Consultation

Chief Minister's Department

Public Consultation on Limited Liability Partnerships (Jersey) Law 201-

---

Summary:

Limited Liability Partnerships are common in many jurisdictions. Jersey has a law enabling businesses to set themselves up as limited liability partnerships. A new draft law has been prepared that would improve the existing law. The aim of this consultation is to invite comments on the proposed new Limited Liability Partnerships (Jersey) Law 201- and the Limited Liability Partnerships (Dissolution and Winding Up, etc) (Jersey) Regulations 201- before they are submitted to the States of Jersey for debate.

Date published:
22 January 2016

Closing date:
4 March 2016

Supporting documents attached:

Limited Liability Partnerships (Jersey) Law 201- and Limited Liability Partnerships (Dissolution and Winding Up, etc) (Jersey) Regulations 201-

---

How we will use your information

The information you provide will be processed for the purpose of consultation. The Department of the Chief Minister will use your information in accordance with the Data Protection (Jersey) Law 2005 and the Freedom of Information Jersey) Law 2011. Please note that we may quote or publish responses to this consultation but we will not publish the names and addresses of individuals. If you do not want any of your response to be published, you should clearly mark it as confidential. Confidential responses will be included in any summary of statistical information received and views expressed.

Outline of consultation

Limited Liability Partnerships ("LLPs") are partnerships governed by the terms of their partnership agreements. They have some of the benefits that are offered by companies including separate legal personality and a form of limited liability. LLPs are flexible structures which can be used for a variety of purposes: for instance, by professionals, by small businesses and in financial services. They were innovative when introduced in Jersey in 1997. Since that date LLPs have become commonplace across the world albeit taking different forms.

After a previous consultation the Limited Liability Partnerships (Jersey) Law 1997 (the "**1997 Law**") was amended by the Limited Liability Partnerships (Amendment of Law) (Jersey) Regulations 2013 (the "**2013 Amendment**"). The 2013 Amendment did not incorporate all the changes that had been suggested by the LLP steering group. It was decided to initially remove the largest impediment to businesses setting up Limited Liability Partnerships ("**LLPs**"). The requirements for a £5 million bond were replaced with a requirement for solvency statements to be filed.

Work continued on a restatement of the 1997 Law and the Limited Liability Partnerships (Insolvent Partnerships) (Jersey) Regulations 1998 ("the 1998 Regulations"). The results are the Limited Liability Partnerships (Jersey) Law 201- ("the Draft Law") and the Limited Liability Partnerships (Jersey) Law 201- ("the Draft Regulations")

The aim of replacing the old framework with the Draft Law and the Draft Regulations is to make the Jersey LLP more competitive so that it is used as a vehicle of choice for local and international businesses.

Respondents are invited to comment generally on the Draft Law and Draft Regulations as well as answer specific questions that are raised. It should be noted that the current drafts are subject to change before being finalised.

States of Jersey

Ways to respond

This consultation can be responded to electronically by the following link:

Write to: James Mews
Director, Finance Industry Development, Financial Services Unit
Chief Minster's Department
5th Floor, Cyril Le Marquand House
The Parade, St Helier,
Jersey JE48UL
Telephone: +44 (0) 1534 440413
Email: j.mews@gov.je

Responses from the finance industry may be sent to Jersey Finance at the address below:

Write to: William Byrne
Head of Technical, Jersey Finance Limited
4th Floor, Sir Walter Raleigh House
48-50 Esplanade
St Helier
Jersey JE2 3QB
Telephone: +44 (0) 1534 836021
Email: william.byrne@jerseyfinance.je

Responses sent to Jersey Finance will be shared with Government unless the respondent indicates that they wish to remain anonymous. Please indicate clearly on your response if this is the case.

This consultation paper has been sent to the Public Consultation Register.

Feedback on this consultation

We value your feedback on how well we consult or seek evidence. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact Communications.Unit@gov.je

Consultation on the Draft Law and Draft Regulations

Introduction

1. The Assistant Chief Minister invites responses on the text of the Draft Law and Regulations. The Draft Law comprises a number of changes from the 1997 Law. The most significant changes are commented on in this paper. However, there are many clauses where the language of the 1997 Law has been retained.

Article 2 – Requirements to contribute

2. Under principles of customary law it is a key requirement of a partnership that the partners contribute "something of value" to the partnership.

3. Under Section 1 of the Partnership Act 1890 as a matter of English law there must be a carrying on of a business in common by two or more persons with a view of profit.

4. Under the 1997 Law, Article 2(2)(b) requires partners in a partnership to contribute effort and skill to the business as an agent of the business. Article 2(2)(c) states that the profits of the business shall be divided between them and that they shall each have an interest in the limited liability partnership property.

