EXPLANATORY DOCUMENT

THE PUBLIC SERVICE REFORM (INSOLVENCY) (SCOTLAND) ORDER 2016/141

Contents

1 INTRODUCTION

1.1. This Explanatory Document has been prepared in respect of the draft Public Service Reform (Insolvency) (Scotland) Order 2016 ("the Order"), which would be made in exercise of powers conferred by section 17 of the Public Services Reform (Scotland) Act 2010 ("the 2010 Act").

1.2. The draft Public Services Reform (Insolvency) (Scotland) Order 2016, and associated Explanatory Document, was laid in the Scottish Parliament on 30 September 2015 for the formal 60 day consultation in accordance with section 26 of the 2010 Act ("the 60 day consultation"). During this period the Accountant in Bankruptcy ("AiB") on behalf of the Scottish Government sought views and representations from stakeholders representative of the interests affected by the proposals in the Order.

1.3. Prior to the parliamentary process for the Order, AiB had consulted on the proposals with key stakeholder groups, providing them with an opportunity to raise any concerns and engage in constructive dialogue. This process resulted in a number of stakeholder comments being reflected in the proposed draft Order as laid for consultation under section 26 of the 2010 Act.

1.4. Responses to the 60 day consultation were received from key stakeholders; the Institute of Chartered Accountants of Scotland ("ICAS"), the Association of Business Recovery Professionals ("R3") Scottish Technical Committee, and the Law Society of Scotland. While stakeholders generally welcomed and agreed with the proposals set out in the Order, recommendations and amendments were suggested which have resulted in changes being made, though not all changes could be accommodated at this time. In accordance with section 26(4) of the 2010 Act, the key stakeholders were given a further short opportunity to comment on the revised Order. Section 10 of this document provides a detailed assessment of the 60 day consultation responses, the changes made from the proposed draft Order and the action taken.

1.5. This Explanatory Document, which is laid before the Scottish Parliament under section 25(2)(b) along with the Order, contains the details set out in section 27(1) of the 2010 Act.

1.6. The Order will amend the Insolvency Act 1986 ("the Insolvency Act") for the purposes of modernising devolved aspects of corporate insolvency in Scotland (aspects of the process of liquidation and receivership) in line with amendments made in England and Wales and reserved aspects of corporate insolvency in Scotland by the Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2010 ("the 2010 LRO")[1]. It will also make related consequential amendments including to the Small Business, Enterprise and Employment Act 2015 ("the 2015 Act"), the Limited Liability Partnerships (Scotland) Regulations 2001 (" the LLPSR 2001"), the Limited Liability Partnership Regulations 2001 ("the LLPR 2001") and repeal section 51(2ZA) of the Insolvency Act to remove a geographical restriction relating to a receiver dealing with property related to Scotland.

[1] S.I. 2010/18. Reference is also made to the Explanatory Memorandum published with the Legislative Reform Order which sets out further justification for the changes on which this note draws, available on this link.

1.7. The amendments in relation to the Insolvency Act are:-

- amendment to section 92A to require a liquidator in a members' voluntary winding up ("MVWU") in Scotland to produce a progress report on certain matters for prescribed periods, then send these reports to prescribed members of the company and other interested parties;

- a related amendment to remove the section 93 requirement for annual meetings in a MVWU continuing for longer than one year;

- amendment to section 104A to require a liquidator in a company voluntary winding up ("CVWU") in Scotland to produce a progress report on certain matters for prescribed periods, then send these reports to members and creditors of the company unless they are opted out (and such other persons as may be prescribed under the Insolvency Rules under the Insolvency Act);

- a related amendment to remove the section 105 requirement for annual meetings in a CVWU continuing for longer than one year;

- repealing consequential amendments in schedule 9 to the 2015 Act which fall as a result of repealing sections 93 and 105;

- consequential amendments to schedules 2 and 3 of the LLPSR 2001 as result of repealing sections 93 and 105;

- consequential amendments to schedules 3 and 4 of the LLPR 2001 as a result of repealing sections 93 and 105;

- amendments to replace requirements for certain documents to be verified as true by affidavit and instead allow verification by a statement equivalent to a statement on oath in line with the requirement for company administration at present, which complies with the Statutory Declarations Act 1835:-
  - in a statement of affairs in a receivership (section 66)
  - in a statement as to the affairs of a company (section 95)
  - in a statement of affairs in a CVWU (section 99)
  - in a statement of affairs in a winding up by the court (section 131)

- amendment to section 246B to remove the restriction on use of websites to send notices or information in Liquidation and Receivership in Scotland;

- amendment to section 436B in order to allow a report by a receiver to be in electronic form and allow a Liquidator to make appointment under the Companies Clauses Consolidation (Scotland) Act 1845 by way of a document in electronic form;

- repeal of section 51(2ZA) to remove a geographical restriction relating to a receiver dealing with property related to Scotland;

- repeal of section 57(2D) to remove redundant provision about wages in receivership as the employment contracts to which it relates no longer exist;

- amendment to section 204(2) to allow the liquidator to apply to the court at any time for the early dissolution of the company;

1.8. Section 9 of this document is new and relates to the change in adding new article 11 of the Order following the response to the 60 day consultation (see the last bullet above and paragraph 10.2 below). What were sections 4 and 6 of the Explanatory Document for the proposed draft Order on the 60 day consultation have been omitted as a result of the change in removing the relevant provisions the reasons explained at paragraph 10.3 below.

1.9 The following provides a formal assessment of the proposed amendments against the requirements of the 2010 Act.

2. BACKGROUND AND POLICY OBJECTIVE

2.1 The policy objective underpinning these amendments is to modernise and align where appropriate the corporate insolvency regime in Scotland and the functions of Insolvency Practitioners operating in Scottish insolvencies with those undertaking equivalent work in England and Wales.

2.2 The Scottish corporate insolvency regime is underpinned by the Insolvency Act, with much of the detail set out in the Insolvency (Scotland) Rules 1986[2] (ISR). There have been changes made to the Insolvency Act, including those made by the 2010 LRO. These changes have not yet been carried across into the Insolvency Act, in relation to devolved areas of corporate insolvency (receivership and aspects of the process of winding up) although there have been regular stakeholder representations, to say that a way should be found to do this. As a consequence, changes that have predominantly introduced greater efficiency to processes in England and Wales do not yet apply in Scotland.

2.3 The Scottish Government consultation on the proposed changes which sought views from stakeholders including Recognised Professional Bodies, Law Society of Scotland and the UK Insolvency Service.

