MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY: SUMMARY OF THE RESPONSES RECEIVED TO THE DEPARTMENT OF TRADE AND INDUSTRY'S CONSULTATION PAPER

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Introduction and key messages

1.1 The Consultation Paper, *Modern Company Law For A Competitive Economy,* published in March 1998 at the time of the announcement of the Company Law Review, invited comments on its contents generally and on the proposed terms of reference and handling in particular. The deadline for comments was 30 June 1998 The Department received responses from 156 individuals or organisations, the majority - especially the more substantial - arriving just before or just after the deadline.

1.2 At Annex A is a full list of responses, in the order in which they were received, together with a brief indication of the topics covered in each. At Annex B is an alphabetical list of respondents. Some wrote twice - thus the total number listed is slightly higher than the actual 156 figure. This summary also takes account of a number of other inputs received by the Department on the reform of company law which, while not strictly responses to the Consultation Paper, raise issues of relevance to the Review and which are worth recording here. These are listed at Annex C.

1.3 Responses to the Consultation Paper came from the following groups:

businesses	58	(37%)
representative organisations	53	(34%)
individuals (other than academics)	20	(13%)
academics	14	(9%)
Government Departments and public sector bodies	11	(7%).

1.4 One response deserves special mention. The corporate law firm Dibb Lupton Alsop conducted a survey of Yorkshire's top 500 companies on various propositions relating to aspects of the Consultation Paper and submitted the results as a response in its own right. The results, informative though not necessarily representative, are summarised in tabular form at Annex D.

1.5 The remainder of this document is devoted to a summary of the views expressed in the responses received by the Department including the inputs listed at Annex C, though excluding those comments received after the end of August 1998. The comments fell into two broad categories, those that focused on the Review itself, i.e. on the objectives, the terms of reference and the proposed process, and those that addressed specific company law issues. The latter are broken down by subject area on a rough and ready basis. There are, of course, a number of ways of breaking the overall subject down in this manner while there are bound to be some inconsistencies and overlaps. Some individual comments could equally well be transferred to other categories; for instance, a comment on the application of the capital maintenance regime to small private companies could be dealt with under either category.

1.6 The summary does not purport to record every comment made by every respondent, only those that seemed to add something to the debate or made points that the Review needed

to be aware of. In addition, the summary has had to conflate and combine the views of respondents in order to keep itself to a reasonable size.

1.7 References in the summary to the Act are to the Companies Act 1985.

1.8 In so far as it is possible to draw consistent messages from such a large number of responses covering such a wide range of issues, the themes that seemed to be emerging from the comments made in response to the Consultation Paper were these:

- there was overwhelming support for the concept of the Review, as outlined in the Consultation Paper;
- there was a considerable degree of support for making company law more accessible;
- company law should make greater use of civil as opposed to criminal remedies;
- a differential approach needs to be adopted to cater for the needs of different types of company, especially the small private firm;
- there are real doubts about the usefulness of the Annual General Meeting as currently provided for in company law;
- company law needs to be amended to allow greater use of electronic means of communication and storage of information;
- there was unanimous agreement on the case for revision of the provisions relating to a company's objects and powers;
- there was widespread concern that the capital maintenance regime is in need of thorough re-examination;
- there was agreement that the "stakeholder" issue lies at the heart of the Review, though no consensus on the most appropriate approach;
- issues surrounding directors, and especially their duties and their pay, were the areas to attract most comment; and
- a concern that company law is not well suited to groups of companies.

Comments on the Review

2.1 Of the 156 respondents, the vast majority supported the Review - 65 explicitly welcomed it and only two thought that it was not necessary. Of the latter one, a Chartered Accountant, argued that the Consultation Paper had not made a case for a review and suspected that it was being undertaken for “political reasons”, while the other, a credit assessment agency, asserted that the current framework was broadly satisfactory, imposing no undue costs or problems, though attempts by Companies House to modernise its procedures were identified as a cause of concern . A third did argue that while some reduction of the complexity of company law would be useful the problems identified in the consultative document did not justify root and branch reform. On the other hand, 44 respondents indicated a willingness to participate actively in the Review process, eg by joining or nominating representatives for Working Groups.

The Objectives of the Review

2.2 The prime objective of the Review is stated in the Consultation Paper (paragraph 5.1) as being to “promote a framework for the formation and constitution of British businesses which through an effective combination of law and non-statutory regulation:

- supports the creation, growth and competitiveness of British companies and partnerships;
- promotes an internationally competitive framework for business, so that the UK continues to be an attractive place to do business;
- provides straightforward, cost-effective and fair regulation which balances the interests of business with those of shareholders, creditors and others; and
- promotes consistency, predictability and transparency and underpins high standards of company behaviour and corporate governance.”

2.3 There were a small number of detailed comments on these objectives. One respondent suggested that the focus of the Review should be firmly on the creation, growth and competitiveness of companies and partnerships within an international framework which makes the UK itself competitive, while another thought that the references to the competitiveness of British companies and partnerships should be amended to emphasise that the objective of value creation is equally important, on the grounds that it is possible for companies to grow and be competitive but fail to create value. Other views expressed were that the principal purpose of company law should be to control corporations and their directors and to maintain credible levels of accountability rather than to be cost effective and flexible and promote competitiveness and that a further objective, of minimising the extent of regulatory interference should be added. At a more detailed level, it was suggested that the wording of the third bullet point in paragraph 5.1 could be interpreted as requiring companies and their directors to recognise the distinction between the interests of the various constituencies and to act in the interests of all of them, though the interests of shareholders should be the central consideration for the Review and not characterised as a "wider interest"

as defined in paragraph 7.3; and that it was incongruous to place the interests of shareholders along with those of creditors and others, whose interests needed to be balanced against the interests of the business.

2.4 In addition, there were a range of suggestions on the broad principles and approach that should be adopted by the Review. These included the following:

- it should consider companies from an economic standpoint before considering a legal framework as companies are essentially commercial vehicles for the conduct of business;

- it should consider the essential characteristics of the limited company, as the absence of a fundamental understanding of what the limited company stands for and why it should follow particular procedures has led to many of the difficulties which the Review has been established to resolve;

- it should take account of the differences and needs of the variety of companies in the UK, eg the regulation, administration and governance of a FTSE 100 company should be distinguished from that of a smaller quoted company. Equally, it needed to be recognised that not all quoted companies are large - many unquoted companies are equal to or larger than some smaller quoted companies - in order that the latter do not face a disproportionate burden of costs and regulation;

- it should be guided by the twin principles of enterprise and accountability, which are fundamental to a competitive economy and fair society: enterprise for the mutual benefit of shareholders and others who rely upon companies and accountability for the exercise of the considerable power vested in directors of companies and in shareholders in authority over those directors; and

- it needs to adopt a set of five precepts:

  (i) the encouragement of enterprise and competitiveness - company law should provide greater support for the creation, growth and competitiveness of British companies, particularly in an increasingly global marketplace;

  (ii) the preservation of the benefits of the company form - any proposals for change should not undermine the benefits which make it the basic building block for modern commercial activity;

  (iii) a focus on core company law, i.e. to provide an efficient and effective means for the creation, growth and dissolution or liquidation of a company;

  (iv) the encouragement of the adoption of good practice in company direction - directors and their companies should operate diligently and honestly adopting good practice in the interests of their shareholders and other interested parties; and

(v) the modernisation, rationalisation and simplification of company law - since many directors neither understand its details or are unable to obtain professional advice due to high charges.

The terms of reference of the Review

2.5 The Consultation Paper included at paragraph 5.2 the proposed terms of reference for the Review and continued, in paragraphs 5.3 to 5.8, to comment on them. These proposed terms of reference are attached as Annex E for ease of reference. This section of the Consultation Paper attracted a good deal of comment, consisting mainly of detailed suggestions as to how the terms of reference could be improved.

2.6 Taking the proposed terms of reference in the order in which they appeared in the Consultation Paper, and following the numbering it used, the main comments were as follows:

5.2.(i): this section should include a reference to the accountability of companies and the reference to "core" company law should be deleted so that there can be no debate about whether or not a particular area of concern is within the terms of reference;

5.2(i)(a): there were concerns that the reference to "the maximum amount freedom" in this sub-section needed to be qualified or amended so as to refer to permitting **an appropriate** amount of freedom and flexibility, while one respondent suggested the inclusion of a rider as follows:- "consistent with their responsibility to take proper account of the social, environmental and ethical impact of the activities of the enterprise";

5.2(i)(b): the suggestion that company law should protect the interests of those involved with the enterprise, including shareholders, creditors and employees, particularly attracted comment. This split broadly evenly between those that argued that the interests to be protected should be narrowed by: the exclusion of the reference to employees, as their interests are protected by employment legislation; excluding the reference to both creditors and employees as this placed in doubt the key principle that companies are formed by shareholders for their own benefit; or by limiting the reference to "legitimate" interests; and those that sought an expansion, to include the interests of customers and consumers, or the environment. One respondent offered the following wider formulation of this sub-paragraph: "at the same time protects, through legislation or other regulation where necessary, the rights and interests of those involved with or affected by the activities of the enterprise, including shareholders, creditors, employees and the local community".

5.2(i)(c): one commentator noted that clear legislation cannot always be concise;

5.2(ii): another made the point that the Review should not only cover the "choice of legal vehicle" but also the reasons why certain choices for incorporation are made and should in particular consider whether some companies could effectively operate as sole traders (without limited liability) if they were adequately insured against claims against them;

5.2(iii): it was suggested that "and accountability" needed to be added at the end of this sub-paragraph so as to cover disclosure and reporting standards;

5.2: one respondent argued that a new sub-paragraph should be added to the terms of reference requiring the promotion of “transparent, cost effective and fair regulation of business";

5.4: another suggested the insertion of "having regard to ownership patterns and other relevant attributes" after "individual companies" at the end of this paragraph by way of additional clarification; and

5.7: it was pointed out, in respect of the opening sentence of this paragraph, that it is the prerogative of those who own, not manage, a business enterprise to determine the form of vehicle used.

2.7 In addition, a number of other points were made in the responses on the proposed terms of reference:

- they should include the objectives set out in paragraph 5.1, which may otherwise be overlooked. If the objectives were incorporated in the terms of reference, sub- paragraphs 5.2 (i) (a) and (b) could be deleted and 5.2 (i) (c) made an additional objective;

- they should include a reference to the issues discussed in paragraph 5.8, i.e. that the Review should consider the right structure for regulation;

- they should include a provision to require the Review to consider the objectives and main principles of company law;

- they should incorporate the good regulation principles of the Better Regulation Task Force as the criteria by which the Review's output would be tested. In addition, the principles should be enshrined in any new legislation resulting from the Review and any secondary legislation should be similarly constrained;

- the role, independence and accountability of auditors should be included as a separate subject within the terms of reference;

- they should recognise and reflect the growing tendency of small companies ceasing to trade in such a way as to enable their directors to avoid any investigation of their conduct. This leaves the unpaid creditors with little option but to write off the debt as there is little benefit in incurring the costs of a winding-up petition against a company that has no assets; and

- they should include an explicit reference that the impact of developments in technology will be taken into account.

2.8 Finally, in this section, one commentator helpfully offered an alternative set of proposed terms of reference:

"To consider whether UK law, statutory and otherwise, offers a satisfactory choice of legal vehicle for business at all levels and to make recommendations.

To consider whether UK company law provides adequate and appropriate incorporation facilities for all purposes, business and otherwise, and to make recommendations.

To review and advise upon the principles upon which: incorporation is, and ought in future to be, made available under UK law for the conduct of business activities; and UK law gives, and ought in future to give, effect to foreign processes of incorporation for firms trading within the UK.

To review prevailing UK law, guidance and practice governing the company limited by shares, whether incorporated in the UK or otherwise, considering in particular; means of reconciling conflicting interests; and the ease, comprehensibility and cost-effectiveness of incorporation; and to consider and advise upon the future configuration of relevant UK statute law, having regard both to necessary action by the UK Government or legislature and the need for international negotiation and co-operation ".

The Scope of the Review

2.9 The Consultation Paper explained that the aim of the Review is the modernisation of *core* company law and that it would not be including within its remit either the Insolvency Acts or the regulation of Financial Services (paragraph 6.1 - thought it recognised that the boundaries were imprecise and care would be taken to ensure that the implications for other areas of changes which were being considered in relation to company law were taken fully into account). The Consultation Paper also noted that the Review would extend neither to charity law, though it would be aware of the implications of changes for charitable companies (paragraph 6.5), or to co-operatives (paragraph 6.6).

2.10 The comments received on this part of the Paper were overwhelmingly concerned to ensure that the Review did not narrow its focus in such a way that it failed to take into account legislation or other regulation that fell outside the description "core company law" but which had implications for or was important in regard to company law. The areas particularly mentioned were:

insolvency legislation, particularly as core company law must cover the demise of the company, including arguably the recovery provisions of the Insolvency Act as they affect limited companies. Some commentators argued that insolvency law should be included in the Review to allow it to propose improvements to the protection for creditors from "phoenix" directors, eg by considering whether the offences of, and penalties for, wrongful or fraudulent trading provide a sufficient deterrent or whether directors of insolvent companies should be required to disclose that fact to those dealing with any other company with which that director

is connected. In addition, the point was made that if company law is rewritten, it will be necessary for a similar task to take place, in tandem, with regard to insolvency law to prevent any conflict between the two;

financial services regulation, which it was argued could not be disregarded during the Review;

the Company Directors Disqualification Act ;

other forms of business vehicle in addition to companies, i.e. co-operative companies or other businesses operating under the Industrial and Provident Societies Act;

charities, friendly societies and housing associations, which should be subject to the same legislative requirements as companies;

the Criminal Justice Act, where it should be open to the Review to recommend changes consistent with the Government's objectives, eg on price sensitive information;

the Stock Exchange Listing Rules;

the City Code on Take-overs and Mergers and the Rules Governing the Substantial Acquisition of Shares;

the Cadbury Code;

tax law, and especially the relationship between company law and tax law. One commentator pointed out that company law reform could not be seen in isolation and that if it was changed tax and any other related legislation (i.e. on corporation tax, VAT and national insurance contributions) would also need to be harmonised with it;

partnership law, including limited liability partnerships**;** and

trust law, in view of the large number of institutional shareholders that are trusts (notably unit trusts and pension funds).

2.11 One response suggested widening the scope of the Review to include consideration of the purpose of the company in order allow a debate of interest to shareholders, companies, employees and other “stakeholders” in the modern corporation.

2.12 Only one respondent argued for a narrowing of the scope of the Review, contending that it should not consider partnership law as this would make it too extensive and run the risk of duplicating work already undertaken, eg on limited liability partnerships.

Process for the Review

2.13 There were relatively few comments on the proposals contained in Chapter 7 of the Consultation Paper on the process to be followed in conducting the Review. Those that did comment made two specific points: first, that there should be adequate follow up to the results of consultation, with respondents being informed as to why any changes to policy had been adopted; and secondly that, following the Review and subsequent legislation, there was a need for a continuing or intermittent review body to ensure that the legislation was kept up to date in the light of market developments. An additional point - that it was important for Government to commit itself to find time to legislate in accordance with outcome of the Review in view of the recent history of large amounts of time spent on consultation exercises that have yet to result in legislation - has also been made in connection with the Review.