5. The reason for these provisions was to satisfy the requirements of the customary law, to ensure that the English law criteria for a partnership were met and that the separate legal personality of an LLP would not result in a loss of tax transparency in other jurisdictions. At that time it was considered, on the basis of advice received, that there was no need for mutual agency as between the partners in order to satisfy the above requirements.

6. Article 2(2)(b) of the 1997 Law ensures that there is community of contribution and Article 2(2)(c) ensures that there is community of (and direct interests in) the partnership property.

7. It is considered that the contribution of capital as an alternative to the contribution of skill and effort is consistent with the LLP being characterised as a true partnership and for there to be a community of contribution.

8. Accordingly Art 2(1)(b) of the Draft Law contains a broader provision than the 1997 Law, namely that each person may contribute capital or effort and skill to the business.

9. Other than this change, and the new requirement for a secretary rather than a designated partner, the provisions concerning the essential criteria of an LLP have not been amended.

Question 1:

Do you agree that partners should be able to contribute capital to the partnership, as an alternative or in addition to the existing requirements to contribute effort and skill, in order to qualify as a partner? If you think that there are any drawbacks with this approach please state what they are.

Registration requirements and misleading or undesirable names

10. In the main, the Draft Law is similar to the 1997 Law in respect of the registration requirements. However, the Draft Law develops the 1997 Law by granting the Registrar the power to direct that an LLP changes its name when the name registered is misleading or otherwise undesirable in the opinion of the Registrar under Article 6(4). Where a direction is issued, the LLP has 3 months to comply or such longer period as the Registrar may allow under Article 6(5). There is also a procedure added to permit an appeal to be made against a direction issued by the Registrar under Article 6(6).

11. The Draft Law clarifies the effective date on which a change of name takes effect under Article 6(8). A change of name will take effect upon the

certificate being issued by the Registrar. This date is proposed as it is the point in time that the change of name becomes officially recognised and the Registrar has decided not to exercise his powers to refuse to register the change of name.

12. The registered office provisions which are contained in Article 7 in the Draft Law are updated from the 1997 Law by the inclusion of requirements similar to those in the Companies (Jersey) Law 1991 to ensure that the LLP is entitled to use the address for such purposes.

Question 2:

Do you agree that the appropriate time for a change of name to take effect is on the certificate being issued by the Registrar?

Article 12 – Specified Solvency Statement

13. The major change made to the 1997 Law by the 2013 Amendment was to remove the requirement for a £5 million bond in Article 6 of the 1997 Law. It was replaced with an annual requirement for a solvency statement. The rationale was that a bond was seen as an outdated method of providing creditor protection. It was a significant deterrent to LLPs being set up compared to other jurisdictions and no other jurisdiction had a requirement to keep £5 million of reserves in a bond to protect creditors. Instead other jurisdictions with LLP structures either require accounts or solvency statements to be filed. Other jurisdictions with these approaches include the USA, the UK, Dubai, Japan, Qatar, various provinces in Canada, Singapore and India.

14. Jersey decided to adopt the requirement for a solvency statement where partners wish to withdraw property from the LLP. This approach requires LLPs to make a 12 month forward looking statement which is considered to be more helpful to creditors than other alternatives such as the public filing of accounts. Accounts can be opaque as well as out of date at the time that they are filed. There are also similarities in this respect with the development

of company law where there has been a move towards the use of the solvency statement as a means of providing creditor protection in certain circumstances.

15. Article 12 in the Draft Law provides the definition of a specified solvency statement. It can be summarised as a statement made by the limited liability partnership that an LLP is solvent now and will remain solvent until 12 months into the future considering the financial resources available to the LLP and the intentions of the partners who control the management of the LLP in respect of the management of the LLP's business. Solvency is based on the ability of the LLP to discharge its debts as they fall due and to continue to carry on the business of the LLP. The specified solvency statement must be made by one or more of the partners who together control the management of the LLP.

16. However, in order to promote flexibility a solvency statement does not have to be made annually. A distinction has been drawn between the role of the specified solvency statement and requirements to keep accounting records. An LLP is required to keep accounting records which under Article 11(2) must be sufficient to show and explain the LLP's transactions and be such as to disclose with reasonable accuracy at any time the financial position of the LLP at that time.

17. In contrast to the requirement for accounting records which assist the partners in the LLP in knowing whether the LLP is solvent, the requirement for a specified solvency statement is to protect creditors when partners wish to withdraw property or their share of the profits (once struck) from the partnership.