2.4 In particular, before further changes can be made to the ISR, it is necessary to first address changes needed to devolved areas of the Insolvency Act. Related changes to the ISR accompanying changes in England & Wales are under consideration, and it would be useful to have a similar position in place on which to consider any necessary changes to the Scottish ISR.

2.5 The changes will where relevant affect Limited Liability Partnerships registered in Scotland as a result of the regulations on limited liability partnerships (LLPs) noted at paragraph 1.6 above. Generally in this document similar reasoning for the reasons for the provisions in the Order applies to LLPs as for companies.

[2] S.I. 1986/1915 as amended.

3. REMOVAL OF THE REQUIREMENT FOR ANNUAL MEETINGS IN MEMBERS' AND CREDITORS' VOLUNTARY WINDING UP PROCEDURES

3.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act (removing or reducing burdens).

Introduction to and reasons for the provision

3.2 Currently sections 93 and 105 of the Insolvency Act require the liquidator in a CVWU and MVWU in Scotland to summon annual meetings of creditors and/or members for the purpose of laying an account of the liquidator's acts and dealings and of the conduct of the winding up during the preceding year. Sections 92A and 104A of the Insolvency Act, changes introduced through the 2010 LRO have removed the requirement for annual meetings for liquidators of companies registered in England and Wales.

3.3 In practice, the annual meetings amount to no more than laying before the meeting a copy of the liquidator's receipts and payments account for the preceding period. These meetings are rarely attended by creditors/members so the costs of summoning and holding them are incurred to little useful purpose. The provision will remove the requirement for annual meetings in Scotland and align the procedure within England and Wales.

3.4 The 2010 LRO in introducing sections 92A and 104A requires a liquidator in a MVWU and CVWU to produce a progress report on certain matters and send these reports to prescribed members of the company and other parties. However, these provisions only apply to liquidators for companies registered in England and Wales.

3.5 Articles 5 and 6 of the Order will extend this requirement to liquidators of companies registered in Scotland.

3.6 The provision aims to implement corporate insolvency proceedings in Scotland that are efficient, cost effective and consistent with those elsewhere in the UK. Insolvency legislation provides for the fact that there will inevitably be costs and expenses incurred in the course of administering insolvency procedures and those have to be paid according to a prescribed order of priority. This means that before any creditor can receive a dividend, these priority costs must first be met in full. If these costs can be reduced the "pot" of money available to distribute to the creditors will increase accordingly. This might in some cases make the difference between the payment, or not, of a dividend or in other cases increase the amount of the dividend.

3.7 The provision will reduce the cost of insolvency procedures as the creditors and/or members will receive the same information, but in the form of a written progress report that will include a receipts and payments account, without the need for an annual meeting.

Nature of the proposed amendment

3.8 Repeal sections 93 and 105 of the Insolvency Act.

3.9 Extend the provisions of sections 92A and 104A to companies registered in Scotland.

3.10 The changes in respect of sections 92A and 104A will also have an effect where relevant to Limited Liability Partnerships registered in Scotland (this flows from the regulations on limited liability partnerships (LLPs) noted at paragraph 1.6 above). Minor consequential amendments tidy up references in those regulations.

Section 18 preconditions

3.11 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied[3]. The following sets out an assessment of this provision against the section 18(2) preconditions.

Section 18(2)(a) - policy objective intended to be secured by the provision could not be secured by non-legislative means

3.12 The reduction of this burden cannot be achieved by non-legislative means as the burden is created by the legislation in force, which requires amendment. The amendment can only be achieved by means of legislation.

Section 18(2)(b) - effect of the provision is proportionate to the policy objective

3.13 The effect of the provision is to introduce a more cost effective, efficient and streamlined process and align the Scottish insolvency administration processes to those in England and Wales. The provision is the only means by which this alignment and efficiency in process can be achieved. Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it

3.14 It is in the public interest that corporate insolvency proceedings are efficient and cost effective. It is not possible to say that in every case the costs saved will result in a direct and commensurate increase in dividends for all creditors. However, it is the case that cost savings will increase the funds available in the insolvency across all cases and that will mean higher dividends in some cases, or dividends in cases, where there would not otherwise have been one.

3.15 This condition is satisfied, as although the removal of the requirement for annual meetings may impact on insolvency office-holders' fees, any such effect will

[3] Or the condition in section 18(8) is satisfied; section 18(8) is not applicable as the Order does not merely restate an enactment.

be limited by the reduction in overheads and the benefits of simplification and more cost effective processes.

3.16 The amendments to the ISR, are planned to come into effect concurrently with the provisions of section 122(2) of the 2015 Act coming into force. At the same time as these amendments, it will introduce a requirement for liquidators to provide progress reports to the creditors/members including the receipts and payments account currently required to be laid before the annual meeting. As part of an initiative on the remuneration of insolvency office-holders arising out of the Rules modernisation project, this will include a requirement to provide details of the remuneration the liquidator has taken, or proposes to take, over the course of the year. These rules will also give creditors improved rights to request further information about the liquidator's remuneration and expenses and to challenge remuneration drawn by the liquidator.

3.17 In light of the new reporting regime, removing the requirement also to hold a meeting to lay an account of the conduct of the winding up is proportionate. The information will be available to the creditors/members in another form. On the face of it, the provision removes the entitlement to receive information by attending a meeting, but, that information is publicly available by virtue of section 192 of the Insolvency Act. The AiB does not impose a charge for this information, it is therefore less than the cost in time and money of attending the meeting. Moreover, in accordance with proposed changes to the Rules, the information will be provided to each creditor/member directly in the form of a progress report. Therefore, the creditors/members will continue to receive information about the conduct of the winding up and liquidators will be relieved of the necessity of calling a meeting which served little purpose.

Section 18(2)(d) the provision does not remove any necessary protection

3.18 In assessing 'necessary protections' for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of the provisions of subsections 18(3) to (9) of the 2010 Act.

3.19 Section 18(3) gives examples of protections, namely: - (a) the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office, (b) civil liberties, (c) health and safety of persons, (d) the environment, (e) cultural heritage (including access, through display, exhibition or otherwise, to cultural heritage). No such protections are affected by this provision.

3.20 Subsections 18(4) to (6) are not applicable to the Order.

3.21 It is not considered that any other necessary protections are removed. While provision for a meeting is removed, the requirement to hold a meeting at which an account had to be laid was intended to ensure the creditors/members were given appropriate information about the conduct of a winding up. Few creditors/members attend these meetings at present and in future information will be provided to members/creditors by a written report.

