XXIII
2012

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Printed by Image Group, Caslon Court, Pitronnerie Road, St Peter Port, Guernsey GY1 3NE **Price £2.50**

B I L L E T   D’ É T A T

TO THE MEMBERS OF THE STATES OF

THE ISLAND OF GUERNSEY

I have the honour to inform you that a Meeting of the States of Deliberation will be held at **THE ROYAL COURT HOUSE, on WEDNESDAY,** the **28th NOVEMBER, 2012, at 9.30 am,** to consider the items contained in this Billet d’État which have been submitted for debate.

R. J. COLLAS
Bailiff and Presiding Officer

The Royal Court House
Guernsey
19 October 2012

COMMERCE AND EMPLOYMENT DEPARTMENT

MARITIME LABOUR CONVENTION – ENABLING LEGISLATION

The Chief Minister
Policy Council
Sir Charles Frossard House
La Charroterie
St Peter Port

11th September 2012

Dear Sir

1. Executive Summary

1.1 This Report proposes that the States approve a Bailiwick-wide Projet de Loi in the form of an enabling Law to give the States the power to make Ordinances to regulate employment agencies in the Bailiwick generally, and in particular to give domestic effect to Regulation 1.4 of the Maritime Labour Convention, 2006 ("the Convention"). This provision requires contracting states to regulate seafarer recruitment and placement services - commonly known as manning agencies - in their territory.

1.2 The Convention will come into force on 20th August 2013. All maritime administrations with significant tonnages of shipping on their Registers are signatories to it or are expected to have it extended to them, including the United Kingdom. Guernsey has a comparatively small shipping Register, albeit one with a proud tradition, and the Public Services Department and the Law Officers are currently considering, in consultation with the UK's Maritime and Coastguard Agency, whether to seek the extension of the Convention to the Bailiwick, or whether our shipping and other commercial interests, the rights of our seafarers, and our reputation, can properly be protected by taking practical steps that fall short of formal extension.

1.3 While it is hoped that most of the Convention's provisions can be addressed without the need for further legislation the Law Officers have advised that legislation will be required to implement Regulation 1.4, and have recommended that the legislation take the form of an enabling Law. Such legislation would allow an Ordinance to be made in the normal way in due course giving substantive effect to the provisions of that Regulation, and also to address wider problems that the Commerce and Employment Department ("the Department") has experienced with a small minority of manning agencies based in Guernsey (discussed further in paragraph 3.1.3). It would also give the States

the power to regulate employment agencies with no link to shipping in the future by Ordinance should they so decide, without the need for further primary legislation, though the Department has no intention to propose such wider regulation at the present time.

1.4 Regulation 1.4 of the Convention provides, *inter alia*, that contracting states must ensure, in respect of seafarers who work on ships that fly their flag, that shipowners using the services of manning agencies based in other, non-contracting states, must ensure that those services conform to the Regulation's requirements. The importance of this for the Island is that there are several large maritime manning agencies based in Guernsey, employing sizeable numbers of local people, which place many thousands of seafarers on other states' ships. If Guernsey does not have, when the Convention comes into force or shortly thereafter, provisions in place that conform to the requirements of Regulation 1.4, it is possible that those agencies could lose a significant part of that business putting at risk employment, income and the Island's reputation as a reputable and properly regulated service provider.

1.5 To enable the relevant domestic legislation to be in place when the Convention comes into force in August 2012, the Law Officers recommend that it be made as soon as possible, and the Department accepts and supports that recommendation.

1.6 Policy regarding the Convention is within the mandate of the Public Services Department and Guernsey Harbours; however, policy in relation to employment agencies is within the Department's mandate, which is why it is sponsoring this legislation, in consultation and co-operation with the Public Services Department, Guernsey Harbours and the Law Officers.

2. The Convention

2.1 The Convention is intended to provide comprehensive rights and protection at work for the world's more than 1.2 million seafarers. It sets out seafarers' rights to decent conditions of work on a wide range of subjects, and aims to be globally applicable, easily understandable, readily updatable and uniformly enforced. It has been designed to become a global instrument known as the "fourth pillar" of the international regulatory regime for quality shipping, complementing the key Conventions of the International Maritime Organization (IMO).

2.2 Many of the Convention's provisions are relevant only to ships that are bigger than those allowed on the Guernsey Register. The Department is advised by Guernsey Harbours and the Law Officers that, in their view, the majority of the Convention provisions relevant to a Category 2 shipping administration such as Guernsey may be given effect by adoption in Bailiwick legislation of relevant provisions within a new composite small ships code that is currently being developed by the UK's Maritime and Coastguard Agency (MCA), with

concomitant expanded ship inspections, avoiding the need to draft significant amounts of new legislation. The only exception that has been identified at present is Regulation 1.4, which deals with recruitment and placement.

2.3 Regulation 1.4 states that its purpose is "*To ensure that seafarers have access to an efficient and well-regulated seafarer recruitment and placement system"*. It goes on to provide that such a system "*shall be operated only in conformity with a standardized system of licensing or certification or other form of regulation.*" Lawyers from the United Kingdom's Department for Transport have advised that a voluntary system of regulation would not meet the requirements of the Convention, as had been hoped, and that legislation is required to ensure compliance. As a result, Red Ensign Group administrations, including Guernsey, are now considering how best to give legislative effect to the Regulation's provisions, the economic importance of which to the Bailiwick is explained in paragraph 1.4 above. The text of the Regulation is set out in the Annex to this Report.

3. Addressing the issue by enabling legislation

3.1 The Department's proposal is for the approval of enabling legislation, rather than a narrower provision addressing only the Convention requirements, for several reasons.

3.1.1 The Law Officers advise that to make enabling primary legislation now, and to prepare a substantive Ordinance thereunder afterwards, affords the greatest chance of having the necessary provisions in place in our domestic legislation when the Convention comes into force. This is because such legislation need not address policy detail and so can be drafted relatively quickly - in this case it has been drafted already - allowing it to be transmitted to London for scrutiny and Royal Sanction much faster than would be the case if the primary legislation had to address the implementation of the specific requirements of Regulation 1.4. In the meantime, the substantive Ordinance to be made under it, which will address that detail, can be drafted and considered in slower time, and be the subject of appropriate industry consultation. When the Law is then registered on the records of the Island and commenced, the Ordinance can be made and come into force effectively simultaneously.

3.1.2 An enabling Law would give the States the power in the future to regulate employment agencies generally, or other areas within that sector, by Ordinance, without the need to approve further primary legislation to do so, which would enable legislation to put in place significantly more quickly if the need arose. The Department, as stated in the Executive Summary, has no current intention to propose the regulation of employment agencies generally; but as primary legislation is required to address the narrow issue of compliance with the Convention, it seems sensible to take the opportunity to give the States the power to legislate in this area by Ordinance in the future.

3.1.3 Moreover, while the majority of manning agencies based in the Bailiwick are reputable businesses operating to high standards, there have in recent years been cases of bad practice by a small number of agencies, at least one of which has resulted in litigation. The Department thinks it appropriate to take this opportunity to address this issue - to reduce reputational risk to the Bailiwick, to ensure that only the highest standards apply in respect of Bailiwick businesses in this sector, and to reduce the risk of seafarers suffering unacceptable loss and prejudice. The type of requirements set out in Regulation 1.4 and to be addressed in an Ordinance made under the enabling Law would be of direct relevance for that purpose, but the flexibility afforded by an enabling Law would allow provisions that go beyond the strict requirements of Regulation 1.4 if policy analysis shows that to be necessary.

4. Costs/Resources

4.1 Subject to what is said in paragraph 4.2 below, the making of an enabling Law as proposed in this Report will have no implications for costs or resources.

4.2 The making of an Ordinance under that Law, including an Ordinance regulating manning agencies to ensure compliance with the Convention as discussed in this Report, could have such implications, though the Department would expect them to be minor. That would be addressed in the relevant Report in the normal way.

5. Consultation

5.1 The Department is advised that the Public Services Department and Guernsey Harbours have consulted with the relevant authorities in Alderney and Sark, who are aware of the need to ensure that the Convention is given domestic effect and support the making of a Projet de Loi in the terms attached.

5.2 The Department is advised that the Public Services Department and Guernsey Harbours are satisfied that the majority of manning agencies based in the Bailiwick are aware of the Convention and support measures being taken to give appropriate effect to Regulation 1.4. A more detailed consultation with industry will be conducted in the course of the preparation of the relevant subordinate legislation.

5.3 The Law Officers have been closely involved in the formulation of the proposals set out in this Report and support the legislation proposed.

5.4 The United Kingdom Department for Transport and the Ministry of Justice are fully conversant with the Bailiwick's proposals for the implementation of the Convention generally and this proposed legislation in particular.

5.5 The Department believes that it has complied fully with the six principles of corporate governance in the preparation of this States Report.

6. Legislation

6.1 Due to the need to have enabling legislation in place as soon as possible, for the reasons set out in paragraph 3.1.1, the Department has sought the approval of the Policy Council and the Presiding Officer for this Report and the Projet de Loi to appear in the same Billet d'État. The Department is grateful to the Policy Council and the Presiding Officer for their consent in this regard.

7. Recommendations

7.1 The Department recommends that the States:

1. Approves the proposals set out in Section 3 of this Report, and
2. Approves the Projet de Loi entitled the Employment Agencies (Enabling Provisions) (Bailiwick of Guernsey) Law, 2012.

Yours faithfully

K A Stewart
Minister

A Brouard
Deputy Minister

L Queripel
D De Lisle
M Hadley
States Members

Annex

REGULATION 1.4 OF THE MARITIME LABOUR CONVENTION, 2006

Regulation 1.4 – Recruitment and placement

Purpose: To ensure that seafarers have access to an efficient and well-regulated seafarer recruitment and placement system

1. All seafarers shall have access to an efficient, adequate and accountable system for finding employment on board ship without charge to the seafarer.

2. Seafarer recruitment and placement services operating in a Member's territory shall conform to the standards set out in the Code.

3. Each Member shall require, in respect of seafarers who work on ships that fly its flag, that shipowners who use seafarer recruitment and placement services that are based in countries or territories in which this Convention does not apply, ensure that those services conform to the requirements set out in the Code.

Standard A1.4 – Recruitment and placement

1. Each Member that operates a public seafarer recruitment and placement service shall ensure that the service is operated in an orderly manner that protects and promotes seafarers' employment rights as provided in this Convention.

2. Where a Member has private seafarer recruitment and placement services operating in its territory whose primary purpose is the recruitment and placement of seafarers or which recruit and place a significant number of seafarers, they shall be operated only in conformity with a standardized system of licensing or certification or other form of regulation. This system shall be established, modified or changed only after consultation with the shipowners' and seafarers' organizations concerned. In the event of doubt as to whether this Convention applies to a private recruitment and placement service, the question shall be determined by the competent authority in each Member after consultation with the shipowners' and seafarers' organizations concerned. Undue proliferation of private seafarer recruitment and placement services shall not be encouraged.

3. The provisions of paragraph 2 of this Standard shall also apply – to the extent that they are determined by the competent authority, in consultation with the shipowners' and seafarers' organizations concerned, to be appropriate – in the context of recruitment and placement services operated by a seafarers' organization in the territory of the Member for the supply of seafarers who are nationals of that Member to

ships which fly its flag. The services covered by this paragraph are those fulfilling the following conditions:

(a) the recruitment and placement service is operated pursuant to a collective bargaining agreement between that organization and a shipowner;

(b) both the seafarers' organization and the shipowner are based in the territory of the Member;

(c) the Member has national laws or regulations or a procedure to authorize or register the collective bargaining agreement permitting the operation of the recruitment and placement service; and

(d) the recruitment and placement service is operated in an orderly manner and measures are in place to protect and promote seafarers' employment rights comparable to those provided in paragraph 5 of this Standard.

4. Nothing in this Standard or Regulation 1.4 shall be deemed to:

(a) prevent a Member from maintaining a free public seafarer recruitment and placement service for seafarers in the framework of a policy to meet the needs of seafarers and ship owners, whether the service forms part of or is coordinated with a public employment service for all workers and employers; or

(b) impose on a Member the obligation to establish a system for the operation of private seafarer recruitment or placement services in its territory.

5. A Member adopting a system referred to in paragraph 2 of this Standard shall, in its laws and regulations or other measures, at a minimum:

(a) prohibit seafarer recruitment and placement services from using means, mechanisms or lists intended to prevent or deter seafarers from gaining employment for which they are qualified;

(b) require that no fees or other charges for seafarer recruitment or placement or for providing employment to seafarers are borne directly or indirectly, in whole or in part, by the seafarer, other than the cost of the seafarer obtaining a national statutory medical certificate, the national seafarer's book and a passport or other similar personal travel documents, not including, however, the cost of visas, which shall be borne by the shipowner; and

(c) ensure that seafarer recruitment and placement services operating in its territory:

(i) maintain an up-to-date register of all seafarers recruited or placed through them, to be available for inspection by the competent authority;

(ii) make sure that seafarers are informed of their rights and duties under their employment agreements prior to or in the process of engagement and that proper arrangements are made for seafarers to examine their employment agreements before and after they are signed and for them to receive a copy of the agreements;

(iii) verify that seafarers recruited or placed by them are qualified and hold the documents necessary for the job concerned, and that the seafarers' employment agreements are in accordance with applicable laws and regulations and any collective bargaining agreement that forms part of the employment agreement;

(iv) make sure, as far as practicable, that the shipowner has the means to protect seafarers from being stranded in a foreign port;

(v) examine and respond to any complaint concerning their activities and advise the competent authority of any unresolved complaint;

(vi) establish a system of protection, by way of insurance or an equivalent appropriate measure, to compensate seafarers for monetary loss that they may incur as a result of the failure of a recruitment and placement service or the relevant shipowner under the seafarers' employment agreement to meet its obligations to them.

6. The competent authority shall closely supervise and control all seafarer recruitment and placement services operating in the territory of the Member concerned. Any licences or certificates or similar authorizations for the operation of private services in the territory are granted or renewed only after verification that the seafarer recruitment and placement service concerned meets the requirements of national laws and regulations.

7. The competent authority shall ensure that adequate machinery and procedures exist for the investigation, if necessary, of complaints concerning the activities of seafarer recruitment and placement services, involving, as appropriate, representatives of shipowners and seafarers.

8. Each Member which has ratified this Convention shall, in so far as practicable, advise its nationals on the possible problems of signing on a ship that flies the flag of a State which has not ratified the Convention, until it is satisfied that

standards equivalent to those fixed by this Convention are being applied. Measures taken to this effect by the Member that has ratified this Convention shall not be in contradiction with the principle of free movement of workers stipulated by the treaties to which the two States concerned may be parties.

9. Each Member which has ratified this Convention shall require that shipowners of ships that fly its flag, who use seafarer recruitment and placement services based in countries or territories in which this Convention does not apply, ensure, as far as practicable, that those services meet the requirements of this Standard.

10. Nothing in this Standard shall be understood as diminishing the obligations and responsibilities of shipowners or of a Member with respect to ships that fly its flag.