18. If no specified solvency statement is made in the 12 months prior to a withdrawal, or a specified solvency statement has been made without reasonable grounds for the opinion, the partner becomes liable to the LLP to return the property to the LLP or to pay a cash sum representing the value of the property. Articles 12(12) and (13) also impose criminal liability on both an LLP and a partner in the LLP where a partner signs a specified

solvency statement without reasonable grounds for the opinion stated in the statement.

19. There is a mechanism for a copy of each specified solvency statement to be sent to the Registrar along with the annual return each year under Article 20(3).

20. Should the LLP decide not to make a specified solvency statement in a calendar year then there is no direct penalty that is applicable. However, there is an impediment to the partners being able to withdraw assets (including a share of profits) from the partnership and realise the fruits of their labours. The LLP will also have to manage the position with its customers and trade creditors who may refuse to deal with the LLP if no specified solvency statement has been signed. However, there are occasions where an LLP's main role is to hold an asset where there may be no trade creditors and the flexibility to decline making a specified solvency statement will save costs.

21. Where a partner is liable to return property to the LLP under Article 12(6) an application to Court may be made in order to ask the Court to reduce liability and therefore to have the effect of ratifying the transaction. Under Article 12(8) a partner must satisfy the Court that at the time of the withdrawal the LLP was solvent, since that time the LLP has made a specified solvency statement, and that it would not be contrary to the interests of justice for the partner to be released from liability under Article 12(6).

22. Article 12(9) aims to ensure that liability for a withdrawal without the LLP making a specified solvency statement as set out in Article 12(5) is not also a breach of Article 5(3). That means that a withdrawal made solely in Article 12(5) circumstances will not result in liability accruing under Article 5(3) unless there are separate circumstances leading to liability under Article 5(3). However, where the withdrawal is also made in breach of Article 5(3), i.e. the partnership agreement did not permit drawings at that time, as well as there being no specified solvency statement in place, then there is both a breach of Article 12 and Article 5.

23. To remove any ambiguity over the interrelationship between Articles 5 and 12, Article 12(8) ensures that the Court may not extinguish the partner's liability under Article 12 to a greater extent than is permitted under Article 5.

24. New additions to the clause adopted in the 2013 Amendment are set out in Article 12(6). An LLP may require a partner to return the property or the value of the property if the property has appreciated in value. Further a partner who is liable to pay cash to the partnership under Article 12(7) is liable to pay interest at the prescribed rate.

Question 3:

Is it appropriate for the LLP to be able to claim back the increased value of property that has been withdrawn in breach of a solvency statement in certain circumstances? If your answer is no, then please state why.

Liability under Article 5 of a partner or a former partner in an LLP

25. The general policy intent is for no substantive change to the position concerning liability, set out in Article 5. However, the provision has been slightly redrafted in order to assist ease of understanding and to take into account the interplay with liability for withdrawals where the LLP has failed to make a specified solvency statement under Article 12.

26. The key provisions concerning liability are set out in Articles 4 and 5. Firstly Article 4(1) states that the LLP is liable for the debts or losses which if the LLP were a normal partnership the partners would otherwise be liable.

27. Then Article 5 addresses the liability of partners. The initial position is that a partner or former partner is not liable for the debts or losses of the LLP, including those caused by another partner (Article 5(1)). This continues to

be the position even after the LLP's registration has been cancelled (Article 5(5)). However, this limitation of liability does not affect any liability of a partner firstly for their personal debts (ie debts incurred as individuals other than when they are acting as partners) and secondly for any loss for which, even when acting as partners, they incur personal liability under the general law (Article 5(2)). The latter approach was originally modelled on the general position in the case of US LLPs.

28. Therefore, partners may still be personally liable to third parties (alongside the LLP) for losses for which they are treated as responsible. This means that a partner in an LLP will be liable for his own acts of negligence, ie when he is treated as having assumed a duty of care towards a third party claimant. Precedent from the UK and elsewhere suggests that such a duty of care will readily be inferred where a professional service is being provided to a client, and has even been held to arise in the case of an employee. Another example of where personal liability may arise automatically, is where a partner, rather than the LLP, takes on an office (e.g. a trusteeship or directorship): in such a case personal liability is unavoidable, unless it can be excluded by contract.

29. More doubtful is whether a partner in an LLP may also be liable *to the LLP* for the consequences of his own negligence. The better view is that no duty of care or duty to avoid being guilty of "ordinary" (as opposed to gross) negligence is owed to the LLP, but the point is arguable (any analogy with UK LLP law must be viewed with caution as the principles are different).

30. Article 5(3) covers additional circumstances where a partner may be liable for any debt or loss of the LLP when he has withdrawn property (including a share of profits) from the LLP other than in the normal course of the affairs of the LLP or in any circumstances specified in Regulations made under Article 38(1). However, in such a case the partner's personal liability is limited to the value of the withdrawal minus any amount that was previously recovered from the partner (Article 5(4)).

