

Social Security Department
White Paper

Insolvency Payments Scheme

3 December 2009

Purpose and type of consultation: The purpose of the Insolvency Payments Scheme White Paper is to seek responses via public consultation on proposals from the Social Security Minister to introduce a statutory insolvency scheme. The scheme is intended to ensure that employees of insolvent businesses receive compensation based upon a reasonable proportion of the monies owed to them by their former employer (including unpaid wages, holiday pay, statutory notice pay, and statutory redundancy payments).

You are invited to submit comments on any aspect of the proposed scheme.

Closing date Friday 5 February 2010

Please send your comments to:

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Your submission

Please note that consultation responses may be made public. This means, for example, that your comments may be sent to other interested parties on request, sent to the Scrutiny Office, quoted in a published report, reported in the media, published on www.gov.je, or listed on a consultation summary.

Please ensure that when you respond, you advise us if -

1. You **do not** agree that your comments may be made public.
- Or
2. You agree that your comments may be made public **anonymously** (i.e. not attributed to you).

The White Paper is also available on the States website at:

www.gov.je/ChiefMinister/PublicConsultations

SUMMARY

The proposed statutory insolvency payments scheme is intended to provide a basic minimum standard of employee protection and a measure of financial security for employees. Similar schemes are already operating in many jurisdictions, including the UK and Isle of Man.

This White Paper sets out background and supporting information relating to the development of an insolvency scheme in Jersey. The scheme will protect employees where their employment has ended due to their employer's insolvency and the employer is unable to pay money owed to employees.

The paper identifies the policy areas that are subject to consultation with stakeholders and proposals are set out in each section. A full list of the proposals is included as Appendix 3 and a number of specific questions appear in the body of the paper.

The paper explains what is meant by insolvency, it provides details of similar schemes in other jurisdictions, refers to research previously undertaken, explains the current temporary insolvency payments scheme (the "Temporary Scheme"), and sets out the proposals for a statutory insolvency payments scheme.

The intention of the statutory insolvency scheme is to ensure that employees promptly receive a reasonable proportion of the monies owed to them by their former employer. The scheme will allow the States to pay the employee wages due, statutory entitlements and some contractual amounts from an insolvency fund, whilst taking on the employee's right to the debt in order to claim any sums that may be available through the insolvency proceedings.

It is anticipated at this stage that protection for employees in insolvency situations will be achieved by an amendment to the Social Security legislation, as most of the amendments to existing legislation will be in regard to the collection of Social Security contributions. It is proposed that the law will:

- be based broadly on insolvency schemes already operating in the UK and Isle of Man
- clarify the meaning of formal insolvency for the purpose of the scheme
- define the criteria under which an employee qualifies to apply for payment
- set out what financial entitlements are protected by the scheme and the total amounts that may be paid from the scheme
- provide a mechanism to transfer the employee's rights in insolvency proceedings to the Social Security Minister so that he can take steps to recover as much as possible of the amount paid out
- set out how claims are paid and administered by the Social Security Department
- define any decision-making powers and the right of independent appeal, and
- explain the funding arrangements for the scheme.

The proposed legislation accords with the aim of the States of Jersey to support the community through the economic downturn, as set out in the latest draft Strategic Plan 2009-2014. It also accords with the ongoing States strategy (*3.1.1 of the 2006-2011 Strategic Plan*) to promote a safe, just and equitable society by giving legal rights to employees and employers in line with best practice worldwide – and

extends the existing legislation to provide a comprehensive range of basic rights to employees by moving into the second phase of employment law reform, as approved by the States in P.99/2000.

States Members have shown support for a statutory insolvency scheme to be brought forward without delay and a commitment has been given by the Social Security Minister that a Report will be presented to the States outlining the proposals by the end of 2009.

PROPOSAL FOR A STATUTORY INSOLVENCY SCHEME

The provisions of the scheme are subject to review before being finalised. *(A full list of the proposals is included at Appendix 3.)*

To summarise, the Social Security Minister proposes that the statutory insolvency scheme will:

1. Follow the principles of insolvency schemes operating in the UK and the Isle of Man.
2. Be based largely on the current Temporary Insolvency Scheme.
3. Entitle an individual to claim certain payments from the statutory insolvency fund if they meet five specific qualifying criteria.
4. Entitle an individual to claim a number of outstanding payments, including wages and holiday pay owed, statutory notice pay and statutory redundancy payments.
5. Cap payments from the statutory insolvency scheme at the same cap that has been set for the Jersey Employment Tribunal (£10,000).
6. Be funded by increasing Class 1 employer Social Security contribution rates by a small fraction of a percent (i.e. 0.032%).
7. Be administered by the Social Security Department.
8. Be subject to a right of appeal to the Social Security Tribunal.

BACKGROUND

Previous States' propositions

The protection of employees in insolvency situations has previously been addressed by the States. In 1993, Senator R. Shenton lodged a proposition (P.35/1993) asking the States to accept responsibility for any contractual entitlements and termination of employment benefits on becoming redundant where an employer had been declared en *désastre*, so that employees were immediately paid any money owed to them to alleviate possible hardship. The matter was not progressed at that time because it was thought that

legislation to set up such a fund might be complex and difficult to administer. The States rejected the proposition to consider the matter at its next Sitting and referred the relevant part of the proposition to the Finance and Economics Committee of the time.

That proposition was followed by a discussion paper from the then Industrial Relations Committee (R.C.33/1993) seeking views from the public on the proposal to establish a redundancy fund. The Report included the results of a feasibility study undertaken by the Employment and Social Security Committee of the day and alternative methods of funding an insolvency scheme were set out. The option of funding via a levy on employers was favoured, but again the matter was not progressed by that Committee.

In 2000, the States of Jersey adopted the then Employment and Social Security Committee's Proposition (P99/2000), establishing a phased approach to employment legislation. It was proposed that an insolvency fund would be necessary if a redundancy policy was introduced.

Employment Forum consultation

In 2006, the Employment Forum consulted the public on the introduction of legislation relating to Redundancy and Business Transfers by issuing a consultation paper to stakeholders. The Forum asked respondents whether a fund should be set up to ensure that employees would receive redundancy payments due to them if their employer became insolvent.

Of the 24 respondents, only two did not agree that there should be an insolvency fund for this purpose, one of the reasons being that:

"The likely cost of an insolvency fund is likely to be disproportionate to any benefit from it; employees already have priority in désastre and this (in an Island with functionally full employment) should be sufficient."

However, the Jersey Advisory and Conciliation Service (JACS) made the following comment, which suggests that the current protection is not sufficient:

"Employees of such businesses already have difficulty in obtaining their statutory or contractual notice. Without access to such a fund they would be unprotected."

The Forum also asked respondents who should contribute to creating an insolvency fund, whether employers, employees, the States, or a combination of contributors. The Forum recognised that further research would be required as to how the fund should be administered, but recommended on the basis of the consultation responses that an insolvency fund should be established via employer and employee contributions, with the States contributing only as an employer itself.

The former Social Security Minister accepted the recommendation to establish an insolvency fund; however, he was aware that a great deal of

further research would be required. He proposed that the insolvency scheme should be developed as part of a more general Social Security review due to the recommendation that funding for the scheme should be collected via Social Security contributions.