Guideline B1.4 – Recruitment and placement

Guideline B1.4.1 – Organizational and operational guidelines

1. When fulfilling its obligations under Standard A1.4, paragraph 1, the competent authority should consider:

(a) taking the necessary measures to promote effective cooperation among seafarer recruitment and placement services, whether public or private;

(b) the needs of the maritime industry at both the national and international levels, when developing training programmes for seafarers that form the part of the ship's crew that is responsible for the ship's safe navigation and pollution prevention operations, with the participation of shipowners, seafarers and the relevant training institutions;

(c) making suitable arrangements for the cooperation of representative shipowners' and seafarers' organizations in the organization and operation of the public seafarer recruitment and placement services, where they exist;

(d) determining, with due regard to the right to privacy and the need to protect confidentiality, the conditions under which seafarers' personal data may be processed by seafarer recruitment and placement services, including the collection, storage, combination and communication of such data to third parties;

(e) maintaining an arrangement for the collection and analysis of all relevant information on the maritime labour market, including the current and prospective supply of seafarers that work as crew classified by age, sex, rank and qualifications, and the industry's requirements, the collection of data on age or sex being admissible only for statistical purposes or if

used in the framework of a programme to prevent discrimination based on age or sex;

(f) ensuring that the staff responsible for the supervision of public and private seafarer recruitment and placement services for ship's crew with responsibility for the ship's safe navigation and pollution prevention operations have had adequate training including approved sea-service experience, and have relevant knowledge of the maritime industry, including the relevant maritime international instruments on training, certification and labour standards;

(g) prescribing operational standards and adopting codes of conduct and ethical practices for seafarer recruitment and placement services; and

(h) exercising supervision of the licensing or certification system on the basis of a system of quality standards.

2. In establishing the system referred to in Standard A1.4, paragraph 2, each Member should consider requiring seafarer recruitment and placement services, established in its territory, to develop and maintain verifiable operational practices. These operational practices for private seafarer recruitment and placement services and, to the extent that they are applicable, for public seafarer recruitment and placement services should address the following matters:

(a) medical examinations, seafarers' identity documents and such other items as may be required for the seafarer to gain employment;

(b) maintaining, with due regard to the right to privacy and the need to protect confidentiality, full and complete records of the seafarers covered by their recruitment and placement system, which should include but not be limited to:
(i) the seafarers' qualifications;
(ii) record of employment;
(iii) personal data relevant to employment; and
(iv) medical data relevant to employment;

(c) maintaining up-to-date lists of the ships for which the seafarer recruitment and placement services provide seafarers and ensuring that there is a means by which the services can be contacted in an emergency at all hours;

(d) procedures to ensure that seafarers are not subject to exploitation by the seafarer recruitment and placement services or their personnel with regard to the offer of engagement on particular ships or by particular companies;

(e) procedures to prevent the opportunities for exploitation of seafarers arising from the issue of joining advances or any other financial transaction between the ship owner and the seafarers which are handled by the seafarer recruitment and placement services;

(f) clearly publicizing costs, if any, which the seafarer will be expected to bear in the recruitment process;

(g) ensuring that seafarers are advised of any particular conditions applicable to the job for which they are to be engaged and of the particular shipowner's policies relating to their employment;

(h) procedures which are in accordance with the principles of natural justice for dealing with cases of incompetence or indiscipline consistent with national laws and practice and, where applicable, with collective agreements;

(i) procedures to ensure, as far as practicable, that all mandatory certificates and documents submitted for employment are up to date and have not been fraudulently obtained and that employment references are verified;

(j) procedures to ensure that requests for information or advice by families of seafarers while the seafarers are at sea are dealt with promptly and sympathetically and at no cost; and

(k) verifying that labour conditions on ships where seafarers are placed are in conformity with applicable collective bargaining agreements concluded between a Ship owner and a representative seafarers' organization and, as a matter of policy, supplying seafarers only to shipowners that offer terms and conditions of employment to seafarers which comply with applicable laws or regulations or collective agreements.

3. Consideration should be given to encouraging international cooperation between Members and relevant organizations, such as:

(a) the systematic exchange of information on the maritime industry and labour market on a bilateral, regional and multilateral basis;

(b) the exchange of information on maritime labour legislation;

(c) the harmonization of policies, working methods and legislation governing recruitment and placement of seafarers;

(d) the improvement of procedures and conditions for the international recruitment and placement of seafarers; and

(e) workforce planning, taking account of the supply of and demand for seafarers and the requirements of the maritime industry.

PROJET DE LOI

ENTITLED

The Employment Agencies (Enabling Provisions) (Bailiwick of Guernsey) Law, 2012

THE STATES, in pursuance of their Resolution of the * day of *, 2012[1], have approved the following provisions which, subject to the Sanction of Her Most Excellent Majesty in Council, shall have force of law in the Bailiwick of Guernsey.

General power to make Ordinances regulating employment agencies.

1. The States may by Ordinance make such provision as they think fit -

(a) to secure the proper conduct of employment agencies and employment businesses, and

(b) to protect the interests of persons availing themselves of the services of such agencies and businesses.

Specific matters for which Ordinances may make provision.

2. (1) An Ordinance under section 1 may, without limitation, make provision in relation to the following matters –

(a) requiring persons carrying on such agencies and businesses to keep records,

(b) prescribing the form of such records and the entries to be made in them,

1 Article * of Billet d'État No. * of 2012.

(c) prescribing qualifications appropriate for persons carrying on such agencies and businesses,

(d) regulating advertising by persons carrying on such agencies and businesses,

(e) safeguarding clients' money deposited with or otherwise received by persons carrying on such agencies and businesses,

(f) restricting the services which may be provided by persons carrying on such agencies and businesses,

(g) regulating the way in which and the terms on which services may be provided by persons carrying on such agencies and businesses, and

(h) restricting or regulating the charging of fees by persons carrying on such agencies and businesses.

(2) An Ordinance under section 1 may implement the provisions, or any provision, of any relevant convention, treaty or agreement.

General provisions as to Ordinances.

3. (1) An Ordinance under this Law -

(a) may be amended or repealed by a subsequent Ordinance hereunder, and

(b) may contain such consequential, incidental, supplementary, transitional and savings provisions as may appear to be necessary or expedient (including, without

limitation, provision making consequential amendments to this Law and any other enactment).

(2) Any power to make an Ordinance under this Law may be exercised -

(a) in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified cases or classes of cases,

(b) so as to make, as respects the cases in relation to which it is exercised -

(i) the full provision to which the power extends, or any lesser provision (whether by way of exception or otherwise),

(ii) the same provision for all cases, or different provision for different cases or classes of cases, or different provision for the same case or class of case for different purposes,

(iii) any such provision either unconditionally or subject to any prescribed conditions.

(3) Without prejudice to the generality of the foregoing provisions of this Law, an Ordinance under this Law -

(a) may, subject to subsection (4), make provision in relation to the creation, trial (summarily or on indictment) and punishment of offences and may (for the avoidance of

doubt) specify penalties which may be imposed by the courts,

(b) may empower the Department, any other department, and any other body, to make or issue orders, rules, regulations, codes or guidance, for the purposes of this Law or any Ordinance made under it,

(c) may provide that no liability shall be incurred by any specified person or body in respect of anything done or omitted to be done in the discharge or purported discharge of any of their functions under the Ordinance unless the thing is done or omitted to be done in bad faith,

(d) may make provision under the powers conferred by this Law notwithstanding the provisions of any enactment for the time being in force,

(e) may make provision for the purpose of dealing with matters arising out of or related to matters set out in section 1,

(f) may repeal, replace, amend, extend, adapt, modify or disapply any rule of custom or law, and

(g) without prejudice to the generality of the foregoing, may make any such provision of any such extent as might be made by Projet de Loi, but may not provide that a person is to be guilty of an offence as a result of any retrospective effect of the Ordinance.

(4) The power conferred by subsection (3)(a) to create offences and

specify penalties does not include power -

(a) to provide for offences to be triable only on indictment,

(b) to authorise the imposition, on summary conviction of an offence, of a term of imprisonment or a fine exceeding the limits of jurisdiction for the time being imposed on the Magistrate's Court by section 9 of the Magistrate's Court (Guernsey) Law, 2008[2], or

(c) to authorise the imposition, on conviction on indictment of any offence, of a term of imprisonment exceeding five years.

(5) The power to make an Ordinance under this Law shall –

(a) where it is exercised in respect of Alderney, be exercised following consultation with the Policy and Finance Committee of the States of Alderney, and

(b) where it is exercised in respect of Sark, be exercised following consultation with the Finance and Commerce Committee of the Chief Pleas of Sark,

but a failure to comply with this subsection shall not invalidate any Ordinance made under this Law.

Interpretation.

4. (1) In this Law, unless the context otherwise requires –

a "**department**" means any department, council or committee of the

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2 Order in Council No. XVIII of 2009.

States of Guernsey, States of Alderney or Chief Pleas of Sark, however styled,

"**the Department**" means the States of Guernsey Commerce and Employment Department,

"**employment agency**" means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of providing services (whether by the provision of information or otherwise) for the purpose of finding workers employment with employers or of supplying employers with workers for employment by them,

"**employment business**" means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity,

"**enactment**" means any Law, Ordinance or **subordinate legislation**,

"**implement**" includes the enforcement or enactment, and the securing of the administration, execution, recognition, exercise or enjoyment, in or under domestic law -

(a) of the provision or provisions of the convention, treaty or agreement in question, and

(b) of any right, power, liability, obligation, prohibition or restriction created or arising, or any remedy or procedure provided for, by or under the same,

"**relevant convention, treaty or agreement"** means any convention, treaty or agreement having as its object the proper regulation of employment agencies and employment businesses or the protection of the interests of persons

availing themselves of the services of such agencies and businesses; and, for the avoidance of doubt, includes any convention, treaty or agreement adopted by the General Conference of the International Labour Organisation and whether or not directly applicable in or binding upon the Bailiwick, and

"**subordinate legislation**" means any regulation, rule, order, rule of court, resolution, scheme, byelaw or other instrument made under any enactment and having legislative effect.

(2) Any reference in this Law to an enactment is a reference thereto as from time to time amended, re-enacted (with or without modification), extended or applied.

(3) The Interpretation (Guernsey) Law, 1948[3] applies to the interpretation of this Law throughout the Bailiwick of Guernsey.

Citation.

5. This Law may be cited as the Employment Agencies (Enabling Provisions) (Bailiwick of Guernsey) Law, 2012.

Commencement.

6. (1) This Law shall come into force -

(a) in respect of Guernsey and Alderney, on the day appointed by Ordinance of the States, and

(b) in respect of Sark, on the day appointed by Ordinance of the Chief Pleas.

(2) An Ordinance under subsection (1) may appoint different dates

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3 Ordres en Conseil Vol. XIII, p. 355.

for different provisions and for different purposes.

(NB As there are no resource implications identified in this report, the Treasury and Resources Department has no comments to make.)

(NB The Policy Council supports the Report.)

The States are asked to decide:-

I.- Whether, after consideration of the Report dated 11th September, 2012, of the Commerce and Employment Department, they are of the opinion:

1. To approve the proposals set out in Section 3 of this Report.

2. To approve the Projet de Loi entitled "The Employment Agencies (Enabling Provisions) (Bailiwick of Guernsey) Law, 2012" and to authorize the Bailiff to present a most humble petition to Her Majesty in Council praying for Her Royal Sanction thereto.

THE IMAGE RIGHTS (BAILIWICK OF GUERNSEY) ORDINANCE, 2012

The States are asked to decide:-

II.- Whether they are of the opinion to approve the draft Ordinance entitled "The Image Rights (Bailiwick Of Guernsey) Ordinance, 2012", and to direct that the same shall have effect as an Ordinance of the States.

THE MACHINERY OF GOVERNMENT (TRANSFER OF FUNCTIONS) (GUERNSEY) ORDINANCE, 2012

The States are asked to decide:-

III.- Whether they are of the opinion to approve the draft Ordinance entitled "The Machinery Of Government (Transfer Of Functions) (Guernsey) Ordinance, 2012", and to direct that the same shall have effect as an Ordinance of the States.

THE DATA PROTECTION (BAILIWICK OF GUERNSEY) (AMENDMENT) ORDINANCE, 2012

The States are asked to decide:-

IV.- Whether they are of the opinion to approve the draft Ordinance entitled "The Data Protection (Bailiwick Of Guernsey) (Amendment) Ordinance, 2012", and to direct that the same shall have effect as an Ordinance of the States.

POLICY COUNCIL

HEAVILY INDEBTED POOR COUNTRIES INITIATIVE

Executive Summary

1. The Heavily Indebted Poor Countries Initiative ("HIPC Initiative") aims to ensure that no poor country faces a debt burden it cannot manage. Since its launch, responsible members of the international financial community have worked together to reduce to sustainable levels the external debt burdens of the most heavily indebted poor countries.

2. Despite the largely successful efforts to implement the HIPC Initiative by some of the largest institutional creditors, other commercial creditors have lagged behind in their efforts. In addition some commercial organisations have established funds (sometimes referred to as "vulture funds") designed to acquire debt (which it is intended should be reduced in accordance with the Initiative) and enforce payment of the debt through legal proceedings.

3. This States Report proposes that legislation designed to limit the capacity of "vulture funds" to enforce payment of relevant debts through courts in the Bailiwick be prepared and laid before the States of Deliberation.

Background

4. The HIPC Initiative was launched in 1996. Under the Initiative, the International Monetary Fund ("IMF") and World Bank calculate the proportionate reduction required in a country's external debts in order to return them to 150% of the value of the country's annual exports, which is considered to be a sustainable level. All creditors – multilateral, bilateral and commercial – are expected to provide the proportionate reduction that will achieve this. At present, the UK authorities, and many governments of other countries, multilateral lenders (e.g. the World Bank, the African Development Bank, the IMF, the Inter-American Development Bank and all Paris Club creditors) and commercial creditors do so.

5. Debt relief is one part of a much larger effort to address the development needs of low-income countries and make sure that debt sustainability is maintained over time. Thirty nine countries are currently designated by the IMF and World Bank as eligible or potentially eligible under the Initiative. The current position of eligible or potentially eligible countries in the Initiative is set out in the Annex to this Paper[1].

6. Whilst many creditors do reduce the amount of their debts in accordance with the Initiative, some creditors have instead sought to recover the full value of the debt

[1] For current status: http://go.worldbank.org/4IMVXTQ090 or http://www.imf.org/external/np/exr/facts/hipc.htm

plus accumulated interest and any associated charges owed to them. Repayment of these creditors has the effect of inhibiting the full benefit of the HIPC Initiative, as resources provided through debt relief and which are intended to support development and poverty reduction in the country are diverted for the purpose of satisfying the full value of the debt concerned.

Debt Relief (Developing Countries) Act 2010

7. The Debt Relief (Developing Countries) Act 2010 (the 'UK Act') was enacted following a private members Bill introduced by Andrew Gwynne MP. The purpose of the Bill was to limit the amount that can be recovered by commercial creditors from HIPCs by reference to the proportionate reduction calculated as set out in paragraph 4 above in order to return the debtor country's debt to sustainable levels. The Bill was supported by H.M. Government in the UK. The response to the consultation on this Bill from the financial services sector was general opposition to the legislation, and the non-governmental organisations (NGOs) were in favour. The Bill received broad cross-party support in the UK.