Legislative style

Simplification and accessibility

3.1 The proposed terms of reference contained in the Consultation Paper included a requirement for the Review to consider how core company law could become a simple framework "drafted in clear, concise, and unambiguous language which can be readily understood by those involved in the business enterprise" (paragraph 5.2(i)(c)). This concept attracted wide support, with comments that company law should be as understandable to a small firm of builders as it is to a multi-national firm of solicitors, as each of these companies can be equally affected by the legislation, that other jurisdictions such as Canada, South Africa, Australia and New Zealand had lead the way in writing their laws in plain English, and that whatever measures were taken to remove complexity and excessive detail, the new draft legislation should be tested widely on its intended audience. However, one respondent warned that over-simplifying wording could lead to a lack of certainty and, ultimately, further clarifying legislation and a second argued that the use of totally non-technical language would not be feasible, that the emphasis of the Review should be on clarity rather than brevity and on the elimination of archaic terms, while the objective should not be to target the general reader, since a degree of expertise would always be needed to understand company law and guides and handbooks which explain the effects of the legislation would be of more use to the layman.

Civil versus criminal remedies

3.2 The Consultation Paper stated that the consideration of a modernised framework of company law would need to address questions of sanctions and enforcement, and in particular the balance between civil and criminal sanctions, noting that it was commonly suggested that the existing regime too readily invoked criminal penalties when civil remedies might be more appropriate (paragraph 6.3). Those that commented on this issue agreed that the balance needed to be re-addressed, and that there was real scope for making greater use of civil as opposed to criminal remedies. It was argued that the invocation of criminal sanctions was undesirable when civil remedies would be more appropriate. Civil remedies had the advantage of avoiding the greater burden of proof which applied in respect of criminal law, and were preferable except where there were clear public interest grounds for the application of criminal sanctions. It was, for instance, easier to take civil proceedings against company directors where a fraud had taken place, while the use of criminal sanctions, if spread too widely, could serve to debase the currency. One commentator made the point, however, that DTI or some other agency might need to have greater power to institute civil proceedings when no one person or institution had sufficient interest to sue.

Primary versus secondary legislation

3.3 The assertion in the Consultation Paper (paragraph 5.8) that while the basic framework for company law was rightly a matter for primary legislation, some parts of it could appropriately be set out in secondary legislation which permits greater flexibility and scope for

change to meet evolving requirements and expectations, met with a mixed response. There were a number of commentators that supported the case for a new Companies Act in the form of a broad framework embodying basic principles but with the detailed provisions contained in secondary legislation and capable of being updated by affirmative resolution so as to enable the regulatory regime to respond more swiftly to changing commercial circumstances and developments in technology, subject to the proviso that caution was exercised in what parts of the law were selected. The majority of respondents, however, advocated a more cautious approach. The reasons cited for this view were:

- Secondary legislation needs to be scrutinised effectively before it is brought before Parliament. The use of a special select committee, as is proposed in the Pension Sharing Bill, to take evidence from interested parties on proposed legislation may be of benefit but there also needs to be sufficient consultation before it goes to Parliament. In addition, the Parliamentary process does not effectively scrutinise secondary legislation and can only reject it, not amend it, and its wider use should thus be resisted;

- secondary legislation is in principle unwelcome since it advances the power of the executive over that of Parliament ;

- over-reliance on secondary legislation hardly seems the right way to promote an internationally competitive environment, as it gives government the ability to change the law, almost "at the stroke of a pen";

- most users, particularly small and medium sized firms, will rely on the body of company law contained in primary legislation and will be less aware of, or find less acceptable, the secondary legislation. Consideration should rather be given to ways of incorporating the secondary legislation into the primary legislation, or the Department could publish regular lists of statutory instruments that have come into force together with their subject matter; and

- whilst increased use of secondary legislation allows for easy alteration of the law, care must be taken to ensure that such alterations are necessary and do not increase the costs of compliance unnecessarily;

3.4 An additional point made by one commentator that merits recording in this part of the summary was that there could be a 'fast track' procedure for passing urgent reforms on areas that have been the subject to wide ranging debate in order to allow the regime to respond in a timely manner to issues in company law.

Statutory versus voluntary regulation

3.5 The issue of the boundary between statutory regulation and forms of self-regulation such as codes of practice did not attract much comment, perhaps surprisingly since it was pointed up as an area of importance for the Review (see paragraphs 3.5 and 5.8 of the Consultation Paper). Those that did comment made the point that the establishment of appropriate standards needed to be considered and that voluntary codes of best practice

should be restricted since they can lead to confusion, quoting as an example the fact that the Hampel report recommends that the notice period for an annual meeting should be 20 days while the Act says it should be 21 days, and the notice for an extraordinary meeting is 14 days under the Act while Hampel is silent on the point. Another commentator argued that the Review should be based on making self-regulation work, and that this issue should be a priority for the first Working Group. This respondent went on to say that self-regulation of companies has not, and cannot, work where there is an excessive differential of power between management and other "stakeholders" as is the case in most companies. This can lead to management becoming insensitive, unaccountable, uncompetitive, irresponsible, exploitative and even corrupt. A more balanced division of corporate powers, rights and duties with "stakeholders" would create a system of checks and balances for self-governance and provide management with a range of organisational and managerial benefits. One respondent offered the more concrete suggestion that rules applicable to public companies only should be separated out and consolidated with financial services legislation, where a range of other important provisions applicable only to public companies are incorporated. The rules applicable to public limited companies could thus be effectively merged with those of the Stock Exchange.

Structure of revised company law

3.6 The principal comments to be made on the structure of any new company law primarily addressed the question of making the law more accessible and easy to use. The main points to be made were:

- any new legislation should be sufficiently clearly laid out so as to enable companies to organise compliance without having to seek specialist advice. It should be restructured so that as much as possible of the law and regulation relating to a particular area is brought together in a single place. A significant problem at present was knowing where to find all the law relating to a particular topic. Imaginative use of IT in the presentation of future legislation (eg publishing legislation electronically and using hyper-text links to aid cross referencing) could play a valuable role in improving the accessibility of company law [see also paragraph 3.9 below]. In addition, if best practice guidelines replace legislation, it should be made easier to access such guidelines;

- there were a number of areas where the relevant law is a mixture of statute and case law which can be complicated to apply in practice. Where possible, all relevant current law should be consolidated in statute;

- the structure of the law should be simplified so that principle is clearly separated from detail and provisions can be readily understood without the need to cross-refer to numerous other sections in different parts of the law or in other law;

- unnecessary duplication, often resulting from the addition of legislation designed solely to remedy a particular perceived defect, should be removed;

- companies regulation should be a 'one stop shop' with co-ordinated responsibility of the various aspects, including statute, regulation, codes of practice, monitoring, compliance and arbitration; and

- more generally, the approach of introducing non-textual amendments, eg the implementation of EC Directives by secondary legislation without consolidation, is most unhelpful, creating unnecessary complexity.

3.7 There were, however, some dissenting views. One respondent argued that a body of case law had developed over a number of years and care should be taken to ensure that, where appropriate, there was no need for a new body of case law to cover a new area which, albeit in old-fashioned language, was covered satisfactorily by existing provisions (although it accepted that there were some very complicated areas of the Companies Act which were not touched by case law, eg many of the provisions relating to dealings by directors in Part X where a review of the language might make the provisions easier to understand). Another pointed out that detailed provisions were often necessary as anti-avoidance measures and argued that the policy behind such detailed points needed to be examined before they were abandoned.

3.8 The issue of the number and nature of **company formats** also drew some comment. The common theme was that the Review needed to consider the issue of business formats so as to provide alternatives to the company based on the joint-stock model. Points made in support of this view were:

- company law has tended to treat the public company as the norm and design the rules of company law accordingly even though the vast bulk of companies (numerically speaking) are private companies. An important starting point for fundamental reform is the recognition of the pluralistic character of companies (i.e. their diverse forms, sizes and functions);

- that so many small businesses choose currently to incorporate, rather than to trade on a sole trader or partnership basis, suggested that those other formats suffer from certain disadvantages as far as individual businesses were concerned. A new form of business entity would potentially be valuable both to small companies and to businesses which are currently unincorporated. Termed a 'business corporation', this format would offer many of the advantages of the limited company structure, including legal personality, perpetual succession and protection of name, but without the element of limited liability; and

- the only practical alternative to incorporation with limited liability, a partnership, requires the participants to create their own structure and does not offer corporate personality. As a result, too many small businesses incorporate and are given the privilege of limited liability thus transferring the risk of failure to creditors. In many cases limited liability is not sought by small businesses and is not necessarily a stimulus to economic activity. Small businesses often incorporate to achieve convenient off-the-peg incorporated business form. There thus needs to be an incorporated business vehicle not offering limited liability, a concept primarily intended for companies raising public capital. A disincentive to limited liability status could be a modest minimum capital requirement for private companies. The

option of unlimited corporate form based on partnership law and also available to sole traders should be established.

Some of the issues raised in the responses referred to in this paragraph reoccur in more detail in the section of the summary dealing with the comments received on small and private firms (see paragraphs 5.1-5.11).

3.9 Other comments made in the responses which can be usefully recorded here addressed:

- the need for a more purposeful approach to drafting which set out the purpose of provisions, the principles underlying them and then detailed rules reflecting those underlying principles;

- the case for the law to be available in an electronic medium, and probably on the Internet. Other electronic facilities to enhance usability could also be provided. One consequence of an electronic format is that duplication of material is not so significant a disadvantage as it is in paper form. This means that it would be easier to divide the law according to the type of vehicle, so that, for example, all the provisions relating to small companies could be in one defined area. The provisions relating to a different vehicle for large companies would be stated separately, even though some of them may duplicate those applicable to small companies;

- the importance of helping the layman to help himself without the need for expensive and time-consuming professional advice. Australia's recent reforms have been undertaken by a task force that includes a consultant in plain English and it has significantly streamlined the traditional companies legislation, rendering it more user-friendly. It has also produced a detailed plain English guide to the important rules governing small businesses. The Law Commission's 1997 proposals on shareholder remedies recognise the need to empower the layman to assist himself. The Review should consider these initiatives and the potential role of information technology in assisting lay persons eg using the Internet to enable lay people to access advice, forms, information in plain English; the development of computer packages (possibly inter-active in format); videos; and plain English booklets and leaflets providing advice and assistance; and

- the case for clearly stating the consequences of a breach of unlawful action, eg whether any transactions that result are void or voidable.

Non profit making organisations and charities

4.1 The objectives and terms of reference for the Review make it clear that its primary focus is on those companies established and run in order to undertake economic activity. There are, however, a range of other types or organisation that are incorporated under the terms of the Act, including many charities. A number of respondents to the Consultation Paper addressed these types of company:

charities: here the points to be made were:

- that charitable companies were subject to dual regulation, by both the Charities Commission and under company legislation. This contrasts with charitable Industrial and Provident Societies, which were classed as exempt charities, and regulated solely by the Registrar Of Friendly Societies. Some of the duties placed on companies, such as the filing of annual accounts and annual returns, duplicate a charitable company's obligations as a charity and consideration should be given as to whether it would be appropriate to exempt charitable companies from some company law requirements;

- that charities should either be excluded from company law or moved into a separate part of it;

- that the regime for charitable companies needs to be aligned with the rules for unincorporated charities, as at present there is a serious discrepancy between the accounting rules for unincorporated charities contained in the Charities Act and those for incorporated charities, which follow the Companies Act;

- that directors of charities are also regarded as trustees and there could be confusion surrounding the two levels of duty. In considering directors' duties the Review should have regard to this. Just as the Act makes special provision for ultra vires acts of charitable companies, there should be discussion as to whether companies legislation, if it were to include directors' duties, should make special provision for the directors of charitable companies; and

- that in seeking to rationalise the framework in which charitable companies operate, regard should be had to: duties and accountability measures placed on charitable companies under both companies and charitable law; areas of overlap (eg filing of annual accounts and returns); and opportunities to standardise and or rationalise procedures. For charitable companies the interests of trustees and beneficiaries were of primary importance whereas for business the interests of shareholders were paramount. The circumstances of charitable and other non-profit companies need to be taken into account over the course of the Review to ensure that there is rationalisation where appropriate, that there is scope for different structures, procedures and roles where appropriate, that it is clear which regulations prevail in any circumstances. Any new company law framework should complement other regulations governing the operation of charitable companies.

companies limited by guarantee: it was argued that the rules for companies limited by guarantee should be harmonised or that their special position should be taken into account, with consideration given to a separate statute. One commentator noted that Table A applies in default for companies limited by shares but that the same does not apply to Table C and companies limited by guarantee. It argued that consultation should take place on whether the application of a default provision should be extended to companies limited by guarantee; and

flat management companies: a number of responses highlighted the position of tenants' management companies, set up to manage a property on behalf of a group of residents rather than to make a profit. It was argued that they should not be required to make statutory returns to Companies House and that minimising the requirements placed on such companies would lead to fewer breaches and penalties and would result in residents being more willing to act as directors. A particular problem arose when annual returns and accounts were not submitted and the Registrar struck such companies off the register. This could be a serious problem with no one capable of fulfilling the function of the landlord, collecting service charges and carrying out repairs. This situation is apparently common and accounts for a high proportion of company assets going to Crown bodies. A respondent suggested that a vehicle should be established which would not have to submit annual reports and accounts to Companies House and would thus not have to pay professional fees to auditors.

4.2 A number of other comments were made in respect of the less commonly used forms of company. One pointed out that there is no process for converting a company limited by shares into a company limited by guarantee, while another argued that the conversion of a company limited by guarantee to one limited by shares should require a 75% majority and a 50% minimum turnout - this was already a requirement for building societies and had been proposed for industrial and provident societies also. Another respondent referred to those companies which, by reason of the public nature of their undertakings, are incorporated under individual Acts of Parliament. In order to simplify the legislative incorporation process, standard detailed regulations for the operation of such companies (the ancestors of 'Table A' and 'Table B') were established by various 'Clauses Acts'. These Acts and, in particular, the Companies Clauses Consolidation Acts of 1845 (which has been subject to minor amendments up to 1976) and 1888 should be included in the Review. Finally in this section, it was noted that joint ventures were becoming increasingly popular but were not well catered for under existing law and that consideration should be given to the creation of a specialised joint venture vehicle.

Small and private firms

5.1 The Department's Consultation Paper noted that the same basic principles of company law applied to businesses of all sizes and posed the question as to whether the current arrangements were sufficiently well adapted for the needs of individual companies, whether there was a case for differentiating more fundamentally between small and large companies and whether it would be desirable to have a small company statute that assembled in one place the particular requirements for small firms (paragraphs 5.4 and 5.5).

5.2 This subject prompted a large number of comments covering a wide variety of related issues. The vast majority supported the premise that some kind of differential approach needed to be adopted to cater for the needs of different types of company, though a wide variety of different formulations and criteria were offered as the basis for such an approach. The major points to be made in this context can be (roughly) broken down as follows.

5.3 **The case for change**. Several respondents reiterated the case for the Review concentrating on the small and private firm:

- the corporate model on which companies legislation had focused since the mid-19th century was now largely inapplicable to the great majority of limited companies, 99% of which were small and private. Many of the elements of the Act, originally designed to safeguard the interests of non-manager investors, now had little relevance to the situation of most registered companies. As a result, the Companies Act itself had become badly structured;

- some of the current legislation (eg sections 272 and 273 regarding interim and initial accounts) lacked clarity inasmuch as it set out the law for one kind of company only, leaving uncertain the situation for other kinds of company;

- the vast majority of companies were owner-managed companies, where all the shareholders were directors. However, much of company law, whether for public or private companies, was based on the possibility that shareholders may not be involved in management. The result of such a mismatch was that small company directors had to contend with a body of law, requirements and, particularly, rules about communication, that brought little or no benefit but considerable costs; and

- the current law was more appropriate for the relatively few large plcs that are quoted on the London Stock Exchange, rather than the many small, often family-owned companies that make up the majority. The Review must tackle the unfair burdens which the current law imposes on these smaller companies.