Recent political developments

Political interest in insolvency increased in December 2008 when Woolworths Plc. went into administration. The staff in Jersey lost their jobs but, unlike their counterparts in the UK, they did not have any right to statutory redundancy pay or to receive compensation from an insolvency scheme.

Further to a Proposition (P.9/2009) from Deputy Southern, the States of Jersey decided on 4th February 2009 that the Minister for Treasury and Resources should seek agreement with the former Woolworths employees on the assignment to the States of any claims on the administrators of the company, allocate a sum to provide compensation to these employees, and seek reimbursement of the sum from the administrators.

On the basis of a further proposition (P.34/2009) from Deputy Southern, the States decided on 24 March 2009 that the Woolworths payments constituted a precedent which must be followed in similar cases of redundancy through insolvency in Jersey. The Minister for Social Security was required to establish a system to deliver payments on a similar basis to all Jersey employees made redundant by insolvency, having liaised with the Minister for Treasury and Resources in regard to funding.

The Minister for Social Security presented the details of a temporary insolvency scheme to deliver payments (“the Temporary Scheme”) to the States as a Report (R.44/2009) on 29 April 2009. Since that time, the Social Security Department has administered the Temporary Scheme in accordance with the criteria and procedures set out in that Report, as amended.

Bankruptcy and insolvency in Jersey

The bankruptcy or insolvency of an individual or a business (the debtor) can affect a range of different people and businesses (the creditors) which are owed money, including employees, suppliers of goods and services, banks and government departments.

Where there are sufficient realisable assets, an individual or company can be declared en désastre, which falls to be administered by the Viscount. In Jersey, this is the most common method of dealing with people and companies that run into severe financial difficulties. The purpose of a désastre is to gather in and sell the debtor’s assets (which might include cash, property and equipment) and to distribute the proceeds of the assets to those who are entitled to them, including any employees who are owed wages and other statutory amounts.

Under the Bankruptcy (Désastre) (Jersey) Law 1990, “secured” creditors are paid first - for example, where money has been lent via a loan or mortgage

secured on property, building or land. The Viscount's fees and expenses are also deducted.

These are followed by priority debts, which include Social Security contributions and Income Tax owed, rent arrears and parish rates. Priority is also given to arrears of employees' wages or salaries for up to six months before the *désastre* was declared, up to a maximum of **£3,500** per employee, plus holiday pay and contractual bonuses due to that date, up to a maximum of **£1,000** per employee. In some cases, there will be insufficient funds remaining to meet these claims in full.

Priority claims are followed by 'ordinary' claims. Pay in lieu of notice and redundancy payments (whether statutory or contractual) are treated as ordinary claims.

The Viscount's office has indicated that it would not be unusual for a priority creditor to receive less than half of what they may be entitled to and it could take from six months to a year to receive the money (although the Viscount can make interim payments where possible and appropriate). In the ordinary course of events, the administrative processes take about 18 months to complete.

If employees are to receive the statutory entitlements that are due to them in the event of their employer becoming insolvent, the best way to deliver this is through a statutory insolvency payments scheme.

Désastre is the most common form of insolvency in Jersey, however other forms do exist. For more information about "en désastre", the role of the Viscount, the order in which debts are settled and other types of insolvency in Jersey, see Appendix 1.

HOW THIS PAPER IS ORGANISED

The following five sections provide more details of the background and justification for these proposals.

Section 1 - Insolvency schemes in other jurisdictions

Section 2 - The temporary insolvency scheme

Section 3 - Qualifying criteria

Section 4 - Entitlements

Section 5 - Funding and administration

SECTION 1 – Insolvency schemes in other jurisdictions

Proposal 1 – It is proposed that the most suitable models on which to base an insolvency scheme for the Island are schemes operating in jurisdictions with similar employee relations and employment legislation frameworks to Jersey, principally the UK and the Isle of Man.

Jersey's temporary insolvency scheme was set up to provide compensatory notice pay to employees made redundant through insolvency and was modelled broadly on the UK scheme. The Temporary Scheme has been successful in processing claims and making payments in a timely manner. See Section 2 for further details of the Temporary Scheme.

A summary of the UK and Isle of Man schemes, as well as an observation on the situation in Guernsey, is set out below. *Appendix 2 provides more detailed information about the UK insolvency scheme and summaries of how similar schemes operate elsewhere, including the parameters set by EU Directives and the recommendations of the International Labour Organisation.*

United Kingdom

The UK's Insolvency Service protects employees where their employer has become insolvent and is unable to fulfil its obligations in regard to certain amounts owed to employees, including unpaid wages, holiday pay, statutory notice pay and statutory redundancy pay.

An individual may claim a maximum of eight weeks' wages, up to six weeks' outstanding holiday pay owed, and any statutory redundancy payment owed, each of which is capped at a maximum of £380 a week (figure from 1 October 2009). The number of weeks' redundancy pay is also subject to a statutory maximum of 30 weeks.

In addition, a maximum of 12 weeks' pay may be claimed if the employee was not given the required statutory minimum period of notice on termination of employment (or pay in lieu). This payment is reduced by any income received, or that the employee could have received, during the notice period, whether through new employment or "social benefits".

Other debts that an individual may claim are a basic award for unfair dismissal awarded by an Employment Tribunal, certain contributions into an occupational or private pension scheme, and any reasonable sum to reimburse any fee or premium paid as an apprentice or articulated clerk.

If the employee is owed any money beyond the maximum sums that may be claimed from the Insolvency Service, they may claim it from the Insolvency Practitioner (IP) or Official Receiver handling the insolvency; however, there is no guarantee of success.

To qualify to claim an insolvency payment, employees do **not** need to have worked for their employer for a specified period of time and there are no age limits, other than those that apply to each particular statutory right. Office holders such as company directors might not fall within the definition of an "employee" if they have a controlling interest in the company. The self-employed, members of a partnership and employees who normally live and work outside Great Britain are excluded from the scope of the scheme.

Insolvency payments are made from the National Insurance Fund, which is funded by contributions from both employers and employees (as is Jersey's

Social Security Fund). The Insolvency Service takes on the employee's right to the debt and seeks to recover it via the insolvency proceedings.

Isle of Man

The Isle of Man's insolvency provisions are similar to the UK. The main difference is that although the bankruptcy legislation places a £250 per week cap on arrears of pay under the Preferential Payments Act (1908), this is not applied when the debt is funded from the Manx National Insurance Fund.

Weekly pay for the purpose of unpaid wages, holiday pay owed and most other payments from the fund are not capped, other than a redundancy payment which is capped by the redundancy legislation at a maximum of £480 per week. Statutory notice pay is only capped in the sense that a maximum of 12 weeks may be claimed. This situation is likely to be reviewed by the Manx Government due to concerns about depletion of the fund. Appeals or complaints are made to the Employment Tribunal.

Guernsey

Guernsey does not currently make any provision for statutory redundancy payments or an insolvency scheme. However, it has been reported that the Law Officers of the Crown in Guernsey have formed a working party to draft and implement new insolvency legislation by the first half of 2010.¹

SECTION 2 – The Temporary Insolvency Scheme

Proposal 2 – It is proposed that the statutory insolvency scheme will be based largely on the Temporary Scheme that is currently operating.