3.22 The Scottish Ministers therefore consider that the provision does not remove any necessary protection.

3.23 Creditors/members will still be able to ask questions of the liquidator concerning information contained in the receipts and payments account (to be published by the AiB under section 192 and sent to creditors/members as part of a progress report). Any general rights under the Insolvency Act to challenge the actions of the liquidator will remain unaffected by this change.

Section 18(2)(e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise

3.24 This condition is satisfied as the provisions does not preclude (a) office holders from choosing to hold meetings of creditors should this be considered necessary in the circumstances or (b) creditors to request that a meeting be held. Parties will not, therefore, be prevented from continuing to exercise rights or freedoms which that person might reasonably expect to continue to exercise.

3.25 Obviously as a result creditors/members will no longer have the right to attend a meeting to receive an account of the conduct of the winding up. However, given that these meetings are currently rarely attended by creditors/members and they will receive a progress report containing that information, it does not seem that the right to attend a meeting is one which creditors/members can reasonably expect to continue to exist.

Removal or reduction of a burden under section 17

3.26 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

3.27 The burden to be reduced by this provisions falls under section 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

3.28 The provision will remove costly and burdensome requirements associated with the organisation and hosting of creditors meetings. Lifting those burdens will reduce the costs of administering insolvency procedures, bringing benefits to creditors as a whole.

3.29 The amendments put forward within the Order retain all necessary requirements to keep creditors informed of the conduct of insolvency procedures.

4. REPLACEMENT OF VERIFICATION BY AFFIDAVIT WITH STATUTORY DECLARATION FOR STATEMENT OF AFFAIRS IN RECEIVERSHIP, COMPANY VOLUNTARY WINDING UP AND WINDING UP BY THE COURT

4.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act.

Introduction to and reasons for the provision

4.2 At present sections 66, 95, 99 and 131 of Insolvency Act place a requirement for the statement of affairs in receivership, MVWU, CVWU and winding up by the court procedures in Scotland to be verified as true by affidavit. Changes already introduced in England and Wales as a result of the 2010 LRO have removed this requirement in favour of verification by a statement of truth.

4.3 Articles 4, 8, 9 and 10 will broadly align procedures in Scotland to those in England and Wales, where a statement of truth in accordance with the court rules in England and Wales is used, following the model for Scotland a provision which applies as part of the procedure for administration in Scotland in Schedule B1 to the Insolvency Act, paragraph 47(5). Affidavit procedure will be replaced by a statutory statement on oath under the Statutory Declarations Act 1835. As in England and Wales, criminal penalties will accordingly apply for false statements made[4]. It aims to implement corporate insolvency proceedings in Scotland that are efficient, cost effective and consistent with practices elsewhere in the UK. Reducing the costs associated with the administration of corporate insolvency including those associated with the notary public witness required for an affidavit will result in an increase the funds available to creditors. This might in some cases make the difference between the payment, or not, of a dividend or in other cases increase the amount of the dividend.

Nature of the proposed amendments

4.4 Replace the requirement at section 66(2) of the Insolvency Act for the statement of affairs to be verified as true by affidavit and instead require it to be verified by statutory declaration.

4.5 Replace the requirement at section 95(4A) of the Insolvency Act for the statement as to the affairs of the company to be verified as true by affidavit and instead require it to be verified by statutory declaration.

4.6 Replace the requirement at section 99(2A)(b) and (e) of the Insolvency Act for the statement of affairs to be verified as true by affidavit and instead require it to be verified by statutory declaration.

[4] Section 44 of the Criminal Law (Consolidation) (Scotland) Act 1995 will apply, the offence is subject to maximum sentence of imprisonment or a fine or both (rather than contempt of court for an affidavit).

4.7 Replace the requirement at section 131(2A)(b) of the Insolvency Act for the statement of affairs to be verified as true by affidavit and instead require it to be verified by statutory declaration.

Section 18 preconditions

4.8 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied[5]. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

Section 18(2)(a) - policy objective intended to be secured by the provision could not be secured by non-legislative means

4.9 The reduction of this burden cannot be achieved by non-legislative means as the burden is created by the legislation in force, which requires amendment. The amendment can only be achieved by means of legislation.

Section 18(2)(b) the effect of the provision is proportionate to the policy objective

4.10 The effect of the provision is to introduce a more cost effective, efficient and streamlined process and broadly to align the Scottish insolvency processes to those in England and Wales. The provision is the only means by which this alignment and efficiency in process can be achieved.

4.11 The provision will reduce the burden and cost associated with the verification of statements of affairs in corporate insolvency proceedings.

4.12 Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it

4.13 It is in the public interest that corporate insolvency proceedings are efficient and cost effective. It is not possible to say that in every case the costs saved will result in a direct and commensurate increase in dividends for all creditors. However, it is the case that cost savings will increase the funds available in the insolvency across all cases and that will mean higher dividends in some cases or dividends in cases where there would not otherwise have been one.

4.14 Notaries public, in practice usually solicitors, may lose personal income. However, the income from notarising is not large and the work can be disruptive from other more remunerated fee paying work. We do not have evidence to suggest there are objections from the legal profession for these changes. In any event, it is considered that this condition is satisfied, as the adverse effect is outweighed by the utility of the alternate provision proposed.

[5] As above, section 18(8) is not applicable as the Order does not merely restate an enactment.

Section 18(2)(d) - provision does not remove any necessary protection

4.15 In the context of 'necessary protections' for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of the provisions of subsections 18(3) to (9) of the 2010 Act.

4.16 The section 18(3) examples of protections, (a) the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office, (b) civil liberties, (c) health and safety of persons, (d) the environment, (e) cultural heritage are not affected by this provision. In particular, the alternate approach proposed in the Order retains the assurance required by the courts that statements made in relation to the legal affairs of receivership and winding up are true, and appropriate sanctions are available in the case of default with no loss of evidential value in this context.

4.17 Subsections 18(4) to (6) are not applicable to the Order.

4.18 Accordingly, the Scottish Ministers consider that the provision does not remove any necessary protection.

Section 18(2)(e) - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise

4.19 The provisions do not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. It makes clear that there is still a requirement for the verification to be legally appropriate. Parties will not be prevented from continuing to exercise any right or freedom. The amendment will only substitute a less onerous, but no less rigorous, form of verification.

Removal or reduction of a burden under section 17

4.20 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

4.21 The burden being reduced by this provisions falls under section 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

4.22 The provision will remove costly and burdensome requirements associated with the verification of statement of affairs. Lifting those burdens will reduce the costs of administering insolvency procedures, bringing benefits to creditors as a whole.