5.4 **The public/private distinction.** A number of commentators suggested that the important distinction was not so much a company's size as the structure of its ownership:

- the key distinction should be between private companies and plcs, with separate statutes for each. The State of Wyoming had led the way with the "Limited Liability Company" and this concept, developed for US tax reasons, had proved useful outside the US for non-tax

purposes. The Isle of Man legislation was a good example where the concept was not tax driven; and

- the focus should be on owner-managed companies with an overall upper size limit imposed, derived from the small company size criteria in the Second Company Law Directive, with consideration given to increasing the UK's qualifying thresholds for a small company up to the maximum permitted by the EU Directives.

5.5 **The size criterion.** Some commentators, however, specifically addressed the issue of the definition of the "small firm" and how the key criterion should be drawn:

- the prime need was for a new corporate entity for very small, owner-managed businesses, considering particularly the needs of "micro-businesses";

- the first step would be to define a 'small company'. To maintain the competitive element the current £350,000 turnover threshold could, subject to certain safeguards, be raised to £1 million; the number of shareholders could be limited to eight, with all directors (perhaps a maximum of five) being shareholders. Companies with fewer then 10 employees or a turnover of less than, say, £100,000 could be exempt from having to state turnover and number of employees. Those above those thresholds would be required to state they fell within the £100,00 to £350,000 range or that they had more than 10 employees. An advantage of this proposal was that it would enable Companies House and the credit reference agencies to maintain more comprehensive statistics;

- there should be a separate statute for small companies with a size criteria of £5 million turnover and £15 million for medium companies;

- companies were confused about the definitions of small and medium sized enterprises and the exemptions and criteria for filing abbreviated and modified accounts. Filing abbreviated accounts entailed additional expenditure. For non-shareholder users small company abbreviated accounts were of very little use. The 10 month filing deadline for a private company meant that the accounts were of limited value as a credit reference check; and

- the medium sized category of company should be abolished as it was meaningless in respect of cost-effective exemptions from Schedule 4 disclosures (on the form and content of company accounts). A threshold should remain in respect of medium size groups and exemptions from the requirement to prepare group accounts.

5.6 **Alternative formulations**. A wide range of respondent gave their view as to the best way to proceed in terms of applying company law to small or private firms:

- there should be nine different types of company, as follows: public limited companies (either listed on the Stock Exchange or admitted to AIM or unlisted); wholly-owned subsidiary companies; private companies; small private companies; service companies; companies limited by guarantee; mutual companies; unlimited liability companies; and unregistered companies ;

- new legislation should fall into five parts: provisions applicable to all types of company; additional provisions only applicable to private companies; additional provisions only applicable to public companies; provisions only applicable to special types of companies such as unlimited companies or companies limited by guarantee; provisions only applicable to unregistered companies. Within the basic core of provisions applicable to all private companies, additional provisions could be added once a company grew beyond a certain size;

- corporate entities could be categorised as follows: quoted plc; unquoted plc; large private company; small private company; lifestyle private company;

- there should be specific parts of the Act designed to apply to (a) small private companies; (b) small and medium sized public companies; and (c) large private and public companies. Each part of the Act would have a basic framework with provision for secondary legislation. A problem was the speed with which small enterprises grew beyond their original intended size and became big players needing large injections of capital, thus coming into another category. Provision would have to be made for this transition;

- there should be three different categories of limited companies: listed (Stock Exchange, AIM etc); private - unquoted (with a minimum share capital of £20,000); private - exempt (in effect a small or medium sized company which would not be the subject of an audit but for which accounts would have to be prepared by a suitably qualified firm or individual);

- the framework of the legislation should cover European companies; large companies registered in the UK; small companies registered in the UK;

- company law should be split into three sections - partnerships, limited companies and listed companies;

- there should be separate company statutes for small companies, private companies and companies limited by guarantee;

- the Review should consider the merits of dividing the Act into two for ease of reference, with one part dealing with the affairs of owner-managed companies and the other part addressing companies with outside investors;

- the Act should be reordered so that firstly it deals with provisions applying to all companies, secondly deals with provisions applying only to private companies and thirdly with provisions applying only to plcs. The legislation should be arranged so that each category of company sees that which is applicable to it together with an outline of the trigger points and additional legal requirements for moving up to the next category;

- there should be a greater distinction between the legal requirements for the listed and public interest companies, the small companies and others. The legal requirements for these three

categories could be put in separate sections of the Act, possibly with a fourth (small) section dealing with matters common to all;

- a new corporate vehicle should be available where ownership and management interests coincide, probably subject to an upper size limit to reflect the responsibilities of increased economic importance. The law and requirements for such an enterprise should be stated separately from those of public interest enterprises; and

- a new form of vehicle should be created as the means through which individuals could set up in business for the first time. They would enjoy the benefit of limited liability but have to comply with very few legal requirements. These vehicles would have a limited life eg three to five years at which time the proprietor would either convert the business to a small company or an unincorporated entity. Such businesses would have an identifier in their name so that those dealing with them knew their status.

5.7 There were, however, a number of responses that sounded a more cautious note. The thought that a small company statute could lead to problems in terms of creating obstacles in the progression from a small private company to a large public corporation while a single act presents a smoother transition process as companies grew, was mentioned by two commentators while a third argued that a two-tiered system for smaller and larger companies which would lead to further complexity and difficulties. Other points made were that the evidence was that those setting up new businesses can and do select from the present options and there would be resistance to change as it would create uncertainty among customers, suppliers, bankers, investors and professional advisers. Finally, one commentator contended that while it might be argued that it would be preferable to differentiate much more fundamentally between small companies and large companies it might be an oversimplification of the position. Although there were well over half a million companies on the register which could be described as shareholder managed, within this group there were a large variety of types of company, from the smallest one person company up to the multinational private company. Instead of a separate small company statute, a workable solution may be a series of tailor-made constitutions, in the form of alternative Tables A, acknowledging that closely held corporations were extremely diverse .

5.8 One additional point made in the context was that while the benefits and responsibilities of incorporation must remain with limited companies, consideration should be given to the suggestion that there should be a new entity affording some degree of protection for unincorporated businesses. The principal intention of this proposal would be to protect the personal and family assets of the entrepreneur.

Partnership law

5.9 The Consultation Paper identified partnerships as one of a range of business vehicles that an enterprise could chose to adopt, noted that partnership law was already the subject of a review by the Law Commission, the results of which would inform the wider company law Review and explained that the Government had announced its intention to bring forward

proposals for a new form of partnership, the Limited Liability Partnership (paragraph 5.7). A handful of responses made salient points on partnership law. They were that the Review should consider partnerships as a viable alternative to limited liability companies, that English partnerships should be given legal personality in the same way as Scottish partnerships and that the rule which limits the maximum number of partners in a limited partnership to 20 seems to serve no useful purpose in the context of venture capital fund-raising but led to extra work as parallel partnerships are set up to overcome the limit or to the use of off-shore jurisdictions. Finally, the point was made that partnerships should be made more accountable by requiring any partnership greater in size than a small or medium sized firm to comply with company law.

5.10 On the proposals for the creation of a Limited Liability Partnership, one respondent thought that they could be extended to provide a suitable incorporated vehicle for small business as well as for professional firms and individual service companies and another argued they were an important concept as a protection against the numerous liability claims that are now made against, for example, accounting partnerships and the significant costs of insuring for such claims. One commentator did, however, take issue with the a Limited Liability Partnership proposals on the basis that the Limited Liability Partnership Act 1907 had provided for limited liability partnerships for nine decades though the concept had not been as successful as it had been hoped. This was because all the advantages (and more) of a limited liability partnership could be obtained by incorporating as a limited liability company. The Review should aim to increase the utilisation of "partnership companies" by considering the feasibility of granting such business entities a separate legal personality, apart and separate from the legal status of each individual partner, which would create uniformity with limited liability companies.

Limited liability

5.11 It may be useful to refer, in this section of the summary, to three responses which raised issues surrounding the concept of limited liability. One argued that it was and should remain the core characteristic of commercial life in the UK but noted that companies legislation had failed to keep pace with the way in which businesses actually operate, with the result that the protection of limited liability was much more widely available than was originally envisaged by the law. It was thus arguable that this development had to a degree, been at the expense of creditor protection . The law should, as a basic principle, recognise that the limitation of members' liability was a significant public concession to an incorporated business and that it should not be granted lightly and without substantial commitments on the part of the company. The second similarly contended that the benefits of limited liability should be weighed with the associated risks to ensure that the correct balance was maintained in the public interest. Shareholders enjoyed all of the benefits of limited liability without shouldering any of the responsibility for the acts of the company when things went wrong. Whilst this may well encourage investment, the absence of any such responsibility did not necessarily assist the operation of a number of statutory provisions which were part of the structure of corporate governance and which depended upon the active participation of shareholders. The third argued that the role and efficacy of limited liability should be reviewed, i.e. whether it

was necessary and desirable in the context of small private companies, whether limited liability should apply with respect to torts and to what extent could compulsory liability insurance (frequently required in practice) should be adopted to protect the company and those damaged by its activities.

Company information and communication

6.1 The Consultation Paper emphasised both the need to include the principle of transparency in a new framework of company law and the objective of ensuring that that framework is proportionate to the needs of regulation in the context of particular types of company. Against this background, issues such as the content and timing of the annual report and accounts are of clear importance and consequently attracted a good deal of comment from those who responded.

Annual report and accounts

6.2 A wide range of comments were received on this issue, focusing on a number of key points:

the deadlines for filing company accounts - some commentators felt that these should be tightened so as to provide more prompt, and therefore more useful, information for users of company accounts. One suggested a reduction in the filing period to five months for public companies and seven months for private companies, with the position being reviewed after a further three years, and another periods of five months and eight months and a third a reduction in the filing period to six months and eight months, for public and private companies respectively;

extending the content of company reports - one respondent argued that the cause of social and environmental accounting should be promoted by a review of financial reporting to include the exploration of alternative and complementary ways of presenting corporate performance, while a second though that companies should be required to include in the annual report details of the employment of ethnic minority groups and their position within the organisation, but only where an employer has more than 250 employees. Such reports should also include the number of ethnic minority applicants to the company and the number accepted and rejected listed in appropriate grades of employment;

report and accounts for small private firms - several commentators questioned the value of the current reporting and accounting arrangements as they apply to small and private firms. It was suggested that only abbreviated accounts should be required for small companies, that the audit requirements for private companies and unquoted public companies should be abolished and that in return for such reforms, it may be practicable for smaller entities to file financial statements in a more realistic timescale, perhaps within six months after the year end. One respondent questioned even the value of abbreviated accounts for small and medium sized companies, contending that if the reason for filing was to make companies accountable,

abbreviated accounts did little to assist this process, telling the reader nothing of value about the company;

greater transparency - several commentators made suggestions to improve the transparency of company information. A number of these concerned the role of auditors, with the view being expressed that they should act *de facto* as well as *de jure* in the interests of shareholders or should be required to report not to the shareholders but to the public and to the Registrar. It was also argued that as it was in the public interest that information on public record was audited to give it credibility the decision as to what was required to be placed on public record should determine where the audit exemption applied: if the information was not needed on public record, the legal requirement for an audit should be abolished for that category of companies. There should, however, be a continuing statutory right for members to insist on audit and there remained the option for lenders to insist on audits as a condition of funding. One respondent suggested that auditors should be required to report on a company's tax avoidance arrangements and that no auditor should be permitted to be employed in any other capacity either for the audited company or any associate. Finally, one commentator argued that there was a need for greater flexibility in the presentation of information in the profit and loss account in order to show a true and fair view and give the clearest possible presentation of a company's performance to investors and others. The current formats were too prescriptive and consequently did not always reflect the economic reality of a company's operations or profitability. A clause should be included in Schedule 4 to the Act which when invoked would empower companies to vary the prescribed formats; and

other detailed points - there were, in addition, a number of detailed points made on the report and accounts. There were that: all qualified accountants should sign the audit report in their own names; that some of the accounting parts of the Act need to be repealed (elements of Part VII and Schedules 4, 9 and 9A) to the extent that they duplicate current and forthcoming accounting standards; that audit exemption reports (which are now relevant only to charities) should be abolished and section 249A simplified, while the accountant's report under section 249A has always been misleading and should be abolished); and that it is not attractive for wholly owned foreign subsidiaries of UK parents to have to file their accounts in the UK.

AGMs and other meetings

6.3 The conduct of annual general meetings (AGMs) was identified in the Consultation Paper as a topic on which the Department had already consulted on proposed changes to the present rules to made it easier for shareholders to table resolutions and to attend and vote at AGMs if they do not hold shares in their own name. It also pointed out, however, that others had called for more substantial changes to enable shareholders to play a more active role. These issues - at both the general and the detailed level - were picked up by a number of commentators.

The Concept and Principle of the AGM

6.4 One respondent pointed out that the legislation does not explain the purpose of the AGM or why a company should have one and went on to comment that, ideally, the AGM

should constitute a meaningful forum in which the board of directors presents to shareholders its account of its stewardship of the company and gives members the opportunity to raise questions and discuss relevant issues concerning the company's record and its future plans. In practice, however, the AGM was seen as a routine chore which was of no real interest or benefit to either members or directors. The Review should thus consider ways of reforming the AGM in order to make it a more constructive exercise for the company and its shareholders, although any expansion of the right to participate must guard against its possible exploitation by unrepresentative elements for their own purposes. If reform proved impossible, the commentator favoured the abolition of the requirement for an AGM to be held. Other commentators stressed the need to address how AGMs could be made more accessible and useful for private investors, taking account of developments in the ways in which shares were now held, recognising that the introduction of CREST would increasingly mean that many shareholders would hold their shares through a nominee, or thought that consideration should be given as to whether there were better ways in which the views of shareholders could be established, eg by replacing AGMs with postal or electronic voting. This would reduce the cost and administrative burdens incurred by listed companies. A related thought was that with many listed companies now having large numbers of shareholders in many countries, the practicability of an AGM as the main forum for the directors and the auditors to communicate with shareholders was seriously in doubt. The thought that small companies could benefit from the abolition of requirements to hold meetings, which are often 'held' only for the purpose of making an entry in the minute book was extended by some to cover wholly-owned subsidiaries and the proposal that shareholders should be able to elect to dispense with holding an AGM. However, one commentator argued that annual meetings and extraordinary general meetings were vital to ensuring the accountability of directors.