The Temporary Scheme for making compensatory notice payments to employees where their employer is insolvent was, by necessity, developed rapidly. The scheme is relatively straightforward to administer, although it must be noted that, at this time, the scheme only provides compensation for unpaid statutory notice periods, whereas the statutory insolvency scheme, as proposed, would cover a range of other payments and statutory entitlements owed to employees. As such, it is appropriate that some provisions of the statutory scheme may differ from those of the temporary one.

Since February 2009, 35 individuals have received a payment from the Temporary Scheme as a result of six employer insolvencies². A fund of £200,000 was allocated to the provision of the Temporary Scheme and a total of £91,000 has been paid out in the period February to November 2009. The average pay out per person in respect of statutory notice pay claims from the Temporary Scheme is £2,600.

¹ <http://www.legalweek.com/Navigation/34/Articles/1197449/Offshore+To+the+rescue.html>

² An additional 41 individuals (former Woolworths employees) claimed compensatory payments prior to the introduction of the Temporary Scheme.

SECTION 3 – Qualifying criteria

Proposal 3 – It is proposed that if a claimant meets all five of the following qualifying criteria, they will be entitled to claim certain payments from the statutory insolvency fund.

1. The person's employment with the insolvent employer has ended due to the insolvency.
2. The person was employed wholly or mainly in Jersey. If the person worked wholly or mainly outside Jersey, they would not be entitled to claim from the insolvency fund.
3. The Social Security Department has received, or was due to receive, Class 1 contributions from that employer in respect of that employee in the quarter prior to insolvency.
4. The claimant is an "employee" (as defined by the Employment (Jersey) Law 2003) immediately prior to the employer's insolvency. It is immaterial whether an employment contract is express or implied, and whether it is oral or in writing. A person is an "employee" if:
 - (a) that person works for another person under a contract of service or apprenticeship, or
 - (b) that person enters into any other contract with another person under which the first person undertakes to do, or to perform personally, work or services for the second person and the status of the second person is not that of a client or customer of any profession or trade or business undertaking carried on by the first person.

An individual will not qualify to claim a payment from the insolvency scheme where the Social Security (Classification) (Jersey) Order 1974 defines them as not having an employer and therefore being a Class 2 contributor, where the individual is employed "by a limited company where the Minister is satisfied that the insured person, the insured person's spouse, nominee or other agent

- a) is beneficially entitled to not less than one half of the total shares of that company; or
- b) otherwise has substantial control of the operations of that company."

This test will be conducted by a Social Security Officer and may, on occasion, exclude some claimants who might have been defined as an "employee" for the purpose of the Employment Law. An employment tribunal would ordinarily consider whether or not a person is an "employee", based on a number of facts, such as mutuality of obligation between the parties, the economic reality of the situation and whether a contract is genuine. The test relating to contribution status is a less legalistic and more objective test, and is one

which Officers of the department are accustomed to conducting in other contexts in order to determine whether a person is a Class 1 or Class 2 contributor.

5. The employer is formally insolvent.

For present purposes, this means that formal and/or legal insolvency proceedings must have been instituted. If the employer just stops trading or closes down a branch or branches of the company, this is not insolvency.

Generally, in other jurisdictions, legal and formal insolvency proceedings must be instituted before any payments are considered. In the UK, if the employer is not insolvent and owes money to employees, the Insolvency Service cannot help.

In the Isle of Man, however, the Department of Health and Social Security (DHSS) has discretionary powers to pay specified debts from the Manx National Insurance Fund in cases where the employer is not technically insolvent, but where employment has been terminated, the employer has ceased trading in the Isle of Man and the employee has taken all reasonable steps (other than legal proceedings) to recover the debt from the employer.

Jersey's Temporary Scheme gives the Minister the discretion in wholly exceptional circumstances, and in consultation with the Viscount, to make payments where an employer has not yet been formally declared insolvent. The rationale was specifically to prevent undue delay in processing employees' compensatory payments in the absence of a statutory insolvency scheme. For the statutory scheme, discretion will **not** be available as it would introduce uncertainty, which is considered to be inappropriate in legislation. Where an employer has ceased trading but is not insolvent, an individual has recourse to the Employment Tribunal and to the Courts. Where hardship may result, an individual may apply for Income Support.

This section has set out the five criteria that must be met to entitle an individual to claim certain payments under the statutory insolvency scheme.

Question 1 – Do you have any comments on the proposed qualifying criteria?

SECTION 4 – Entitlements

Proposal 4 – It is proposed that an individual will be entitled to claim a number of outstanding payments (that were owed to them by their insolvent employer) from the insolvency fund. Any redundancy pay and pay in lieu of notice relates only to statutory, not contractual entitlements.

Proposal 5 – It is also proposed that the amounts that may be paid to an employee from the insolvency fund will be capped at the same overall maximum that applies to awards made by the Jersey Employment

Tribunal, which is £10,000 in total for amounts that the individual is entitled to.

These payments and the overall cap are described in more detail below:

- (a) Unpaid wages
- (b) Pay for contractual holidays and Public and Bank holidays owed
- (c) Pay in lieu of statutory notice
- (d) Statutory redundancy pay
- (e) Employers' occupational/personal pension scheme contributions
- (f) Caps and maximum payments.

As with Jersey Employment Tribunal awards, any payments made from the statutory insolvency scheme would be made gross, and any Income Tax and Social Security liabilities would be the direct responsibility of the employee.

(a) Unpaid wages

An employee will be able to claim from the statutory insolvency scheme any “wages” owed equivalent to the appropriate Employment Law entitlements, in particular the following amounts which would not be capped (other than by the £10,000 overall cap):

- i) Basic pay
- ii) Contractually payable commission
- iii) Contractually payable overtime
- iv) Contractually payable bonuses
- v) Weeks notice worked but not paid by the employer
- vi) Wages owed for statutory time off to act as an employee representative (*equivalent to a reasonable amount of paid time off to prepare for a hearing and to represent the employee at a hearing*)
- vii) Wages owed for statutory time off to seek work or arrange for training prior to redundancy (*equivalent to two paid working days where the employer has at least two years' service.*)

For the purpose of the Employment Law, “wages” means: *“remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by a relevant agreement or by or under an enactment, which are payable by virtue of a contract of employment by an employer to an employee for work done or to be done or for services rendered or to be rendered but does not include pensions contributions paid by the employer or any other ancillary non-monetary benefits.”*

For the purpose of an award made by the Jersey Employment Tribunal, in addition to basic pay, “wages” includes any overtime and shift allowances that the contract of employment states that the employer is bound to provide and the employee is bound to work.

In the UK and Isle of Man, “wages” includes contractually payable commission, overtime and bonuses, and any “protective award” made by an

employment tribunal if an employer has failed to consult an employee's representative about a collective redundancy. Employees will not be entitled to claim protective awards from Jersey's statutory insolvency scheme as the award is intended to penalise an employer and is not intended to compensate the employee. The Minister considers that it would be inappropriate for employees to receive such penalty payments from a fund that has been designed as a "safety net" to deal with the immediate and unexpected loss of employment, rather than as a fund to meet employers' obligations in full.

Notice pay is treated as wages where the employee has worked any part of the statutory notice period and has not been paid by the employer for that period of time. The UK insolvency scheme also includes as wages a number of other sums relating to statutory paid time off that do not yet apply in Jersey employment legislation (e.g. time off for duties as a pension scheme trustee), as well as wages owed for statutory time off to act as an employee representative and time off to seek work where redundancy is being proposed.