8. During its progress through Parliament concerns were raised with regard to: the interference with contractual rights; human rights issues, including Article 6 and Article 1 of the First Protocol of the European Convention on Human Rights; the retrospective impact of applying the legislation to judgement already made; uncertainty about the scale of benefits to developing countries; potential 'spillover' effects, including developing countries' ability to borrow; whether other countries would take similar action; and the possible impact on the UK as a financial services centre.

9. In order to address some of these concerns, and to allow the future review of unintended consequences caused by the proposed measures, a sunset clause was inserted. The sunset clause meant that the legislation would expire after a year unless renewed by the House of Commons by an order approved by both Houses of Parliament. The UK Act received Royal Assent on 10 April 2010 and entered into force two months later.

10. The UK Act prevents creditors of HIPCs recovering an amount of debt in excess of that consistent with the HIPC Initiative. The main provisions of the UK Act are to: reduce the amount recoverable on a debt to which the Act applies to the amount which the creditor could recover if the creditor provided the level of debt relief expected under the HIPC Initiative and to reduce the value of judgments and arbitration awards relating to debts to which the UK Act applies. The UK Act applies to: a fixed stock of historic debts (that are eligible for the HIPC Initiative), and does not apply to new borrowing undertaken by HIPC governments; to judgments given in the UK before commencement of the UK Act, so that such judgments may be enforced only for the reduced amount; and to the enforcement of awards and foreign judgments in the UK (so that those awards and judgments may only be enforced for the reduced amount). It excludes debts where the debtor does

not make an offer to repay the amount which remains recoverable by the creditor under the terms of the UK Act.

11. The compliance with Article 6 and Article 1 of the First Protocol of the European Convention on Human Rights was debated. It was considered that, in respect of Article 1 of the First Protocol, creditors would not be deprived of their property and that they would retain an asset of some economic value. Article 6 is potentially engaged because the Act will reduce the enforceability of judgements, including existing judgments. The legislation would not be effective without these measures.

12. The sunset clause inserted in the UK Act meant that it was due to expire on 7 June 2011. The UK coalition Government consulted with representatives of the financial services sector, lawyers, civil society, the international financial institutions (IMF, World Bank) and HIPC country Governments. The evidence suggested that the UK Act had had some benefit on HIPCs and no evidence was found of unintended or adverse effects. Legislation to make these provisions permanent was made on 16 May 2011.

Proposed Guernsey legislation

13. Following the move to make the UK Act permanent the Policy Council considered a report in relation to Heavily Indebted Poor Countries Initiative on 6 June 2011 and agreed that:

    "*A report should be prepared recommending the enactment of appropriate legislation designed to limit the capacity of "vulture funds" to enforce payment of debts through Courts in the Bailiwick. The Council is aiming for proposals to be laid before the States at the earliest possible juncture*."

14. On 27 June 2011 Lord Sassoon, the Commercial Secretary to the Treasury, wrote to the Chief Minister to welcome the Policy Council decision and offered to share the UK's experiences on the development and implementation of the Debt Relief (Developing Countries) Act 2010. The Policy Council subsequently liaised at officer level with HM Treasury and has maintained an ongoing dialogue in this matter.

15. In August 2011, the Policy Council issued a consultation which invited comments from business on the enactment of legislation similar to the UK Act. The consultation closed on 16 September 2011, and only three responses were received. Two responses were from NGOs supporting the enactment of legislation similar to the UK Act. One business respondent raised concerns aligned to those raised in the UK Parliament and described above. No response suggested that the enactment of a Law containing provisions similar to those of the UK Act would have adverse consequences on Guernsey businesses. Following the consultation the Policy Council received a message of support from the Jubilee Debt Campaign.

16. On the 18 November 2011 the Policy Council issued the following statement to clarify the position should a vulture fund be established in Guernsey prior to the proposed legislation:

    "*It is anticipated that the legislation will follow the UK example [the Debt Relief (Developing Countries) Act 2010] , which will ensure that if a fund has the right to recover a qualifying debt incurred prior to the commencement of the law there will be appropriate restrictions on the right to recover the amount owed after the law is enacted.*"

17. To date the courts within the Bailiwick have not been used to enforce payment of debts covered by the HIPC Initiative. However, this is not an academic or theoretical issue. Judgment for a debt involving La Générale des Carrières et des Mines Sarl ("Gécamines") company owned by the Democratic Republic of Congo ("the DRC") was given in the Royal Court of Jersey on 27 October 2010[2]. In this case F.G. Hemisphere purchased two arbitration awards against the DRC and sought to enforce these awards against Gécamines in the Jersey courts. The Gécamines case had a high profile in the national media and within UK Parliament.

18. On 27 October 2010 the Royal Court of Jersey enforced the debt against Gécamines. On appeal, on 14 July 2011 the Jersey Court of Appeal affirmed this judgement by a majority.[3] Gécamines appealed to the Judicial Committee of the Privy Council, with leave of the Court of Appeal and judgement was handed down on 17 July 2012[4]. The Privy Council ruled that Gécamines was not an "arm of the State" and held that Gécamines and the DRC were not so closely associated that they should have to bear each other's liabilities. It held that Gécamines was 'a real and functioning corporate entity' which was clearly distinct from the executive organs of State.

19. The judgement of the Privy Council suggests that it will be more difficult for the Guernsey courts to enforce arbitration awards or court judgements against state-owned entities; it does not obviate the need to legislate in line with the UK Act to prevent the enforcement of these debts.

20. The concerns raised in the UK Parliament have not transpired, and the UK has not experienced any consequences that have impacted businesses adversely outside of the area intended to be affected by the UK Act. In respect of concerns with regard to human rights compliance, thus far no successful challenge has been brought. In addition, it should be noted that it is the UK which is the State party to the European Convention on Human Rights and by replicating the provisions in the UK Act, it therefore follows that the UK is likely to defend the position of the Islands in respect of those rights that might be engaged. In the circumstances, it seems that there are limited grounds upon which to base a policy which does not support the HIPC Initiative in a manner consistent with that of the UK's.

[2] *FG Hemisphere Associates LLC v Democratic Republic of Congo & Others* [2010] JRC 195
[3] *FG Hemisphere Associates LLC v Democratic Republic of Congo & Others* [2011] JCA 141
[4] *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27

21. The implementation of similar legislation to the Debt Relief (Developing Countries) Act 2010 would demonstrate Guernsey's shared aims with the HIPC Initiative. In light of the high profile nature of 'vulture funds' there are significant adverse consequences for Guernsey's international reputation unless the issue is addressed in an acceptable manner within a reasonable time-frame.

Proposed Legislation in Other Crown Dependencies

22. The States of Jersey published a consultation document on the 'promotion of debt relief for poorer countries' on 15 September 2011, with the consultation period ending on 8 December 2011. On 1 February 2012 the Chief Minister made an announcement he was proposing to introduce legislation '*designed to stop creditors, including so-called 'vulture funds', from pursuing inequitable payments through Jersey's courts*'. Jersey received 25 responses to the consultation from private individuals, companies and representatives of non-governmental organisations, as well as the United Nations. The Chief Minister of the States of Jersey commented:

    "*By bringing forward a law to discourage so-called vulture funds from using our courts, Jersey will be sending a clear and positive message that ours is a well-regulated, co-operative and transparent jurisdiction. In proposing this legislation, our aim is to ensure that Jersey continues to support international debt relief efforts, while at the same time upholding the sanctity of contract law and remaining compliant with our human rights commitments*."

23. Legislation has not yet been laid before the States of Jersey, but a draft Law is currently being prepared.

24. The Isle of Man announced that it intended to progress legislation to prevent the Isle of Man being used as a jurisdiction for enforcement of relevant debts by 'vulture funds'. The Treasury Minister stated that:

    "*We have no evidence of vulture fund activity in the Isle of Man and as an internationally responsible country we do not want it here. The Manx Government is happy to introduce legislation to ensure that our Island is not used for the disreputable business of exploiting Heavily Indebted Poor Countries.*"

25. The Isle of Man's Tynwald published the Heavily Indebted Poor Countries (Limitation on Debt Recovery) Bill 2012 on the 1 May 2012. This Bill had its third reading on 12 June 2012 in the House of Keys and first reading in the Legislative Council on 26 June 2012.

26. The States of Alderney have been consulted and agreed that they would wish to have legislation along the line proposed in this report.

27. The General Purposes and Advisory Committee of the Chief Pleas of Sark has declared that they would not wish the legislation to be drafted on their behalf.

Whilst it would be preferable for any Law to be Bailiwick-wide and therefore include Sark, the risk of someone having, or establishing, a right to litigate before the Court of the Seneschal for the purpose of trying to recover a debt subject to the HIPC Initiative, is probably fairly remote. The absence of a Sark companies law also mitigates the risk of any fund or other necessary vehicle for use by relevant creditors being set up in Sark. Thus a Law that applies to Guernsey and Alderney (which has its own companies legislation) should be effective to deter use of the whole Bailiwick as a jurisdiction within which to try to recover debt contrary to the intention of the HIPC Initiative.

Principles of Good Governance

28. The proposal meets the relevant principles of good governance. In supporting the HIPC Initiative the States will be meeting its objective, as agreed in the States Strategic Plan, of "*maintenance and enhancement of Guernsey's standing in the global community*". This promotes values of international cooperation by supporting this IMF and World Bank initiative and reduces the risk of damaging the reputation of the Bailiwick. The Policy Council has engaged with the relevant stakeholders and the general public in relation to this proposal, and has made public announcements as to the intentions of the Policy Council.

Recommendation

The Policy Council recommends that the States of Deliberation resolve to support the Heavily Indebted Poor Countries Initiative and direct the preparation of legislation, based upon the provisions of the Debt Relief (Developing Countries) Act 2010, to prevent creditors of Heavily Indebted Poor Countries recovering an amount of debt in excess of that consistent with the Heavily Indebted Poor Countries Initiative.

Deputy Peter A Harwood
Chief Minister

1 October September 2012

Deputy J P Le Tocq
Deputy Chief Minister

Deputy G A St Pier
Deputy R Domaille
Deputy D B Jones
Deputy R W Sillars
Deputy P A Luxon
Deputy A H Langlois
Deputy K A Stewart
Deputy A H Adam
Deputy M G O'Hara

Annex

Eligible or potentially eligible countries in the HIPC Initiative (as at June 2012)

Eligible for the Initiative		*Potentially eligible for the Initiative*
Post-Completion Point (33)	**Post-Decision Point (3)**	**Pre-Decision Point (3)**
Afghanistan	Chad	Eritrea
Benin	Comoros	Somalia
Bolivia	Guinea	Sudan
Burkina Faso		
Burundi		
Cameroon		
Central African Republic		
Republic of Congo		
Democratic Republic of Congo		
Côte d'Ivoire		
Ethiopia		
The Gambia		
Ghana		
Guinea-Bissau		
Guyana		
Haiti		
Honduras		
Liberia		
Madagascar		
Malawi		
Mali		
Mauritania		
Mozambique		
Nicaragua		
Níger		
Rwanda		
São Tomé Príncipe		
Senegal		
Sierra Leone		
Tanzania		
Togo		
Uganda		
Zambia		

Note: Applicant countries must meet certain criteria, commit to poverty reduction through policy changes and demonstrate a good track-record over time. The IMF and World Bank provide interim debt relief in the initial stage (post decision point countries) and, when a country meets its commitments, full debt-relief is provided (post-completion point countries)

(NB As there are no resource implications identified in this report, the Treasury and Resources Department has no comments to make.)

The States are asked to decide:-

V.- Whether, after consideration of the Report dated 1 October 2012, of the Policy Council, they are of the opinion:

1. To resolve to support the Heavily Indebted Poor Countries Initiative as recommended in the Report.

2. To direct the preparation of such legislation as may be necessary to give effect to their above decision.

POLICY COUNCIL

REPEAL OF CONTROL OF BORROWING LEGISLATION

Summary

1. This report examines the relevance and legislative history of the Control of Borrowing (Bailiwick of Guernsey) Ordinance, 1959. It concludes that most of the provisions of the Ordinance have been repealed or replaced. Those that remain have no useful commercial or regulatory functions save for those aspects that relate to company formation in Alderney. It is recommended that the Ordinance is repealed to allow Alderney to control and exercise oversight of beneficial ownership of Alderney companies in a manner that is consistent with the companies' law in Guernsey.

Purpose of the Law

2. Legislation for the regulating of borrowing, raising monies, and promoting and financing transactions was introduced throughout the British Isles after the end of the Second World War, at a time of chronic financial difficulty. In the UK the Borrowing (Controls and Guarantee) Act 1946 was enacted ('the 1946 UK Act', now repealed). This Act, and subordinate legislation under it, replaced with modifications certain provisions of the Defence (Finance) Regulations 1939 and Capital Issues Exemption Order 1941. The provisions were also replicated in the Bailiwick of Guernsey by the Borrowing Control (Bailiwick of Guernsey) Law, 1946 ('the 1946 Law'). The Bailiwick of Jersey enacted the Control of Borrowing (Jersey) Law 1947.

3. In its application the 1946 Law enabled the States to provide some input on the economic direction of the Bailiwick. Whilst the Law is primarily concerned with borrowing it also regulates certain aspects of raising money by issues of securities. The Control of Borrowing (Bailiwick of Guernsey) Ordinance, 1959, as amended, ('the 1959 Ordinance' colloquially known as "COBO"), was made[1], following recommendation by the Board of Administration, under section one of the 1946 Law. One of the main purposes of the introduction of the 1959 Ordinance was to extend the use of the 1946 Law to regulate the offers for the sale of shares (such as prospectuses).

4. The 1946 Law and the 1959 Ordinance provide that, subject to exemptions, certain transactions, by which monies are borrowed or raised in the Bailiwick where the aggregate amounts involved exceed £50,000 in any 12 month period, require the States of Guernsey's consent. The 1959 Ordinance also required consent to be obtained for transactions such as the raising of money by the issue of shares and the circulation in the Bailiwick of offers for the sale of shares (such as prospectuses) in

[1] This came into force on 12 March 1959

companies not incorporated in the Bailiwick. The 1959 Ordinance established the current consent framework for these transactions, but it has been amended several times since it came into force, in order to refine and modernise the nature and extent of those transactions which require consent.

Legislative and Policy History

5. In 1967, a relaxation of controls saw section six of the 1959 Ordinance repealed. This removed a prohibition on offers for subscription or sale of certain securities without the consent of the Advisory and Finance Committee. Exemptions were also introduced for transactions by residents or for non-sterling securities.[2] These exemptions were amended in 1970 so that the Ordinance applied to investment trust companies resident in designated territories.[3]

6. In 1976, the 1959 Ordinance was amended to regulate the incorporation of companies.[4] In the preceding States report[5] it was recognised that:

   "*it was necessary for the proper economic development of the Bailiwick that the incorporation of companies within the Bailiwick and which carry out acceptable activities should be encouraged. It is equally important to ensure that there is a reasonable measure of control and that there are no obvious grey areas in the legislation by which control is exercised.*"

7. The proposal to amend the 1959 Ordinance was considered, at the time, to be the simplest and most readily available method by which to control any undertakings from the Bailiwick and to reduce the risk of bringing the island's reputation into disrepute. These amendments included a reversal of the 1967 policy and the reinstatement of section six of the 1959 Ordinance. It was recognised that this stepping back in policy was to address a greater need to establish controls against the backdrop of increasingly sophisticated commercial activities being undertaken in the Bailiwick. These changes were as a result of the growing finance sector and the establishment of regulation of financial services in the islands.