The conduct of the AGM

6.5 Comments were received addressing a range of issues relating to the regulation of the conduct of AGMs:

resolutions:

- the distinction between extraordinary and general resolutions at AGMs should be abolished, while a related thought was that the distinction between ordinary, special, extraordinary and elective resolutions should be reconsidered with a view to refining the four different types of resolution;

- resolutions would benefit from the inclusion of composite resolutions drawn up by a non-executive director;

- shareholders should be given the right to raise any issue at an AGM by way of a resolution if they gave three days' prior notice;

- there is an unduly high threshold for shareholders wanting to table a resolution - companies can impose the reasonable costs of circulation on the shareholders who have filed the

resolution. This is an uncertain liability which acts as a deterrent to all but the relatively large investor. It is inherently discriminatory against the small investor; and

- on the same topic, the provisions under which shareholders may have resolutions circulated at their own expense need to be reviewed so that pressure groups do not have too great a say in AGMs. Here the law should follow the United States, where a resolution is circulated at the company's expense if shareholder has held, for a minimum of one year, 1% of the company's shares or $1,000 of shares.

timetables:

- the statutory timetable does not allow sufficient opportunity to receive and consider the relevant materials - 21 days for AGMs and 14 days for EGMs is too brief - while vital information (such as directors' contracts or amendments to Articles) is not required to be circulated and shareholders are not even entitled to full biographical information. Shareholders who wish to intervene on an issue must file resolutions before they have received the report and accounts - this is an illogical order in the timetable; and

- the special notice requirement in section 379 should be abolished. Shareholders should need no longer to consider a special resolution rather than an ordinary one. There should be a standard notice period for all resolutions of 21 days.

voting issues:

- resolutions at the AGM and EGM may be passed on a show of hands by those shareholders attending the meeting, effectively disenfranchising the majority of investors who vote by post or proxy;

- a professional nominee is likely to hold shares in any company on behalf of a number of nominee customers. If the nominee appoints a "representative" under section 375 to attend a company meeting that representative would be entitled to speak and vote for all of that nominee's shareholdings. A nominee company will not, therefore, permit any individual customer to be its representative for this purpose. Beneficiary shareholders, pension schemes and others thus have the right only to cast their votes by proxy, not to attend or speak at meetings;

- lifting restrictions on proxy voting would encourage greater voting by institutions;

- institutional investors should be required to disclose their voting policy and the level of voting they achieved in the companies in which they invest;

- compulsory voting would be counter-productive. The votes submitted by shareholders who presently do not vote and who have been compelled to do so are unlikely to be made on a "considered" basis. These may swamp the votes of shareholders who have thought carefully about their decisions; and

- company registrars should be required to reveal voting records to shareholders or their representatives.

other issues:

- immediate reforms should be made to improve the conduct of AGMs, rather than awaiting the outcome of the Review;

- amendments to the Act concerning shareholder communications at the AGM proposed by the Department in 1996 should not be held up by the Review. In particular, section 375 should be amended to make it easier for beneficial shareholders to appoint representatives to speak at such meetings. At present, section 375 does not permit a company to appoint more than one representative for a particular meeting;

- third party attendance (particularly the press) should be facilitated at all public company meetings and the frequency of public meetings increased;

- all proxy holders should be allowed to speak of right;

- verbatim reports of proceedings should be made available to those that request them; and

- it should not be made easier for shareholders to table resolutions or attend and vote. Many large plcs find it difficult as it is to manage AGMs with increasing concerns over security.

Electronic communications

6.6 The problems caused by the Act in terms of restricting the use of information technology in company administration were highlighted by the Consultation Paper which noted that, in particular, reform was needed to allow electronic filing at Companies House and that the rules on AGMs could be adapted to allow votes to be registered electronically (paragraph 3.4, final bullet point). The responses received were almost unanimously in favour of the concept of amending the law to allow greater use of electronic means of communication and storage of information, with only one dissenting voice arguing that electronic voting at AGMs should not be allowed on the grounds that the existing arrangements are adequate.

6.7 In supporting the concept, commentators had a number of relevant points to make:

- failure to allow the greater use of electronic technology could put UK companies at a competitive disadvantage;

- the Review needed to include the scope for the electronic filing of accounts and the maintenance and retention of accounting and other records. There should be electronic distribution of all filings with Companies House so that all information in the report and accounts as well as the notice of meeting could be captured and distributed electronically;

- the courts have started to recognise the validity of media such as fax machines and video, but it is desirable for statute law to do likewise and to provide satisfactory safeguards for their use;

- the arrival of electronic media means that equal information could be provided to all shareholders at the same time - when paper communication was the norm companies had a strong argument that the cost of distributing their presentation to analysts or private investors would be too high and administratively burdensome. Companies should be allowed to electronically disseminate annual reports, meeting notices and proxy forms; shareholders should be able to complete proxy forms electronically and sign them digitally;

- electronic voting at AGMs should be permitted. One commentator noted that a factor discouraging voting is the administrative burden. The existing proxy voting system is manual, paper-intensive and vulnerable to error. Institutional investors with large numbers of clients, who may all have different voting policies, incur considerable costs in exercising their clients' votes. It would simplify the voting process if shareholders were able to receive their information electronically and to return their votes directly in the same way. Others commented that information technology is sufficiently advanced to make electronic voting feasible both remotely and at the venue of the company meeting itself. The adoption of electronic voting on a wide scale would almost certainly help to increase voting turnout. Although permissive legislation would not of itself persuade companies and registrars to adopt electronic voting, it was an essential precondition. One commentator did, however, make the point that electronic voting should be approached with caution as, while most companies will have increased IT capabilities within a very short time, it is less likely that shareholders will have access to on-line terminals;

- interactive video-conferencing and electronic AGMs, eg via the Internet, would encourage "attendance" and enhance the value of meetings so that they become more meaningful; and

- consideration should be given to enabling both the disclosure of information by companies to shareholders via the Internet, to avoid the necessity for hard copies of documents such as accounts, and decision-making at board and shareholder levels to be conducted via the Internet to avoid the need for physical attendance at meetings.

Company information: other issues

6.8 There were a number of additional points made in the responses which bear on the information a company makes public and which it is worth recording here:

- private investors receive both too much detailed legalistic information on the one hand and on the other too little real-time valuable information, compared with that supplied to investment analysts. The majority of private investors have neither the time nor the

inclination to read the bulk of the paper which they receive relating to a company's affairs. Rather, the sheer volume and complexity of the information supplied at present may act as a deterrent to the development of wider share ownership. It is already possible for companies to provide a short form of the annual report and accounts. It should be possible for all key documents to be provided in a summary form with the full document available on request so as to encourage share-ownership amongst the general public;

- access to a company's register of shareholders should be restricted to its shareholders only. This would stop time consuming enquiries and burdensome requests for copies of the registrar from disinterested third parties;

- the charges able to be levied for copies of registers under s356(3) do not meet the costs of provision; this is being abused for commercial gains by third parties; and

- there is need for clarification of companies' responsibilities in contacting "lost" shareholders under s430(11) and (12).

International issues; Oversea companies

7.1 Although the Consultation Paper included a complete chapter on the wider international picture and explained that an important objective of the Review was to increase the attractiveness of the UK to overseas companies (paragraph 4.7) the responses did not address international issues to any great extent. The comments that are worth recording here sounded warning notes. One was to the effect that foreign companies should be required to demonstrate, as a pre-condition of trading in the UK, that their corporate standards were in the opinion of the Registrar, at least as high as those for UK companies, and if they not, they should be denied access to the UK market. As a corollary, incorporation in "rogue" jurisdictions should be outlawed and consensus sought on these matters with all primary trading nations. A second pointed to the absence of any formalities when a foreign company merely conducts business in the UK, arguing that this presents difficulties and that it would be helpful to be able to check when, and if, the different regulatory regimes have been brought into play. If there were a way whereby certain details could be supplied to the Registrar to enable a company to be classified as falling within a particular set of rules, this would assist both the company and parties dealing with it. A third commentator suggested that the Review needed to consider whether the UK should retain an approach based on place of registration or move to the continental test of considering the location of the central management - the latter is less easily evaded and looks to the substance of location rather than its legal form.

7.2 A further comment received by the Department, though not directly as a result of the Review, concerned the Eleventh Company Law Directive (89/666/EEC) which requires Member States to adopt a specified regime for the registration of branches of limited companies. The Directive was implemented by Schedule 21A to the Act leaving intact the existing regime in sections 691 and 692 for companies establishing a place of business in Great Britain. It would, it is argued, be an improvement if the two regimes were to be merged. It would also be helpful if the requirements of the Oversea Companies (Accounts)

(Modifications and Exemptions) Order 1990 made under section 700 were to be reconsidered in the light of the present requirements for companies incorporated in Great Britain.

Companies House issues

8.1 The role and procedures of Companies House represented an obvious focus for comments since all companies incorporating must do so via the Registrar and thereafter make a continuing series of returns to him. The comments received focused equally on both issues.

8.2 On the principles and process of company formation and registration the main points to be made were:

- the trade in off the shelf companies should be prohibited;

- the requirement the Act for company formation documents to be sworn by a solicitor should be abolished. Companies which are acquired off the shelf and which are substantially changed afterwards are not subject to subsequent statutory declarations. The application for registration could include a suitable declaration by or on behalf of the subscriber(s) to the memorandum of association;

- the need for companies (especially private companies) to have a separate memorandum and articles of association governed by different rules in matters such as alteration was questioned. New Zealand and Australia have recently determined that small companies do not need a separate memorandum and articles and that having a constitutional document should be optional; and

- registration should be restricted to companies limited by shares.

8.3 On the regular returns a company is required to file at Companies House, the following issues were raised:

- the purposes served by filing information at Companies House should be re-considered. It may be considered that filing is the price of limited liability; it may be for other reasons. The conclusion reached should drive the detailed decisions on what is filed. This will include such matters as audit exemption and abbreviated accounts. These decisions need to be made before the detailed legislation is approached. The issue of what needs to be on the public record, and why, should be used to decide whether companies should be permitted to file documents in Welsh;

- there is unnecessary duplication concerning information that has to be filed with Companies House and also at the company's own office. In particular, the annual return form 363 and the requirement to detail the shareholders in form 88(2) should be abolished. The annual return serves very little purpose. It duplicates information already held at Companies House and is administratively burdensome;

- the requirement to file names of shareholders at Companies House should be abolished and replaced by a requirement for them to be made available at a website at the plc's main UK location;

- the annual return for small companies should be replaced by a requirement for changes to be filed as they take place;

- the Act contains numerous different filing periods for various documents/returns but for no obvious purpose and there is therefore scope to standardise these periods; and

- companies should be obliged to file details of their insurers at the time of Registration, in order to facilitate claims by third parties.

8.4 In addition, one commentator suggested that empirical research was needed on the reasons for the three and half million searches are undertaken every year, the extent to which they serve any useful purpose and whether they reveal information that is important for the proper regulation of companies. It could be that the majority of searches are undertaken by solicitors seeking to protect themselves from negligence claims. Another questioned the wider role of Companies House, arguing that it could be a registry not only for companies but also for other business entities along the lines of a "mercantile registry", offering a one-stop registry for all those dealing with business organisations.

The objects clause and the ultra vires doctrine

9.1 The Consultation Paper identified (in paragraph 3.4) the present requirement for a company to have a statement of the “objects” or purpose of the company in the memorandum of association, which serves to limit the powers or “vires” of that company, as an arguably obsolescent or ineffective provision, noting that a previous attempt to allow companies to describe themselves as a “general commercial company” had been little used. The responses received on this topic were unanimous in agreeing the need for change to section 3A of the Act. Comments were: that the general purpose objects clause was a well-intentioned but commercially unworkable provision, with continuing concerns about ultra vires preventing professional advisers from relying on it except as an adjunct to the usual “shopping list” of objects; that the term "general commercial company" in section 3A did not cover the ancillary powers set out in the memorandum of association while it was not clear whether the section 3A object was intended to stand on its own or could be amplified to cover perceived gaps, a particular concern where the requirements of lenders and finance houses have had to be met; that the catch-all description of objects at length or the general commercial company provision in section 3A defeated the reason for an objects clause; that section 3A may not be used much because it is possible to purchase an off-the-shelf company which had a long objects clause; and that the primary reason, for the utilisation of extremely wide objects clauses in the memorandum of association was an attempt to counteract the application of the ultra vires rule.

9.2 The responses offered a variety of ways of replacing the objects clause:

- the doctrine of ultra vires and section 35 (which deals with a company's capacity) are increasingly seen as irrelevant and provide no practical comfort for either lawyers or business persons. The relevance of the doctrine and its practical benefits, if any, should be considered by the Review. The doctrine of ultra vines should be abolished completely;

- a company should be allowed to exercise all the powers of a natural person. It was noted that Manx law had tackled this issue by giving bodies corporate capacity to contract as if they were individuals and deleting the objects clause entirely from the memorandum of association;

- another attempt should be made at re-drafting a single objects clause;

- the objects clause should be simplified by making it include all lawful action except any so named therein. Alternatively, there should be a presumption that a company can carry on business of any kind with any restrictions specified in a shareholders' agreement which would not bind third parties and should not have to be registered at Companies House; and

- there should be an equivalent of Table A for the memorandum of association which covers not just the primary objects of the company but its general powers.

9.3 Only one respondent thought that a more restrictive approach was called for and that the objects clause should be tightened to help companies focus on proper activity and enlighten shareholders, with the objects changed at the AGM so that a change in direction would be subject to shareholder approval.

Table A

10.1 Respondents offered a number of suggestions for detailed change to Table A, the model articles of association which provides the basic constitutional framework for most companies:

- Table A should make it clear by explanatory notes which regulations merely repeat or expand upon sections of the Act;

- there should be two different, newly designed versions of Table A to meet the modern-day needs of both large and small companies. Redesigned articles for general use could accommodate the needs of companies on issues such as information technology, de-materialisation of shares, electronic voting and record keeping;

- parts of Table A, eg paragraphs 8, 64, 76, 77 and 113 are generally omitted by most small companies and may be inappropriate, especially if there were to be a new Small Companies Statute;

- the proxy form should be deleted as it causes confusion to the layman;

- a special Table A for small companies could be drawn up with, for example, provision for informality (written decisions without meetings etc) and for exit and succession (eg buyouts of those removed from the Board etc);

- Table A should contain a provision relating to the use of dispute resolution services; and

- as private companies often need to use solicitors for variations to their constitution; the contents of Table A should be extended to cover standard resolutions, minutes etc.

The capital maintenance regime

11.1 The capital maintenance rules in the Act attracted a good deal of comment from respondents. One argued that much of the legislation surrounding the subject was overly complex, with the result that company restructuring, financial assistance etc could be difficult, time consuming and costly. It went on to argue that the legislation included a plethora of detailed rules, whilst sometimes appearing to have lost sight of the underling principle, noted that the Department had already recognised the problems in relation to financial assistance and contended that a more radical solution should now be considered, in relation to the whole subject of capital maintenance, eg replacing the capital maintenance requirements with an all-encompassing solvency test and directors' certificate, reinforced by appropriate penalties on the directors if the certificate proves to be negligently or fraudulently made. A second argued that capital maintenance requirements should follow the rationale for incorporation and the legal vehicles created to meet those reasons. A number of commentators pointed to the need to simplify the arrangements for reducing capital, focusing in particular on the requirement for a company to make an application to the Court to reduce its share capital, and suggesting that an alternative procedure involve a special resolution combined with a statutory declaration of the board of directors supported by an auditor's report confirming there were no contingent nor actual liabilities. A transfer of an asset between group companies at a gross undervaluation might then be dealt with by a simplified procedure.

11.2 The responses also addressed a number of more detailed issues related to share capital and its maintenance. These are dealt with in the following paragraphs.

Minimum authorised share capital

11.3 While two commentators argued that there was no benefit in retaining the concept of authorised capital, others put the case for requiring a company to have a minimum level of share capital. It was pointed out that the UK is one of only two EU countries which do not impose a minimum capital requirement on new private companies. It was argued that the ease with which companies may be set up was not commensurate with the advantages which incorporation provided to shareholders and directors, and did nothing to encourage the latter as a group to approach their responsibilities seriously. The DTI White Paper of 1973 and the subsequent (aborted) Companies Bill had recommended a minimum capital, partly to protect creditors and partly to deter 'frivolous incorporations'. Whether it was achieved by means of a

minimum level of paid-up capital or, alternatively, by a form of bond which members or directors would be required to pay in the event of a company's insolvency, it was suggested that the Review needed to give serious consideration to ways of restricting company registrations to those which give a material assurance to potential creditors that debts can be met. A test of this kind would be particularly helpful in the fight against the phenomenon of 'phoenixism'. It was also argued that requiring a minimum paid up capital (£10,000 was suggested) would reduce the large number of shell and inactive companies, perhaps a quarter of a million, which gave rise to needless cost to Companies House and others. Another commentator argued that the minimum capital requirement should be raised to a level comparable to the minimum cost of setting up a new business. Such a cost is of the order of £1,000 for companies that are actively trading, and £100 for companies that are not intended to trade, eg those protecting the names of unincorporated businesses. Other commentators addressed the issue of minimum share capital in respect of other types of firm, arguing that there was poor general understanding of the status of plcs, with a common assumption that such companies are large and listed on the Stock Exchange. The danger of this situation was amplified by the fact that a plc could have paid-up share capital of as little as £12,500. If it was to remain possible for plcs to issue quarter-paid shares, the minimum share capital should be raised to £250,000. A further commentator argued that the concept of nominal and issued share capital was so simple that it was not clear why a change would offer material benefits while the existence of nominal capital offered some comfort to minority shareholders, and gave an insight into the ambitions of the company's founders.