31. Article 5 also contains provisions to ensure that there is appropriate interlinking with circumstances where there is also liability under Article 12(5) in respect of the same withdrawal. This is referred to in the section on solvency statements and the consequences of a breach of Article 12(5) above.

32. Article 5(4) provides that where a withdrawal is made in circumstances that fall foul of both Article 5 and Article 12(5), the total liability of the partner under Articles 5 and 12 is restricted to the maximum that the partner can be forced to pay in respect of the Article 12(5) breach. This paragraph was inserted to remove the risk of double jeopardy where a partner is liable both under Article 5 and under Article 12 and, without this cap, could be forced to pay twice in respect of the same withdrawal. Article 12(8) also cross-refers to Article 5(3) so that the Court's powers where it decides to ratify a withdrawal where there is a failure to make a specified solvency statement under Article 12(5) are limited. The Court is not able to reduce a partner's liability more than the amount of the liability remaining under Article 5(3) if the withdrawal was other than in the ordinary course of affairs of the LLP, for example if there was a breach of the partnership agreement.

33. Therefore, if there was a withdrawal of partnership property in breach of Article 5(3) namely other than in the ordinary course of the affairs of the partnership (perhaps because the partnership agreement prevented drawings at that time) and also a separate breach under Article 12(5) (because the LLP has not made a current specified solvency statement), then liability will remain under Article 5(3) and Article 12 even if the Court ratifies the breach of Article 12.

Question 4:

Article 5 has provisions which reflect the 1997 Law concerning the quantum of liability when the LLP wishes to reclaim drawings from a partner other than in the ordinary course of the affairs of the partnership. Article 12, has different provisions regarding quantum if there is a breach of Article 12 where drawings are made without a current specified solvency statement. In summary, under Article 12 where the partner withdrew cash then interest is payable, and where the property was other than cash and the property is no longer available, the LLP may elect to receive a sum equal to any increased rise in value. Should liability be standardised in these two provisions?

If yes then state which approach should be taken.

Question 5:

Do you agree with the policy as stated in the notes and the draft regarding the interplay between Article 5 and 12? If your answer is no, then please state why.

Designated Partner replaced by secretary

34. When the LLP industry steering group was constituted considerable thought was given to international requirements to be able to access accounting records while retaining flexibility and ensuring that accountability would rest on appropriate parties.

35. The proposal adopted by the steering group was to replace the designated partner (who did not have to be located in Jersey in the 1997 Law) with a Jersey-based secretary who would be responsible for keeping accounting records including solvency statements and filing annual returns. Where a partner is Jersey resident then they could act as the secretary with certain limitations set out below. Where all the partners are incorporated or reside overseas, the secretary would be either a company or an individual who is a registered person under Article 2(4)(e) of the Financial Services (Jersey)

Law 1998 to carry on trust company business. This requirement will assist with ensuring the accountability of a responsible person within the jurisdiction.

36. The main advantage of this approach is that it creates considerable flexibility while ensuring accountability. The role of the designated partner under the 1997 Law was mainly administrative (to be the party responsible for filing documents with the Registrar) and had no substantive management function. Under the Draft Law, for predominantly domestic LLPs or LLPs where there is a Jersey based partner, it is proposed that the role of secretary can be carried out by that person with the potential for no additional costs. For non-domestic LLPs, the role of secretary can be carried out by an appropriately registered person without creating a new class of business.

37. This proposal is set out in Article 8 of the Draft Law. A secretary must be appointed from the date that the LLP is registered and ceases only on cancellation of the LLP or in circumstances set out in the Draft Regulations. Further a deputy secretary may be appointed by the LLP where the secretary is unable to carry on a function (see Article 8(1)). If the secretary's appointment ceases then the LLP must appoint a new secretary within 28 days.

38. The secretary may be a company incorporated anywhere in the world or an individual. However, where the secretary is not a Jersey resident or Jersey incorporated partner, it must be registered to carry on secretarial services to LLPs (a new addition to Article 2(4)(e) of the Financial Services (Jersey) Law 1998) (see Article 8(3)). The duties of the secretary are set out in Article 10(3).

39. The role of the secretary is to hold certain records and to file the annual return. Under Article 9(1) the secretary shall keep at a place in Jersey all the accounting records and returns of the LLP that are provided to the secretary by the LLP. Under Article 11(4) where the accounting records are kept outside Jersey the LLP must send its secretary every 6 months a return that must be sufficient to show and explain the LLP's transactions

and be such as to display with reasonable accuracy at any time the financial position of the LLP. A copy of any specified solvency statement made by the LLP is also to be sent to the secretary under Article 12(3).