8. These controls were also intended to supplement the requirement for persons incorporating a company in the Bailiwick to require a 'fiat' or 'visa' from the Law Officers before seeking permission from the Royal Court to register the Memorandum of Association of a proposed company. The requirement of the 'visa' from a Law Officer was introduced in 1927 following the settlement of Guernsey's imperial contribution following a request from H.M. Government following World War I[6]. The purpose of this 'visa' was to signify approval of the incorporation of the company following consideration of a questionnaire. The questionnaire was designed to establish the name and address of the beneficial

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[2] Control of Borrowing (Amendment) (Bailiwick of Guernsey) Ordinance, 1967
[3] Control of Borrowing (Amendment) (Bailiwick of Guernsey) Ordinance, 1970
[4] Control of Borrowing (Amendment) (Bailiwick of Guernsey) Ordinance, 1976
[5] Billet d'État IX 1976
[6] *Guernsey and the Imperial Contribution*, Sir Havilland de Sausmarez, Royal Court 1930

owners and purpose of the company, in particular whether or not the company's activities would result in the avoidance of United Kingdom taxation. The principle behind the latter purpose of the questionnaire was supported by a resolution of the States of Deliberation made in September 1926 which supported cooperation with H.M. Government to prevent evasion of British taxation[7].

9. Applications under the 1959 Ordinance were considered by the Advisory and Finance Committee. Following the establishment of the Guernsey Financial Services Commission (GFSC) in 1988, individual officers of the GFSC have been delegated to act on behalf of the Committee in undertaking the administration of the 1959 Ordinance[8]. Where consent was likely to be refused the matters were referred back to the Committee (latterly the Policy Council). This had the practical benefit of ensuring that those officers who had access to relevant information and expertise undertook this function whilst remaining accountable to the Committee. This delegated authority still remains and is refreshed from time to time; the last resolution of Policy Council delegating authority to listed officers of the GFSC was made on 24 October 2011.

10. In 1989, the 1959 Ordinance was amended to remove functions that were then to be discharged under the Protection of Investors (Bailiwick of Guernsey) Law 1987 ("the POI Law"). These amendments to the 1959 Ordinance included: exempting any public issues or offer for subscription or sale of shares or units in any collective investment scheme, such as closed ended investment funds; increasing the threshold for exemption from £10,000 to £50,000 in section one; increasing the threshold for exemptions from £50,000 to £500,000 in section eight; and removing out of date references.[9]

11. In 2003, the 1959 Ordinance was amended to require the issuance of guidance on the administration under the Ordinance and introduced the ability to charge fees.[10]

12. In 2007, the States began to further repeal elements of the 1959 Ordinance[11] (the 1946 UK Act having been repealed in 1991[12]). This repeal included the removal of the raising of money by closed ended collective investment funds as an activity requiring consent and, instead, funds and investment sector firms providing services were placed within the remit of the GFSC via amendments to the POI Law[13]. The provisions in the 1959 Ordinance in connection with the circulation of

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[7] *Guernsey company formation – the Procureur's Visa*, Nik van Leuven, JLR June 2009; Billet d'État XVI 1926

[8] This now undertaken by resolution of the Advisory and Finance Committee and latterly the Policy Council in exercise of its discretion under the Public Functions (Transfer and Performance)(Bailiwick of Guernsey) Law, 1991.

[9] Control of Borrowing (Amendment) (Bailiwick of Guernsey) Ordinance, 1989

[10] Control of Borrowing (Bailiwick of Guernsey) (Amendment) Ordinance, 2003

[11] Protection of Investors (Bailiwick of Guernsey) (Amendment) Law, 2007

[12] By the Government Trading Act 1990. As early as 1957 the Radcliff Committee, established by H.M. Treasury to enquire into and make recommendations on the working of the monetary and credit system acknowledged the 1946 UK Act had little effect.

[13] Billet d'État XIX 2007, p1516

prospectuses were also repealed, and replaced by rules issued by the GFSC under the POI Law.

13. The Companies (Guernsey) Law, 2008 ("the 2008 Law"), which introduced a modern and streamlined company law regime, removed the need for consent under the 1959 Ordinance to be given for the formation of Guernsey companies. The 2008 Law provides that a resident agent, being either a Guernsey resident director of a Guernsey Company or a Guernsey regulated corporate services provider, is under a duty to know upon incorporation, and thereafter from time to time to take reasonable steps to obtain, the identities of the beneficial owners of the company.[14] This information is consequently made available to the Companies Registrar who has authority to pass this information on to the law enforcement and the regulatory authorities.

Current Application of COBO

14. Although the revisions to the POI Law and the 2008 Law brought about the repeal of significant elements of the 1959 Ordinance, a number of aspects of the 1959 Ordinance remain in place. These include the requirement for consent to be provided in relation to:

    - those transactions which remain treated as the borrowing of money in the Bailiwick as defined in section one of the 1959 Ordinance;
    - the raising of capital by companies, including the raising of capital by the issue of founder shares on the formation of Alderney companies;
    - the issue of partly paid shares, certain other issues of shares and other securities;
    - the issue of government securities which are to be registered in the Bailiwick;

    in each case these are subject to the exemptions set out in the 1959 Ordinance. The matter relating to Alderney company formation is described below.

15. Following consultation and advice from the GFSC the Policy Council has concluded that, in respect of Guernsey, all remaining sections of the 1959 Ordinance, but not the enabling 1946 Law, serve no useful purpose from either a regulatory or commercial point of view. The purposes of the Ordinance relates to a period when the control of borrowing was essential for economic reasons. These reasons no longer exist. Accordingly, the Policy Council recommends the repeal of the 1959 Ordinance, provided that no aspect is required by Alderney and Sark. This recommendation would bring the control of borrowing control in line with UK standards. Whilst it is proposed to retain the 1946 Law at this stage matter should remain under review.

[14] *Ibid* s 484

16. Jersey has a similar regime to the 1959 Ordinance under the Control of Borrowing (Jersey) Order 1958 ('the 1958 Order'). It does not have similar beneficial ownership provisions to Guernsey's 2008 Companies Law and an application for consent is required under its 1958 Order to raise shares and enable company formation[15].

COBO in relation to Alderney

17. The 1959 Ordinance is still relied on for the purposes of issuance of shares in relation to the formation of Alderney companies under the Companies (Alderney) Law, 1994 ('the Alderney Company Law'), in similar manner to how the Ordinance was used in Guernsey prior to the coming into force of Guernsey's 2008 Companies Law.

18. The Alderney Gambling Control Commission (AGCC) may only grant Category One or Category Two licences to an Alderney company by virtue of the Alderney eGambling Ordinance, 2009. This means that the use of COBO in relation to company formations is tied to the regulatory regime in relation to internet gambling and gaming.

19. Prior to December 2011 the GFSC used its delegated authority in respect of the 1959 Ordinance to consider applications for consent made on behalf of proposed Alderney companies, except in those cases where consent might be refused. These latter cases were referred to the Policy Council for consideration. This has created an anomaly whereby the Council, which is accountable to the States of Deliberation, is being asked to make a decision in relation to a company formation under Alderney Law, a matter which ought to lie within the competence of the States of Alderney.

20. In addition to the anomaly described above, the GFSC's involvement under the 1959 Ordinance in respect of the formation of an Alderney on-line gambling business is not appropriate or necessary given the overall supervisory regulatory role of the AGCC. In effect this means that the GFSC's functions involve being asked to second guess concerns and considerations which are more appropriately matters for the AGCC. In the light of these concerns the GFSC has decided to no longer undertake this delegated function in respect of companies that were due to be, or might in the future be, regulated by the AGCC. The GFSC continue to undertake the delegated functions under the 1959 Ordinance for all other borrowing, where the Ordinance applies, and for those Alderney companies that are not involved in gambling activities. Applications that relate to proposed companies that are to be regulated by the AGCC, or that propose to undertake activities related to gambling, are now processed directly by the Policy Council in consultation with: the States of Alderney; the AGCC; the GFSC; the Law Officers of the Crown and the law enforcement agencies. The Policy Council has delegated authority for these applications to officers accountable to the Council, in similar terms to the delegated

[15] Jersey companies are formed under the Companies (Jersey) Law 1991

authority to officers of the GSFC. This delegation of authority streamlines this process, except in any cases where consent may be refused.

21. The use of the 1959 Ordinance to check beneficial ownership details is not a robust measure. It does not require any reasonable steps to indentify the beneficial ownership from time to time and nor does it apply when there is a change of beneficial ownership. The process of Alderney company application is significantly slowed by this process. The delay in processing is significant in comparison with the modern process in operation in Guernsey. In addition this process is a duplication of effort between the Policy Council, corporate service provider and the AGCC. The referral to the Policy Council creates a risk of direct political interference in individual company formations. It has also been argued that the use of the 1959 Ordinance to control beneficial ownership might be considered *ultra vires* because the 1946 Law was not intended to regulate corporate formation but was directed at the control of borrowing and because, when considering the general monetary exemptions, is disproportionate when used in relation to a company formation with a small shareholding where the nominal value may be as little as £2[16].

22. In July 2012, following a review of the Alderney Company Law the States of Alderney, approved the Companies (Alderney) (Amendment) Law, 2012. This Projet de Loi amends the Alderney Company Law by inserting similar provisions to Guernsey's 2008 Company Law in respect of beneficial ownership. The amendments to be made under the Projet de Loi will be commenced by Ordinance following Royal Assent. This means provisions in the 1959 Ordinance will still be required until these amendments have entered into force.

23. The States of Alderney have been consulted on the repeal of the 1959 Ordinance. The Policy and Finance Committee raised no objection to the Ordinance's repeal following the amendment of the Alderney Company Law when it will no longer be relied upon to control beneficial ownership of Alderney companies.

COBO in relation to Sark

24. The Chief Pleas have been consulted and the Finance and Commerce Committee who supported the repeal of the 1959 Ordinance, except for the provisions relating to the consent being required for the formation of Alderney companies, and those provisions which support or relate to this function, until such time that these provisions are no longer required.

[16] Guernsey company formation – the Procureur's Visa, Nik van Leuven, JLR June 2009

Other Consultation

25. Officers from the Policy Council have liaised with the Law Officers, the Commerce and Employment Department, and the Alderney Gambling Control Commission on the proposals in this Report. No objection has been raised in respect of the Policy Council's recommendations. The Guernsey Financial Services Commission supports the repeal of the 1959 Ordinance.

Principles of Good Governance

26. The repeal of the 1959 Ordinance will meet the Six Principles of Good Governance. At its core it prevents the States of Guernsey, and the GFSC on its behalf, from carrying out functions that are superfluous to requirements, enabling resources to be focussed on the Council's, and GFSC's, core functions. The lack of accountability that arises because the Policy Council is responsible for decisions in relation to COBO applications that relate to Alderney company formation under Alderney law is removed. The process will be replaced by a system that replicates the provisions described in Guernsey's 2008 Companies Law in Alderney. The change will ensure an equally high standard of transparency and ensure that Bailiwick law enforcement agencies and regulators are able to access required information in relation to beneficial ownership of Alderney companies.

Recommendation

27. The Policy Council recommends the States of Deliberation to repeal the remaining provisions of the Control of Borrowing (Bailiwick of Guernsey) Ordinance 1959 upon, or in order to coincide with, the bringing into force of the Companies (Alderney) (Amendment) Law, 2012 and request the preparation of the necessary legislation to give effect to this decision.

Deputy Peter A Harwood
Chief Minister

1 October 2012

Deputy J P Le Tocq
Deputy Chief Minister

Deputy G A St Pier
Deputy R Domaille
Deputy D B Jones
Deputy R W Sillars
Deputy P A Luxon

Deputy A H Langlois
Deputy K A Stewart
Deputy A H Adam
Deputy M G O'Hara

(NB As there are no resource implications identified in this report, the Treasury and Resources Department has no comments to make.)

The States are asked to decide:-

VI.- Whether, after consideration of the Report dated 1 October 2012, of the Policy Council, they are of the opinion:

1. To repeal the remaining provisions of the Control of Borrowing (Bailiwick of Guernsey) Ordinance 1959 upon, or in order to coincide with, the bringing into force of the Companies (Alderney) (Amendment) Law, 2012.

2. To direct the preparation of such legislation as may be necessary to give effect to their above decision.

COMMERCE AND EMPLOYMENT DEPARTMENT

REVISION OF COMPANIES LAW

The Chief Minister
Policy Council
Sir Charles Frossard House
La Charroterie
St Peter Port

11 September 2012

Dear Sir

1. Executive Summary

1.1. In 2008 the States of Deliberation, on the recommendation of the Commerce & Employment Department ("the Department") introduced the *Companies (Guernsey) Law, 2008* ("the Law"). The introduction of that Law represented the most far reaching and fundamental reform of company law ever undertaken in Guernsey.

1.2. Following its introduction the Department decided to allow a period for the Law to become established following which it would conduct a post implementation review. This report represents the conclusion to that process and recommends a number of amendments to the Law which are intended to address some of the issues which have arisen in practice and to introduce some changes to ensure that the Law remains a key part of Guernsey's international competitive offering.

2. Background

2.1. The introduction of the Law in 2008 represented a fundamental change in Guernsey's commercial legislation. The reform of Guernsey's company law had been under consideration for some 10 years and once the project was formally commenced it took some 4-5 years to complete. The Law represented a substantial change from the law which had been introduced in 1994, and indeed the 1994 Law could trace its origins back to the *Loi relative aux Sociétés Anonymes ou à Responsabilité Limité* of 1908.

2.2. A substantial number of the changes brought in by the Law were revolutionary and took into account the evolution of company law in many jurisdictions. The key element of the change was the abolition of the principle of capital maintenance towards a system based on solvency. This change brought Guernsey's company law into the leading edge of jurisdictions and has proven to be a successful and useful change for Guernsey.

2.3. Nevertheless given the substantial reform which the Law introduced, the Department believed that following a period to allow the Law to be implemented, it was important to conduct a post implementation review of the legislation to address any issues which may have arisen in practice. In addition the role of company law is central to the success of all advanced economies, and even more so in Guernsey where financial services represent approximately 40% of Gross Domestic Product. Accordingly the Department considered that the Law should remain under review to ensure that it kept pace with the needs of modern business. The Department will continue to monitor developments to ensure that the Law keeps pace with international developments.

2.4. The changes are listed in detail in section 4 below.

3. Consultation

3.1. The Department has engaged in an extensive consultation process with the industry as well as other relevant stakeholders such as the Registrar of Companies, the Guernsey Financial Services Commission and the Guernsey Bar. That process was conducted as follows:

- **Stage One -** Consolidation of all information feedback and comments during the first 12-18 months of operation of the Law.
- **Stage Two -** April 2010, release of a Consultation Paper detailing proposed amendments to the Law and inviting additional comments and feedback from Industry.
- **Stage Three -** Review of the 24 detailed responses received, analysis and review of proposals to take into account of feedback.
- **Stage Four -** Consultation meetings with industry representative bodies such as the Commercial Bar Association and the Guernsey Society of Chartered and Certified Accountants to review recent international developments in Company Law.
- **Stage Five -** Release of a Consultation Feedback document in May 2012 setting out those changes which the Department intends to take forward.