In the UK, claimants are entitled to a maximum of eight weeks' wages, to include all of the payments described above, and the claimant may choose the best eight weeks from any full weeks that were owed prior to the date of insolvency. A week's pay is capped at a maximum of £380 per week (effective 1 October 2009). In the Isle of Man, a maximum of eight weeks' unpaid wages may be claimed, but the weekly wage is not capped. However, this is likely to be reviewed.

(b) Holiday pay owed

An employee will be entitled to claim from the insolvency scheme any pay in lieu of contractual holidays owed, as well as statutory Public and Bank Holidays owed (where they were not included in the total contractual holiday entitlement), that the employee had accrued during the 12 months prior to termination of employment.

If an employee owes their employer holiday (i.e. they have taken more days holiday that they were entitled to, pro rata), this sum will be deducted from the overall payment made to the employee from the insolvency scheme.

As with unpaid wages, the UK and Isle of Man limit the sums that may be claimed to a maximum of six weeks' holiday pay accrued during the 12 months prior to termination of employment. The UK caps weekly pay at a maximum of £380 per week and employees are not limited to claiming only statutory holidays owed. There is no cap on weekly pay in the Isle of Man, but this is likely to be reviewed in the near future.

(c) **Pay in lieu of statutory period of notice**

Notice payments paid from the Jersey statutory insolvency scheme will be limited to the statutory maximum of 12 weeks' pay, but will not be subject to a weekly cap on wages.

Statutory notice pay is already capped by the employment legislation in that a maximum number of weeks may be claimed depending on the employee's length of service. In Jersey, this is currently a maximum of 16 weeks after 15 years' service. However, the enactment of an amendment to the Employment Law in 2010 (which will also introduce the redundancy pay provisions) will reduce the statutory notice period to a maximum of 12 weeks' pay after 12 years' service (as in the UK and Isle of Man).

In the UK, in addition to a maximum of 12 weeks' pay, notice payments are also capped at a maximum weekly pay of £380. The value of weekly pay is not currently capped in the Isle of Man, but is likely to be subject to review.

Mitigating notice payments

To be eligible to claim compensatory pay in lieu of statutory notice, claimants will be required to demonstrate that they are actively seeking employment (unless in receipt of Maternity Allowance or Short-Term Incapacity Allowance), and must not unreasonably refuse suitable employment.

Unlike other payments, such as wages owed and statutory redundancy pay, an employer's failure to pay notice is treated in the UK and Isle of Man as a damages payment, so the employee is required to keep their losses to a minimum (mitigating losses) by claiming all the benefits to which they are entitled; by doing their best to find employment; and by taking full wages or salary during the notice period in any new job. If the claimant could have reduced their loss but did not, the notice payment may be reduced by the value of the unclaimed benefits or the amount that could have been earned through employment.

Jersey's Temporary Scheme provides that statutory notice payments, other than the first four weeks of notice, are mitigated by any income that the employee has received, or could have received, during the statutory notice period. Any weeks' notice remaining to be paid after week four are reduced by income from any of the following:

- earnings from employment
- Short-Term Incapacity Allowance (STIA)
- Maternity Allowance, and
- *additional* Income Support payments paid to an individual or their household as a result of their unemployment.

In the UK and Isle of Man, the full statutory notice period (a maximum of 12 weeks) is mitigated for income in this way. The first four weeks is treated differently in Jersey's Temporary Scheme in view of the fact that this scheme

was developed to address the lack of statutory redundancy pay in Jersey, as well as the lack of a statutory insolvency payment scheme.

In the UK, notice payments are reduced by any state benefits claimed (or benefits that could have been claimed). The Isle of Man also reduces notice payments by any earnings from new employment and benefits that replace income, such as job seeker's allowance. Where a claimant had two jobs, income from the second job which continues is not taken into account to reduce the notice payment.

As statutory redundancy pay will be available to employees when the statutory insolvency scheme comes into effect, it is not considered appropriate to continue to treat the first four weeks of notice pay differently (as it is under the current Temporary Scheme).

Statutory notice payments will be mitigated for income for the full period of notice, including the first four weeks of the notice payment. The following social benefits will be counted as income for the purpose of reducing (mitigating) notice payments in the statutory insolvency scheme:

- i) Short-Term Incapacity Allowance (STIA)**
- ii) Maternity Allowance (MA)**
- iii) *Additional* Income Support payments made to an individual or their household as a result of their unemployment**
- iv) Invalid Care Allowance (ICA)³**

(d) Statutory redundancy pay

It is anticipated that the law granting employees an entitlement to a lump-sum payment on redundancy will be introduced by March 2010. An employee will be entitled to one week's (capped) pay for every full year of service, irrespective of age. The redundancy payment will be capped at either a figure set by Ministerial Order or, by default, the most recent figure for average weekly earnings in Jersey, published at least one month before the effective date of termination of employment. On the basis of the average earnings figures released by the Statistics Unit in August 2009, the maximum amount would be £620 a week.

In the Isle of Man, full years of service up to the age of 65 count in calculating a redundancy award and the value of a week's pay is capped at £480. In the UK, the redundancy payment is calculated in a similar way, based on age and length of service, with the value of a week's pay capped at £380 and a maximum of 20 years' service taken into account, giving a maximum of 30 weeks' (capped) statutory redundancy pay.

³ Due to the income bar, an employee might not have previously qualified to receive ICA if they were receiving a certain amount of income from earnings, whilst also acting as a full time carer. Following redundancy, an individual might qualify to receive this income replacement allowance.

For the purpose of statutory redundancy payments in Jersey, the value of a week's pay is capped by the legislation at a maximum weekly amount (currently £620). An employee will be entitled to claim from the insolvency scheme any redundancy pay owed up to that statutory weekly cap, and subject to the overall cap of £10,000.

In the UK, an employee who has not technically been made redundant but has been dismissed due to their employer's insolvency may claim a basic unfair dismissal award from an employment tribunal instead of a redundancy payment. An employee may receive either a statutory redundancy payment from the Redundancy Payments Office or the equivalent of a basic unfair dismissal award from the Insolvency Service. These two payments are calculated in exactly the same way and are capped at the same maximum sum (currently £11,400). The vast majority of employees receive a redundancy payment and therefore do not claim a basic unfair dismissal award.

Jersey's unfair dismissal legislation provides that an unfair dismissal award is calculated by reference to a scale based on uncapped weekly pay and length of service, up to a maximum of 26 weeks' pay after five years' service and so is potentially of far greater value to an employee than a statutory redundancy payment. In addition, an employee qualifies to claim compensation for unfair dismissal much earlier in their employment than a statutory redundancy payment (26 weeks' service for unfair dismissal and two years for statutory redundancy pay).

The purpose of the statutory insolvency scheme is to deal with the immediate and unexpected loss of employment and prevent hardship by providing redundancy payments up front, so that employees do not have to wait months, and in some cases years, to reclaim through the insolvency proceedings any redundancy pay owed by their former employer.

The statutory insolvency scheme will therefore entitle claimants to receive a redundancy payment (equivalent to the statutory maximum) in circumstances where an employee is not technically "redundant" at the time of insolvency. This will include claimants who have been dismissed prior the employers' insolvency where the individual's statutory or contractual period of notice (whichever is the greater) takes their effective date of termination of employment up to (or beyond) the date of the employers' insolvency.