40. The secretary also has the role of filing the annual return with the registrar. Under Article 20(1) the secretary must deliver the annual return which states whether the secretary has received from the LLP any specified solvency statement made by the LLP and the requisite accounting records/return.

Question 6:

Bearing in mind on the one hand the need for flexibility, and on the other the requirements for accounting records to be accessible, do you have any objections to the steering group's proposal that the designated partner is replaced by a Jersey regulated secretary or a Jersey resident secretary (in the case of an individual who is a partner)?

If there are objections please state your reasons and what your preferred alternative would be stating reasons for your views.

Transitional Provisions including governing the change from a designated partner to a secretary

41. The Draft Law is intended to repeal and replace the 1997 Law. Therefore, LLPs registered under the 1997 Law would become governed by the Draft Law and transitional provisions are required to make this work effectively.

42. It is proposed that there would be a time limit of one year for existing LLPs to replace the role of a designated partner with a secretary. If a secretary is appointed earlier than 1 year then it is proposed that the provisions relating to the secretary would apply from the date that the secretary is appointed. However, it is proposed that the designated partner's role would continue

until the secretary is appointed. Therefore, the designated partner would, for example, continue to deliver to the Registrar any specified solvency statement made by the LLP, as required under Article 6(8) of the Draft Law, until the secretary is appointed.

43. Once the Draft Law has been in force for one year, the LLP would be treated as if it had been registered under the Draft Law. If the LLP has not appointed a secretary within one year of the Draft Law coming into force, the LLP would be committing an offence under Article 8.

44. Where the Draft Law places an obligation on a secretary which is not an obligation of a designated partner under the 1997 Law it is proposed that there would be transitional provisions placing the obligation on the LLP, rather than placing additional requirements on the designated partner, until a secretary is appointed. It is proposed that where provisions are substantially the same in the Draft Law as in the 1997 Law then the new provisions would apply immediately without a transitional period.

Question 7:

Are the transitional provisions appropriate? If your answer is no, please state why.

Question 8:

Are the transitional provisions for the replacement of the designated partner with a secretary adequate? If your answer is no please state why.

Partners entering into transactions with the LLP

45. Article 14 permits a partner in an LLP (subject to any terms in the partnership agreement to the contrary) to enter into any transaction with the limited liability partnership, including lending money to, and borrowing money from the LLP. This would permit a partner of an LLP to be an employee of the LLP at the same time. This is considered to be an

improvement on the position in the United Kingdom which was recently considered in the case of Reinhard v Ondra LLP [2015] EWHC 26 (Ch) handed down on 14th January 2015.

Time limits for the LLP carrying out certain functions

46. The 1997 Law generally sets a time limit of 28 days in order for the LLP or the designated partner or the last remaining partner to take actions required by the statute. For example, under Article 8(6) when there is a change in particulars of the partners the list kept at the registered office must be amended within 28 days. Article 21 requires the person responsible for winding up the affairs of the LLP to deliver a statement of dissolution to the Registrar within 28 days of the dissolution. Recently the Companies (Jersey) Law 1991 was amended to reduce many of the time periods in respect of companies. There are arguments in favour of consistency across the financial services legislation however particular regard also has to be had to the effect on third parties, comparable insolvency legislation and whether the obligation is one that is fair to require a party to comply with within a short period of time. For example, where an appeal has to be made against a decision of the registrar is it fair to only give the party 21 days in which to take legal advice and decide whether to make an appeal?

47. The provisions in the Draft Law requiring actions to be taken within 21 or 28 days are as follows:

    a. Article 6(6) requires an LLP to make an appeal to the Court from a direction of the registrar to change a misleading name within 21 days;
    b. Article 6(7) requires an LLP to comply with the order of a Court to change its name within 28 days;
    c. Article 7(9) requires an LLP to amend the records of the particulars of the partners if they change within 28 days;
    d. Article 8 requires the LLP to appoint a new secretary within 28 days of the secretary's appointment ceasing;

e. Article 12(3) requires the LLP to send a specified solvency statement to the secretary within 28 days;
f. Article 19(1) requires the LLP to send any changes in the declaration post registration to the registrar with such a statement signed by the secretary within 28 days.