5. REMOVAL OF THE RESTRICTION ON USE OF WEBSITES TO SEND NOTICES OR INFORMATION IN LIQUIDATION AND RECEIVERSHIP IN SCOTLAND

5.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act.

Introduction to and reasons for the provision

5.2 At present section 246B(2) of Insolvency Act places restrictions on the use of websites to send notices or information in liquidation and receivership procedures in Scotland. Changes already introduced in England and Wales as a result of the 2010 LRO have made provision for the use of websites as a means to communicate this information. The provision will improve the efficiency of corporate insolvency procedures in Scotland.

5.3 Article 12 of the Order will extend to Scotland the flexibility offered to practitioners administering corporate insolvency in England and Wales.

5.4 The provision aims to implement corporate insolvency proceedings in Scotland that are efficient, cost effective and consistent with practices elsewhere in the UK and modernise certain aspects of insolvency law to take account of technological developments, particularly the growth in the use of electronic communication over the last 20 years. Reducing the costs associated with the administration of corporate insolvency including those associated with the production and conventional delivery of information notices will result in an increase the funds available to creditors. This might in some cases make the difference between the payment, or not, of a dividend or in other cases increase the amount of the dividend.

Nature of the proposed amendment

5.5 To remove the restriction on the use of websites in section 246B(2) of the Insolvency Act (and consequentially amend section 246B(3)(a)).

Section 18 preconditions

5.6 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied[6]. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

Section 18(2)(a) - the policy objective intended to be secured by the provision could not be secured by non-legislative means

5.7 The reduction of this burden cannot be achieved by non-legislative means as the burden is created by reason of the requirements in the legislation to send the relevant documents or information, which requires amendment. The amendment can only be achieved by means of legislation.

[6] As above, section 18(8) is not applicable as the Order does not merely restate an enactment.

Section 18(2)(b) - the effect of the provision is proportionate to the policy objective

5.8 The effect of the provision is to introduce a more cost effective, efficient and streamlined process and align the Scottish insolvency administration processes to those in England and Wales, while at the same time ensuring that the relevant recipients still have access to the same documents they are currently sent. The provision is the only means by which this alignment and efficiency in process can be achieved. In accordance with the proposed ISR, recipients will retain the right to request free hard copies.

5.9 Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it

5.10 It is in the public interest that corporate insolvency proceedings are efficient and cost effective. Enabling the use of websites as a means to communicate notices or information will reduce the cost and burden associated with corporate insolvency administration. Use of websites will not be compulsory for insolvency practitioners. It is not possible to say that in every case the costs saved will result in a direct and commensurate increase in dividends for all creditors. However, it is the case that cost savings will increase the funds available in the insolvency in all cases and that will mean higher dividends in some cases or dividends in cases where there would not otherwise have been one. While creditors may have to request full free documents, it is not considered that this is onerous enough to outweigh the benefits of the change. The consultation response for the 2010 LRO noted that large quantities of documents are sent out and simply binned or shredded by creditors who have no interest in their contents[7].

5.11 This condition is satisfied, as there is no known adverse effect on any person affected by the provision and it is in the public interest.

Section 18(2)(d) the provision does not remove any necessary protection

5.12 In the context of 'necessary protections' for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of the provisions of sub-sections 18(3) to (9) of the 2010 Act.

5.13 None of the section 18(3) examples of protections are affected: - (a) independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office, (b) civil liberties, (c) health and safety of persons, (d) the environment, (e) cultural heritage.

5.14 Subsections 18(4) to (6) are not applicable to the Order.

5.15 No other necessary protection is removed. Save in exceptional circumstances, creditors will be sent notice regarding the availability of the documents in question on

[7] 2010 LRO Explanatory memorandum, p.31, paragraph 22.

the website and the right to request a copy free of charge. The Scottish Ministers consider that the provision therefore does not remove any necessary protection.

Section 18(2)(e) - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise

5.16 The provision allows for practitioners to exercise some discretion in the method by which notices or information are communicated and do not preclude conventional post if required. The right to have the necessary information communicated to creditors, members and others will remain. Parties will not be prevented from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

Removal or reduction of a burden under section 17

5.17 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

5.18 The burden being reduced by this provisions falls under section 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

5.19 The provision will remove costly and burdensome requirements associated with communicating notices and information using conventional means. Lifting those burdens will reduce the costs of administering insolvency procedures, bringing benefits to creditors as a whole.

6. USE OF ELECTRONIC FORMS FOR RECEIVER'S REPORTS AND CERTAIN LIQUIDATOR APPOINTMENTS

6.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act.

Introduction to and reasons for the provision

6.2 Section 436 of the Insolvency Act makes provision for "things in writing" to include documents in electronic form. However, section 436B(2)(b) and 436B(2)(e) of Insolvency Act exclude the report by a receiver (in terms of section 67(2) of that Act) and the provisions of a winding up of a company in Scotland in relation to the Companies Clauses (Consolidation (Scotland) Act 1845 (in terms of section 111(4) of the Insolvency Act). As a consequence of the current provisions, receivers and liquidators involved in insolvency proceedings in Scotland are precluded from including electronic documents as "things in writing" for the purposes of the Insolvency Act.

6.3 Article 13 will extend the flexibility offered to practitioners administering corporate insolvency in England and Wales for utilising electronic documentation in proceedings.

6.4 The provision aims to implement corporate insolvency proceedings in Scotland that are efficient, cost effective and consistent with practices elsewhere in the UK and modernise certain aspects of insolvency law to take account of technological developments, particularly the growth in the use of electronic communication over the last 20 years. Reducing the costs associated with the administration of corporate insolvency including those associated with the use of electronic documentation will result in an increase the funds available to creditors. This might in some cases make the difference between the payment, or not, of a dividend or in other cases increase the amount of the dividend.

Nature of the proposed amendment

6.5 To omit paragraph (b) section 436B(2) of the Insolvency Act (receiver's report).

6.6 To omit paragraph (e) section 436B(2) of the Insolvency Act (arbitration under the Companies Clauses Consolidation (Scotland) Act 1845).

Section 18 preconditions

6.7 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied[8]. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

[8] As above, section 18(8) is not applicable as the Order does not merely restate an enactment.

Section 18(2)(a) - the policy objective intended to be secured by the provision could not be secured by non-legislative means

6.8 The reduction of this burden cannot be achieved by non-legislative means as the burden is created by reason of the legislation in force, which requires amendment to make the position clear. Provision elsewhere in the Insolvency Act makes provision for certain things to be done electronically, creating a doubt for certain remaining provisions without express provision. Accordingly, the amendment can only be achieved by means of legislation.