This might be appropriate where, for example, an employer has gradually reduced the workforce over a period of weeks prior to the formal insolvency in an attempt to make the business more marketable to potential buyers.

(e) Employers' occupational/personal pension scheme contributions

The statutory insolvency scheme will make provisions that are similar to the Isle of Man regarding the payment into a pension scheme of unpaid

employer contributions and employee pension contributions relating to the 12 month period before the employers insolvency. Any such payments from the fund would be subject to the proposed £10,000 maximum overall cap described in f) below.

In the UK and Isle of Man, payments may be made to pension funds from the insolvency fund where an employer has failed to pay contributions due, whether on his own behalf or that of the employees, up to the date of insolvency.

In the Isle of Man, for example, the DHSS may pay to the managers of an occupational pension scheme or personal pension plan any employer or employee contributions to the scheme unpaid in the 12 months before the employer's insolvency:

- in the case of an employer's contributions, up to the lesser of (a) 10% of the total remuneration (including holiday pay and payments for time off with pay) and (b) the amount certified by an actuary as required to pay the benefits due in respect of the employees;
- in the case of an employee's contributions, up to the amount deducted from the employee's pay in that period.

In the case of contributions payable on behalf of an employee, the intention would be that payment would be made under the scheme only where the amount of the contributions was deducted from the pay of the employee, but had not been paid into the pension scheme.

f) Caps and maximum payments

The amounts that may be paid to an employee from the statutory insolvency fund will be capped at the same maximums that have been set for Jersey Employment Tribunal awards, which is £10,000 in total (excluding any award for unfair dismissal).

Capping protects the insolvency fund and enables clearer estimates to be made as to the size of the fund required. A simple method of ensuring that the fund is sustainable and that payments are limited is to introduce an overall cap on the maximum sum that may be claimed, per employee, from the insolvency fund.

In proposing this, it can be argued that the former employees of an insolvent employer should not have the opportunity to be financially better off as a result of the termination of their employment than they would have been following a Jersey Employment Tribunal decision in their favour.

Insolvency payment schemes in other jurisdictions generally cover the payments detailed in (a) to (d) above. However, as has been described, most are limited by a cap on the level of weekly wages and on the number of weeks that can be paid.

Under Jersey Bankruptcy Law, the maximum amount that can be paid to an individual in wages or salary is capped at £3,500 and the maximum amount for holiday pay/bonus is capped at £1,000. The intention is that this will cover the typical requirement – a month’s outstanding pay, for example. The maximum amounts that apply to priority claims for wages and holiday pay owed are set by Order and are periodically reviewed in reference to the Retail Prices Index. The Viscount’s Department intends to review this cap which was set by the Bankruptcy (Désastre) (Jersey) Order 2006 on 1 August 2006.

The statutory insolvency legislation will need to specify the order in which debts are settled from the insolvency fund where a claimant is owed a total of more than £10,000 and intends to initiate their own action to claim any amounts owed beyond the £10,000 via the attendant insolvency processes. This is important because the States will take on each employee’s debt in the insolvency proceedings and accordingly the States’ claim will have the same “priority” as the employee would have had in the proceedings. For example, wages owed and holiday pay are priority debts and are therefore more likely to result in a payout from the insolvency proceedings than an “ordinary” debt, such as statutory notice and redundancy payments.

It is proposed that the sums that may be paid from the scheme will not be capped in any other way, such as by a maximum value of weekly pay, or a maximum number of weeks that may be claimed, other than those limits that already apply in the employment legislation itself, for example, the statutory maximum of 12 weeks’ notice pay (depending on the claimant’s own length of service).

If, following consultation, the Minister decided to propose a cap on weekly pay for any unpaid wages, holiday owed and statutory notice pay that are paid to an employee from the statutory insolvency scheme, it is considered that, to avoid confusion, the value of weekly pay would have to be capped at the same level as that provided for statutory redundancy payments (£620 per week).

It is intended that, as in the UK, the scheme will make provision so that any amounts owed by an employee to an employer may be offset against the total amount that an employee is entitled to receive from the insolvency scheme e.g. wages overpaid, a loan, or holiday pay owed where the employee has taken more days, pro-rata, than they were entitled to.

Question 2 – Do you have any comments on the proposed payments and method of capping, set out in a) to f) above and are there any other payments that should be included?

SECTION 5 – Funding and administration

The Fund

Proposal 6 – It is proposed that the insolvency fund will be created by increasing Class 1 employer social security contribution rates by a small fraction of a percent (0.032 percent) and that these funds would be accounted for separately for the purpose of funding insolvency payments. Employee social security contribution rates would be unaffected by the creation of the insolvency fund.

A key issue for the insolvency scheme is how it will be funded. Similar schemes in other jurisdictions are generally either funded from employer contributions only, or from existing social funds derived from employer and employee contributions.

The schemes operating in the UK and the Isle of Man are funded by national insurance funds, which consist of contributions from employees, employers and the self-employed, plus interest on investments. The funds are held separately and are not directly available for general expenditure by the government. As well as insolvency payments, the fund is used to pay for certain social security benefits, such as state retirement pensions.

The Jersey equivalent would be the Social Security Fund which is made up of employee, employer and States contributions. In the Isle of Man, the monies within the fund are not ring-fenced specifically for the purpose of insolvency payments and there is no limit on how much can be spent in total on insolvency payments to employees.

As discussed on page 4, the Employment Forum recommended in 2007 that an insolvency fund should be funded by a combination of contributions from both employers and employees, with no States funding (other than as an employer itself). It had been suggested that a small levy per employee could be collected, from both employer and employee, in conjunction with the first Social Security Contribution Schedule of each calendar year. However, an earlier Discussion Paper (R.C.33/1993) presented to the States favoured the option of a levy on employers only.

Having given further consideration to the long-term funding of the insolvency scheme and the administrative requirements to establish and maintain this fund, it is clear that an annual levy is not the most effective course of action. The Minister is proposing that it will be simpler and more cost effective, both for the Department and for employers, if a fraction of a percentage is added to the current Social Security contribution rates made by employers, so that the fund gradually builds up.

The rationale for an employer-only contribution is that many of the costs involved – wages, redundancy pay, notice pay – are properly the responsibility of the employer. Therefore it seems appropriate that responsibility for funding a scheme that is stepping in to make such payments should be met by employers. Contributions would be required from the States

of Jersey as an employer, even though States employees are never likely to have to call on the fund while continuing to work for the States.

Such a move will require legislative and technological changes, although this will be less complicated administratively than making provision for each employer to pay a one-off lump sum at the start of each year, with that sum based on the number of employees that they employ (a number which could change frequently).

The proposed change would not bring any additional administration for employers as the Social Security Department undertakes the necessary calculation and bills employers for the amount that they owe.

An estimate can be made of the funding required for a scheme by reference to the 76 people (including 43 Woolworths staff) who have, so far this year, been eligible to claim statutory notice pay under the Temporary Scheme.⁴ If this number was taken as the figure for a full year and each claimant was owed sums up to the maximum amount available per person (£10,000), then £760,000 would have to be raised to fund the scheme in that year.

2009 is anticipated to have been an exceptional year. The Woolworths scenario was unusual in terms of the number of employees and the number of employees with long service. In a more typical year, the number of employees calling on the fund and the number claiming the maximum £10,000 payout is expected to be fewer than 79.