No par value shares

11.4 The adoption of the concept of no par value shares was canvassed in the Consultation Paper as one of those reforms that might serve a deregulatory purpose, eg by enabling a simpler statement of share capital in companies' accounts (paragraph 3.2, third bullet point). This suggestion met with a mixed response. Some commentators agreed that the par value concept was confusing, had no meaning except in a historical sense and given its apparent irrelevance in the majority of cases (as shares, particularly of listed companies, were often issued at a premium to their par value) argued that no par value shares should be introduced. One commentator contended that the distinction between par value and issue price was an anachronism which caused practical problems, especially on redemption funding. Others, however, took the view that the Second EC Directive's rules on no par value shares and capital maintenance generally did not cause problems, while revoking the requirement for shares to have a par value would be a retrograde step, as the size of share premiums, and the status of those paying premiums, were made very clear under existing arrangements, and served as useful information in the assessment of companies. Other points made against the adoption of no par value shares were that the education required in such a fundamental change may be too great and cause problems and misunderstandings and that there was no advantage in the abandonment of the requirement for shares to have a nominal value, except where shares have been issued at a premium, in which case the premium was effectively part of the share capital. Provided stamp duty was also reformed the issue price should be the only factor and the premium abolished.

Financial assistance

11.5 Many respondents specifically mentioned the provision of financial assistance by a company for the acquisition of its own shares as an area of company law that needed to be reviewed in view of the complexity of the current arrangements. Indeed, some respondents considered financial assistance to be the area which was in need of amendment more than any other. One or two respondents did, however, mention the need for caution. Some of the specific comments are set out below:

- the uncertainty caused by the Aveling Barford decision needed to be addressed. In particular, action following the November 1996 consultation on proposals for reforming the law relating to the provision of financial assistance by a company for the acquisition of its own shares in sections 151 to 158 should not be held up by the Review;

- the principle that companies should not be able to provide financial assistance to others to purchase their own shares was correct though the rules which implement this principle should not be too bureaucratic or compliance involve undue expense. In practice, the provisions of the Act on financial assistance caused confusion and companies are concerned about the legal fees incurred in seeking advice on them; and

- making all transactions which infringe the rules void is unnecessarily harsh. Transactions should be voidable, not automatically void.

Company charges

11.6 The provisions in the Act relating to company charges also attracted a good deal of criticism from respondents on the grounds that they were a cause of doubt and uncertainty - particularly as to whether charges were registrable or not - and should be reviewed. A number of detailed points were made in this context:

- section 395 (the requirement to register a charge) needed to be clarified: there were two opposing views as to the need to register a charge when the beneficial ownership belonged to a third party. In any event, the current forms did not record whether the company owned the beneficial, as well as legal, interest;

- there was a serious concern over the implementation of section 410 dealing with crystallisation of a floating charge;

- a mechanism should be introduced to allow the simple and quick removal of charges from a company's register where registration is invalid or made in error;

- where a company acts as a trustee over assets it should be permitted to enter on the register a note that it is not the beneficial owner of the asset being charged by a third party and only acts in a trustee capacity in relation to that asset ; and

- it was questionable whether the provisions in sections 421-423 requiring companies to maintain a copy of every instrument creating a charge and register all charges served any useful purpose, especially as the House of Lords has determined that this register should not be relied upon.

Other capital maintenance issues

11.7 Finally in this section of the summary, it is useful to include a number of other points made in the responses on issues relating to the capital maintenance regime:

- the need for legislation to permit the redenomination of existing issued share capital into another currency for shares that are convertible from one class to another, eg a preference share convertible into ordinary share capital. Currently, conversion is a cumbersome procedure even when the two classes of share are denominated in same currency. A simple statutory procedure for such conversions is needed whether from one currency to another or where both classes of shares are denominated in the same currency;

- there was a need to revise section 171 which permits a private company to redeem or purchase its own shares out of capital to the extent of an amount which is referred to as the permissible capital payment. The way in which the permissible capital payment is defined means that in some, fairly common, circumstances it was not be possible for a company to take advantage of section 171. Furthermore, the company would also not be able to make a purchase or redemption under the general rules in section 160; and

- there was also a need to review section 276 because of uncertainties arising from the 1989 Aveling Barford decision to clarify the position where an asset was sold to a company's shareholders, or to a company controlled by them, for consideration which was less than the value of the asset.

Shareholders' rights and responsibilities

12.1 Issues surrounding the rights, responsibilities and role of the shareholders in a company were also a natural topic for comment. At the general level, the point was made that company legislation placed no responsibilities upon shareholders for the management of the companies which they own although the ability to exercise such responsibility was vested in them, eg by exercising their votes at a General Meeting of the company. Although there might be reasons why shareholders did not exercise their powers, a system which placed all of the power in the hands of those who did not exercise it was not an effective system. The role which shareholders were obliged to play should thus be increased and a structure should be developed to enable shareholders to participate actively in the company's affairs. Another commentator argued that reforms were need to ensure clarification of the duties of fiduciary investors in relation to voting, disclosure and the use of other corporate governance powers. Other respondents, on a related theme, argued that shareholders needed sufficient power to control the conflicts of interest between the duties owed by directors to their company and

their own personal interests, and that prior shareholder approval should be a statutory requirement for a much wider range of key management decisions.

12.2 In addition to these general points, a number of respondents commented on specific provisions in the legislation relating to shareholders. These comments focused, in particular on three issues: shareholders' voting rights, the disclosure of an interest in shares and pre-emption rights. The main points to be made under each heading are set out in the following paragraphs.

12.3 **shareholders' voting rights**:

- an additional abstention box on proxy voting forms should be provided to allow disaffected shareholders to give a cautionary "positive" abstention or message to the company, i.e. in cases where voting against a motion could be an unreasonable response;

- there was merit in the Hampel Committee's recommendation to announce the proxy vote for each resolution. The disclosure of overall voting statistics, including abstentions, was an essential stage in nurturing the voting process;

- the Review would need to consider how those shareholders that hold their shares in nominees and who wish to exercise their right to vote and to participate in other corporate actions can receive information in a timely manner. It was arguable that companies should recognise beneficial shareholders in the same way as direct shareholders;

- the Review should address the role of the 'fiduciary' investor, i.e. the investor who is investing professionally on behalf of others, rather than simply 'institutions' which may in fact also be investing on their own account. While Government might extend the range of issues upon which shareholder approval must be sought, there was no guarantee that investors would take the opportunity this provided for them to exercise effective oversight. Where private investors fail to do so, Government has no real concern, though it might want to encourage small shareholders to pool their influence in order to become more effective and protect their interests. However, among listed companies, the vast majority of shares are held by institutions investing on behalf of others. Despite the position of immense influence which these institutions have, there were no requirements for them to conform to the principles of transparency and accountability which are considered vital for companies in which they hold shares; and

- voting rights of shareholders should be based on the premise one shareholding, one vote and not one share, one vote, in order to protect small shareholders.

12.4 **disclosure of interest in shares**: a number of respondents argued that the rules on the disclosure of interests in shares contained in Part VI of the Act needed to be simplified. Some of the specific comments were:

- the disclosure regime for fund managers was relaxed in 1993 so that they need only report holdings above a 10% threshold of the total issued share capital of a company whilst pension fund trustees were still required to disclose holdings at a threshold of 3%. The present position represents a clear anomaly, given that a fund manager is more likely to orchestrate a take-over bid than a pension fund, and imposes a particularly heavy reporting burden on pension funds with multiple external investment managers with no obvious advantage to the wider public interest;

- since fund managers, although not the beneficial owners of the shares, are the principal holders of shares, (and thus the deemed controllers), it is they who are most commonly required to disclose information. Modern systems make it easier for fund management groups to satisfy disclosure reporting requirements. However, as growing fund management groups continue to consolidate on an international basis, it is becoming more and more difficult to be certain that dealings by subsidiaries in different time zones are fully accounted for in any such reports. Disclosure requirements should be removed from fund management groups below, say, the 29.9% level currently regarded by the Takeover Panel as effective control;

- Part VI, particularly as it relates to derivative interests, may result in multiple notifications which may cause confusion. For example, double-counting may arise out of disclosures relating to the same holding, eg when an interest in shares arises by way of a derivative and separately by way of a real holding. Disclosures should be more specific about the types of interest being disclosed; and

- consideration should be given to lengthening the time periods for notification.

12.5 **Pre-emption rights**:

- the procedures for offering shares on a pre-emptive basis should be simplified to align them with current practices, thus obviating the practice (often seen in rights issues) of disapplying statutory pre-emption rights simply to replace the statutory procedure with a better one;

- the current best practice on pre-emption rights should be made law. The Act currently provides in section 89(1) for a limited disapplication of pre-emption rights. Most companies apply best practice by limiting the amount of new shares that can be issued without pre-emption rights applying to 5% of the issued share capital with the power to do so lasting one year. However, others have no limit on the amount of shares that can be issued without pre-emption rights applying and with that power lasting five years; and

- pre-emption rights are a basic shareholder right that should not be eroded. The pre-emptive rights issue is an equitable and cheap method of raising capital. Book building by contrast does not guarantee shareholders the right to subscribe for their pro rata entitlement and can lead to an involuntary dilution in wealth.

"Stakeholder" issues

13.1 A key objective of the Review is the development of a new regulatory framework which, inter alia, balances the interests of business with those of shareholders, creditors and others (see paragraph 5.1, third bullet point, of the Consultation Paper). The question of identifying the constituencies of interest that need to be taken into account and the achievement of the appropriate balance between them - in effect, the answer to the question "whose interests should a company primarily serve?" - not surprisingly gave rise to a range of comments. These fell into two clearly identifiable groups, those that wished to see a more wide-ranging concept of the interests a company should acknowledge than is contained in the current regulatory regime which, of course, has its foundations in the nineteenth century, and those that favoured the retention of the traditional and tightly-focused definition.

13.2 Taking the former group first, respondents tended to argue that reform was needed to ensure improved reporting and disclosure to provide both shareholders and other stakeholders with essential information on a company's financial, environmental and social performance, and to give the workforce and trade unions specific rights to be consulted and even involvement in the supervisory membership of a board. The concept of social reporting, covering environmental issues and general matters of social responsibility, such as employment practice - including Investors in People status, staff training and development expenditure, progress on fairness at work and the intellectual base of the organisation - and care for the local community surrounding each operation, was referred to by several commentators in this group, who argued that the Review should consider whether the existing statutory rules on financial control and reporting could be supplemented by, for example, a requirement for large companies to prepare reports on their social and environmental performance and that the opportunity should be taken to codify and develop organisations' social and environmental accountability. One commentator though that initially this should only apply to plcs, but that the principles applied equally to other companies and could be extended.

13.3 Those commentators that favoured the more tightly-focused definition of the role of the company took the view that the Review should not be used as vehicle for the implementation of industrial relations, fiscal or social policies, and that company law should not include provisions relating to employment protection, environmental protection, health and safety and consumer protection etc, which would be better dealt with by separate legislation. One commentator argued that it was true that in some companies, very often the less successful, the interests of the shareholders had sometimes been subordinated to those of the employees, particularly those in senior management. But a company ultimately belonged to its shareholders and wise shareholders would only install and support management which respected the interests of all those involved with the company. Respect for the interests of others was not the same as being forced by law to protect those interests. It was widely acknowledged that well managed companies, which treated their creditors and employees well, would usually produce a better return for their shareholders. It was, however, quite another matter to incorporate into company law a requirement to protect the interests of the employees. This was not to argue that the law should not protect those interests, as it clearly should do so, but only that a companies act was not the place to do it.

Directors and their duties

14.1 The Department's Consultation Paper identified the issue of directors' duties as one area in which statutory underpinning and clarification of best practice and the principles of case law might be appropriate. It referred to the fact that the Law Commissions were currently examining the detailed rules on regulating conflicts of interest in Part X of the Act and the case for a statutory restatement of directors' duties and pointed out that a wider issue for the Review was whether a director's duty to act in the interests of the company should be interpreted as meaning simply acting in the interests of shareholders or whether a director should take account of other interests, such as those of employees, creditors, customers, the environment and the wider community (see paragraph 3.7, first bullet point). This question clearly has a close bearing on the "stakeholder" question, addressed above. The issue of directors, their duties, their role and responsibilities, their competence, and their pay easily attracted more comment than any other single issue or set of issues. The main points to be made are recorded below.

Directors' duties - the principle

14.2 As with the responses on the wider "stakeholder" issue, commentators generally fell two broad groups, one favouring the traditional approach to the subject and the second advocating a more wide-ranging view of directors and their duties. Points made by the former were:

- company law should state that the board of directors first duty is to the company and, in fulfilling its role, it must be held accountable for its actions by the shareholders. A company's directors should be accountable primarily to its present and future shareholders as they are the owners of the company and the providers of its capital. Any move to make directors accountable to stakeholders should be resisted. It would create major difficulties in identifying the various stakeholders and deciding the nature and extent of the directors' duty to each stakeholder group. In practice, this could mean that the directors were not accountable to anybody since there would be no clear yardstick for judging their success;

- company law should highlight that in making decisions directors, both individually and collectively as part of the board, must act in the general interests of the company but should not attempt to prescribe how boards of directors should carry out their decision-making function;

- the duties of directors needed to be addressed succinctly but no further obligations should placed on directors beyond the current law. Any requirement for directors to take account of others' interests as well as shareholders is already covered by other legislation such as Environmental Protection Act;

- to increase or widen the duties of directors is to move into dangerous territory and any change would have to be phased in very carefully. Such change risks creating a lawyers' charter, where every interest group would fund litigation against companies. It would

certainly make people less willing to take on the role of director. Company law should not attempt to regulate individual items on the management agenda;

- any general increase in directors' duties should be rejected as it would impose on directors a duty of care which would expose them to "liability in an indeterminate amount for an indeterminate time to an indeterminate class"; and

- the fiduciary duty of directors is to act in the long term interests of shareholders. This interpretation of fiduciary duty should not constrain directors from taking a broad view. Indeed, directors cannot act in shareholders' long term best interests if they do not act responsibly towards employees, creditors, customers, the environment, and the wider community in which a company operates. But in terms of fiduciary duty directors can only ever be accountable to shareholders. Directors are elected by shareholders to act as their agents, and conversely, can be removed from the board if shareholders are dissatisfied with their performance. It is difficult to see how a similar line of accountability between directors and "stakeholders" could be established. It is possible that boards which are required to take account of "stakeholder" interests will be diverted from their primary aim of providing shareholder value for their shareholders.

