

6 Flexibility for the Future

6.1 Powers

The Government published a consultation document “Flexibility and Accessibility” in May 2004, which sought views on specific proposals to introduce new legislative powers as part of the Bill. The CLR had suggested that many areas of company law, particularly those where provisions were most likely to require updating over time, should be moved from primary into secondary legislation. However, as the Government’s consultation document explained, it is not in practice easy to establish a clear dividing line between “core” provisions (which could remain in primary legislation) and “detail” (which could sit in regulations), and such a line might risk separating one subject into two places. The Government’s proposal was therefore that changes to company law in future could be made by a special form of secondary legislation (rather than by primary legislation), to produce both *reform and restatement* of the law. This would further the fundamental objectives which the CLR identified, by helping company law remain flexible for the future and accessible to all of those who use it, particularly smaller firms.

The introduction of powers of this type is not intended to take the place of making any necessary substantive reforms now, in the Bill; nor is it intended to take the place of any restatement of the law in more accessible fashion where that can be accomplished in the Bill itself.

The consultation exercise revealed substantial support for powers both to reform and to restate. The point was made that company law, unlike many other forms of “regulation”, is the provision of a legal form which is to some extent mobile over time, and which can only work if it successfully balances various potentially conflicting interests, since otherwise people will use an alternative business vehicle (or the company form from a different jurisdiction). It is in a sense self-regulating, and reform by secondary legislation may therefore be more appropriate than for some other areas of law.

The Government therefore intends to proceed with its proposals. Several consultees did however stress that simplification of the drafting of the law is not easy; needs to be handled with care if it is to avoid inadvertent consequences; and is only one element in making the law accessible to business users, with other forms of support and guidance potentially just as helpful. The Government intends to take full account of these important points in going forward.

Consultation also suggested that, while there was general support for the need for some form of broad criteria delimiting the exercise of the powers (reflecting the principles established for the reform of company law by the CLR), it would be important that the criteria did not function as excessively strict vires constraints, as this might introduce an element of uncertainty and potential challenge to orders made under the powers. Consultees were also keen that the requirement for consultation be as full and open as possible in all circumstances. Again, the Government is reflecting these important points in taking the policy forward.

Finally, consultees agreed with the Government's proposals that there should be very strict requirements both for public consultation and for Parliamentary scrutiny. These will be based very much on the procedures currently in place for Regulatory Reform Orders under the Regulatory Reform Act.

6.2 Institutional arrangements

The CLR proposed the creation of various bodies which would be responsible for reviewing the law and/or for formulating detailed rules in specific areas. The Government's White Paper of 2002 discussed the idea of the proposed new statutory bodies – the *Company Law and Reporting Commission*, and the *Private Companies Committee* – which would have had a continuing remit to review company law as a whole and recommend changes, and rejected these ideas on the basis that they risked entrenching in statute arrangements which might over time themselves become unnecessarily inflexible. The Government does however intend to continue to develop any proposals for changes to company law in close consultation with those who might be affected. The proposed reform and restatement power could only be exercised after full consultation with interested parties.

The 2002 White Paper indicated that the Government saw more attraction in the idea of a *Standards Board*, which would have had responsibility for setting detailed rules on company reporting and disclosure. The Government now believes, however, that, in the light of more recent events, there is no case for the creation of a new body. The increasing importance of International Accounting Standards (IAS) is tending to limit the areas in which a purely domestic standards-setting body would have a role; and the changes already made to the Financial Reporting Council (FRC), and the responsibilities of the bodies that fall under it, are now providing some of the functions originally envisaged as the functions of the Standards Board.

6.3 Company investigations

The Government is keen to ensure that there is effective management of the large investigations undertaken by Companies Act inspectors. Administrative measures are being reviewed in order to help avoid prolonged and unduly expensive inspections. However, there is also a need for new statutory provision. A new power will be introduced to enable the Secretary of State to direct Companies Act inspectors, both at the outset of and during the life of an inspection, as to the scope, conduct, timing and certain other matters in relation to their investigation, and to discontinue an investigation.

Additionally, there will be an amendment to section 8 of the Company Directors Disqualification Act 1986 so that the Secretary of State can make a decision to apply to the Courts for the disqualification of a company director in the light of any information obtained by Companies Act inspectors, without the need for the information to be included in a report by such inspectors.

6.4 Miscellaneous repeals

The development of company law over the last 150 years means that there are many provisions in the current legislation which are no longer required. While a number of examples of these are given elsewhere in the White Paper, there are also a number of other, more miscellaneous provisions which it is planned to repeal. These are described in Annex C.