48. Under the Draft Regulations the actions to be taken within 28 days are as follows:
    a. Regulation 5(1) requires a secretary to deliver to the registrar a statement of dissolution within 28 days of the dissolution of an LLP other than when such occurs by an act of the court;
    b. Regulation 6(2) requires the partner making an application to dissolve an LLP by an order of the court to deliver a copy of the order to the registrar within 28 days;
    c. Regulation 7(2) requires an LLP to send to the registrar the statement of cancellation of dissolution when two of the partners wish to acquire the partnership interests of the remaining partners within 28 days;
    d. Regulations 9(7), 14(7) and 17(5) require the dissolution manager to deliver to the Judicial Greffier notice of the vesting of the LLP's property in another party within 28 days;
    e. Regulation 12(1) requires the dissolution manager to deliver to the registrar a statement of the winding up of the LLP within 28 days;
    f. Regulation 15(1)(b) requires a dissolution manager to call a meeting of all known creditors within 28 days of sending a notice to the registrar stating that he is of the opinion that the LLP is insolvent;
    g. Regulation 28(1) requires the LLP to deliver a copy of a declaration that an LLP is *en desastre* or an order recalling a declaration within 28 days to the registrar;
    h. Regulation 55(6) requires an LLP to deliver a copy of a decision of the court that an overseas order winding up the affairs of the LLP has been recognised in Jersey to the registrar within 28 days.

49. Amending these provisions to 21 days will give the LLP, dissolution manager, insolvency practitioner or secretary less time to take certain steps than is the case at present.

Question 9:

Should the length of time be standardised at 21 days, 28 days or variations made for the activities required to be undertaken depending on what is required? Please explain your answer.

Dissolution and Cancellation of an LLP

50. An LLP may be dissolved, wound up and the certificate cancelled for a variety of reasons. Firstly, an LLP must always have 2 or more partners. Therefore, under Regulation 4, an LLP shall be dissolved immediately on there ceasing to be 2 or more partners in the partnership.

51. Under Article 22, the registrar may serve on the LLP a notice of intended dissolution in a number of circumstances. These include where the LLP is no longer carrying on business, where there has been a failure of the LLP to appoint a secretary, to provide the requisite accounting records/return to the secretary, to pay fees owed to the Commission, to have a registered office in Jersey, and where there has been a failure of the secretary to provide returns to the registrar.

52. Where the omission is not rectified within the period of notice given in the notice served by the registrar, the registrar may serve a certificate of dissolution on the LLP.

53. Dissolution may also take place as a result of an act of a partner under Regulation 5, or by Order of the Court under Regulation 6 including where a partner is permanently incapable of performing his or her part of the partnership agreement, where a partner is unfairly prejudiced by another partner's conduct, and where it is just and equitable that the partnership is dissolved.

54. Following dissolution, the LLP is wound up pursuant to the Draft Regulations. Following the dissolution of the LLP, Regulation 7(1) permits two or more partners to acquire the partnership interests of the remaining partners, by agreement or direction of the Court. Upon a statement being sent to the registrar, the registrar must issue a certificate that the dissolution of the LLP is void under Regulation 7(3).

55. Article 22(6) states that the LLP may be reinstated from the state of dissolution where an interested person or a former partner applies to the Court from the date of dissolution of the LLP up to 10 years after the date of cancellation of the LLP.

56. Regulation 7(6) enables the Court to order that the certificate of dissolution is void where all the former partners agree, the LLP is not insolvent and a certificate of dissolution has been issued. Under Article 22(6) the Court may make the order on such terms as the Court thinks fit, and under Article 22(7) may give directions or provisions so as to place the LLP and other interested persons in the same position as nearly as may be as if the LLP had not been dissolved.

57. Parts 3 and 4 of the Regulations deal with winding up solvent and insolvent LLPs and will be discussed below.

58. After the registrar has been notified of the completion of the winding up of the affairs of the LLP, Article 23(1) states that the registrar shall cancel the entry in the register and issue a certificate of cancellation.

59. If there is some reason why the LLP should be reconstituted, such as an asset that was not dispersed remaining in the name of the LLP, the Court may order under Regulation 7(7) that the LLP is reinstated by the certificate of cancellation being declared void. Under Article 23(5) the Court may make the order on such terms as the Court thinks fit, and under Article 22(6) may give directions or provisions so as to place the LLP and other interested persons in the same position as nearly as may be as if the registration had not been cancelled.

60. The interrelation between Article 22 and Article 23 would therefore allow the Court to order both that the LLP is reinstated on the register in a dissolved state and that the dissolved state is itself reversed so that the LLP is fully reinstated on the register.

Question 10:

Is there any reason why an LLP should not be reinstated following cancellation? Is it desired to permit an LLP to be reinstated both to a dissolved but not cancelled state, as well as a full reinstatement i.e. where both the certificates of cancellation and dissolution are declared void?

Winding Up of Solvent LLPs

61. Part 3 of the Regulations sets out the manner in which a solvent LLP is wound up. The policy objective is for the drafting to be similar to the 1997 Regulations unless there is a good reason to depart from that model.