3.2. The Department has been mindful of the need to ensure that any changes are properly considered, benefit the industry, and adhere to Guernsey's international obligations.

4. The Substantive Changes

4.1. Section 15(5) – Memorandum of incorporation – the Law currently requires the maximum number of guarantee members to be stated in the memorandum. The Department does not consider that this requirement serves any useful purpose and therefore proposes that it is repealed, to increase the flexibility of the Law.

4.2. Section 17(9) – Application for incorporation – at present an application for incorporation may only be made by Corporate Services Provider. It is proposed that this should be widened to include advocates and accountants registered with the GFSC for Anti-Money Laundering (AML) and Combating the Financing of Terrorism (AML/CFT) and anyone fully licensed under any of the following: the Protection of Investors (Bailiwick of Guernsey) Law, 1987; the Banking Supervision (Bailiwick of Guernsey) Law, 1994; the Regulation of Fiduciaries, Administration Businesses and Company Directors (Bailiwick of Guernsey) Law, 2000; the Insurance Business (Bailiwick of Guernsey) Law, 2002; or the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002. This will increase flexibility, and reduce the cost of incorporating a company in some cases, whilst maintaining AML and CFT standards, which apply to all the above.

4.3. Section 21 – Compulsory components in a company's name – alongside its registered name, it is proposed that companies should be permitted to register an alternative name in a non-Roman script. This is an option in a number of other jurisdictions and will increase the appeal of Guernsey as a jurisdiction for company incorporation to emerging markets with non-roman alphabets, such as the Middle and Far East.

4.4. Section 24(4)(b) – Prohibited names – a company whose incorporation pre-dates the registration of a trademark with the same name should not be prevented from continuing to use that name. At present the Law does not state this explicitly and it is proposed that the Law be amended for clarification.

4.5. Section 27 – Reservation of Names – Presently it is only possible to reserve a name where a person wishes to use that name to form a new company. It is not possible to reserve a name in circumstances where an existing company wishes to change its name. Companies should be permitted to reserve a name in

circumstances where they intend to change their name within 3 months of the reservation.

4.6. Section 40 – Court may annul alteration of objects – under this section the Court may annul a change to a company's objects as set out in its memorandum of incorporation in certain circumstances. A concern has arisen that an annulment may result in any transactions which the company has effected between the amendment of the objects and the order of the Court. To avoid this uncertainty it is proposed to include a provision clarifying that any order annulling an amendment to the objects does not affect the right title or interest of a third party which have arisen as a result of any transaction the company has effected.

4.7. Section 61 – Types of bodies corporate which can amalgamate – this section requires that all bodies corporate which wish to amalgamate must be of the same type. For example a PCC may only amalgamate with another PCC. This restriction did not exist prior to the 2008 Law and under the Amalgamation of Companies (Guernsey) Ordinance, 1997 different types of companies were able to amalgamate. The introduction of the restriction in 2008 has reduced the flexibility of Guernsey's Company Law. Therefore this restriction should be removed to increase the flexibility of Guernsey's company law.

4.8. Section 69(3), 70(5), 97(3), 98 - Statutory timelines - these sections contain provisions relating to notice periods and time lines for amalgamation or migration proposals that run from the date an application is made to the Registrar. The introduction of these provisions in 2008 has meant that amalgamations and migrations now take longer than they did under the 1997 Ordinances, as these formal notice periods cannot run concurrently with other notice that must be given of proposed amalgamations and migrations, such as notice to members and creditors. To speed up the process these provisions should be amended to permit these to run from when the intention to amalgamate or migrate is first notified to the Registrar. This will ensure that the proposals can be dealt with more quickly in the future.

4.9. Section 89(b) – this subsection should be repealed, as it refers back to an earlier mention of the *"Loi ayant rapport aux Débiteurs et a la Rénonciation"* in section 89(a), which has itself been repealed.

4.10. Section 94(2)(b) – consent of HM Procureur and Director of Income Tax – A number of provisions in the Law require the consent of HM Procureur and/or the Director of Income Tax such as migrations to and from Guernsey. Historically HM Procureur has charged a nominal fee for the granting of this

consent. It is proposed to put that charge on a Statutory footing by allowing the Registrar to prescribe by regulation a statutory fee for the consent of both HM Procureur and the Director of Income Tax. The Department will consult with both before exercising a power to make such regulations.

4.11. Section 98(a) – Effect of transfer – Section 98(a) provides that once a company has migrated from Guernsey it must delete from its memorandum of incorporation the statement that its registered office is situated in Guernsey. This has caused some difficulty as it is not clear whether all companies are taking this step or whether or not the deletion occurs automatically by operation of Law. It is proposed that this section be amended to clarify that the deletion occurs by operation of law regardless of whether the Company takes any steps to effect the change.

4.12. Section 102 – Documents in a language other than English – this section requires foreign documents to be translated into the English language. However it does not specify whether the translation needs to be by an authorised translator. It is proposed to give a discretion to the Registrar to prescribe the form and means of verification of any translation submitted to the Registry.

4.13. Section 111(7) – Arrangements and reconstructions – this section provides that the term ‘transferee company’ includes an overseas company for the purpose of section 111. The Department considers that the term ‘transferor company’ in this section should also include an overseas company, subject to the proviso that at least one of the companies involved in the compromise or arrangement must be a Guernsey company.

4.14. Section 115(3) – Power of directors to bind the company – this subsection provides that any liability incurred by reason of the directors having exceeded their powers is not affected by sections 115(1) or 115(2). It has been queried whether this applies to directors acting individually as well as the directors acting collectively. It is proposed to clarify that it applies to directors acting both individually and collectively.

4.15. Section 135 – Company must have at least one director – the Department recommends that failure to have at least one director should be an explicit ground for striking the company off the Register and proposes that this section is amended accordingly.

4.16. Section 137(2)(c) – Eligibility to be a director – This sub-section provides that a director who has been disqualified for reasons of misconduct or unfitness in a jurisdiction outside Guernsey is prohibited from being appointed in Guernsey. It has been argued that this can lead to perverse results where for example a person is classed as unfit for spurious reasons such as political affiliations or racial background. It is proposed to give the Registrar the power to prescribe jurisdictions where he is satisfied that the processes for disqualifying directors adheres to principles of natural justice similar to that which exists in Guernsey (for example the British Isles, Australia, New Zealand etc). Disqualification in those jurisdictions would prevent an individual being appointed or holding office as a director in Guernsey. For all other jurisdictions the Registrar would consider each application on a case by case basis and where satisfied that an individual may not be fit to hold office as a director he, or any other person listed in section 150(2), will bring an action under Part XXV of the Law as he presently does so for Guernsey directors whose conduct may fall short of the standards required by the Law. All those who seek appointment as a director of a Guernsey company will be required to disclose all disqualifications in any jurisdiction outside Guernsey. A false declaration would constitute an offence.

4.17. Section 150(1) – Application to court for disclosure of usual residential address – the Department wishes to ensure that where appropriate time frames for disclosure of information under the Law are consistent. A number of other sections (e.g. sections 128, 144 and 174 of the Law) require disclosure of information within 5 working days. The Department therefore recommends that this section be amended to permit an applicant to make an application to the Court if the company does not comply with the request for disclosure within 5 working days.

4.18. Section 151(1) – Disclosure of usual residential address by Registrar – the Department considers that a Parish Constable should be able to request disclosure of a director's usual residential address. Disclosure may from time to time be necessary for the purpose of facilitating the collection of parochial rates.

4.19. Section 154(1) – Minutes of directors' meetings – the Law currently requires minutes of 'all proceedings' to be recorded. It has been noted that a literal interpretation of this would require the recording of minutes of entirely inconsequential matters that occur at a meeting. The Department proposes that the section be amended to require the recording of 'minutes of the proceedings'.

4.20. Section 157(2) – Exempting directors from liabilities – this section provides that any provision by which a company directly or indirectly provides an indemnity for a director of the company, or an associated company, against any liability attaching to him in connection with any negligence, default, breach of duty, or breach of trust is void, subject to two exceptions in sections 158 and 159. The definition in the Law of 'company' and 'associated company' does not include an overseas subsidiary. The Department considers that the prohibition on providing an indemnity should extend to a director of an overseas subsidiary and proposes that this section be amended accordingly. Otherwise the intent of this provision can be circumvented by permitting Guernsey companies to provide indemnities to directors of overseas subsidiaries.

4.21. Section 162 – Disclosure of interests – section 162 provides that directors have an obligation to disclose any interest they may have in a transaction or proposed transaction of the company. The section is quite prescriptive and requires the disclosure to include monetary values. It is proposed to simplify this provision to simply require the director to disclose the nature and extent of his or her interest in the transaction. This will simplify corporate administration without adversely diluting corporate governance standards.

4.22. Section 170 – Eligibility to be a secretary – the Department recommends that this section be amended to provide that the acts of a person acting as a secretary are valid notwithstanding that it is afterwards discovered that there was a defect in his appointment, that he was not eligible to be a secretary, or that he had ceased to hold office. This will mirror the provisions of section 141(1) of the Law in respect of directors' appointments and will provide commercial certainty to the actions of company secretaries.

4.23. Section 170(2)(c) – Eligibility to be a secretary – it is proposed that the Registrar should be given a power to prescribe those jurisdictions outside of Guernsey in which a disqualification will prevent appointment as a secretary of a Guernsey company, to mirror the proposed amendment to section 137(2)(c) described at 4.16 above. It is also proposed that the ineligibility should be extended to those disqualified in a prescribed jurisdiction from acting as a secretary or other officer of any company.

4.24. Section 171 – Duties of secretaries – this section prescribes mandatory duties imposed on secretaries, where one has been appointed. However, the appointment of a secretary itself is optional. It has been questioned whether the duties of a secretary should be mandatory when it is possible to decide to have

no secretary at all. Instead, the extent of the duties of a company secretary, where one is appointed, should be a matter for the company's memorandum and articles. Consequential amendment to section 161 will be required to clarify that, where a company secretary is appointed but does not have all of the duties currently listed in section 171, the directors of a company are primarily responsible for carrying out any duties which are not the responsibility of the company secretary. Either a secretary or a director will be responsible for carrying out these duties, but companies will have greater flexibility as to the allocation of those duties between the directors and secretary.

4.25. Sections 178(6), 179(6)(a) and 180(3) – Special resolutions – the Department considers that it may be appropriate in limited circumstances for very small companies to be able to disapply the requirements of these sections, as a special resolution may be void where these requirements have not been satisfied, even though all the members of the company agreed that the resolution should be passed. The Department therefore recommends that the Law be amended to permit the Department to prescribe by regulation those companies that may disapply sections 178(6) and 180(3) and the circumstances and manner in which they may do so. The Department will consult before bringing in such regulations. It is anticipated that the exemptions would only apply to companies with very few members, for example, less than 10.

4.26. Section 180 – Unanimous resolutions – for the sake of clarity, it is proposed that this section be amended to specify that a unanimous resolution is one agreed to by every member *entitled to vote*. It is also proposed that the wording of the section be amended to specify that a unanimous resolution is one agreed to by every member entitled to vote or *duly appointed proxies*. This reflects the provisions of section 222 of the Law and harmonises the wording of section 180 relating to Unanimous Resolutions with that of sections 176 (Ordinary Resolutions), 178 (Special Resolutions) and 179 (Waiver Resolutions).

4.27. Section 181 – Written resolutions – it is proposed that this section be amended to provide for the closure of the Register of Members for a limited period of time. This is necessary to permit the circulation of a written resolution amongst members without the possibility of the identity of members changing during the circulation of the resolution, particularly for publicly traded companies. Many companies have such provisions in their articles of incorporation but this amendment will provide additional certainty.

4.28. Section 213(2) – Quorum at meeting – this sub-section currently distinguishes between a company that only has shareholders (where two members holding 5% of the issued share capital constitute a quorum at a meeting) and one that has other types of members (where two members that hold 5% of the total voting rights of the company constitute a quorum). It is proposed that the distinction is removed by deleting the reference to issued share capital and referring only to voting rights for all kinds of company. The distinction would represent a simplification and clarification that only those eligible to vote at a meeting can count towards quorum requirements.

4.29. Section 228(1)(b) – Records of resolutions and meetings, etc – the Law currently requires minutes of 'all proceedings' of general meetings to be kept. It has been noted that a literal interpretation of this would require the keeping of minutes of entirely inconsequential matters that have occurred at a meeting. The Department proposes that the section be amended to require the keeping of minutes of 'the proceedings' of general meetings.

4.30. Section 232 – Application to class meetings: shareholders – this section is currently very prescriptive in the quorum requirements for such meetings. The Department considers that this is a matter that, subject to appropriate safeguards, can properly be left to the Memorandum and Articles of individual companies and that does not need to be prescribed in Law. It is therefore proposed that the Law be amended to permit the variation or dis-application of the quorum requirements for variation of class rights meetings, subject to appropriate safeguards.

4.31. Section 235(2) and 235(3) – Content of annual validation - where a company has a share capital these sections require detailed information regarding the company's shares on the 31st December of the previous year to be provided as part of the annual validation. This data is not required for any States purpose and is only necessarily accurate for the 31st of December of the year prior to the annual validation, so the value of the information being on the Register is extremely limited, yet its provision adds to the compliance cost of preparing the annual validation. The Department considers that these subsections should be repealed.

4.32. Section 236(1) – Declaration of compliance (annual validation) – at present, a declaration of compliance with the requirements of the Law must be signed by a director or secretary of the company. The Department proposes that an individual employed by a Corporate Services Provider ("CSP") should be permitted to sign the declaration on behalf of a director or secretary, having been authorised to do so by a director or secretary. The offence under section

236(3) will also need to be amended to provide that a person who without reasonable excuse authorises signature of a declaration of compliance which is false, deceptive, or misleading or commits an offence as well as a person who signs the declaration in such circumstances. This amendment will permit, but not require, CSPs to sign a declaration of compliance on behalf of a client. This will facilitate the administration of the annual validation process by CSPs and will reduce cost but will not undermine the effectiveness of the sanction for false, deceptive, or misleading declarations.

4.33. Section 243 – Preparation of individual accounts – it is proposed that this section be amended to provide that a Protected Cell Company need not prepare consolidated accounts for its core and its cells and may prepare them individually.

4.34. Section 248 – Duty to prepare directors' report – the Department considers it appropriate that it should be possible for a waiver resolution to be passed in respect of the requirement for a directors' report. This is likely to be attractive to very small companies where the shareholders agree that an annual directors' report is unnecessary. It is proposed that annual and indefinite directors' report waivers should be permitted on the same terms as the provisions applying to audit waiver under section 256.

4.35. Section 256 – Exemption from audit – at present it is not possible for individual cells of protected or incorporated cell companies to pass an audit waiver. It is proposed that individual cells should be able to be audit exempt.

4.36. Section 256 – Exemption from audit – at present the Law requires companies that are eligible to be exempt from audit requirements to pass and file an audit waiver annually. This generates a cost and administrative burden on many companies. The Department proposes that it should be possible to file an indefinite audit waiver. This will enhance the appeal and competitiveness of Guernsey's company law. Given the nature of indefinite audit waiver, the Department proposes that rescission of an indefinite audit waiver in the manner currently prescribed by section 256(3) of the Law should be possible at any time, in order to protect the interests of members of the company.

