up or a court (just and equitable) winding up? If not, please provide details.
- Q22.** Do you have any comments in relation to the recovery of the Viscount's disbursements?
- Q23.** Do you think that if the company was not insolvent at the date the application for winding up was made (whether the process was instigated by way of a statutory demand or otherwise), the company should have a right of action against the applicant to recover damages for or in respect of any loss sustained by the company as a consequence of the application, unless the applicant in making the application, acted reasonably and in good faith?
- Q24.** Do you think the provisions at Article 186A are sufficient to provide protection? Should any other category of person be added? Do you consider that any additional measures should be taken to protect third parties? If so, please provide details.
- Q25.** Do you agree that the proposed winding up provisions should relate only to Jersey registered companies, or should the winding up provisions be extended to include foreign companies carrying on business in Jersey or with property in Jersey?
- Q26.** Do you have any comments on the relevant commencement date for the winding up or connected timings?
- Q27.** Overall, are you satisfied with the proposed creditors' winding up application process? Please provide any additional comments particularly if there are some points of disagreement.





## **Data Protection (Jersey) Law 2018 Privacy Notice**

### **How will we use the information about you?**

We will use the information you provide in a manner that conforms to the Data Protection (Jersey) Law 2018.

We will endeavour to keep your information accurate and up to date and not keep it for longer than is necessary. In some instances, the law sets the length of time information has to be kept. Please ask to see our retention schedules for more detail about how long we retain your information.

We may not be able to provide you with a service unless we have enough information or your permission to use that information.

We may not pass any personal data on to anyone outside of the State of Jersey, other than those who either process information on our behalf, or because of a legal requirement, and we will only do so, where possible, after we have ensured that sufficient steps have been taken by the recipient to protect your personal data.

We will not disclose any information that you provide “in confidence” to anyone else without your permission, except in the few situations where disclosure is required by law, or where we have good reason to believe that failing to share the information would put someone else at risk. You will be told about this unless there are exceptional reasons not to do so.

We do not process your information overseas using web services that are hosted outside the European Economic Area.

### **Data Sharing**

We may need to pass your information to other States of Jersey (SOJ) departments or organisations to fulfil your request for a service. These departments and organisations are obliged to keep your details securely and only use your information for the purposes of processing your service request.

We may disclose information to other departments where it is necessary, either to comply with a legal obligation, or where permitted under other legislation. Examples of this include, but are not limited to: where the disclosure is necessary for the purposes of the prevention and/or detection of crime; for the purposes of meeting statutory obligations; or to prevent risk or harm to an individual, etc.

At no time will your information be passed to organisations for marketing or sales purposes or for any commercial use without your prior express consent.

### **Your rights**

#### **You can ask us to stop processing your information**

You have the right to request that we stop processing your personal data in relation to any of our services. However, this may cause delays or prevent us delivering a service to you. Where possible we will seek to comply with your request, but we may be required to hold or process information to comply with a legal requirement.

### **You can withdraw your consent to the processing of your information.**

In the few instances when you have given your consent to process your information, you have the right to withdraw your consent to the further processing of your personal data. However, this may cause delays or prevent us delivering a service to you. We will always seek to comply with your request, but we may be required to hold or process your information in order to comply with a legal requirement.

### **You can ask us to correct or amend your information**

You have the right to challenge the accuracy of the information we hold about you and request that it is corrected where necessary. We will seek to ensure that corrections are made not only to the data that we hold but also any data held by other organisations/parties that process data on our behalf.

### **You request that the processing of personal data is restricted**

You have the right to request that we restrict the processing of your personal information. You can exercise this right in instances where you believe the information being processed is inaccurate, out of date, or there are no legitimate grounds for the processing. We will always seek to comply with your request, but we may be required to continue to process your information in order to comply with a legal requirement.

### **You can ask us for a copy of the information we hold about you**

You are legally entitled to request a list of, or a copy of any information that we hold about you. However, where our records are not held in any way that easily identifies you, for example a land registry, we may not be able to provide you with a copy of your information, although we will do everything we can to comply with your request.

You can ask us:

- to stop processing your information
- to correct or amend your information
- for a copy of the information we hold about you.

You can also:

- request that the processing of your personal data is restricted
- withdraw your consent to the processing of your information.

You can complain to us about the way your information is being used by contacting us at [dataprotection2018@gov.ie](mailto:dataprotection2018@gov.ie). Alternatively you can complain to the Information Commissioner by emailing [enquiries@dataci.org](mailto:enquiries@dataci.org).