62. The concept of a dissolution manager was created in order to identify the person(s) responsible for the winding up of the LLP's affairs, whether the partners themselves (or some of them) or a person appointed by them. Regulation 9 sets out the manner in which a dissolution manager is appointed. Circumstances include where a partner is the last remaining partner and the partnership dissolved because there were no longer 2 partners (Regulation 4), or where a dissolution manager is appointed by the remaining partners.

63. Regulation 9(3) states that the Court may appoint or remove a dissolution manager upon the application of a partner, or a dissolution manager appointed because, inter alia, they are the last surviving partner, or an interested party in certain circumstances.

64. The dissolution manager must do whatever is necessary or desirable to achieve a beneficial winding up of the LLP or otherwise act in accordance with the terms of the partnership agreement under Regulation 9(4).

65. Regulation 9(6) states that in circumstances where there are no longer 2 or more partners of the LLP, whether that causes a dissolution of the LLP or occurs after a dissolution, the LLP ceases to be a legal person, the duty to appoint a secretary ceases, and the LLP property vests in the dissolution manager who remains subject to the obligation to wind up the affairs of the LLP. While legal actions against the LLP may be continued or commenced against the dissolution manager, the dissolution manager is protected against personal liability and such proceedings shall only be enforceable against the LLP property.

66. Where the dissolution manager, a creditor or any partner, or in the absence of any of these persons, an interested party, is in need of guidance or seeks the assistance of the Court, the Court may give such directions as it thinks fit in respect of the winding up under Regulation 10.

67. Regulation 11 sets out the order of priority that the dissolution manager is to apply in settling the accounts of the dissolved LLP. Any LLP property remaining after liabilities have been repaid is to be divided between the partners in accordance with the terms of the partnership agreement or equally by default where the partnership agreement does not address the issue of division.

68. Following the completion of the winding up of the LLP, the dissolution manager is required to send a statement to the registrar stating that the affairs of the LLP have been wound up under Regulation 12(1) and the LLP's certificate will then be cancelled.

Winding up of Insolvent LLP

69. Part 4 contains Regulations relating to the winding up of LLPs that are either insolvent at the time of dissolution or where the dissolution manager realises that they are insolvent during the winding up of the LLP. Regulation 13(1) provides that Part 4 applies to insolvent LLPs.

70. Because insolvency requires provisions to ensure that the creditors of the LLP are treated fairly a separate set of rules are necessary to deal with such circumstances.

71. Regulation 14 sets out similar provisions to those in Regulation 9 by providing for the appointment initially of a dissolution manager whose functions in this case are strictly limited. One of the duties of the dissolution manager of an apparently solvent or potentially insolvent LLP is to inform the registrar within seven days if he becomes aware or forms the opinion that the LLP is insolvent under Regulation 15(1)(a).

72. The dissolution manager must call a meeting of all known creditors of the LLP within 28 days of the notice being sent to the registrar, and make a statement of the affairs of the LLP to be considered at the creditors' meeting. Under Regulation 15(4) the dissolution manager shall take no action without the Court's sanction and must protect and preserve the LLP property leading up to the date of the creditors' meeting.

73. Regulation 17 provides for the appointment of an insolvency manager by the creditors. The creditors may nominate an insolvency manager under Regulation 17(1). It is necessary for there to be a majority in value of the votes of the creditors who actually do vote on the resolution under Regulation 16(6) for the resolution appointing the nominee to be passed. If the creditors do not nominate an insolvency manager, the dissolution

manager's nominee is appointed. The appointment takes effect from the end of the creditors' meeting. However, if no-one is appointed, the dissolution manager, a partner or a creditor may apply to the Court for an insolvency manager to be appointed under Regulation 17(3).

74. An insolvency manager must be an individual and a member of one of the professional bodies as set out in Regulation 48.

75. Regulation 19 provides for the insolvency committee or the Court to determine the remuneration of the insolvency manager, and provides for the removal and reappointment of an insolvency manager by the creditors' meeting or by the Court.

76. The duties and responsibilities of the dissolution manager cease from the date of the insolvency manager's appointment under Regulation 17(4). Under Regulation 17(4) and (5), where the partnership has ceased to comprise two or more partners, any property that had previously vested in the dissolution manager (see paragraph 65 above) now vests by statute in the insolvency manager and any proceedings against the LLP or dissolution manager may only be continued or commenced against the insolvency manager.

77. Under Regulation 13(2) the insolvency manager is defined as the person appointed to be responsible for the winding up of an insolvent LLP. The powers and duties of an insolvency manager are set out in Regulation 30. The insolvency manager shall pay the debts of the LLP in accordance with the rules set out in the Draft Regulations and with the sanction of the Court or the insolvency committee may pay a class of creditors in full or compromise any claim. The insolvency manager may take such other steps as are required in order to achieve the beneficial winding up of the LLP's affairs. Where there are questions relating to the winding up or the powers of the insolvency manager, the insolvency manager may seek the guidance of the Court, by making an application under Regulation 21.