4.37. Section 257 – Appointment of auditor – the Department has received feedback that the provisions relating to the appointment of auditors are seen as overly complicated and prescriptive. The Department proposes that the requirement to appoint an auditor within 28 days should be repealed and the provisions relating to appointment should be simplified.

4.38. Section 258(2)(a) – Term of office of auditor – at present, this sub-section provides that an auditor cannot be deemed re-appointed where he was appointed by the directors. It is proposed that this sub-section is repealed, as it requires many companies to incur the administrative burden of the directors re-appointing an auditor. The Department considers that re-appointment by the directors offers no additional protection to members of the company over and above deemed reappointment, as section 258(2)(c) of the Law provides that the auditor cannot be deemed reappointed where the members have resolved that he should not be re-appointed; and the members may remove an auditor from office after his appointment, under section 268 of the Law, at any time.

4.39. Section 283 – No conversion into stock – the Department does not consider that this prohibition serves a useful purpose and is aware that other jurisdictions permit conversion of shares into stock. The Department therefore proposes that this section is repealed.

4.40. Section 284 – Different amounts may be paid on shares – if so authorised by its memorandum or articles, a company may (a) make arrangements to distinguish between shareholders as to amounts and times of payment of calls on their shares; (b) accept from any shareholder the whole or any part of the amount remaining unpaid on any shares held by him, although no part of that amount has been called up; or (c) pay dividends in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others. At present, a company may only do the things identified above if authorised by its memorandum or articles. In order to increase the flexibility of the Law the Department considers that this should be widened to circumstances where the company is authorised to do so either by its memorandum or articles; or by the terms of issue of the shares in question.

4.41. Sections 291 - 293 – Exercise by directors of powers to issue shares etc – the Department considers these provisions have proved to be overly prescriptive and does not consider that such prescriptive measures are necessary. The Department proposes the repeal of these sections to be replaced by a general power for directors to issue shares, to the extent permitted by the company's memorandum or articles or by ordinary resolution. This will increase flexibility for companies but allows shareholders to limit the power of directors if they choose.

4.42. Section 294 – Consideration for issue of shares - the 2008 Law represented a move from a "capital maintenance" basis for certain corporate actions to a "solvency" based model. However, the wording of a number of

sections of the Law has led to some debate about the availability of share capital (the nominal value of a company's shares and any share premium received as consideration for issue of shares) for distribution to shareholders as a dividend. This section should be amended to provide, for the avoidance of doubt, that the Law permits share capital to be paid out by the Board of Directors as a distribution, including as a dividend, in accordance with the solvency test.

4.43. Sections 295 and 296 – Consideration to be decided by board of directors – section 295(1)(b) currently requires the directors to resolve that the consideration for and terms of the issue of shares is fair and reasonable to the company *and all existing members*. The Department considers that the italicised words should be deleted as the globally accepted fiduciary duty of a director is to act in the interests of the company, not every individual member. A director should therefore act in the best interests of a company even if this were not in the best interest of an individual member.

4.44. Sections 295(2) and 296(6) – Consideration to be decided by board of directors – these provisions require directors to certify matters relating to the consideration for which shares are to be issued, primarily those matters that the directors are required to have decided and resolved under sections 295(1) and 296(5) namely the consideration and terms on which the shares will be issued and that these are fair and reasonable to the company. The certificate therefore duplicates matters that will appear in any event in the minutes and resolutions of the meeting at which they were decided. The Department considers that the additional bureaucracy created is not justified by the very limited benefits of requiring the matters to be separately certificated. It will remain obligatory to record such decisions in the minutes of the directors meetings.

4.45. Section 309 – Recovery of distributions – at present there is no time limit on the recovery from members of distributions made at a time when immediately after the distribution the company did not satisfy the solvency test. Whilst it is right that such distributions can be recovered by the company in the circumstances provided for by the Law, the Department proposes the introduction of a time limit of 2 years for the recovery of distributions to provide some certainty. The Department also proposes the introduction of a "whitewash" provision in respect of directors' personal liability under this section. This will provide that no recovery from a director can be made where the company would have passed the solvency test at the time the distribution was made and would pass it at the time recovery is contemplated. This change increases certainty for directors and shareholders whilst providing appropriate protection to creditors.

4.46. Sections 336 - 340 – Takeovers – the effect of the current provisions is that the transferee in a takeover has to wait four months from the date of making an offer before he is able to serve notice on dissenting shareholders effecting the compulsory acquisition of their shares under, even where he has received the approval of 90% of the shareholders in value of the shares which triggers the compulsory acquisition provisions. The Department considers that once the threshold of 90% has been reached, there is no useful purpose in requiring the transferee to wait until the four month period has expired before serving notice and commencing the acquisition process.

4.47. Section 337 - Takeovers - some jurisdictions have securities laws that restrict the making of an offer to persons resident in those countries. The Department considers that the Law should permit the making of an offer to shareholders in jurisdictions with securities laws that restrict the direct communications of such offers by publication in the Gazette Officielle. This will provide greater certainty that such offers can be made for the purposes of Guernsey law without infringing the requirements of foreign laws.

4.48. Section 337(2) – Right of transferee to acquire shares – in the case of the compulsory acquisition under this section of the shares of a dissenting shareholder, the dissenting shareholder should have the same choice of consideration as was initially offered. At present the Law does not explicitly provide for this which could lead to a dissenting shareholder being bound to transfer the shares on the terms chosen by those who accepted the offer. The Department proposes amending the Law to state explicitly that the dissenting shareholder has the choice of which form of consideration to accept in such circumstances.

4.49. Section 355(1) – Striking defaulting company off the Register of Companies – the Department proposes that this section is amended to include the failure by the company to have at least one director as a ground for striking off.

4.50. Section 359(a) and (b) – Circumstances in which applications for voluntary strike off not to be made: proceedings with solvency not concluded – these sub-sections should be repealed for consistency with the amendments to section 89. The *Loi ayant rapport aux Débiteurs et a la Rénonciation* of 1929 to which these sub-sections refer does not apply to companies.

4.51. Section 371(10) – Restoration to the Register of Companies – at present the Registrar has a very limited discretion to permit a company to be restored to

the Register in the absence of a Court order. The Registrar may only restore a company off where it was struck off in error or in circumstances in which it should not have been struck off, where he is satisfied that an application to the Court would be successful but is not necessary for the fair disposal of the matter - sub-section 371(10)(b) - and that no creditor or third party would suffer any prejudice – sub-section 371(10)(c). This has meant that it may only be used in very limited circumstances. It is proposed that the discretion be widened to permit the Registrar to restore a company, subject to the same caveats in sub-section 371(10)(b) and (c), where the company was not struck off in error but where the circumstances leading to its striking off have been remedied and all fees and penalties have been paid. The Department proposes a requirement for the Registrar to consult HMP, HMRG and (in the case of a company that was a supervised company) the GFSC prior to exercise this restoration power.

4.52. Section 417(4) – Examination of liquidator's accounts by Commissioner – notices must be placed in La Gazette Officielle on two occasions falling in successive weeks stating the date of the creditors meeting fixed under section 417(2)(a) and the date of distribution fixed under section 417(2)(b). The requirement to advertise the date fixed for distribution on two occasions falling in successive weeks has caused administrative difficulties. The Department considers that publication of two notices of the date of the creditors meeting constitutes sufficient notice to interested parties that the liquidation is to be concluded and that separate notice of the distribution date fixed by the Commissioner under section 417(2)(b) should not be required.

4.53. Section 434(3) and 435(3) – Civil liability of directors for wrongful trading – these sub-sections provide that the Court shall not make a declaration of personal liability on the part of director for wrongful trading where the directors have taken *every step* to minimise the potential loss to the company's creditors that he ought to have taken. Notwithstanding the words *that he ought to have taken* the Department considers that there should be an explicit reference to reasonableness in these sub-sections and believes that *every reasonable step* is the appropriate standard.

4.54. Section 437(1)(a) – Companies which can be protected cell companies – it is proposed that this section be amended to confirm that registered (in addition to authorised) collective investment schemes are eligible to be Protected Cell Companies.

4.55. Section 498 – Registers may be in electronic form – to facilitate the move to electronic record holding by the Registry, it is proposed that the Law

should permit the destruction of hard copy records after a period of 3 years where an electronic copy is retained and should provide for the presumed authenticity of electronic copies. It is also proposed that the Registrar should be under no obligation to retain the originals of documents delivered in electronic form where the information contained in the document has been recorded in the Register.

4.56. Section 523 – Service of documents – it is proposed that this section should be amended to permit service of documents by e-mail, subject to any provision to the contrary in the company's memorandum or articles, where the intended recipient has agreed to accept service by e-mail and has provided an e-mail address for this purpose. A document served in this manner should be deemed to have been received 24 hours after sending. It is also proposed to bring other notice periods into line with those in competitor jurisdictions.

4.57. Section 530 – Meaning of "supervised company" – at present this section defines a supervised company to include companies that have formerly held a licence under one of the regulatory laws, as well as those that currently hold a licence. It is proposed that a former licence holder, which is therefore no longer subject to the supervision of the GFSC, should not require the consent of the GFSC to migrate. It is therefore proposed that the references to former licence holders are repealed.

4.58. Section 530 – Meaning of "supervised company" - it is also proposed that sub-section 530(a) should be amended to make explicit reference to registration under section 8 of the Protection of Investors Law, 1987, to clarify that a registered collective investment scheme is a supervised company.

4.59. Section 532 – Interpretation – to ensure consistency, the Department proposes that interpretation of "*closed-ended investment company"* is amended so that the term is defined by cross-reference to the interpretation section of the Protection of Investors Law, 1987 (currently section 44 of the Law).

4.60. Part V – Conversions – the Department considers that the Law should permit the conversion of a cell of a protected cell company into a standalone company.

4.61. Part XVIII – Takeovers – the Department proposes two amendments to strengthen shareholder protection in takeovers. First, to provide that compulsory acquisition of dissenting shareholders' shares is only possible where the offer relates to all the shares in the company or in a particular class.

Second, to provide that shares already held by the offeror (or a close associate of the offeror such as a spouse or child, a nominee, a holding company, subsidiary or fellow subsidiary or nominee thereof, a body corporate in which the offeror has a substantial interest, a person, or nominee of a person, who is party to a share acquisition agreement, etc) will not be counted towards the threshold of 90% that triggers the right to compulsorily acquire the shares of dissenting shareholders. The present arrangements do not include such requirements, which has resulted in the potential for a takeover to be effected by acquiring shares in lots and applying the squeeze out provisions in stages. While the Department does not believe this is common practice it is sufficiently different from many other jurisdictions to justify changes to the Law to improve shareholder protection.

4.62. Part XX – Striking off – it is proposed that this section be amended to provide that an application for voluntary striking off must not be made if the company has outstanding debts or liabilities. The director signing the declaration of compliance will therefore be required to confirm that this is the case.

4.63. Parts XX, XXII and XXIII – Striking Off, Voluntary Winding Up and Compulsory Winding Up – at present the Companies Law does not make explicit provision for the restoration to the register of companies that have been wound up under Parts XXII or XXIII of the Law, only for companies that have been struck off under Part XX which contains the restoration provisions. The Department considers that the existing restoration provisions should be explicitly extended to include companies that have been wound up, as there are occasions where it is appropriate that such a company is restored, for example to deal with an asset which was unknown to the liquidator at the time of the winding-up and dissolution of the company.

4.64. Part XXIV – Provisions of general application in winding up – the Department proposes that a copy of any application made by a supervised company during the course of a winding should be served on the GFSC not less than 7 days before the hearing of the application and that the GFSC should have the right to be heard on the application. This will ensure that the GFSC is aware of and able to comment on applications which could have an impact on regulatory action being taken or contemplated against the company.

4.65. Part XXIV – Provisions of general application in winding up – the Department proposes that the Court should have the power to grant the release and discharge of a liquidator from liability in respect of his acts or omissions, save for acts of fraud, wilful misconduct, or gross negligence. At present the

Court does not have an explicit power to do so. It is proposed that release and discharge should only be granted on application and the Court will therefore retain the discretion as to whether or not to grant the application; and if so whether any terms, conditions or limitations should apply. This will ensure that experienced insolvency practitioners are prepared to act as liquidators of Guernsey companies, as they will know that in appropriate cases they can apply for a release and discharge from liability at the conclusion of the winding up. This is particularly important in the case of a compulsory winding up as there is no Official Receiver in Guernsey.

4.66. Ancillary Amendments

In addition to the matters set out above, the Department has identified a range of other ancillary amendments that are required:

- All references to "memorandum and articles" should, where appropriate, be changed to "memorandum or articles" as many matters can be recorded in either document.
- The circumstances in which the memorandum of a company can be amended should be clarified throughout the Law.
- The Law confers on the Commission the power to certify in writing that a resolution of an overseas company is "equivalent" to a special resolution under Guernsey company law. That responsibility should be transferred to the Registrar.
- Procedures for amalgamating subsidiaries should be simplified.
- There are a range of circumstances which require matters to be authorised by foreign law (for example migrations). These provisions should be clarified to provide certainty on the standard required to be met.
- There are a number of references to the term "authenticated" (see for example section 187) but the Law provides no procedure for such authentication. Those references should be deleted.
- Provisions relating to redemption of shares should permit partly paid shares to be redeemed.
- The provisions relating to when a company is authorised to purchase its own shares should be simplified.
- There are a number of cross references in the Law which refer to provisions that have been repealed or amended which should be clarified.
- The definition of "director" should be clarified to ensure the obligations and rights of directors, alternate directors and shadow directors are clear and explicit.

- For companies with few members the Department proposes introducing a regulation making power to prescribe simplified procedures for calling meetings, including the ability for small companies to waive notice periods, etc. The Department will consult widely before enacting any such regulations.
- There are a number of references in the Law to English legal concepts such as deeds and debentures. The references will be reviewed and amended where possible to ensure that they reflect their Guernsey equivalents.

4.67. In addition to the specific amendments identified above, there are a number of typographical matters, corrections, clarifications, consequential and minor amendments which will be addressed in the amended Law, which the Department does not believe will substantively alter the provisions of the Law and which have not been specifically set out in this report in the interests of brevity.

5. Further Information

5.1. Whilst many of the proposed changes outlined above are expressed in precise terms and by reference to specific sections and sub-sections of the Law, the Department does not intend the suggested wording or location of amendments to fetter the discretion of the draftsman in identifying the most appropriate way of implementing the desired amendment. In general, it is the substance of the proposals that is important, not the precise wording or the precise mechanism for implementation.

6. Funding implications

6.1. The Guernsey Registry has assessed the cost of necessary system enhancements to ensure that the Registry systems comply with the requirements of the amended Law. Such enhancements are calculated at £14,000. These costs have already been factored in to the Registry's budget and agreed as part of a loan from Treasury and Resources to the Registry to ensure the Registry systems remain fit for purpose.