Section 18(2)(b) - the effect of the provision is proportionate to the policy objective

6.9 The effect of the provision is to introduce a more cost effective, efficient and streamlined process and align the Scottish insolvency administration processes to those in England and Wales. The provision is the only means by which this alignment and efficiency in process can be achieved. It is considered that both of these cases are appropriate for electronic provision to be possible. The provision merely allows a choice of the method of doing the relevant thing. There is no obligation on the relevant office-holder to use electronic means.

6.10 Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

Section 18(2)(c) the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it

6.11 It is in the public interest that corporate insolvency proceedings are efficient and cost effective. Enabling "things in writing" to be in electronic form will reduce the cost and burden associated with corporate insolvency administration. It is not possible to say that in every case the costs saved will result in a direct and commensurate increase in dividends for all creditors. However, it is the case that cost savings will increase the funds available in the insolvency across all cases and that will mean higher dividends in some cases or dividends in cases where there would not otherwise have been one. The rules in the ISR will mean that those affected will have consented to use of the provisions.

6.12 This condition is satisfied, as there is no known adverse effect on any person affected by the provision and it is in the public interest.

Section 18(2)(d) the provision does not remove any necessary protection

6.13 In the context of 'necessary protections' for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of the provisions of sub-sections 18(3) to (9) of the 2010 Act.

6.14 None of the section 18(3) examples of protections are affected by this provision.

6.15 Subsections 18(4) to (6) are not applicable.

6.16 For the reasons indicated above, no other necessary protections are removed. The Scottish Ministers consider that the provision does not remove any necessary protection.

Section 18(2)(e) - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise

6.17 The provision allows for practitioners to exercise some discretion in the method by which notices or information are produced and do not preclude the use of non-electronic means if required. Recipients will consent under the ISR to receiving electronic communications at an appropriate address. Parties will not therefore be prevented from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

Removal or reduction of a burden under section 17

6.18 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

6.19 The burden being reduced by this provisions falls under section 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

6.20 The provision will remove potential unnecessarily costly and burdensome requirements associated with communicating notices and information using conventional means. Lifting those burdens will reduce the costs of administering insolvency procedures in some cases, bringing benefits to creditors as a whole.

7. REMOVAL OF THE GEOGRAPHICAL RESTRICTION RELATING TO A RECEIVER DEALING WITH A PROPERTY SITUATED OUTWITH SCOTLAND

7.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act.

Introduction to and reasons for the provision

7.2 At present, stakeholders have argued that section 51(2ZA) of the Insolvency Act creates uncertainty about the effectiveness of a floating charge granted by a Scottish company in certain circumstances since it restricts the ability of a receiver appointed to a Scottish company to deal with assets outwith Scotland. It is also argued that as a result in practice a lender's means of enforcement is removed otherwise than by winding up the company, which increases the expense of the process. It is said that there is a potential impact on lending to Scottish companies.

7.3 Article 2 will remove the current restriction in section 51(2ZA) facing a receiver appointed to a Scottish company in dealing with assets outwith Scotland.

7.4 The provision aims to implement receivership proceedings in Scotland that are effective, efficient and cost effective. Reducing costs associated with the process of receivership and having access to additional assets outwith Scotland will result in an increase in the funds available to creditors. The provision increases the potential for a creditor to pursue receivership rather the more costly winding up process. This might in some cases make the difference between the payment, or not, of a dividend or in other cases increase the amount of the dividend.

Nature of the proposed amendment

7.5 To remove section 51(2ZA) of the Insolvency Act.

Section 18 preconditions

7.6 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied[9]. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

Section 18(2)(a) - the policy objective intended to be secured by the provision could not be secured by non-legislative means

7.7 The reduction of this burden cannot be achieved by non-legislative means as the burden is created by reason of the legislation, which requires amendment. This amendment can only be achieved by means of legislation.

[9] As above, section 18(8) is not applicable as the Order does not merely restate an enactment.

Section 18(2)(b) - the effect of the provision is proportionate to the policy objective

7.8 The effect of the provision is to introduce an effective, efficient and cost effective process. The provision aims to ensure that the receivership can have effect in the most cost effective manner possible, taking account of feedback from expert stakeholders. The removal has been consulted on and is supported by stakeholders, including the judges of the Court of Session who formerly agreed with creating the restriction in 2011[10]. The provision is the only means by which this alignment and efficiency in process can be achieved.

7.9 Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective.

Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it

7.10 It is in the public interest that receivership is effective, efficient and cost effective. Enabling company insolvency in Scotland to be administered through a receivership process even where floating charge exists over a property outwith Scotland will allow a more cost effective process. It is not possible to say that in every case the costs saved will result in a direct and commensurate increase in dividends for all creditors. However, cost savings will increase the funds available which may mean higher dividends in some cases or dividends in cases where there would not otherwise have been one.

7.11 This condition is satisfied, as there is no known adverse effect on any person affected by the provision and it is in the public interest.

Section 18(2)(d) - the provision does not remove any necessary protection

7.12 In the context of 'necessary protections' for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of the provisions of sub-sections 18(3) to (9) of the 2010 Act.

7.13 None of the section 18(3) examples of protections: (a) the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office (b) civil liberties, (c) health and safety, (d) the environment, (e) cultural heritage are affected by this provision.

7.14 Subsections 18(4) to (6) are not applicable to the Order.

7.15 No other necessary protection is removed. The court will continue to supervise the receivership under the general rules which the Scottish courts apply to receivership in Scotland, applying the general rules of jurisdiction and conflict of laws rules in international private law more widely. The Scottish Ministers consider that the provision does not remove any necessary protection.

[10] Section 51(2ZA) was inserted by SSI 2010/140.

Section 18(2)(e) - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise

7.16 For the reasons noted at paragraph 9.15 parties will not therefore be prevented from continuing to exercise any right or freedom which that person might reasonable expect to continue to exercise.

Removal or reduction of a burden under section 17

7.17 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

7.18 The burden being reduced by this provisions falls under section 17(2)(d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

7.19 The provision will enable receivership proceedings to take place under the most effective and efficient process. It will do so to the extent of removing the restrictions of receivership in respect of property outwith Scotland.

8. REMOVAL OF REDUNDANT RECEIVERSHIP PROVISION ON EMPLOYEES' WAGES

8.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act.

Introduction to and reasons for the provision

8.2 Article 3 repeals one element of the priority given to employees' wages in receivership, as the type of employment contract to which it relates no longer exists.