14.3 Points made by those advocating a wider-ranging approach were:

- generally, directors will take into account the interests of their investing members, but in defined circumstances they are currently entitled or required to take into account the interests of their employees and creditors. The Review should consider whether it is appropriate that the effective influence of these interest groups be technically restricted to defined circumstances, and whether, in determining the best interests of their company, directors may legitimately take into account wider, third party interests. By implication from the disclosure rules in the Act, companies may currently make donations to charity or to political causes, provided their directors consider that doing so would serve the interests of their companies. There is however no express recognition in the Act of the legitimacy of the influence of such causes, and clarification is desirable. In addition, the Review should consider granting recognition of other 'public interest' considerations in the context of company powers and the decision-making process, such as a concern for the protection of the environment;

- directors should be free from an excessively narrow interpretation of their fiduciary duties. In today's economy, a company's annual report and accounts are not exclusively for the benefit of the shareholders but are relied on by employees, creditors, customers and statistical agencies;

- whether a duty to the company can be defined ultimately as a duty to the shareholders has not been resolved in recent debate and raises a question about how this might be balanced with the duty to employees, set down in the Act, and in practice the wider sense of responsibility which many directors consider they owe to other groups such as local communities, the environment, and their customers, suppliers and business partners;

- a director's fiduciary duty to the company should be extended to include interests of employees, creditors and customers;

- the duty to provide information and explanations should be extended to include a duty on directors to provide all information which they knew or ought to have known would be material to the financial statements of the company and should apply, not only in the course of the audit, but in other circumstances where reports are prepared by accountants for public use, eg prospectuses;

- directors' duties should be clarified to enable them to take a broader view of their responsibilities. It should be emphasised that they are not just responsible for, and to, shareholders but also for the interest of employees, sub-contractors, creditors and the public at large. The profit motive should not be the sole driving force behind any strategic decision made; and

- directors' duties should include a requirement to provide for effective business management within their companies.

Directors' duties - clarification, legal underpinning and codification

14.4 This range of issues also attracted a good deal of comment from respondents. The main points to emerge were:

- it would be helpful to clarify the duties of directors, and would raise the awareness of individuals as to their responsibilities. It has never been the case that the duty to act in the interests of the company required directors only to have regard for shareholders. It is perfectly proper for the directors to take into account other interests where it is in the interest of the company to do so. Difficulties arise where the legislation requires directors to have regard to particular interests, eg section 309. Directors' duties should be clarified to make clear that they are responsible to the interests of employees, subcontractors, creditors and general public;

- directors' duties which are not covered by Hampel may require legislation. Directors' duties generally should be subject to legal underpinning though legislation must not make it difficult for directors to be clear where their duties lie. Directors should be subject to a statutory duty of care: the duty of care developed by the common law courts has not been vigorously enforced. Action on directors' duties is an absolute requirement in any new legislation. At the moment, one has to draw from case law, steering committees, the Institute of Directors and Table A;

- there is some advantage in defining under statute the fiduciary duties of directors to the company and thus to its shareholders rather than relying on case law. Directors should be free from a very narrow interpretation of their fiduciary responsibilities which could work against the company's interests. It is right that directors should not be constrained to do anything against the long term interests of the shareholders but, equally, it should not be for directors to be given in law the powers and discretion to do anything which is not in the

long term interests of the shareholders. The fiduciary duty of the directors to the shareholders should be brought into company law, but there should be no introduction into company law of duties of directors to other "stakeholders". It is clear that conflicts of interest could arise and if directors owe duties to shareholders of the company and to other "stakeholders" such as employees, companies will become unworkable. It should be relationships with stakeholders which are being discussed, rather than considering their interests;

- directors should be held responsible for the prevention and detection of fraud. There be a requirement of company law, as in other countries, that adequate controls are in place;

- directors' duties should be clarified, possibly by having a comprehensive code which sets out all the duties of a director. This code could be given force by statute and would supersede all the existing statutory and common law provisions. The liability of directors for breach of these duties should also be clarified and explained. The code could also set out the grounds upon which directors could be disqualified both in relation to insolvency matters and for other breaches of duties. Directors' duties should be set out in a code (to which the statute could refer and which is issued after consultation) so that they can be clarified and allow directors to have a fuller understanding of their responsibilities;

- directors' duties could be codified in the new statute with definitions of minimum standards of care in given situations. The Act currently makes no specific provision for minority shareholders to sue company directors following losses sustained as a result of actions by the directors. The shareholders' only option would be to sue for negligence, but it is far from clear whether precedent provides for a duty of care on the part of directors to the minority shareholders. The Cadbury and Hampel reports have gone some way to addressing codifying directors' duties, but compliance with their codes is not mandatory. Remedies for failure to comply with such minimum standards of care could be set out, contemplating both criminal and civil actions, with specific access for actions based upon breach of statutory duty for those likely to be affected by the breach - namely shareholders. The USA concept of shareholder derivative actions could be introduced, whereby the shareholders can bring an action against a director in the name of the company. This would offer the shareholders the opportunity to bring a collective action, with the consequent dilution of the legal costs; and

- directors' duties is one area where case law has worked well and best judged independently by the judiciary rather than by political considerations.

Directors' liabilities

14.5 Closely related to the issue of directors' duties is that of their liability in law. This issue attracted a number of comments:

- the issue of directors' liability should be clarified, including that of non-executive directors, for example when they have not breached any rules personally, but their executive director colleagues on the board have done so;

- present penalties, eg section 221(5) and (6) need sharpening to make directors jointly and severally liable with the company;

- the primary responsibility (and penalty) should rest with the directors, not with the company since companies can do little without the authority of the directors;

- shareholders should be able to sue directors for negligence or incompetence - they cannot at present since directors' duties are owed solely to the company. A shareholder can issue a summons once a company is in liquidation but by this time it is often too late; and

- despite frequent statements emphasising that the primary responsibility for preventing and detecting fraud rests with the directors, the public perception is that it is the auditors who are responsible for detecting fraud and, in addition, that the mere fact that an audit is to be undertaken will act as a deterrent. Those perceptions are misplaced. No specific legal obligations are placed upon any party to prevent and/or detect fraud and those best placed to prevent and/or detect fraud are those within the company themselves. Directors must develop a strategy to combat fraud and accept the responsibilities associated with limited liability.

Directors’ competence

14.6 A number of responses addressed the specific question of the abilities that a company director needed to possess. The comments on this topic were as follows:

- a requirement for directors to undertake training on company law, the responsibilities of a director and on running a business before they become directors should be considered;

- there should be a legal requirement for all directors to demonstrate some minimal level of competency - a "driving test" for company directors. In the case of existing companies, directors could either be required to pass such a test or comply with a requirement to appoint a suitably qualified company secretary;

- the Review could usefully address what part the Act might play in raising the level of competence of directors. While the law acknowledges that a person can be ruled 'unfit' to be a director of a company, it does not set any positive test of fitness which a person should be required to pass in order to qualify for appointment. Neither does it oblige directors to familiarise themselves with their legal responsibilities. Combined with the ease with which private companies may be incorporated, these factors have led to legitimate concerns about the overall standard of directors' conduct. While, at the top end of the size scale, the need to inspire market confidence in the composition of the board motivates larger companies to achieve high standards of conduct, that same pressure does not exist among small, owner-managed companies. There is scope for much improvement at this level. In

this respect, abolition of the annual audit has not helped. Although the purpose of the statutory audit is not to ensure that directors are complying with the range of their duties under the law, it does provide a valuable opportunity for an independent expert to review directors' actions over the reporting period; and

- directors of plcs should be required by law to disclose their criminal convictions in any prospectus raising money issued by a plc.

Directors’ pay

14.7 The Consultation Paper noted that directors’ pay continues to be a controversial issue and indicated that the Review provided an opportunity to examine the responsibilities of shareholders in this area. Against this background it is not surprising that a number of respondents focused on this particular issue. The majority view to emerge from the comment was that there was a strong case for greater shareholder control over directors’ pay. One respondent commented that shareholders should be given direct control over directors remuneration arguing that the experiment with disclosure and remuneration committees comprising non-executive directors had signally failed to douse public controversy, link pay to performance and ensure that boardroom pay rises did not inflame pay inflation in the economy. Those who paid the price were the ultimate beneficiaries of the funds invested by institutions, while other costs were imposed indirectly through the impact on employee morale and short term incentives to executives which distorted business objectives. This respondent suggested that the disclosure format should be improved and shareholder authorisation introduced, and that the remuneration section of the annual report and accounts should be subject to shareholder approval.

14.8 The concept that shareholders should vote on remuneration packages was supported by a range of commentators, while one argued that submitting the board's report on remuneration to a shareholder vote at the AGM would enable shareholders to provide the company with formal feedback on its remuneration policy (although it thought that the pay of individual directors should not be put to a vote - it was the responsibility of the remuneration committee members, as fully independent non-executive directors, to set a suitable policy and to be accountable for that policy to the board and to shareholders. Shareholders could remove non-executive directors on remuneration committees who failed in their responsibility to set appropriate levels of executive pay).

14.9 The thought that the reports of remuneration committees (but not the remuneration of individual directors) should be voted upon separately at AGMs was also supported on the basis that voting against the whole of the reports and accounts would be heavy handed and inappropriate. Related thoughts were that remuneration committees should be elected by shareholders, that remuneration advisers should be independent of any other professional organisation which had a fee-based relationship with the company, and all plcs should be required to list all their advisers, including compensation consultants, and state whether or not the company's advisers also advised the remuneration and audit committees. Other, more detailed, points on this issue were that compensation to directors for loss of office should be subject to shareholder approval but without the exemptions currently provided for in section

316(3) of the Act, and in respect of subsidiaries, it should be the shareholders and not the holding company who approved compensation to directors for loss of office. Finally, one commentator pointed out that some companies, when amending their articles of association, included a provision increasing the directors' remuneration [or at least their maximum remuneration] with the effect that a shareholder could only vote on the amendments as a whole, which posed a problem if all the other amendments were desirable.

14.10 Only three respondents expressed a dissenting voice. One argued that remedies were available to shareholders in the form of voting against the appointment or re-election of directors, that means would be found to avoid legislative requirements on shareholder approval and that their introduction would prompt managers to avoid taking the title of director. Another contended that institutional investors should not be forced to vote on the pay of individual directors and neither should legislation on directors’ pay be introduced. The third thought that shareholders control over directors' pay should not be a matter for the Review, but left as a matter for directors and the company to resolve.

Directors - other issues

14.11 A range of other detailed points relating to directors were made by respondents:

- there should be a requirement for resigning directors to make a statement of the reasons for their resignation in a manner similar to the current requirement on auditors in section 394 of the Act. Its value might be enhanced by its having to be made on oath;

- directors should be re-elected in a way that relates to their contract with the company. Directors should be required to face regular re-election and directors over 70 should be required to face annual re-election. The requirement that all directors retire by rotation should be codified and not left to the discretion of the individual company ;

- directors of companies in liquidation or compulsory receivership should be prevented from being directors of other companies for a defined period, eg 3-5 years;

- the law was not always clear as to whether the term 'director' included 'shadow director' or not. Wherever shadow directors were included this should be made explicit by stating 'directors and shadow directors'. The word 'directors' would therefore mean directors and not shadow directors;

- section 389A (on the rights of auditors to a company’s information) does not require directors to volunteer information and explanations which they consider necessary to auditors for the performance of their duties (it only requires directors to provide information when requested by the auditors). It also does not extend to providing information and explanations to those acting in capacities other than auditors, eg reporting accountants;

- compliance with relevant Accounting Standards should be obligatory. The Act only requires that it should be stated whether the accounts have been prepared in accordance with applicable accounting standards and that any material departure from them should be given;

- many directors find the provisions dealing with the legality and disclosure of directors' transactions very confusing;

- Part II of Schedule 6 relating to loans, quasi loans and other dealings in favour of directors should be recast in a way which would make for simpler interpretation and practical application. Paragraphs 20 and 21 of the Schedule are particular instances of provisions which give rise to problems of interpretation; and

- the Review should assess whether it is still appropriate for the law to allow directors (and company secretaries) to be limited companies themselves. Given the Act's provisions regarding the recording by companies of information on such persons (and, in the case of secretaries, their professional qualifications), it is illogical that legal persons can be appointed and the practice offers scope for abuse.

Corporate governance - other issues

15.1 The Consultation Paper identified the relationship between company law and corporate governance as a major issue for the Review, commenting that in general the issues dealt with under the combined voluntary code introduced following the Hampel report were more suitable for best practice than for legislation. It did, however, recognise that there may be a need for legislation in certain areas, especially those not covered by the new Code or those where experience showed that some legal underpinning was necessary (paragraphs 3.5-3.8).

15.2 The majority of those who commented on corporate governance issues focused on directors' duties or directors' pay. Those who commented more generally under this heading tended to support the view that corporate governance was an issue that should be left to codes of practice and that there were few areas which should be prescribed under legislation. Points made in support of this approach were: that best practice both had the potential to bring about major improvements in corporate governance and was more flexible than legislation and thus should not be replaced by legal rules, which would reduce flexibility and might lead to a culture of passive "box ticking" with no real improvement in the standards of corporate governance; and that best practice was an evolving process, which should be allowed to develop freely, enabling improvements to emerge, while in a legislated environment companies would strive to comply with the letter of the law rather than the spirit of good governance. One commentator supported the argument that the pursuit of best practice by companies and their shareholders had the potential to produce significant improvements in UK corporate governance by pointing to the recent responses of shareholders to remuneration policies and other boardroom issues at Granada and First Leisure. It contended that companies often consult shareholders and shareholder representative bodies on a variety of sensitive issues which enabled them to resolve problems so that when proposals come into the public domain they did not attract disproportionate damaging criticism. Only one commentator expressed a dissenting view,

contending that it was questionable whether best practice was the most appropriate method for regulating corporate governance, pointing to the fact that the impetus for the development of best practice was the incidence of scandals which risked market confidence. This respondent thought that the regulation of corporate governance was the proper role of Government and that greater effort should be made to ascertain which principles were, and which were not, suitable for legal regulation. The appropriate sanctions for breaches of that legal regulation could then be devised, potentially to include criminal law sanctions which were inherently outside the scope of a self-regulatory system. The proliferation of "soft law" should be avoided. Part of the problem with UK company law was its increased fragmentation which would be encouraged by greater use of codes of practice.

15.3 Two other detailed points were made that can usefully be categorised under the general governance heading: that political donations by companies could be made subject to shareholder approval which, of course, anticipated the recommendation since made by the Neill Committee on Standards in Public Life, and that it should not be permissible for directors to vote on matters in which they have a material interest.

The structure of a company

16.1 Apart from the large number of responses on issues relating to directors dealt with in section 14 above, there were few comments on the other major components of a company's structure. There were two comments on boards, one arguing that a two-tier board - supervisory and management - along the lines of the German model should be considered and the other taking the opposite line, that two-tier boards lose the advantage of the interplay between directors - who know their own business - and non-executive directors - who are conscious of the wider context. In single-tier boards these two groups learn from each other while in two-tier boards they are confined to what may become ivory towers. There was one comment directly on non-executive directors, to the effect that company law should formally recognise their different roles and responsibilities while one respondent expressed the view that the innovation of requiring companies to have company secretaries has not proved its worth and should be abolished.

Auditors and auditing

17.1 Similarly, there were relatively few respondents that focused on auditors and auditing issues. There were, however, several who emphasised the need to include a reconsideration of the audit function as part of the Review, arguing that although historically the auditor's role has been to consider whether financial statements give a true and fair view, developments within companies for translating accounting data from point of sale to management accounts pointed to the need for consideration as to whether, in addition to expressing an opinion upon the financial statements, auditors should report on the company's compliance with its statements of internal control. Another contended that as auditors formed an essential element of independent verification the scope and purpose of the audit needed careful consideration. This commentator noted that there was currently considerable debate about the role of auditors

covering a range of issues including: their liability and forms of incorporation, the scope of the audit as defined under statute and new areas such as due diligence, auditors' regulatory functions, the verification of non-audit areas such as governance reporting, and environmental and social reviews; the disclosure of non-audit fees, and the concern with maintaining independence and best practice in relation to the audit committee and AGMs. A third went so far as to pose the questions that it saw as needing to be examined: for whom do the auditors provide assurance and to whom do they owe a duty of care, eg the shareholders, the company, other stakeholders, other interested parties; if the auditor's responsibilities extend beyond the shareholders how should conflicts of interest (eg between the shareholders and the employees) be resolved; and to whom should the auditors' report be addressed, eg to the shareholders or to the company itself? Finally, other suggested that the appointment of auditors should be made more independent of the board of directors, with the auditors appointed annually by a specially convened body of shareholders elected on a one shareholder, one vote basis or elected by shareholders generally.