The Minister is therefore proposing a funding requirement of £350,000 per year at the outset, to include approximately 5 percent administration costs. To raise this sum would require all Class 1 employers (not including self-employed people and sole traders) to contribute an additional 0.032 percent in contributions (up to the current contributions ceiling). This means that employers' Social Security contributions would increase from 6.50 percent currently to 6.532 percent. (A rise of 0.01 of a percentage point in employer contributions equates to around £110,000 annually.)

Administration

Proposal 7 – It is proposed that the Social Security Department will continue to administer claims, monitor insolvency proceedings in conjunction with the Viscount's Department or other insolvency office holder, process claims and undertake validation.

The UK's National Insurance Fund is managed by Her Majesty's Revenue and Customs. The Insolvency Service is part of the Department for Business Innovation and Skills and claims for statutory redundancy payments and other statutory guaranteed debts are submitted via an Insolvency Practitioner or Official Receiver to the Redundancy Payments Offices.

⁴ There were 40 other Woolworths' staff who, if the statutory insolvency scheme had been in place at the time, may have been entitled to a payment. However, the strong likelihood is that such individual payments would have been minimal.

In the Isle of Man, the Department for Health and Social Security is responsible for administering claims and payments under the scheme. The administration effectively involves only two officers, one to process claims and one to check and authorise payments. These officers are involved in the administration of other social security benefits and the administration of the insolvency scheme involves only a portion of their time.

Experience of the Jersey Temporary Scheme has shown that the Social Security Department is well positioned to deal with this type of claim, particularly as it already deals with redundancy issues in the award of contribution credits and retaining information about unemployment.

Subrogation – assigning of claims

Under the temporary Insolvency scheme, the employee must sign a separate legal document that assigns their rights to the payments made under the scheme to the States, via the Minister for Social Security. This means that the States will take on the employee's claims for payment and will pursue the claim as a creditor when the proceeds of any remaining assets of the company are distributed amongst the creditors. It gives the States an opportunity to recoup any monies that it has paid out under the scheme. An individual is not obliged to assign their right but if they fail to do so, they will not receive any payment under the scheme.

The intention would be that, as in the UK and Isle of Man, the legislation will provide that, in receiving an insolvency payment from the proposed statutory scheme, the claimant has automatically assigned their right to the Minister, or to the States.

Timescales

If a claimant meets the five qualifying criteria (described on page 8), an application for payment must be submitted to the Social Security Department within 40 days of the date of the former employer's insolvency.

Jersey's Temporary Scheme requires initial claims to be submitted within four weeks of termination of employment; however, this has proved to be a restrictive timescale in some circumstances. In the Isle of Man and UK, claimants must apply within 12 months of termination of employment.

The Viscount advertises for creditors' claims to be filed with him by a specified date, which is usually 40 days from the date of the désastre declaration. If the Minister fails to meet the deadline in filing a claim that he has taken on from the employees, he loses the opportunity to make a claim through the insolvency proceedings. The Minister can however safeguard his position by filing a protective unquantified claim within 40 days, and quantifying the claim later when final and validated figures are available.

If the deadline for claims under the insolvency payments scheme was set beyond 40 days, this could result in a situation where an employee claims a payment from the scheme after the deadline has passed for the Minister to submit his claim in the insolvency proceedings (whether quantified or unquantified) to the Viscount.

Method of appeal

Proposal 8 – It is proposed that claimants will initially have the right to a re-determination of their claim by making a written request to the Social Security Department. Further, it is proposed that, as in the UK and Isle of Man, employees will have an equivalent right of appeal to a Tribunal. Claimants could appeal against:

- i) a decision about their entitlement to any payment, and**
- ii) the value of any payment.**

Insolvency schemes usually include an appeals mechanism or at least the opportunity for re-determination. In the Isle of Man, when there is a dispute about entitlement to payments or the amount of payment from the DHSS, the complaint must be made to the Employment Tribunal within three months of the date of the decision.

Similarly if a claimant in the UK disagrees with the amount that they have received from their Redundancy Payments Office, the individual can ask an employment tribunal to consider what the payment should be. Rather than the insolvent employer, the 'respondent' on the tribunal claim form is the Secretary of State for Business, Innovation and Skills. The complaint must be made within three months.

It is considered that insolvency provisions do not sit within the existing Jersey employment legislation, which is concerned with rights and liabilities arising out of employment. This new legislation would be concerned with rights and liabilities arising between a former employee and the States so the Jersey Employment Tribunal is not likely to be an appropriate forum for hearing disputes. The Social Security Tribunal is deemed to be the appropriate forum.

Question 3 – Do you have views or any comments about this section, which discusses issues around funding, administration and the method of appeal?

CONCLUSION

The introduction of a scheme to compensate employees for monies owed following the insolvency of their employer has been a matter of public and political debate in Jersey since 1993 and was widely consulted upon by the Employment Forum in 2006. A limited Temporary Insolvency scheme has been in operation since early 2009. On the basis of previous reviews and

States debates, firm proposals are now being put forward by the Social Security Minister.

Your comments and views are invited on the aspects of the scheme that are proposed in this White Paper. Law drafting will begin shortly to prepare the legislative framework and the details of the scheme will be finalised on the basis of the consultation outcomes.

You are strongly advised to give your views during this consultation period as insolvency protection must be implemented as soon as possible and there will not be another opportunity to comment on the proposals before a draft law is presented to the States for debate.

Stakeholders are encouraged to complete the consultation in writing, however, the Minister would invite anyone who wishes to discuss the proposals in person to contact the Department and make an appointment.

Your submission

Please note that consultation responses may be made public. This means for example, that your comments may be sent to other interested parties on request, sent to the Scrutiny Office, quoted in a published report, reported in the media, published on www.gov.je, or listed on a consultation summary.

Please ensure that when you respond, you advise us if -

1. You **do not** agree that your comments may be made public.

Or

2. You agree that your comments may be made public **anonymously** (i.e. not attributed to you).

Please send your comments to:

Kate Morel
Policy Principal
Social Security Department
PO Box 55
La Motte Street
St Helier JE4 8PE

Email K.Morel@gov.je

Fax 01534 447446

Tel 01534 447204

Further information

Social Security Minister's Report to the States (R.44/2009) "Insolvency: Temporary Scheme for Compensatory Payment"

www.statesassembly.gov.je/documents/reports/2996-3987-2942009.pdf

Insolvency: Temporary Scheme for Compensatory Payment – Extension to scheme proposing flexibility in the scheme

www.statesassembly.gov.je/documents/propositions/23983-44930-1252009.pdf

Insolvency: Temporary Scheme for Compensatory Payment – Social Security Minister's intentions regarding discretion where insolvency is not formalised

www.statesassembly.gov.je/documents/propositions/5859-39929-162009.pdf

Employment Forum's recommendation on Redundancy and Business transfers, including recommendations relating to insolvency provisions

www.gov.je/NR/rdonlyres/2C91D7A1-A25C-46A3-92FA-DE7699B4A8A6/0/RedundancytuperecommendationFINAL.pdf

Social Security Minister's response to the Forum's recommendation

www.gov.je/NR/rdonlyres/C4DE4F74-BEB3-4FDF-B4CA-80CF1D407DC3/0/MinisterResponse.doc

This consultation paper has been sent to the following:

The Public Consultation Register
Council of Ministers
States Assembly Members
Viscount's Department
Chief Minister's Department
Treasury and Resources Department
Economic Development Department
Law Officers' Department
Judicial Greffe
Office of the Data Protection Commissioner
Scrutiny - Health, Social Security & Housing Panel
Local Insolvency Practitioners and specialists
Jersey Society of Chartered and Certified Accountants
Jersey Chamber of Commerce
Institute of Directors
Unite
Jersey Civil Service Association
Prospect
Communication Workers' Union
GMB
States Employment Board
Employment Law Practitioners
Jersey Law Society
Employment Forum
Jersey Employment Tribunal
Social Security Tribunal
Social Security Advisory Council

Jersey Advisory and Conciliation Service
Jersey Business Venture
Citizen's Advice Bureau
Community Savings and Credit Limited
Jersey Rights Association
Jersey Financial Services Commission
Jersey Finance Limited
Jersey Competition Regulatory Authority
Jersey Bankers Association
The Society of Trust and Estate Practitioners

APPENDIX 1 – How “en désastre” works and other company liquidations

The role of the Viscount

Generally, where there are sufficient realisable assets, the property of an individual or a company can be declared en désastre and administered by the Viscount.

The Viscount is the Royal Court’s Executive Officer. Désastre administrations make up a significant part of the Viscount’s Department’s work. In this context, the closest analogous English function would be that of Official Receiver. However, it also embraces much work undertaken by English ‘licensed insolvency practitioners’.

The Viscount advertises in the JEP (Gazette) section and in any other publications he thinks necessary (such as the London and Edinburgh Gazettes) for creditors to file their claims with him by a set date. That date is usually 40 days from the date of the désastre declaration. If any creditor fails to file a claim with the Viscount by the set date, the creditor may forfeit the right to claim and to benefit from any available dividend payments.

After the claims period has expired, the Viscount makes the creditors’ claims available for public inspection. Any interested person can object to any claim filed within one month of the date of the public inspection of claims. The Viscount gathers in the bankrupt’s assets and sells them.

The order in which debts are settled

Mortgagees are paid from the net sale proceeds of the property against which their debts were secured. Even if insufficient cash is realised from the sale of a mortgaged property to pay in full all mortgages, the mortgages lapse and do not run against the new owner of the property. In that event, mortgagees become ordinary, unsecured creditors for the unpaid part of their mortgages.

Under the Bankruptcy (Désastre) (Jersey) Law 1990, as amended, the order in which debts are settled is as follows (Article 32):

- secured creditors (e.g. if have lent money via a loan or mortgage secured on the property, building or land) – the proceeds of sale of that property are first applied to repay that loan before any other creditor or the owner recovers any of the cash.
- the Viscount’s fees and expenses (generally 10 per cent of the value of assets realised, plus 2.5% of the funds distributed to creditors). If insufficient assets are realised to pay the Viscount’s expenses (such as adverts and bought-in legal and accountancy services), the creditor who applied for the désastre to be declared may have to reimburse the shortfall.

Priority debts

- arrears of employees' wages or salaries for up to six months before the désastre was declared plus holiday pay and bonuses due to that date
- the full amount due to the Social Security Department
- Income Tax due for the year in which the désastre was declared and for the preceding year. The priority will be extended to ITIS and GST debts under a prospective amendment made by the Income Tax (Amendment No.32) (Jersey) Law 200-, which is expected to be in force by the end of 2009 or early 2010).
- up to six months' arrears of rent to their landlord, provided there are sufficient net realisable assets on the rented premises to cover these arrears
- Parish Rates for up to two years

If there are insufficient funds to pay out all debts with a priority, the available funds are shared pro rata between creditors with such claims. For example, a creditor with a priority claim for £2,000 will receive twice as much as a creditor with a priority claim for £1,000.

The amount that can be paid to an individual in wages/salary is capped at £3,500 plus £1,000 for holiday pay/bonus. These figures are deemed adequate in that they generally cover the typical requirement, which may be a month's outstanding pay, for example.

Ordinary claims

Once priority claims have been paid in full, then 'ordinary' claims are considered – again, on a pro rata basis.

Notice pay is currently an ordinary claim and redundancy pay will be similarly treated. In many cases, it is unlikely that there will be sufficient funds available to meet these 'ordinary' claims.

The Viscount's Department has indicated that it would not be unusual for a priority creditor (listed above) to receive less than half of what they may be entitled to and it could take from six months to a year to receive the money (although the Viscount can make interim payments where possible and appropriate). In the ordinary course of events, the administrative processes take about 18 months to complete.

Creditors' winding up

The shareholders of an insolvent company can, if the company's creditors agree, have the company's affairs wound up by a liquidator (usually an accountant in private practice). The procedure is governed by Chapter 4 of the Companies (Jersey) Law 1991, as amended, and is much the same as that of désastre.

Any costs, charges and expenses incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims. Then the same rules apply with regard to the respective rights of secured and unsecured creditors, to debts payable and to the order of payment of debts (Article 166) as applies in a désastre.

Other insolvency proceedings are available in Jersey. For more information, see 'A guide to the Bankruptcy Law' published by the Viscount's Department.

www.gov.je/Viscount/Desastre+%28Bankruptcy%29/A+Guide+to+the+Bankruptcy+Law/

APPENDIX 2 – Other jurisdictions and international perspectives on insolvency provisions

United Kingdom

Funding – Payments are made from the National Insurance Fund which is made up of contributions from employers and employees.

Qualifying criteria – Employees do **not** need to have worked for their employer for a specified period of time and there are no age limits (other than those that apply to each particular statutory right). Office holders such as company directors and company secretaries might not qualify if they have a controlling interest in the company. Those who are self-employed, a member of a partnership or an employee who normally lives and works outside Great Britain are excluded.

Payments that can be claimed:

Unpaid wages – The maximum that an individual can claim is *eight weeks' pay*. There is some flexibility in the weeks e.g. if an employee has not been paid for 12 weeks, they may choose the 'best' eight weeks. There is also a limit on a week's pay, which is a maximum of £380 a week from 1 October 2009 (proportioned for part-weeks). Wages include commission, overtime and tribunal awards where an employer has failed to consult on collective redundancies. Income tax and National Insurance are deducted from the amount paid to the claimant. Employees can claim any money owed above the limit from the independent insolvency practitioner or Official Receiver handling the insolvency.

Holiday pay – Up to six weeks' outstanding holiday pay can be paid up to the maximum of £380 a week. (Income tax and national insurance are deducted from this amount.)

Notice pay – Compensation can be claimed if the employer failed to give the statutory minimum period of notice on termination of employment, up to the statutory maximum of 12 weeks' notice. The payment is reduced by any income received, or that the employee could have received, during the notice period, whether through new employment or social benefits.

Pensions – If the former employer has not paid certain contributions into an occupational or private pension scheme, the administrator of the scheme may ask the Insolvency Service to pay those contributions into the scheme (not to the individual employee).

Redundancy pay – Statutory redundancy pay can be claimed up to the maximum of £380 a week (with the payment being based on age and length of service as under the redundancy pay legislation) where the employee had at least two years' continuous service with the employer.

Other debts that an individual can claim are a basic award for unfair dismissal and any reasonable sum to reimburse any fee or premium paid as an apprentice or articulated clerk.