6.2. The Guernsey Registry has considered the potential impact of the introduction of indefinite audit waiver (see 4.36 above) on revenue. The Registry considers that the fee for indefinite audit waiver should remain the same as the fee for annual audit waiver, on the basis that the fee for this activity should be based on the amount of work undertaken by the registry to process the filing. The ability for a company to file an indefinite audit waiver will therefore have an impact on revenue after the first year in which indefinite audit waivers are passed. In

2011 £58,000 in fees was received for audit waivers and this figure is anticipated to be matched in 2012. In years following the first filing of indefinite audit waivers, the registry estimates that the figure will reduce to approximately £10,000 per annum. However, under the current fee structure it should be noted that it would only take an increase of approximately 80 new financial product companies as a result of the enhanced appeal and competitiveness of the amended regime to make up this loss of revenue in future years.

7. Consultation

7.1 The Department has carried out extensive consultation with the financial services industry. That included a detailed public consultation which resulted in 24 submissions which ran to several hundred pages of comments as well as informal consultation with interested parties on an ongoing basis since the Law came into force. The Department has also provided a public feedback document setting out the consultation responses and the decisions taken by the Department as a result. Those documents are on the Registry Website.

The Department has consulted with the GFSC and addressed those matter raised by the Commission where appropriate.

The Law Officers have been consulted and have no comment on the proposals. It is estimated that the proposed amendments will take 4-6 weeks, full time, to draft.

8. Principles of Good Governance

8.1 In preparing this report, the Department has been mindful of the States Resolution to adopt the six core principles of good governance defined by the UK Independent Commission on Good Governance in Public Services (Billet IV of 2011). The Department believes that all of the proposals in this Report comply with those principles.

9. Recommendations

9.1 The Commerce and Employment Department recommends the States to:

1. Agree that the above amendments should be made to the Companies (Guernsey) Law, 2008.

2. Direct the Law Officers to prepare the necessary legislation.

Yours faithfully

K A Stewart
Minister

A H Brouard
Deputy Minister

M P J Hadley
D de G de Lisle
L B Queripel
States Members

(**NB** **As there are no resource implications identified in this report, the Treasury and Resources Department has no comments to make.)**

(NB **The Policy Council supports the Report.)**

The States are asked to decide:-

VII.- Whether, after consideration of the Report dated 11 September, 2012, of the Commerce and Employment Department, they are of the opinion:

1. To agree that the above amendments be made to the Companies (Guernsey) Law, 2008.

2. To direct the preparation of such legislation as may be necessary to give effect to their above decision.

HEALTH AND SOCIAL SERVICES DEPARTMENT

TOBACCO CONTROL STRATEGY 2009-2013: RE-INTRODUCTION OF TOBACCO LICENCES AND TOBACCO CONTROLS

The Chief Minister
Policy Council
Sir Charles Frossard House
La Charroterie
St Peter Port

11 September 2012

Dear Sir

EXECUTIVE SUMMARY

1. Smoking remains the major preventable cause of premature death and ill health in the Bailiwick. Smoking is highly addictive with two thirds of regular smokers taking up the habit before they reach the age of 18. In adopting the Tobacco Control Strategy 2009 – 2013 the States demonstrated its wish that all necessary legislative and regulatory measures are taken to protect children from tobacco and to ensure that the interests of children take precedence over those of the tobacco industry.

2. The range of measures agreed by the States of Deliberation in March 2008 (Billet d'État No. III of 2008) included the reintroduction of a tobacco licensing system:-

   > *"That licences to sell tobacco be introduced and to direct the Health and Social Services, Commerce and Employment and Home Departments to report back to the States regarding their preferred method of implementation and enforcement including proposals on how to meet the associated costs of any licensing system"*

3. This paper is an update on progress made with the development of such a licensing system, a proposed detailed framework for such a regime and concludes with a recommendation for implementation.

4. The States of Deliberation in July 2010 (Billet d'État No XV of 2010) also agreed to a whole range of additional measures to reduce the prevalence of smoking, especially amongst under-18s. This paper proposes several additional legislative measures to increase the effectiveness of anti-smoking measures to protect children and public health, especially amongst under-18s. In addition, there have been a number of new initiatives and activities recently that warrant amendments to existing tobacco control provisions, and these are outlined in this report.

BACKGROUND TO THE RE-INTRODUCTION OF TOBACCO LICENCES

5. The Loi relative à La Vente de Tabac, 1904 requirement for persons selling tobacco products to hold a licence was repealed on January 1st 1980 by the Tobacco Licences (Repeal) Ordinance, 1979.

6. The reason given for the repeal was that the licensing regime revenue had been insufficient to cover administrative costs.

7. Following the States resolution to re-introduce a tobacco licensing regime, HSSD and Home Department staff met to discuss potential roles and responsibilities. It was agreed that the Office of Environmental Health and Pollution Regulation should lead because Environmental Health Officers are generally experienced in monitoring compliance with public health legislation and undertaking any necessary enforcement work, and already visit virtually all of the tobacco outlets. This will reduce duplication of effort and the regulatory burden on businesses.

8. Following consultation with the Home Department and Commerce and Employment Department, on Tuesday 27 April, 2010, the HSSD Board went on to:

   i) approve in principle, a tobacco licensing system whereby:

      a) the Office of Environmental Health and Pollution Regulation administers and regulates the licensing legislation;

      b) retail outlets are licensed rather than the owner/manager;

      c) the licensing fee be set at a level to cover the cost of administration and enforcement of the law by Environmental Health staff, the signage and training;

      d) the licence fee be set at a level that will also generate income to extend the Quitline Service;

   ii) agree that a States Report be prepared directing the preparation of new tobacco licensing legislation.

9. On Tuesday 08 February 2011, the HSSD Board agreed that tobacco licensing legislation be prepared in accordance with the framework contained within the appendices of this paper.

10. The tobacco traders in Guernsey were invited to a series of meetings that took place in June and July 2011 and a further meeting in September 2012 was organised. Members of staff from St James' Chambers and the Commerce and Employment department also attended and commented on the proposals.

11. A guidance document "Toolkit for Responsible Tobacco Licence Holders" has been developed to assist potential tobacco licence holders;

- through the application process;
- develop policies and procedures around the sale of tobacco;
- train their staff;
- effectively monitor compliance.

12. A training seminar was held on the evening of Tuesday 02 June 2011 to introduce the toolkit and proposed application forms to potential licence applicants.

13. Appendix 1: outlines the content of the proposed licensing regime for tobacco sales and therefore the basis on which the new tobacco licensing legislation would be drafted. The Licensing Framework is set out in detail as an example of how the licensing regime could work in practice. Minor departures from and modifications to this Framework might be necessary in the process of drafting the legislation.

14. Appendix 2: summarises the tobacco licence application process in a flow chart. The HSSD Board would, from time to time, authorise officers of the Office of Environmental Health and Pollution Regulation or any other appropriately qualified officers to undertake regulatory activities.

15. Appendix 3: references the evidence on which this policy is based.

FINANCIAL IMPLICATIONS

16. As outlined above, it is proposed that fees are introduced to cover the cost of administration and enforcement. The HSSD Board will set the level of fees to ensure the licensing regime and the Quitline support is cost neutral to the department. The fees will be set on a sliding scale, proportionate to the size and nature of the business operation, and in line with other licensing regimes such as the alcohol licensing system.

AMENDMENT TO EXISTING LEGISLATIVE PROVISIONS

17. The Guernsey Prison has introduced a smoke-free policy that will be fully implemented by 1st January, 2013. To facilitate this strategy an amendment to the Smoking (Prohibition in Public Places and Workplaces) (Exemptions and Notices) Ordinance, 2006 is necessary to remove the States Prison from the exemption.

EXPRESS OBJECTIVES OF NEW LEGISLATION

18. It is proposed that the primary objective of the new legislation implementing the licensing regime and giving effect to the anti-smoking measures be expressed to be reducing the prevalence of smoking and other use of tobacco products, especially amongst children.

CONFISCATION OF TOBACCO PRODUCTS

19. As mentioned above the States Tobacco Strategy has a primary objective of reducing smoking by children and exposure of children to harmful tobacco smoke. In line with the provisions on the possession of alcohol by under 18s in public places, this report proposes the drafting of legislation to allow the Police to confiscate tobacco products and paraphernalia from under 18s in the street or other public places. The Home Department has been consulted on this.

PROHIBITION ON CERTAIN PACK SIZES

20. The previous States report in 2008 proposed that commercial importation and sales of cigarettes should be restricted and a minimum pack size of 10 imposed. However, there has been an increase in the marketing of packs of 14 cigarettes, so this report proposes that the minimum pack size should be 20. This policy is consistent with other neighbouring jurisdictions (e.g. Ireland) and is aimed at protecting children from sales of tobacco products.

PRICE DISPLAYS

21. The prohibition of display of tobacco products, approved by the previous States report in 2010 does not allow for 'pricing' to be prohibited and could potentially allow a 'loophole' in the regime. It is proposed that a prohibition on displaying the prices of tobacco products be added to the existing provisions to ensure a robust approach is introduced. Exceptions would be strictly controlled by regulations made by HSSD. For example, the exemptions will include price lists typed using a small font size on white paper, no more that A4 in size that can be shown to prospective purchasers.

ENFORCEMENT

22. It is proposed that HSSD be expressly empowered to authorise its officers (currently Environmental Health Officers) to enforce the Tobacco Products (Enabling Provisions) (Guernsey) Law, 2010, including any Ordinance or statutory instruments made under it (which would include new anti-smoking measures, such as the licensing regime). It is also proposed that HSSD be given similar powers in respect of existing anti-smoking legislation listed in Schedule 2 to that Law (such as smoke-free legislation). Officers authorised by HSSD should be given adequate statutory powers to enforce the relevant legislation, such as entry, inspection, seizure of documents, tobacco products and other evidence. These powers should be subject to proper safeguards (for example, entry of

dwellings would require a warrant to be issued by the Bailiff on specified grounds).

OFFENCES AND PENALTIES

23. Penalties for offences would be based on similar offences in the Liquor Licensing Ordinance, 2006 and the Tobacco Advertising Law, 1997, subject to appropriate modifications. The new legislation should also authorise forfeiture of tobacco products, and suspension or revocation of licenses to be imposed in appropriate cases.

LAW DRAFTING TIME

24. St James Chambers has been consulted and it is estimated that all of the legislation referred to in this report can be completed within 3 months.

CONCLUSION AND SUMMARY

25. The purpose of this report is to ensure that all necessary legislative and regulatory measures are taken to protect children from tobacco and to ensure that the interests of children and the wider community take precedence over those of the tobacco industry.

26. The drafting of legislation under existing statutory provisions will allow a range of appropriate measures outlined in this report to be regulated by authorised officers of the HSSD.

27. The licensing regime detailed in Appendices 1 and 2 to this report will implement the legislative objectives of the States Tobacco Control Strategy 2009-2013 and promote consistency across the tobacco supply chain.

28. Extensive international research was undertaken prior to drafting the States Tobacco Control Strategy 2009-2013 to provide an informed strategy, in a Guernsey context, in managing tobacco supply and use, particularly to children, the health risks associated with smoking tobacco and in promoting help to quit for those already smoking. Since then further research has been carried out to support the proposals detailed in this report (Appendix 3).

29. HSSD has consulted with the Commerce and Employment Department, the Home Department, the Treasury and Resources Department and St James' Chambers on the development of the proposals in this report. It has been agreed that officers of the Office of Environmental Health and Pollution Regulation will be authorised by HSSD to regulate legislation implemented as a result of this report. This will provide effective delivery of the licensing regime as those officers are already involved with most of the premises to be licensed.

30. During the development of the licensing regime, HSSD has consulted with the local tobacco industry and a wide range of stakeholders involved in providing services to those affected by smoking.

31. The Department has complied with the six principles of corporate governance in the preparation of this States Report.

RECOMMENDATIONS

32. The States are recommended to resolve and direct that:

a) The express objective of the legislation to give effect to anti-smoking measures, approved by the States in 2008, 2010 and following this States report, is stated to be to reduce the prevalence of smoking and other use of tobacco products, especially amongst persons under the age of 18;

b) Legislation is drafted under the Tobacco Products (Enabling Provisions) (Guernsey) Law, 2010, to provide for the licensing of sale and supply of tobacco products in terms set out in this report and its appendices, subject to any necessary modifications and adjustments. Penalties for offences should be based on similar regulatory offences, and forfeiture of tobacco products and suspension or revocation of licences should be imposed as penalties in appropriate cases;

c) An amendment is made to the Smoking (Prohibition in Public Places and Workplaces) (Exemptions and Notices) Ordinance, 2006, to remove the States Prison from the exemptions to facilitate the smoke-free prison strategy;

d) Legislation is drafted to allow the Police to confiscate tobacco products and paraphernalia from under 18's in the streets and other public places;

e) Legislation is drafted to regulate price displays of tobacco products;

f) Legislation is drafted to prohibit commercial importation and retail sales of cigarettes other than in a minimum pack size of 20; and

g) Legislation is drafted to give officers authorised by HSSD adequate powers to enforce the licensing regime and other legislation to be made under the Tobacco Products (Enabling Provisions) (Guernsey) Law, 2010, as well as smoke free and other anti-smoking legislation, subject to appropriate safeguards.

Yours faithfully

A H Adam
Minister, Health and Social Services Department

B L Brehaut	E G Bebb	D A Inglis	A M Wilkie
Deputy Minister	Member	Member	Member

Appendix 1

LICENSING FRAMEWORK

1 The Licence Holder

1.1 Licences would be held by all wholesalers and retailers of tobacco including indirect sellers (where the seller and purchaser are not in the same place at the same time – e.g. telephone and internet sales). This approach differs from the original retail outlet proposal and is justified on the basis that it would be likely to increase the coverage of the retail scheme and make it harder for retailers to avoid being licensed. One requirement of wholesalers obtaining a licence would be to provide the regulator on request with a current and complete list of all the parties to which it supplies. Furthermore, the licensed wholesaler could only supply licensed retailers. Licensing wholesalers would also effectively help spread the financial burden on retailers created by the licensing regime. Most importantly, such joint licensing would increase public health outcomes not least through increased protection of minors.

1.2 Each licence would apply to individual premises; however, the licence would also stipulate the contact details for the designated person responsible for those premises. The advantage of this approach is that the location of all tobacco-related premises is known to the regulating authority. Furthermore, this approach more directly provides a link between the fee structure and the nature of enforcement (inspections are based on the number and size of premises, not the number of owners). Checks to ensure compliance with the legislative provisions concerning display and advertising would be undertaken as part of the licence inspection.

1.3 The licence may be held by either an individual or a body corporate (with 2 or more designated responsible persons nominated by the body). The designated responsible person could personally be prosecuted for tobacco control offences. The licence would authorise the sale or supply of tobacco products by the licensee, or servant or agent of the licensee (provided that they were aged 18 or over). Each licence can authorise only one category of sale/supply, those being: retail, wholesale or indirect. Provision will be made for retail sale from mobile and temporary premises.

2 The Application Process

2.1 To be made using an approved form issued by the Department. Information to include:-

- If the applicant is an individual, the name of the applicant and proof of identity.
- If the applicant is a body corporate, proof of incorporation, the names of at least 2 responsible persons to act in the absence of the other and proof of identity of each responsible person.
- Postal address of applicant and any responsible persons.
- Physical address of the premises, or the address where any mobile will be kept.
- Type of proposed sale/supply – retail, wholesale or indirect with subcategories of retail to cover mobile or temporary.
- For retail sales, a map of the premises showing the single point where sales would be conducted, the area and layout where tobacco products will be displayed and how it will be sealed off from under 18s;
- Any other information or evidence the Department requires for proper consideration of the application.