8.3 A company can continue to trade under the direction of the receiver, usually pending sale of the business or assets, at which point the receiver is personally liable for certain debts incurred by the company which are payable ahead of the fees of the receiver. For an employee to become entitled to have wages paid as an expense, the insolvency practitioner would have to adopt their contract. As well as including salary for actual days worked, the definition of wages extends to cover payment for holiday entitlement, absence and payment in lieu of holiday. Certain employment contracts ('year-in-hand' schemes) earned an employee holiday entitlement for the year ahead. Social security legislation provides that this holiday is counted as accrued in the year it was earned.

8.4 So as not to discriminate against employees on these schemes, section 57(2D) of the Insolvency Act provides that "wages or salary" includes, in respect of a holiday period, a sum which would be treated as earnings for that period for the purposes of an enactment about social security. This enables a claim for this earned holiday entitlement to be made after receivership.

8.5 This provision is redundant as 'year in hand' schemes are no longer legally possible since the coming into force of the Working Time Regulations 1998. Article 3 accordingly repeals that provision to simplify the legislation.

Nature of the proposed amendment

8.6 To remove section 57(2D) of the Insolvency Act.

Section 18 preconditions

8.7 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied[11]. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

Section 18(2)(a) - the policy objective intended to be secured by the provision could not be secured by non-legislative means

8.8 This provision has no effect and merely tidies up redundant provision. Accordingly it cannot be achieved by non-legislative means.

[11] As above, section 18(8) is not applicable as the Order does not merely restate an enactment.

Section 18(2)(b) - the effect of the provision is proportionate to the policy objective

8.9 The provision is redundant. Accordingly, its removal has no effect which is proportionate to the policy objective of simplifying the legislation.

Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it

8.10 The provision as redundant is of no effect. There is no adverse effect on any person so a fair balance is struck.

Section 18(2)(d) - the provision does not remove any necessary protection

8.11 In the context of 'necessary protections' for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of subsections 18(3) to (9) of the 2010 Act. The provision has no effect so no protection is removed, including none of the section 18(3) examples: (a) the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office (b) civil liberties, (c) health and safety, (d) the environment, (e) cultural heritage. Subsections 18(4) to (6) are not applicable. No other necessary protection is removed. The provision does not remove any necessary protection.

Section 18(2)(e) - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise

8.12 As noted, the provision as redundant is of no effect. No one is prevented from exercising any right or freedom they might reasonably expect to continue to exercise.

Removal or reduction of a burden under section 17

8.13 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

8.14 The burden reduced by this provisions falls under section 17(2)(c) (obstacle to best regulatory practice) and (d) (obstacle to efficiency, productivity or profitability) of the 2010 Act. The provision will have the modest benefit of simplifying the legislation by removing a redundant provision.

9. APPLICATION BY A LIQUIDATOR FOR THE EARLY DISSOLUTION OF THE COMPANY

9.1 This provision is made under the powers in section 17(1) and (9) of the 2010 Act.

Introduction to and reasons for the provision

9.2 Currently where it appears to the liquidator that the realisable assets of the company are insufficient to cover the expenses of the winding up, the liquidator can apply to the court for the early dissolution of the company, rather than convening a final meeting of creditors. These meetings are rarely attended by creditors so the costs of summoning and holding them may in some cases be incurred to little useful purpose.

9.3 There is also variation in the interpretation between different courts of the timing of when this application should be made.

9.4 The proposed amendment in article 11 will bring clarity and consistency between the courts in Scotland and will align the wording with the equivalent section of the Insolvency Act (section 202) in England and Wales.

Nature of the proposed amendment

9.5 To insert the words "at any time" in section 204(2).

Section 18 preconditions

9.6 Section 27(1)(d)(i) of the 2010 Act provides that this Explanatory Document must explain why the Scottish Ministers consider that the conditions in section 18(2) (where relevant) are satisfied[12]. The following sets out an assessment of this provision against the section 18(2) pre-conditions.

Section 18(2)(a) - the policy objective intended to be secured by the provision could not be secured by non-legislative means

9.7 The reduction of this burden cannot be achieved by non-legislative means. The burden arises out of doubts arising in the context of the current legislation about when an application for early dissolution can take place. As the burden is created by reason of the legislation, this amendment can only be achieved by means of legislation.

Section 18(2)(b) - the effect of the provision is proportionate to the policy objective

9.8 The effect of the provision is to clarify the existing law so it is beyond doubt on the face of the legislation that an application can be made to the court for early dissolution at any time, notwithstanding the rest of the liquidation process. It does not

[12] As above, section 18(8) is not applicable as the Order does not merely restate an enactment.

remove the discretion of the court as to whether and on what terms early dissolution should be granted.

9.9 Scottish Ministers therefore consider the effect of this provision is proportionate to the policy objective. The provision has been consulted on and is supported by the key stakeholders.

Section 18(2)(c) - the provision, taken as a whole, strikes a fair balance between the public interest and the interest of any person adversely affected by it

9.10 It is in the public interest that liquidation is efficient and cost effective. Enabling the liquidator to apply for early dissolution of the company can remove the need to convene a final meeting of the creditors in cases where this is not appropriate or cost effective. This applies to cases where there is no prospect of a dividend to the creditors so there will be no adverse effect on them. As noted, the courts would retain the ability to refuse any application if they deemed it was not appropriate and the liquidators would require to seek their discharge and the subsequent dissolution of the company by other means.

9.11 This condition is satisfied, as there is no known adverse effect on any person affected by the provision and it is in the public interest.

Section 18(2)(d) - the provision does not remove any necessary protection

9.12 In the context of 'necessary protections' for the purposes of section 18(2)(d) of the 2010 Act, account must be taken of the provisions of sub-sections 18(3) to (9) of the 2010 Act.

9.13 None of the section 18(3) examples of protections: (a) the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying judicial office (b) civil liberties, (c) health and safety, (d) the environment, (e) cultural heritage are affected by this provision.

9.14 Subsections 18(4) to (6) are not applicable to the Order.

9.15 No other necessary protection is removed. The court will continue to supervise the liquidation under the general rules which the Scottish courts apply to liquidation in Scotland, applying the general rules of jurisdiction and conflict of laws rules in international private law more widely. The Scottish Ministers consider that the provision does not remove any necessary protection.

Section 18(2)(e) - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise

9.16 For the reasons noted at paragraph 9.14 parties will not therefore be prevented from continuing to exercise any right or freedom which that person might reasonable expect to continue to exercise.