17.2 Two particular issues to emerge from the comments on auditors related to the question of their liability and to the current levels of audit exemptions. On the first, two commentators thought that the Review should assess the continuing appropriateness of the current system of joint and several liability of auditors (and directors) towards the company's shareholders and whether some system of proportionate liability might be more equitable to all parties, including the repeal of section 310 dealing with the exemption of officers and auditors from liability. The comments received on the level of audit exemption were unanimous that it should be considerably increased, to the maximum allowed by the Fourth Company Law Directive. On a related issue, one commentator pointed out that the insistence on the audit requirement for small companies with turnover greater than a certain figure (currently £350,000) had no logical basis. If the exemption was available to all small companies, it would be up to lenders to make audit a condition of their loan if they so decided. Equally, the Inland Revenue could insist on an audit (subject to some appeal procedure) if they distrusted the returns made to them. Audit for small companies would thus be permissive. A by-product of this would be that audit for small companies would be regarded as a benefit rather than, as so often now, a burden.

17.3 In addition, there were a number of more detailed points made on auditors and auditing:

- the regulation of auditors of plcs should be administered by the National Audit Office and not subject to self-regulation by the professional bodies;

- letters of representation from directors of plcs to auditors should be filed at Companies House. In addition, it would be helpful for Companies House to maintain a register of plc auditor changes and the filed resignation letters. There are unlikely to be more than forty per year, so this should not be an onerous requirement, but it would provide valuable market information and often a useful pointer to problems. It would also counter uninformed comments which regard all auditor changes as sinister;

- in order to enhance the clarity and completeness of disclosed audit and non-audit fees, disclosure should be extended to enable users to make a full comparison between the two by giving a description of the nature of the non-audit services provided; and

- section 389A (which makes misleading statements to auditors an offence) should be extended to cover misleading false or deceptive statements made to auditors by the employees of a company in order to close off the opportunity for officers to mislead auditors by arranging for employees to act as their intermediaries. A recent survey suggested that directors and management were responsible for over half of the most serious frauds perpetrated against companies, and that in 80% of cases the fraud involved an employee. This suggests there are inadequate systems in place to prevent fraud at senior levels within companies. Companies should be given an incentive, as well as a responsibility, to take steps to put in place procedures to minimise the risk of fraud. In particular, no obligations are placed on employees to report frauds of which they are aware either to the auditors or to the relevant regulator or prosecuting authority. section 389A, which applies to directors but not to employees, should be extended.

Business names

18.1 Only a handful of respondents commented on this aspect of company law. The points they made were:

- there seemed to be no reason why an application for exemption from the use of the word "limited" in a company name should have to take the form of a statutory declaration. A simple declaration, subject to penalties, would suffice;

- the extensive list of "sensitive" names, the use of which needs to be cleared, could be usefully reduced. Whilst words such as "bank", "trust", "university" and "royal" could be used to mislead and therefore should be subject to some form of restriction, others such as "international", "national", "British", "group" and "holdings" should not;

- there is a need for the equivalent of the Business Names Registry, but one that is constantly updated and readily accessible by the public to counter difficulties that can arise with unincorporated businesses and when companies use trading styles. In the past, instances have been found where the same individuals are directors of a limited company and also partners of a business, both of which are trading in the same activity, and have names identical except for one including "Limited". Such arrangements place third parties at a considerable disadvantage, as it is difficult for them to be confident as to which legal entity is involved in individual transactions. Such dual-status trading should be prohibited unless the trading styles used are sufficiently distinct to avoid the possibility of confusion;

- companies should not be allowed to change names, or transfer assets away from a company, while the subject of legal action; and

- limited liability companies should be required to indicate their status in advertisements, as they are required to do on their business stationery.

<u>Company dissolution, disincorporation, reconstruction</u>

19.1 Although the scope of the Review does not include the Insolvency Acts, its task is to develop a legal framework which covers the requirements for the birth, existence and death of companies (see paragraphs 6.1 and 6.2 of the Consultation Paper). It was thus natural that some responses focused on the expiry of companies rather than their birth or existence. In fact, the majority of the comments that fall under this heading concentrated on the need to review sections 651-658 of the Act, dealing with company dissolution and *bona vacantia* (i.e. assets without an owner and which revert to the Crown). Of particular concern was the use by unscrupulous directors of the voluntary dissolution procedure in sections 652A-F that allows companies to be struck off the register without going through formal insolvency proceedings and without directors' actions being subject to scrutiny. While the procedure was efficient from the company's point of view it could be used to circumvent in-built protections for the public and creditors and from a public interest perspective mechanisms needed to be introduced to ensure proper compliance and to ensure that the names of the directors involved were reported to the appropriate authority so as to identify those who repeatedly use this process as a means of defrauding creditors and of avoiding investigation. In the same context, one commentator pointed out that it was currently legal for a company to be dissolved by the Registrar for, say, an infringement of section 652 and for the directors of the dissolved company to re-register it with exactly the same name thus presenting an appearance of continuity. This practice usually occurred as a result of the initial company not providing the Registrar with accounts within the statutory period. The general public was not able to protect itself against companies which operated on the fringe of legal requirements. The fact that the Registrar published his intent of dissolution in the Gazette did not help the general public. There were two other points made on this part of the Act: first, that dormant companies that do not trade within three years of inception or ceasing to trade should automatically be struck off; and secondly, that public companies should be included in the striking off procedures under section 652A and not have to go through the formal winding-up procedure.

19.2 A number of other points were made that fell under this heading:

- demergers and reconstructions should be dealt with entirely in a separate section within the Act. Currently, section 110 of the Insolvency Act 1986 is commonly used;

- it should be made easier for companies to disincorporate;

- the procedures for schemes of arrangement under Part XIII of the Act could be improved if the court were to have wider powers than at present to deal expressly with matters beyond the summoning of the meeting. In particular, it would be useful for the court to deal with matters such as classes and methods of voting on creditors' schemes at the outset of the procedure rather than leave it to the effective hearing of the petition. A further useful

power would be to allow a court to render valid something which would or might otherwise be rendered invalid as a result of a breach of a term of the relevant legislation;

- concern was expressed at the apparent ease with which so called “phoenix” companies are able to be established, eg through using a member of the same family of a director of a liquidated company; and

- there was a case for a formal system of making inquiries of apparently insolvent companies - it might serve to limit losses to creditors where companies continue trading whilst being hopelessly insolvent, eg by making directors personally liable for losses incurred following such an inquiry .

Groups and subsidiaries

20.1 The application of company law to groups and subsidiaries attracted only a relatively few responses. The thrust of those that were received was that the focus of legislation was predominantly on individual companies, whereas much business activity is conducted through groups of companies, that company law was not well suited to groups, especially where subsidiaries were wholly owned and operated as a division of the group rather than as separate companies in their own right and that it was thus an area ripe for review. It was noted that, in principle, the law looked on a parent company simply as a shareholder, so that, for example, the directors of a subsidiary were meant to act at all times in the interests of the subsidiary itself rather than following the instructions of the parent. In many cases, the law did not correspond to what actually happened. Another commentator, in supporting the case for a re-examination of this area, took the view that current legislation adopted a somewhat inconsistent approach. At one extreme, for accounting purposes, groups were considered as a single entity. At the other extreme, for purposes such as capital maintenance, creditor protection, taxation and determination of profits for distribution, each member of a group was largely considered in isolation. In other areas, a sort of "half way house" prevailed. For example, a subsidiary may not provide financial assistance for the purchase of shares in its parent, but no restriction applied to a parent giving financial assistance for purchases of shares in a subsidiary even though the economic effect and the scope (or lack of it) for abuse may be much the same in both cases. The Review needed to consider the following issues: the responsibilities of a large multinational corporation towards an insolvent subsidiary; where a parent guarantees all debts of a wholly owned subsidiary, the need for that subsidiary to prepare and file separate accounts; how far the accounts of a wholly owned subsidiary can in fact "give a true and fair view"; and whether any profit arising from the sale of an asset to a subsidiary can be regarded as available for distribution?

20.2 On a related, but slightly different theme, a number of respondents argued that the regime for wholly-owned subsidiaries should be simplified. For example, did they need separate memorandum and articles of association, separate company books and separate Companies House filings? It was also suggested that it should be easier to dissolve subsidiaries to reflect changes in business circumstances. Supporting this view one commentator argued that shareholder protection needs far less legislation and the protection of

creditors might be achieved in ways other than the full legal provisions that apply to stand-alone companies and another thought that the present requirement for a group to present not only consolidated financial statements but also financial statements for each subsidiary could be removed while yet another thought there was a case for the relaxation of the restrictions on subsidiaries holding shares in their parent companies, which could usefully be limited to certain types of subsidiaries for certain purposes, eg where the shares are held for bona fide investment purposes. Another commentator thought that this restriction should be amended to allow the holding of shares in its parent by an insurance company as part of its policyholders' funds, with appropriate restrictions on amounts and exercise of voting rights.

20.3 Conversely, a number of respondents argued for greater regulation of subsidiaries, contending that groups of companies should be responsible for the debts owed to creditors of component subsidiary companies. A further commentator put the same point slightly differently, arguing that consideration might be given to whether parent companies should enjoy limited liability for the debts of a wholly owned subsidiary or whether those debts should become the responsibility of the group as a whole and suggested that this might be appropriate where it can be shown that the failure of the subsidiary is due to some default by the parent company in its management of the subsidiary. Finally, the same respondent pointed out that fraud can arise where the structures of groups of companies are complex, diverse or based in a country where the regulatory regime is lax or non-existent and argued that the Review should thus address the issues which such groups give rise to - for example, by requiring a full and proper description of the group and its affairs, including a description of the relationships between the companies in that group, to be contained in its annual report and its annual return to Companies House or by imposing a responsibility upon UK holding companies to impose and manage internal controls within its subsidiaries.

20.4 Finally in this part of the summary, there were two detailed technical points:

- section 224 sets the start of a company's first accounting period as the date of incorporation and section 227 requires a company to prepare group accounts as well as individual accounts. As a consequence, the first accounting period of a group headed by a newly formed parent company may be for a period of less than a year even though its subsidiaries have accounting periods of a year. This presents a problem in the case of a business combination or group reconstruction which is accounted for as a merger under FRS 6 and Schedule 4A to the Act. It would be a help if the requirements were changed to allow the consolidated profit and loss account of a newly formed parent company to cover a period of a year in respect of subsidiary undertakings being dealt with by the merger method of accounting, even though the individual profit and loss account of the parent company may cover a period of less than a year; and

- section 230 provides that a company's own profit and loss account may be omitted from its filed annual accounts if it is required to prepare group accounts in accordance with the Act. It would be helpful if the provisions of section 230 could be extended to cases where the company is not required to, but does, prepare group accounts as part of its statutory accounts, since it is not uncommon for companies voluntarily to prepare group accounts.

Enforcement issues

21.1 The Consultation Paper recognised that the Review would need to address questions of sanctions and enforcement, noting that the current arrangements are complex, with responsibility shared between the Department and a variety of other agencies (see paragraphs 6.3 and 6.4). Against this background, surprisingly few commentators addressed this particular set of issues. Of those that did, one agreed that at present there were many cases of overlapping regulations and codes enforced by different bodies and argued that there would need be clear responsibilities for enforcing any new legislation. Another thought that a body should be established to enforce the prescribed sanctions and impose penalties - i.e. to receive reports of non-compliance, investigate these, initiate any resulting action and impose penalties - similar to the way in which the Occupational Pensions Regulatory Authority operates in relation to pension schemes and also suggested that a clear indication should be given in law of the consequences of non-compliance and of the penalties that would apply. It argued that such penalties should be significant enough to provide an effective deterrent, and that mechanisms should be adopted to ensure that the real value of the penalty amounts is maintained.

21.2 The other issue to be addressed related to dealing with unfit directors. The same respondent argued that it was very easy to become a company director but very difficult to disqualify unfit directors. There was a high level of ignorance by directors, especially of smaller companies, of the actual responsibilities of company directors, and across companies of all sizes there were directors who flouted the requirements of company law both intentionally and unintentionally. The most public of such cases were "phoenix companies" where directors had deliberately used the company vehicle to defraud creditors whilst continuing in business through a different company. It argued that consideration should be given to addressing these problems by: looking at raising barriers to incorporation; requiring a greater financial commitment from directors wishing to incorporate their business as a company, such as increasing the minimum paid up share capital for new companies to at least £1000; requiring compulsory indemnity insurance to be held by directors; creating a robust regulatory framework for directors which would complement legal requirements, including some form of directors' licensing; making directors more accountable in the event of company failure; and making disqualification of directors easier.

EU issues

22.1 The influence of the EU on UK company law and in particular the impact the various EU Directives might have on the Review was another issue which, somewhat surprisingly, attracted relatively little comment. One respondent did make the point that the Review needed to assess the impact of the EU Company Law harmonisation programme, querying whether what was intended to be an engine of change had become an obstacle to progress in that it had prevented the reform of certain anachronistic concepts, as in the case of par value shares, and how and whether it could be re-configured to play a more constructive role in company law reform. A similar point was made by another commentator who argued that the Government should be prepared to have a continuing dialogue with other Member States and the

Commission to ensure that the Review was not inhibited from proposing changes that could not be made because of the constraints of EC Directives and that potential obstacles to reform that arise because of existing EC Directives should not be left until the end of the process. A slightly different note was struck by a third, who contended that UK company law was one with which North American business felt familiar, and which thus gave the UK a competitive advantage over other EU countries whose frameworks are not so familiar so that any move to bring the UK more into line with Europe might weaken this competitive advantage.

22.2 Two other respondents addressed issues relating to the EU. One thought that the implementation of various EU Directives had often gone beyond what is needed to achieve compliance while sometimes the existing law was left unrepealed so that there were in effect two sets of requirements with the same basic purpose, while the other suggested that the UK should participate in the Standing Forum to be set up by the Commission.

Other Issues

23.1 The responses to the Consultation Paper also contained a number of suggestions for change to individual provisions in the Act which cannot be usefully categorised elsewhere:

- the requirement for directors to be specifically authorised under section 80 to allot shares should be reviewed where shareholders had already authorised the creation of unissued share capital;

- under section 130(2) one of the purposes for which the share premium account may be applied is in writing off the expenses of, or a discount allowed on, an issue of debentures or in providing for the premium payable on redemption of debentures. It was illogical to permit the share premium account to be applied in that way as debentures are liabilities and not share capital;

- under section 275 a provision for depreciation or diminution in value or for liabilities and charges is treated as a realised loss. An exception to this rule is, however, made in respect of a provision in respect of a diminution in value of a fixed asset appearing on a revaluation of all the fixed assets or of all the fixed assets other than goodwill. It important that this exemption is confined to a temporary diminution in the value of assets;

- the qualification requirements for company secretaries of public companies in section 286 should be abolished in respect of unquoted companies;

- section 286 should be amended to reflect that fact that the Institute of Cost and Management Accountants is now the Chartered Institute of Management Accountants;

- section 349(4) should be amended to prevent its application to unknowing employees of a company;

- Regulation 4 of the Companies Act 1985 (Disclosure of Remuneration for Non-audit Work) Regulations 1991 exempts small and medium-sized companies entitled to the exemptions in section 246 from disclosing non-audit fees. However, as regards medium-sized companies, the exemptions formerly in section 246 were removed to a new section 246A by regulation 3 of the Companies Act 1985 (Accounts of Small and Medium-sized Companies and Minor Accounting Amendments) Regulations 1997. It would be helpful if an appropriate amendment, referring to section 246A, could be made to regulation 4 of the 1991 Regulations;

- the NAO should be allowed to act as auditor for incorporated companies that are either public sector bodies or the subsidiaries of such bodies. Because of provisions of section 25 of the 1989 Act, the C&AG is not qualified to be such an auditor; and

- the requirement for two directors or a director and a secretary to execute deeds needs relaxing. One or more individual(s) authorised by the Board either by name or by function should be permitted to execute deeds .