78. In an insolvent winding up, Regulation 22 provides that in most cases the same rules apply as if a declaration of desastre has been made under the Bankruptcy (Desastre) (Jersey) Law 1990. Under Regulation 21(1)(b) the

Court may also grant the insolvency manager the powers that the Court or the Viscount may exercise if a declaration had been made. Where creditors agree an arrangement, such is binding providing that it is agreed by at least three-quarters of those in number and those entitled to vote under Regulation 23(1), subject to a right of appeal to protect minority interests.

79. The insolvency manager may disclaim any onerous property under Regulation 31, may apply to the Court to recover property where there has been a transaction at an undervalue or a preference under Regulation 34, can apply to the Court to recover property from a partner where the Court finds that there is responsibility for wrongful trading or fraudulent trading under Regulations 35 and 36, or from a party who has benefited from a extortionate credit transaction under Regulation 37 and may seek the delivery or transfer of the property that belongs to the LLP to the insolvency manager under Regulation 39,

80. As with the dissolution manager there is a regime for settling accounts during the winding up, after which any LLP property remaining is distributed equally to the partners subject to the terms of the partnership agreement under Regulation 24. Following the completion of the winding up of the affairs of the LLP, the insolvency manager reports to the partners and the creditors at separate meetings under Regulation 26. Then under Regulation 27, the insolvency manager delivers to the registrar a statement that the above meetings have been duly held and their dates, and a copy of his report of the winding up.

Question 11:

Are there any improvements that could be made to the Draft Regulations concerning the solvent and insolvent winding up of LLPs?

Record Keeping requirements

81. The general record keeping requirement is set by permitting the registrar to destroy records in the registrar's possession or control 10 years after the date of cancellation in Article 31(1). Article 31(2) then extends the same

protection to all other parties who destroy records after 10 years from the date of cancellation by removing any duties to maintain records.

82. In an insolvent winding up, the requirement for retaining records is set in practice as a long stop of 10 years from the date of the cancellation of the registration of the LLP under Regulation 53(3).

Next steps

83. Following the completion of the period of consultation, any final changes will be made to the Draft Law and Draft Regulations as a result of responses and the Draft Law and Regulations then lodged for debate.

Questions

Particular questions as stated above are:

Question 1:

Do you agree that partners should be able to contribute capital to the partnership, as an alternative or in addition to the existing requirements to contribute effort and skill, in order to qualify as a partner? If you think that there are any drawbacks with this approach please state what they are.

Question 2:

Do you agree that the appropriate time for a change of name to take effect is on the certificate being issued by the Registrar?

Question 3:

Is it appropriate for the LLP to be able to claim back the increased value of property that has been withdrawn in breach of a solvency statement in certain circumstances? If your answer is no, then please state why.

Question 4:

Article 5 has provisions which reflect the 1997 Law concerning the quantum of liability when the LLP wishes to reclaim drawings from a partner other than in the ordinary course of the affairs of the partnership. Article 12, has different provisions regarding quantum if there is a breach of Article 12 where drawings are made without a current specified solvency statement. In summary, under Article 12 where the partner withdrew cash then interest is payable, and where the property was other than cash and the property is no longer available, the LLP may elect to receive a sum equal to any increased rise in value. Should liability be standardised in these two provisions?

If yes then state which approach should be taken.

Question 5:

Do you agree with the policy as stated in the notes and the draft regarding the interplay between Article 5 and 12? If your answer is no, then please state why.

Question 6:

Bearing in mind on the one hand the need for flexibility, and on the other the requirements for accounting records to be accessible, do you have any objections to the steering group's proposal that the designated partner is replaced by a Jersey regulated secretary or a Jersey resident secretary (in the case of an individual who is a partner)?

If there are objections please state your reasons and what your preferred alternative would be stating reasons for your views.

Question 7:

Are the transitional provisions appropriate? If your answer is no, please state why.

Question 8:

Are the transitional provisions for the replacement of the designated partner with a secretary adequate? If your answer is no, please state why.

Question 9:

Should the length of time be standardised at 21 days, 28 days or variations made for the activities required to be undertaken depending on what is required? Please explain your answer.

Question 10:

Is there any reason why an LLP should not be reinstated following cancellation? Is it desired to permit an LLP to be reinstated both to a dissolved but not cancelled state, as well as a full reinstatement i.e. where both the certificates of cancellation and dissolution are declared void?

Question 11:

Are there any improvements that could be made to the Draft Regulations concerning the solvent and insolvent winding up of LLPs?