Removal or reduction of a burden under section 17

9.17 Section 27(1)(d)(ii) of the 2010 Act provides that this Explanatory Document must include, so far as appropriate, an assessment of the extent to which the provision made by the order would remove or reduce any burden or burdens within the meaning of section 17(1).

9.18 The burden reduced by this provisions falls under section 17(2)(c) (obstacle to best regulatory practice) and (d) (obstacle to efficiency, productivity or profitability) of the 2010 Act.

9.19 The provision will have the modest benefit of clarifying the interpretation of the legislation by the Scottish courts.

10. THE PUBLIC SERVICES REFORM (INSOLVENCY) (SCOTLAND) ORDER 2016 – CONSULTATION RESPONSE

10.1. This section of the document discusses the response from the 60 day consultation and the changes made to the Order.

10.2 An issue was raised by stakeholders concerning the application of the Order to Limited Liability Partnerships ("LLPs"). It was felt that the position was unclear and as a result, stakeholders may require to seek legal advice or direction from the courts. The position is that where relevant the amendments made by the Order do apply to LLPs by virtue of regulation 5(1) of the Limited Liability Partnership Regulations 2001 (S.I. 2001/1090), which apply Part IV of the First Group of Parts, and the Third Group of Parts, of the Insolvency Act 1986, and regulation 4(1) and schedule 2 of Limited Liability Partnership (Scotland) Regulations 2001 (S.S.I. 2001/128) which apply sections 50 to 52, 55 to 58, 63 to 66 and 91 to 93, 95, 104 to 105 and 131 of the 1986 Act. For clarity, this information has been added to the Explanatory Note which accompanies the Order. Also, minor consequential amendments and repeals are proposed to tidy up references in the Limited Liability Partnership Regulations 2001 and the Limited Liability Partnership (Scotland) Regulations 2001 following the changes made by the Order, and this is now reflected at article 7(2) and (3) of the Order.

10.3 A change to section 204 of the 1986 Act was suggested in order to clarify that an application under that section for early dissolution of a liquidation can be made at any time. It was said that there can be variation as to how this provision is interpreted across different sheriff courts, with different practices developing in relation to the circumstances when early dissolution can be applied for (see section 9 of this Document above). Having considered this matter, and as the wording "at any time" is used in the equivalent provision for England and Wales at section 202 of the 1986 Act, the recommendation has been accepted and is included in the Order at article 11.

10.4 As was indicated in the initial proposed Explanatory Document, 3 of the proposed changes from the initial draft of the Order, as laid in October 2015, are due to be superseded by the coming into force of the provisions in the Small Business, Enterprise and Employment Act 2015 ("the 2015 Act"). In view of the likely timings of the commencement of those provisions and feedback from stakeholders, the original commencement dates for the main articles of the Order have been changed from 1 October 2016 to allow for greater flexibility and pegged to the commencement of the relevant provisions of the 2015 Act – in the interests of certainty, specifically section 122(2) which abolishing requirements to hold certain meetings in company insolvency. The result of this is that former article 8 (members' voluntary winding up: notice of creditors' meeting by means other than post), article 10 (creditors' voluntary winding up: notice of creditors' meeting by means other than post), and article 13 (remote attendance at meetings; winding up in Scotland and receivership) from the initial draft of the Order have now been removed.

10.5 Reference is also made to the Order, which contains minor drafting changes, following comments made, including to clarify the commencement provisions.

10.6 The savings arrangements on the application of the amendments contained in the Order was an issue raised by some respondents to the consultation. It was suggested that the savings provisions within the Order could be reviewed and amended so that they could be utilised to the fullest possible extent, and not be limited to new appointments. It was thought allowing the use of the provisions irrespective of when the case commenced would introduce significant advantages and efficiencies into a greater number of insolvency proceedings. However, given that the purpose of the Order is to align the corporate insolvency regime in Scotland with that in England and Wales, and as the corresponding provisions in England and Wales did not have effect on insolvency processes which had already begun, this could in some cases have an effect on the rights of parties, the savings provisions as drafted are deemed appropriate. It is further thought appropriate not to change the savings arrangements on the basis of the general principle of ensuring effects on claims are predictable by parties entering into legal relations.

10.7 It was suggested by consultees that an additional amendment should be introduced to provide a specific power in legislation for a liquidator in a court winding up to seek the direction of the court, as is provided for in voluntary winding up at section 112 of the 1986 Act. In order to achieve this at present in a court winding up, the provisions at section 169(2) of the 1986 Act give the liquidator the same powers as a trustee in a bankrupt estate. It was suggested that the introduction of specific powers without reference to the Bankruptcy (Scotland) Act 1985 would bring clarity and cost savings. The Scottish Government considers this a matter which requires more careful consideration, given the wide scope of the effect of section 169(2), and issue about its effect[13]. It may also in that light raise issues relating to competence and reserved/devolved powers, as well as consideration with the court authorities about related provision in court rules. As such, and due to the timescales involved for the Order, such provision has therefore not been included. However, the Scottish Government is keen to convene a Working Group for the purposes of the modernisation of the insolvency rules for Scotland, and this is a matter which could be explored further by the Group, in addition to the modernisation of the Insolvency Rules made under the 1986 Act.

10.8 It was also suggested that in order to achieve a more efficient appointment procedure in relation to receivers, and particularly joint receivers, who may be in different locations, consideration should be given to allow the appointment document to be authenticated electronically. This would suggest an amendment to section 53(1) of the 1986 Act and a consequential amendment to section 436B(2)(a). However, the current reference in section 53(1) is to an instrument "subscribed" in accordance with the Requirements of Writing (Scotland) Act 1995. It is understood that in practice the instrument takes the form of a traditional (paper and wet ink signature) document[14]. In the Requirements of Writing (Scotland) Act 1995 'subscription' is used in relation to traditional documents with the equivalent term used for electronic documents being 'authentication'. Enabling the instrument to be entered into as a full electronic document will involve discussion and work with the registrar of companies to ensure that provision for an instrument of appointment in electronic form would work for

[13] discussed in the Inner House of the Court of Session in Joint Liquidators of the Scottish Coal Co Ltd, Noters (2014) S.C. 372.

[14] Rule 3.1. of the Insolvency Rules 1986 as amended in any event provides for a written docquet on the instrument of appointment.

practical purposes. In these circumstances, there are no changes to section 53(1) or repeal of section 436B(2)(a) of the 1986 Act in this Order at this time. However, given that the Scottish Government is keen to convene a Working Group for the purposes of the modernisation of the insolvency rules for Scotland, that Group could consider this issue, and the necessary discussions could be undertaken. If then, in due course, changes to section 53 were considered necessary or appropriate, these could be made at a later date, including by a future Public Services Reform Order if appropriate.

