

19-21 Broad Street | St Helier  
Jersey | JE2 3RR

Deputy David Johnson  
Chair  
Economic and International Affairs Scrutiny Panel  
Sent by email

24 January 2022

Dear Deputy Johnson

**RE: p.108-2021 – Draft Companies (Amendment No. 8) (Jersey) Regulations 202-Creditors' Winding Up Regime**

Thank you for your letter of 17 January 2022 in relation to the proposals for the Creditors' Winding Up Regime.

You have asked for details of the consultation process that was undertaken and the results on which it was considered appropriate to proceed with these proposals.

**Consultation Process**

The formal consultation process, in the shape of a published Consultation Paper on the draft legislation, was open between 19 July – 6 September 2021.

This project has, however, been under discussion for a number of years. Most recently, the Association of Restructuring and Insolvency Experts ("ARIES") and the Financial and Commercial Sub-Committee of the Law Society (the "Sub-Committee") came together to seek that Government proceed with these reforms. Accordingly, the consultation and draft legislation was developed following discussions over some time with representatives from ARIES and the Sub-Committee who provided comments on the drafts before publication. Where there was a divergence of views, specific questions were formulated in the Consultation Paper to invite responses.

In case the Panel is not aware of ARIES, the ARIES Committee consists of senior lawyers from a number of local law firms including, Carey Olsen, Mourant, Bedell Cristin, Appleby, Oben Law, Walkers, Bedell Cristin, and Collas Crill, together with insolvency practitioners from firms such as EY, Grant Thornton and Deloitte.

In addition, the Viscount and the Jersey Financial Services Commission were directly consulted throughout the process including before and after the issue of the consultation and the drafts, and after receipt of the responses.

## Responses to Consultation

Six responses were received to the Consultation Paper from the following: the Viscount of the Royal Court; the Sub-Committee; ARIES; two law firms (Ogier and Carey Olsen); and one Jersey qualified lawyer (who sits on the Sub-Committee) responding in his individual capacity (the "Advocate").

The Sub-Committee response stated in the covering letter that it had seen the response from the Advocate, attached a copy of it, and confirmed that "we agree with the points raised and endorse the comments made." No additional representations were made by the Sub-Committee beyond this.

Despite sending the Consultation document directly to various parties (including, for example, Citizens Advice Jersey, Jersey Business, the IOD, Chamber of Commerce), the responses received were essentially from those already engaged in the process (ARIES and the Law Society).

The responses showed universal support for the underlying principle of these amendments. The concerns expressed by way of response were therefore related to particular aspects of the proposals.

Copies of the responses are attached on a confidential basis as, although there is reference to the fact of release to scrutiny in the Consultation Paper, it states that the name and addresses of individuals will not be published without consent.

The responses received were carefully considered by officers and certain changes made or decisions crystallised based on those responses, the discussions overall, and further consideration by policy officers of the position, including in other jurisdictions. It was this combination of factors on which it was considered appropriate to proceed with these proposals.

Some of the comments received in response to the consultation related to wider points which would necessitate amendment of the Bankruptcy Law or other legislation (such as the appointment of a security receiver). That sort of change is not possible as part of this project. However, the points are on the record and will be considered again in the future.

Where specific queries were raised in the responses such as how the bond for an insolvency practitioner would work, or whether the Viscount or the JFSC wished to be able to bring proceedings or be convened to the court hearing, further clarification was sought from the relevant parties. In this instance, the Viscount and JFSC answered in the negative.

Where there was a continuing divergence of views, the matter was very carefully considered and the position adopted which was considered would optimise the operation of the process and on the basis of the strong support for the proposals from certain respondents in counter-balance to the opposition from others.

A Response Paper was issued on 5 January 2022 which details the positions taken by the Respondents.



### **Particular points raised by Law Society**

In your letter you refer to recent correspondence from the Law Society (received since the date of the private briefing to the Panel) which was copied to officers and which highlighted three principal concerns: the concepts of the statutory demand, provisional liquidation, and the commencement date of a winding up order. You also comment that you were not aware from the briefing of the concerns in relation to the latter. I am sorry for that and I know that was not the intention of the officers in any way. In the time available, and whilst also answering questions from the panel, officers sought to focus on the key points raised by the Law Society Sub-Committee (in its response to the Consultation) which were seen as the first two mentioned points. Whilst the commencement date point had been made by the Sub-Committee in its response, amendments had been made to the draft Regulations in response to those comments. Whilst the deemed commencement date is stated to be the date of the application before the court, the provision was changed so that the Court is able to order that the commencement date should be such other date as it deems fit.

In relation to the comments as expressed in the letter from the Law Society, these will be addressed under separate cover. Officers will of course be available at the next briefing (or before as may be required) to provide further clarification.

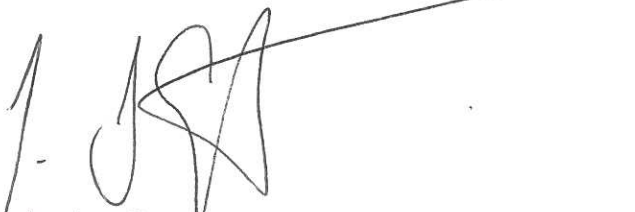
### **Conclusion**

I trust that the above information assists in your deliberations. It is recognised that there is indeed the need to ensure that Jersey continues to maintain its reputation as a creditor friendly jurisdiction to support commercial work, and the introduction of this regime in its totality will confirm that, providing the creditor with another option and facilitating the process in cross-border situations. The proposals align with the norms for many other jurisdictions said to be 'creditor friendly' (including the UK, Guernsey, Australia, Cayman, and Singapore). Being a creditor friendly jurisdiction, however, does not mean that there should not be a fair process for a debtor – and institutional lenders are aware of these processes in other jurisdictions.

I note that you are writing to the Viscount's Department to seek their views, which I welcome. If there are specific queries in relation to the reasoning for the policy decisions made on the specific points raised by the Law Society Sub-Committee in their letter of 13 January, might I suggest that the Panel also ascertain the views from ARIES on these points. This will help ensure that the Panel can consider a wider range of the views and arguments from practitioners as part of its review of these proposals.

I have included an annex which sets out the changes made to the original draft proposals since the consultation closed. I hope this is helpful. My officers and I remain available to assist the Panel with its work, for which we are grateful.

Yours sincerely

A handwritten signature in black ink, appearing to be 'I. Gorst', with a long horizontal line extending from the end of the signature across the page.

**Senator Ian Gorst**  
**Minister for External Relations and Financial Services**

#### **Annex: Changes made to the original draft have included**

- Not changing the name of the process.
- Removal of the words 'clear evidence' in Article 157A(2) as they were considered unclear and a redrafting of this provision.
- Ensuring that the court has a discretion to grant the winding up order (using "may" rather than "shall" as advised by drafters).
- Applying the provisions to Jersey companies only at this time.
- Applying the requirements in relation to an Approved Liquidator only to the creditors' winding up and not a summary winding up (which is a company matter in relation to a solvent company and thus with no creditor interests).
- Agreement that the threshold should match that in the bankruptcy legislation (ie £3,000) – which level would be reviewed in due course in consultation with the Viscount.
- Enabling the court to convene other parties to the hearing and enabling a creditor to apply to the court to seek the appointment of a different liquidator (without fettering the court's discretion by making it a requirement that the court appoint a suggested liquidator).
- Changes to the ambit of the investigatory powers of the Viscount.
- Giving the court the power to fix the commencement date of the order.
- No extension of the powers given to the Liquidator.