To be accompanied by the appropriate application and licence fee.

3 Fees

3.1 Fees to be prescribed by regulation. This will allow flexibility and the ability to change fees as required.

3.2 The fees would be set by the HSSD Board in accordance with paragraph 15.

4 Form of Licence

4.1 In the case of retail licences, would include a map of the premises showing the single point of retail sale and places (if any) where tobacco products are displayed.

4.2 Licences would include the name of responsible person (if any).

5 Criteria for granting of licence

5.1 The Department *must grant the licence unless* one of the following disqualifications applies:

- Applicant (if an individual) has not reached 18 years of age;
- Applicant has been refused or disqualified from holding a licence anytime within the 2 year period before the application was made;
- Applicant holds a licence that has been suspended;
- Applicant has been convicted of an offence under this Ordinance or a relevant law anytime within the 2 year period before the application was made;
- Applicant is the subject of a pending charge anywhere in the world for an offence involving fraud or dishonesty;
- The information or evidence provided is insufficient to assure the Department that the applicant's operations would comply with the tobacco control laws;
- Applicant is unable to meet any requirement prescribed by regulations for demonstrating sufficient knowledge, or understanding, of the tobacco control laws;
- Any other disqualifications prescribed by regulations;
- There is another good reason for not issuing the licence to the applicant.

6 To whom do the disqualifications apply?

6.1 The disqualifications apply to the applicant if the applicant is an individual. If the applicant is a body corporate, the disqualifications apply to *both* the applicant and each of the two or more responsible persons nominated by that applicant.

7 Authority to seek and disclose personal data

7.1 For the purpose of determining whether or not a person is disqualified, the Department may seek, receive and disclose information.

8 Advance notice of proposed refusal

8.1 The applicant would be notified in advance of any proposed refusal and allowed to make representations.

9 Licence Conditions

- Compliance with tobacco control laws and all licence conditions;
- Payment of any fee payable under this Ordinance or any associated regulations;
- Holder must not authorise or allow the sale or supply of tobacco products other than:-
  (a) at premises specified on the licence, and
  (b) in accordance with the terms and conditions of the licence;

- Retail tobacco sellers to be allowed to:-
  (a) sell tobacco products only from a single point of sale marked on a map of the licence; and
  (b) display tobacco products only in the place marked on the map on the licence;

- Wholesale tobacco sellers must not sell or supply to anyone other than another tobacco licence holder;
- Holder must display warnings and penalties prominently at each licensed premises;
- Current licence or copy of licence must be prominently displayed at each licensed premises;
- Holder must produce current licence when requested by an authorised officer;
- Holder must record licence number on all invoices, receipts etc;
- Holder (or former holder) must keep records prescribed by regulations, for a prescribed period of time (regulations will require wholesalers to keep a list of customers for 7 years);
- Sale or supply of tobacco products at the licensed premises must be under the personal supervision of the holder, or (in the case of a body corporate) one of the responsible persons named on the licence (would normally require the person to be present on the licensed premises);
- Provision of any information prescribed by regulations, either on request by the Department or an authorised officer, or on an ongoing and regular basis;
- Holder must promptly notify any material change to the Department, and apply for variation of licence. (see also "Variations" below). This applies to –

  - change of any responsible person (if holder is a body corporate);
  - change of location of the single point of sale where products will be sold (if retail premises);
  - change of place at which products will be displayed;
  - any other change that affects or is likely to affect the holder's ability to comply with licence conditions, this Ordinance or any relevant laws;
  - any change of a kind prescribed by regulations;
  - any other condition specified by the Department on the licence.

10 Transferability

10.1 The licence cannot be transferred to another person (and cannot be amended to apply to different premises), but in the case of a body corporate holder, can be varied at the holder's request to delete, replace or add a responsible person specified on the licence

11 Renewals

11.1 Licences to be renewed annually, subject to any disqualifications and payment of the prescribed fee.

12 Replacement licences

12.1 Lost or destroyed licences must be reported. Replacement licences will be issued by the Department on payment of the prescribed fee.

13 Surrender of licence

- Expired or revoked licences must be returned to the Department;
- Holder who ceases to carry on business that is licensed must surrender the licence;
- Holder may surrender the licence at any time.

14 Variations

14.1 Variable conditions can be rescinded, changed, or added –

- at the Department's initiative, after giving opportunity for the holder to make representations; or
- on request by the holder, e.g.
    - deletion, replacement or addition of a responsible person (if holder is a body corporate);
    - change of location of the single point of sale from which products will be sold, at retail premises;
    - change of place at which products will be displayed;
    - any other change that affects or is likely to affect the holder's ability to comply with licence conditions, this Ordinance or any relevant laws.

15 Fees payable

15.1 The level of licence fees should be set to enable full cost recovery. Those costs will be associated with –

- the administration of the licensing regime;
- the enforcement of the licensing regime including inspections;
- the provision of licensing related information directed to customers and the community;
- the provision of information to applicants and licensees to ensure their continued and future compliance;
- public education about the health risks associated with smoking.

15.2 The fees payable shall constitute an application fee and licence issue fee on making an application for a licence or making an application for renewal. If the application is refused the application fee is non-refundable however the licence issue fee will be refunded.

15.3 Fees payable are to be prescribed by regulations. It is anticipated that different fees will be prescribed for –

- application for first licence;
- application for licence renewal;
- application for licence variation;
- grant of licence (licence issue);
- renewal of licence;
- variation of licence.

15.4 Fees will vary for wholesalers and retailers and in accordance with sales area size, the likely range being from around £300 to £1000

16 Suspension and revocation

16.1 Subject to giving the holder advance notice and opportunity to make representations, the Department would be able to suspend or revoke a licence on the grounds that it has reasonable cause to believe that –

- any of the disqualifications apply in respect of the holder or any responsible person;
- any condition of the licence has been breached by the holder or any responsible person;
- the licence was granted on the basis of false, misleading or incomplete information.

17 Appeals

17.1 Appeals are allowed against the refusal of licence or variation of conditions, suspension or revocation made by the Department.

17.2 It is proposed that Appeals will be heard by the Royal Court subject to consultation with the Bailiff.

18 Register of licences

18.1 The Department will keep a public register of licences, including:

- Type of licence
- Name of holder
- Name(s) of responsible person(s)
- Address of licensed premises
- Identifying number of licence
- Day on which licence is issued
- Conditions of the licence
- Any suspension or revocation, or variation of conditions
- Any surrender of licence
- Any change of name of holder
- Any change to the list of responsible persons
- The licence ceasing to be valid for any reason including expiry
- Any other particulars prescribed by regulations

18.2 The register will also include details of enforcement action.

19 Administration

19.1 To be enforced and administered by the Department, or it's authorised officers acting under delegation or authorisation by the Department.

20 Powers of Enforcement

20.1 Appropriate powers of entry, inspection, search and seizure to be part of the licensing regime; with requirements for a warrant to enter a dwelling house.

21 Offences

21.1 Offences will be created for breaching any provision of the Ordinance or breaching any condition of a licence, as well as standard matters such as obstruction, providing misleading information, assisting or attempting the commission of an offence.

21.2 Provision will also be made for the directors and other officers of a body corporate, as well as each responsible person, to be individually liable for the actions of the body corporate under certain circumstances.

22 Penalties for offences

22.1 Various penalties will be provided for the different offences, not exceeding 2 year's imprisonment for the most serious offences.

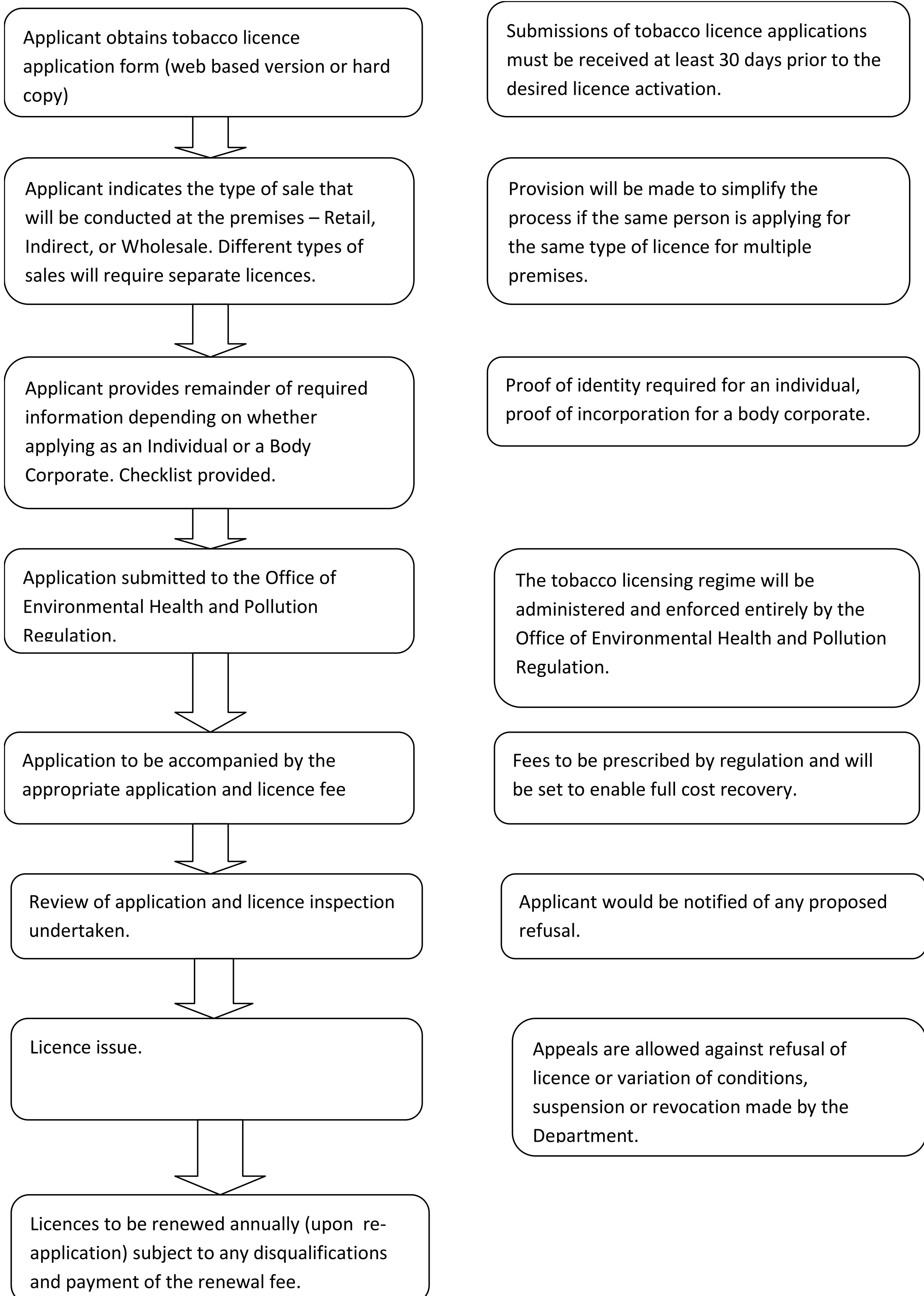
22.2 Larger penalties will be reserved for corporate offenders, as opposed to individual offenders.

23 Other powers of the Court on conviction of a licence holder

- May attach any condition or restriction to a licence held by the holder;
- May suspend or revoke a licence;
- May disqualify the holder from holding any licence for a specified period or permanently;
- May order forfeiture and disposal of any tobacco product or other thing –
  - (a) seized by an authorised officer under the Ordinance; or
  - (b) used in, the subject of, or otherwise involved in the commission of the offence.

Appendix 2

TOBACCO LICENCE APPLICATION PROCESS FLOW CHART



Appendix 3

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(NB The Treasury and Resources Department notes that the Health and Social Services Department intends to set the tobacco licensing fees at a level such that a large part of it will be used to cover the Department's costs of administration and enforcement of the Law and under a third will be used to extend the Quitline Service. It is possible that when the licence fee is introduced some small retailers may choose to stop selling tobacco products. The amount available for extending the Quitline Service may therefore be dependent on the number of licences issued.)

(NB The Policy Council supports the Report.)

The States are asked to decide:-

VIII.- Whether, after consideration of the Report dated 11 September, 2012, of the Health and Social Services Department, they are of the opinion:

1. To resolve and to direct that the express objective of the legislation to give effect to anti-smoking measures, approved by the States in 2008, 2010 and following this States report, is stated to be to reduce the prevalence of smoking and other use of tobacco products, especially amongst persons under the age of 18.

2. To direct that legislation be drafted under the Tobacco Products (Enabling Provisions) (Guernsey) Law, 2010, to provide for the licensing of sale and supply of tobacco products in terms set out in this report and its appendices, subject to any necessary modifications and adjustments. Penalties for offences should be based on similar regulatory offences, and forfeiture of tobacco products and suspension or revocation of licences should be imposed as penalties in appropriate cases.

3. To direct that an amendment be made to the Smoking (Prohibition in Public Places and Workplaces) (Exemptions and Notices) Ordinance, 2006, to remove the States Prison from the exemptions to facilitate the smoke-free prison strategy.

4. To direct that legislation be drafted to allow the Police to confiscate tobacco products and paraphernalia from under 18's in the streets and other public places.

5. To direct that legislation be drafted to regulate price displays of tobacco products.

6. To direct that legislation be drafted to prohibit commercial importation and retail sales of cigarettes other than in a minimum pack size of 20.

7. To direct that legislation be drafted to give officers authorised by HSSD adequate powers to enforce the licensing regime and other legislation to be made under the Tobacco Products (Enabling Provisions) (Guernsey) Law, 2010, as well as smoke free and other anti-smoking legislation, subject to appropriate safeguards.

8. To direct the preparation of such legislation as may be necessary to give effect to their above decision.

STATUTORY INSTRUMENTS LAID BEFORE THE STATES

THE SOCIAL INSURANCE (CONTRIBUTIONS) (AMENDMENT) REGULATIONS, 2012

In pursuance of Section 117 of The Social Insurance (Guernsey) Law, 1978, The Social Insurance (Contributions) (Amendment) Regulations, 2012 made by the Social Security Department on 18 September 2012, are laid before the States.

EXPLANATORY NOTE

These Regulations amend the Social Insurance (Contributions) Regulations, 2000 to allow completed social insurance contribution schedules returned by employers in electronic form to be accompanied by a declaration similarly in electronic form instead of the current requirement of a paper document.

These Regulations came into operation on 1 October 2012.

THE DRIVING LICENCES AND DRIVING TESTS (FEES) REGULATIONS, 2012

In pursuance of Sections 2 A(b) and 2 B of the Motor Taxation and Licensing (Guernsey) Law, 1987, as amended, The Driving Licences and Driving Tests (Fees) Regulations, 2012, made by the Environment Department on 28th August 2012, are laid before the States.

EXPLANATORY NOTE

These Amendment Regulations amend the current fees that are chargeable for tests of competence to drive which take place on or after 1st November 2012 and licences issued or granted which come into force on or after 1st October 2012 as set out in Schedules 2 and 3 respectively of the Driving Licences (Guernsey) Ordinance, 1995, as amended.

These Amendment Regulations came into force on 30th August 2012.