Tax payable – Arrears of pay and holiday pay are taxable as they relate to payments under an employee's contract of employment. Tax and national insurance contributions are deducted at the basic rates before paying the employee. The information is sent to the tax office at the end of the tax year and the individual may claim any tax rebate from the tax office in the normal way. Redundancy pay and compensatory notice payments paid from the insolvency Fund are not taxable as they relate to payments made after employment has ended.

Any state benefits an individual is entitled to are deducted from the compensatory notice pay, even if they have not been claimed (i.e. the individual could have reduced their loss but did not) and a notional amount for tax is also deducted as the individual would have paid this as tax had they received the notice payment as wages. If after these deductions, the amount is still over the current limit, their payment is limited to the statutory amount.

Administration – Employees submit applications to the insolvency practitioner (IP) dealing with their employer's insolvency. The IP then records details of the claim and passes the claim forms to the Insolvency Service. The Insolvency Service takes on the person's rights in the insolvency proceedings and seeks to recover the debts from the National Insurance Fund.

Republic of Ireland

The Insolvency Payments Scheme covers arrears of pay, holiday pay and pay in lieu of notice and certain unpaid pension scheme contributions. Pay entitlements are limited to a maximum weekly rate with time limits on arrears of pay. Payments made are generally taxable. Payments are made from the Social Insurance Fund. Redundancy payments are made direct to the employee from the same fund and can be paid where an employer cannot afford to pay (i.e. not necessarily insolvent) (Employers can claim a 60% rebate from the SIF for redundancy pay.) Appeals are to the Employment Appeals Tribunal.

Canada

The Canadian Government looked at the issue of employee protection in insolvency situations in 2002 and recognised that protection of this nature meant making difficult policy choices:

“Affording greater protection to unpaid wages comes at a cost either to other creditors, if employees are given priority over such creditors; or to employees, employers or taxpayers if a fund is created to satisfy employee claims. Enhanced wage earner protection may also adversely affect the ability of

businesses to obtain credit, especially if wage claims are given priority over secured creditors.”

The Canadian ‘Wage Earner Protection Program’ that was eventually introduced in 2008 after seven years’ consultation and debate only covers unpaid wages and holiday pay (capped), not redundancy payments. It is funded from the Consolidated Revenue Fund (general taxation). There are at source deductions. Appeals to an adjudicator (appointed by the Minister) can only be made on a question of law or jurisdiction.

Australia

The Australian General Employee Entitlements and Redundancy Scheme (GEERS) covers unpaid wages, annual leave notice pay and redundancy. There is a cap on the weekly wage. Claim forms are sent on to the Department of Education, Employment and Workplace Relations, which then contacts the Insolvency Practitioner (IP) to verify employees’ entitlements. The claim is then processed and the payment sent to the IP who will deduct tax and forward the GEERS advance to the individual. An individual can ask for a review of the claim decision. They can then appeal and if still not satisfied contact the Commonwealth Ombudsman.

EU Directives

For many years, the UK has had provisions in place that safeguard employees’ wages and various other statutory entitlements should their employer be declared insolvent. The basic tenets of the scheme mirror those in other European countries, largely because they give effect to EU Directives 80/987 and 2002/74 which required Member countries to put in place arrangements to pay outstanding claims to remuneration where the employer became insolvent. These are often termed Wage Guarantee Schemes. Most major European countries had schemes in place even before the EU Directive, with the one in the UK, for example, dating from November 1975.

The EU Directive, in effect, sets the minimum requirements for any such scheme.

The EU Directive 2002/74 amending 80/987 aims to *“provide a minimum degree of protection for employees in the event of the insolvency of their employer. To this end, it obliges the Member States to establish a body which guarantees payment of the outstanding claims of the employees concerned.”*

Member States cannot exclude part-time employees, those on fixed-term contracts, and those with a temporary employment relationship from coverage under the Directive. Member States cannot set a minimum duration for the contact of employment or the employment relationship for workers to qualify for claims under the Directive.

The guarantee should cover *“payment of employees’ outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships.”* States can limit the liability of the guarantee institutions, but it cannot be shorter than three months. This can be included in a reference period of not less than six months. Member States having a reference period of not less than 18 months may limit the period for which outstanding claims are met by the guarantee institution to eight weeks. Member States may set ceilings on the payments made but *“these ceilings must not fall below a level which is socially compatible with the social objective of this directive”*.

International Labour Organisation

The International Labour Organisation (ILO) states that when an employer goes bankrupt *“It is broadly recognised that workers’ wage claims deserve special protection, since the insolvency of the enterprise and consequently the suspension of payments directly threatens the means of subsistence of workers and their families.”*

International Labour Convention No. 173 for “The Protection of Worker’s Claims (Employers Insolvency)” (which has not been extended to Jersey or the UK) provides guarantees of the employee’s redundancy payment, requires protection of wages for at least eight weeks prior to the insolvency or termination of employment, holiday pay and other paid absence due as a result of work performed in that period, and severance pay due on termination of employment.

The related ILO Recommendation No. 180 requires that consideration is given to providing for national insurance contributions, pensions contributions and other statutory or occupational social security schemes where failure to pay adversely affects workers’ entitlements. The Recommendation also states that an insolvency fund should be administered in a way which ensures that it should be administratively, financially and legally independent of the employer. Workers’ rights to claim from the fund should be unaffected if the employer has defaulted in its contributions.

APPENDIX 3 A statutory insolvency scheme – the proposals

Proposal 1 – It is proposed that the most suitable models on which to base an insolvency scheme for the Island are schemes operating in jurisdictions with similar employment relations and employment legislation frameworks to Jersey, principally the UK and the Isle of Man (Page 6).

Proposal 2 – It is proposed that the statutory insolvency scheme will be based largely on the Temporary Scheme that is currently operating (Page 8).

Proposal 3 – It is proposed that if a claimant meets all five specific qualifying criteria, they will be entitled to claim certain payments from the statutory insolvency fund (Page 8).

Proposal 4 – It is proposed that an individual will be entitled to claim a number of outstanding payments (that were owed to them by their insolvent employer) from the insolvency fund. Any redundancy pay and pay in lieu of notice relates only to statutory, not contractual, entitlements. (Page 10).

Proposal 5 – It is also proposed that the amounts that may be paid to an employee from the insolvency fund will be capped at the same overall maximum that applies to awards made by the Jersey Employment Tribunal, which is £10,000 in total for amounts that the individual is entitled to (excluding any award for unfair dismissal). (Page 10).

Proposal 6 – It is proposed that the insolvency fund will be created by increasing Class 1 employer social security contribution rates by a small fraction of a percent (0.032 percent) and that these funds would be accounted for separately for the purpose of funding insolvency payments. Employee social security contribution rates would be unaffected by the creation of the insolvency fund (Page 18).

Proposal 7 – It is proposed that the Social Security Department will continue to administer claims, monitor insolvency proceedings in conjunction with the Viscount's' Department or other insolvency office holder, process claims and undertake validation (Page 19).

Proposal 8 – It is proposed that claimants will initially have the right to a re-determination of their claim by making a written request to the Social Security Department. Further, it is proposed that, as in the UK and Isle of Man, employees will have an equivalent right to appeal to the Social Security Tribunal (Page 21).

Your written comments are invited on any aspect of these proposals as are your responses to the questions that appear in this paper.