10.9 The Insolvency Amendment (Scotland) Rules 2014[15] introduced rule 4.68B to the Insolvency (Scotland) Rules 1986, which deals with unclaimed dividends to remove references to the Bankruptcy (Scotland) Act 1985 from the 1986 Rules. It was said in one consultation response that rule 4.68B set out similar provisions to section 193 of the 1986 Act, which required reference to section 58 of the Bankruptcy (Scotland) Act 1985. It was therefore suggested that there was tension between primary and secondary legislation, and that section 193(3) of the 1986 Act may need to be repealed. However, it is not considered that there is a difficulty with the substance of section 193(3), and it is considered that any necessary change would be a change to the insolvency rules, where indeed it is considered that a change is required to be made. That being the case, this is a matter which can be considered when modernising the rules themselves.

10.10 It was suggested that the provisions for prosecution of delinquent directors in liquidations should be extended to appointments other than liquidations, it being in the public interest for such activities to be reported no matter the insolvency procedure. However, this is something that was considered to be out with the scope of the Order, particularly where it appears that there are no equivalent provisions in England and Wales. Although this is something which could be considered further in future, and if amendments were necessary or appropriate, it may be possible to take those forward at a later point. In any event, Scottish Ministers could not make changes for Scotland in the context of Company Voluntary Arrangements and administrations as they are reserved matters, so action would only be possible in relation to receivership. Further, as was noted by the stakeholder, there are other mechanisms in place for reporting in this context such as the Company Directors Disqualification Act 1986. There is also nothing to stop a receiver reporting matters to the police or other relevant authorities should the office-holder consider that it is appropriate to do so in any particular case.

10.11 A recommendation was made that the amendments brought about by the Scotland Act 1998 requiring filing requirements to the Registrar of Companies and Financial Services Authority (now the Financial Conduct Authority) to be made to AiB, should be revoked. The requirements in some instances were said to result in additional costs being incurred by way of double filing, while it creates uncertainty for creditors and other stakeholders as to where information is held. There were also concerns about a lack of transparency in relation to Scottish corporate insolvency procedures as filings made with AiB are not available via a public register. However the changes to filing requirements at the time of devolution reflects the divide between the reserved and devolved aspects of insolvency, with devolved functions

[15] SSI 2014/114.

transferred to an office-holder within the Scottish Administration; AiB. Given the policy reasoning behind these provisions as part of the devolution settlement, the Scottish Government do not consider it appropriate to introduce such changes in the present Order.

10.12 A stakeholder raised for consideration the possibility of making changes to the law regarding the powers of a liquidator to disclaim onerous property following the decision in Joint Liquidators of the Scottish Coal Co Ltd, Noters (2014) S.C. 372, particularly as specific provision is provided for a liquidator to disclaim onerous property in sections 178 to 182 of the 1986 Act in relation to companies being wound up in England and Wales. Until the Scottish Coal case it was thought that provisions within the 1986 Act which conferred the same powers of a trustee on a liquidator provided a way for a liquidator in Scotland to address the issues in sections 178 to 182 of the 1986 Act in a Scottish winding up. However, amending the law here raises some particularly significant policy and legal issues which would have to be fully considered. As a consequence, and in these circumstances, the view was taken that it was not appropriate to consider this matter as part of the Order. Instead, this is something which would merit more detailed future consideration.

10.13 Following the Bankruptcy and Diligence etc. (Scotland) Act 2007, which replaced "Permanent Trustee" with "Trustee", it was highlighted that any such references in the 1986 Act should be updated accordingly. This issue has been recognised, and will be addressed by the Order under section 104 of the Scotland Act 1998 planed in consequence of the consolidating Bankruptcy (Scotland) Bill currently before the Scottish Parliament, meaning that there is no requirement to include such amendments in the Order.

10.14 It was suggested that further consideration should be given to aspects of section 440 of the 1986 Act which would benefit from amendment or repeal in conjunction with the development of the new insolvency rules for Scotland (in particular the fact that section 246 of the 1986 Act on the unenforceability of liens on books etc. against a liquidator does not extend to Scotland). The position is that as section 440 is the extent provision, it will require to be considered in connection with any wider proposed amendment of the 1986 Act. Consideration will be given to this issue in due course.

10.15 A number of recommendations from stakeholders concerned disentangling provisions in the 1986 Act from provisions in the Bankruptcy (Scotland) Act 1985. While a broader objective of making the 1986 Act stand independently of the 1985 Act for ease of use is supported, it is felt that this work falls beyond the remit of the Order. The objective is to amend the 1986 Act before modernised insolvency rules for Scotland are made in order to align the relevant provisions on receivership and the process of winding up in Scotland with the equivalent provisions for England and Wales. Further, removing references to the 1985 Act from the 1986 Act and replacing them with self-contained provisions requires careful consideration, and it was felt that the necessary consideration would result in a delay to the Order, putting at risk the overall aim of modernised Insolvency Rules for Scotland coming into force at the same time, or not long after, updated rules for England and Wales. If this project is subject to delay such that it will create a significant on-going mismatch between the rules North and South of the border, this would be considered more

detrimental than retaining references to the 1985 Act in the 1986 Act. However, disentangling the 1985 Act references is something which does have merit, and the Scottish Government is therefore keen to give this matter further consideration. As such, it would seem appropriate that the Working Group which AiB is convening as part of the modernisation of the insolvency rules for Scotland should be tasked with considering the proposed disentangling of the 1985 Act and the 1986 Act in more depth, with a view to assessing whether that might be possible at a later date.

10.16 With regards to disentangling, it was specifically suggested that at section 101(4) of the 1986 Act the reference to powers and duties of commissioners on a bankrupt's estate should be removed, with the reference being only to such powers and duties as may be conferred on the liquidation committee by the rules. However no action is taken on this point for the purpose of the Order, as it is an issue which is made clear by the provision in the Insolvency Rules 1986. The powers conferred are clear because they have to be provided for in the rules, so an amendment here would only be a change to the enabling power – there is no lack of clarity on the powers available. A change to the scope of the powers to make the rules has to be considered more carefully for what it should cover.

10.17 In accordance with section 26(4) of the 2010 Act, as noted above the key stakeholders were then given a further short opportunity to comment on the revised Order and the proposed changes. One stakeholder indicated they were content and no objections or further representations were received.