Company Law Review Team
November 1998

0109

ANNEX A: LIST OF RESPONSES IN THE ORDER IN WHICH THEY WERE RECEIVED

Name	Date of response	Subjects covered
M&G Investment Management Ltd	4/3/98	Shareholder remedies
Billy French, Student, University of Hull	6/3/98	No substantive comments.
Charlotte Villiers, Senior Lecturer in Commercial Law, University of Glasgow	10/3/98	No substantive comments, though enclosed articles on directors' pay, European business law and corporate governance
Glasgow University Library	13/3/98	No substantive comments.
Garretts	12/3/98	Query on relationship between specific reforms currently in hand and wider Review
Stephenson Harwood	10/3/98	No substantive comments, though enclosed papers on political donations and corporate governance
Fork Truck Association	13/3/98	Registers interest only.
Steven Oliver	17/3/98	Company law relating to charities and housing associations
Jonathan Charkham	12/3/98	Directors' accountability
Simon Pallett, Lecturer in Accounting and Finance, University of Newcastle	16/3/98	Par value of shares, AGM effectiveness, small firms, directors' pay, stakeholder and tax issues
West Midlands Autistic Society	17/3/98	Company law and charities
Top Pay Research Group	17/3/98	Re-election of directors and external remuneration advisers. Enclosed copy of its 1998 Independent Chairman and NED Survey
The Institute of Chartered Accountants of Scotland	18/3/98	No substantive comments.
Ralph Instone	19/3/98	Shareholders' rights
S J Berwin & Co	19/3/98	No substantive comments.
ACAS	19/3/98	No substantive comments.
Law Reform Committee, The General Council of the Bar	20/3/98	Promised a substantive response in due course..

Michael C Nower	20/3/98	Argues that there is no need for a review of company law
Gregory, Rowcliffe & Milners	26/3/98	Directors' compensation for loss of office in subsidiary companies
Jordans	31/3/98	No substantive comments.
John P Lowry, Brunel University	28/3/98	Directors' duties
Chiltern International Services Limited	31/3/98	Language and detail of company law, obsolete provisions and small firms
Federation of Small Businesses	31/3/98 7/4/98 28/4/98 (revised version of 7/4/98 letter)	Small companies and company law; internationalisation
Bona Vacantia Division, The Treasury Solicitor	1/4/98	Reform of sections 651-8 of Companies Act 1985
Professional Enterprise Group plc.	Received 6/4/98	No substantive comments; enclosed promotional literature on Professional Enterprise Group.
Warrener Stewart	7/4/98	No substantive comments.
T D Young & Co	13/4/98	No substantive comments.
Andrew Morton	14/4/98	Shareholders' rights
The Association of Chartered Certified Accountants	14/4/98	Registers interest in the Review and promises substantive comments later.
The Institute of Chartered Secretaries and Administrators	15/4/98	No substantive comments; registers ICSA's interest in the Review
CISCO	15/4/98	Registers interest in the Review and promises substantive comments later
York Place Company Services Limited	15/4/98	No par value shares, best practice and legislation, directors' duties, AGMs and comparative studies
Serious Fraud Office	16/4/98	Registers (limited) interest in Review
Chethams	16/4/98	Lists range of issues, mainly related to corporate governance, not addressed in Consultation Paper
National House-Building Council	24/4/97	Keen to be consulted on any proposals relating to private companies limited by guarantee.

The Hundred Group of Finance Directors	24/4/98	No substantive comments; registers interest in Review
Imperial Tobacco Group plc	24/4/98	In favour of fundamental rethink rather than review of existing controls
Woodhall Park Limited	16/3/98	Non-profit making companies
Douglas Bethlehem	1) 2/4/98 2) 18/5/98	In favour of "one shareholder, one vote"
MSP Secretaries Limited	16/4/98	Filing of shareholder details, single objects clause, review of Table A, company law for small firms, protection against minority interests and impact of IT
Faculty of Advocates	28/4/98	No comments.
Brian G Strand	8/5/98	Supports use of "plain English" and makes 16 proposals for detailed change to law
Railtrack	7/5/98	Voluntary codes vs statute, redrafting Table A, capital maintenance, shareholder communications, transparency, practicality of Review proposals
Charity Commission	12/5/98	Registers interest; no substantive comments
Institute of Business Advisers	12/5/98	No substantive comments
Learning at Work Division, Department for Education and Employment	8/5/98	Use of annual reports to indicate companies' investment in training
Professor R H Gray, University of Dundee	8/5/98	Control and accountability of directors, social and environmental accountability, corporate governance
Standard Life plc	13/5/98	corporate governance, directors' duties, legislative flexibility
Peter G Willoughby	14/5/98	Simple form of incorporation for small firms; enclosed copy of paper "Offshore Trusts and Companies: A Consumer's Guide"
John Brady	18/5/98	Promises substantive comments later
Shakespeares	20/5/98	Need for radical approach, Co-operatives and Industrial and Provident Societies legislation, revision of Table A, use of plain English, distinct regimes for public and private companies

SmithKline Beecham	22/5/98	Reducing regulatory burden, globalisation of business
Lazard Asset Management Ltd	28/5/98	Simplification of law for subsidiaries
Federation of Private Resident's Associations	29/5/98	Simplification of law for resident-owned freeholder companies
Association of Corporate Trustees	1/6/98	Rights of nominee shareholders and reform of s375
Watts Gregory & Daniel	28/5/98	Small private firms
K S V Thorogood	3/6/98	Dissolution under s652 and phoenix companies
Institute of Chartered Accountants in Ireland	5/6/98	Relationship between GB and Northern Irish company law
UK Company Formations Ltd	9/6/98	Simplification of incorporation and other administrative arrangements
Ian Snaith, Solicitor, Law Faculty, Leicester University	8/6/98	Scope of company law; small firms; globalisation; corporate governance; civil vs criminal remedies
Institute of Directors	12/6/98	Underlying precepts for successful review
HM Land Registry	8/6/98	Collection and publication of company information
Roger Warren Evans	10/6/98	Case for an approach to company law reform that retains essential elements of "Victorian settlement" and increases "public interest" regulatory scrutiny
Institute of Chartered Accountants in England & Wales	11/6/98	Reduction of duplication of law following implementation of EU Directives
New Economics Foundation	11/6/98	Social and environmental performance of companies
Farrer & Co	12/6/98	Non-profit making companies
KPMG	15/6/98	Globalisation; accessibility of company law
North West Chambers of Commerce	11/6/98	Lists issues covered by the Consultation Document
Better Regulation Task Force	18/6/98	Enumerates the Task Force's high-level principles of regulation; supports focus on small firms
ProShare (UK) Ltd	16/6/98	Shareholder information, corporate governance, AGMs
Institute of Chartered Secretaries and Administrators	16/6/98	accessibility of company law; forms of business association; continuing review of company law

NFU Mutual Insurance Society Ltd	17/6/98	Need for change to company law to keep in step with building society and industrial and provident society law on conversion
Hadfields	18/6/98	Audit thresholds for SMEs
Ernst and Young	19/6/98	Relationship of company and other law; corporate governance and directors' duties; groups; statute and case law
Auditing Practices Board	19/6/98, 22/10/98	Role and responsibility of auditors; the annual report; shareholder communications; corporate governance; fraud
Trust Research Services Ltd	19/6/98	Need for amendment to s430 and 654; need to retain provisions re date member became or ceased to be a shareholder
Mid Yorkshire Chamber of Commerce and Industry Ltd	22/6/98	Need to review insolvency and partnership legislation and for balance re directors' duties
Institute of Chartered Accountants of Scotland	22/6/98	the public interest; need for segmentation of company law; responsibilities of directors and auditors; capital maintenance; groups; electronic communications; enforcement and sanctions; rogue directors
Charlotte Villiers, Senior Lecturer in Commercial Law, University of Glasgow	22/6/98	structure of the law; directors' duties; disclosure rules; AGM; EU Directives
Financial Services Authority	23/6/98	Indicates interest and willingness to participate
Institute of Financial Accountants	23/6/98	New framework for companies
Professor John Birds, Head of Law Department, University of Sheffield	Undated	Need to consider different legal codes for different types of enterprise
3i plc	24/6/98	
Kingston Smith	24/6/98	No par value shares; register of members; directors' duties; codification; SME thresholds; proportional liability;
Seddon (Stoke) Ltd, for National Federation of Builders	24/6/98	Directors' duties; directors' pay; globalisation; accessibility

UK Shareholders' Association	24/6/98	Terms of reference
Institute of Credit Management	24/6/98	LLPs; small firms; enforcement and investigation; creditor protection
K B Stone	24/6/98	Partnerships; indebtedness reporting
S W Blunt	25/6/98	Accessibility; company typology; terms of reference
Labour Finance & Industry Group/Society of Labour Lawyers	24/6/98	Small firms; stakeholder issues; role of auditors; terms of reference
John Kaler, Business School, University of Plymouth	26/6/98	Corporate governance; different company vehicles; need to genuine consultation
Martin Simons Associates	27/6/98	Shareholder communications
Business Continuity Institute	28/6/98	Business continuity provisions should be part of law
Southern Derbyshire Chamber of Commerce, Training and Enterprise Ltd	25/6/98	Director training; phoenix directors
British Bankers' Association	25/6/98	Accessibility; LLPs; directors' duties; memorandum and articles of association; financial assistance; registration of charges
Abbey National plc	25/6/98	Terms of reference and scope of Review; reasons for incorporation; electronic communication; npv shares; corporate governance; simplification
Professor Thomas Clarke, Leeds Business School	26/6/98	Stakeholder issues
NatWest Group	26/6/98	No substantive comments
Law Society	26/6/98	Accessibility; financial assistance; corporate governance; stakeholder issues; scope of Review; structure of legislation
Clifford Chance	26/6/98	A further copy of 99
Dibb Lupton Alsop	26/6/98	Reports on results of survey of Yorkshire's top 500 companies on aspects of Consultative Document
Institute of Company Accountants	26/6/98	Electronic communication; self-regulation and law; directors' duties; directors' pay
I-Vote Limited	26/6/98	Electronic communication; publication of shareholder votes
Chartered Institute of Management Accountants	26/6/98	No substantive comments

Securities Institute	26/6/98	Shareholder rights; financial assistance
Professor Christine Mallin, Nottingham Trent University	26/6/98	AGM and shareholder communications; shareholder voting; corporate governance and small firms
Coopers & Lybrand	29/6/98	Terms of reference; need for pragmatic approach; codification of basis principles; roles of shareholders etc in corporate governance; regulation to meet commercial needs; need to avoid regulatory duplication; accessibility
Gartmore Investment Management plc	29/6/98	Self-regulation and the law; accessibility; objects clause; electronic communications; directors' duties; AGMs; directors' pay
Foreign & Colonial Management Ltd	29/6/98	Shareholder communication; corporate governance
Pannell Kerr Forster	29/6/98	EU perspective; CH filings; not for profits companies; small and medium firms; capital maintenance; abbreviated accounts; audit exemption; subsidiaries; tax; reporting financial performance; shadow directors
Kenneth Lavanchy, Chartered Secretary in Public Finance	29/6/98	Changes to sections 12 and 30; need to review Companies Clause Consolidation Act 1845
Association of Chartered Certified Accountants	29/6/98	Limited liability and consumer protection; minimum capital requirements; directors' duties and responsibilities; structure of law; company reporting and disclosure; scope of Review; electronic communications
Grant Thornton	29/6/98	Small firms; accessibility; scope of Review; structure and format of new legislation
Richard Brandt, Research Fellow, Portsmouth Business School, University of Portsmouth	29/6/98	Directors' duties; public interest companies; small firms; auditor regulation
CISCO	29/6/98	Role of small quoted company; corporate governance; directors' duties; scope of Review
Analytical Solutions	29/6/98	Scope of Review; corporate governance

Andrew Hicks, Senior Lecturer, Faculty of Law, University of Exeter	29/6/98	Small firms
John Faulder	30/6/98	Small firms; objects clauses; LLPs; globalisation
Association of Investment Trust Companies	30/6/98	No substantive comments
National Association of Pension Funds Ltd	30/6/98	Table A; corporate governance; AGMs; shareholder communications and voting
Garretts	30/6/98	Scope of Review; small firms; directors' duties; capital maintenance; financial assistance
Industrial Society	30/6/98	Corporate governance; company reporting and disclosure
British Chambers of Commerce	26/6/98 8/7/98	Need for radical review; accessibility; small firms; scope of Review
Deloitte & Touche	25/6/98	Globalisation; simplification; corporate governance; small firms; AGMs; electronic communications; investigation and enforcement; shareholder remedies; accessibility; auditor regulation
Commission on the Future of Multi-Ethnic Britain	30/6/98	Inclusion of equal access measures for all ethnic groups in disclosure provisions
Norwich Union Investment Management Ltd	30/6/98	Corporate governance; AGMs; electronic communication; directors' duties; accounting standards; minority shareholders
Qui Credit Assessment Ltd	29/6/98	Company names; company reporting and disclosure; share capital; plcs; par value shares; charges; oversea companies; share transfers
G L B Pitt	26/6/98	Company reporting and disclosure; directors' pay
Osborne Clarke	Undated	Table A; resolutions; share buy-backs; financial assistance
Investor Relations Society	30/6/98	Corporate governance; electronic communication; AGM; auditors; globalisation
Barclays Global Investors Ltd	30/6/98	Corporate governance; financial assistance; electronic communications; AGMs; directors' pay

Railway Pension Investments Ltd	30/6/98	Corporate governance; directors' duties; AGMs; directors' pay; disclosure of interests; pre-emption rights
Arthur Andersen	30/6/98	Electronic communication; small firms; structure of company law
Institutional Fund Managers' Association	30/6/98	Corporate governance; shareholder pre-eminence; disclosure of interests
Music Alliance (Performing Rights Society and Mechanical Copyright Protection Society)	30/6/98	Companies limited by guarantee
Centre for Dispute Resolution	30/6/98	Dispute resolution and Table A
Laird Group	30/6/98	Objects clause; directors' duties; AGMs; annual reports; LLPs; charities
London International Insurance and Reinsurance Market Association	29/6/98	No substantive comment
Hermes Pensions Management Ltd	30/6/98	Corporate governance; directors' duties; AGMs; electronic communications; directors' pay
National Council for Voluntary Organisations	30/6/98	Not for profit companies
Alliance of Independent Retailers	26/6/98	No substantive comment
Price Waterhouse	30/6/98	International harmonisation of reporting and disclosure provisions; responsibilities of directors, auditors and other professionals
Institutional Shareholder Services Ltd	2/7/98	Corporate governance
Investigations and Prosecutions Working Party, Fraud Advisory Panel	2/7/98	
Association of British Insurers	3/7/98	simplification; corporate governance; directors' duties; sanctions and enforcement

Music Publishers Association	3/7/98	No substantive comment
Scope	3/7/98	Charitable companies
Pensions Investment Research Consultants Ltd	3/7/98	Importance of enterprise and accountability; role of auditors; purpose of the company; duties towards employees; AGM; directors' pay; shareholder voting
Barclays plc	1/7/98	scope of Review and terms of reference; range of issues relating to shares and shareholding
Management and Investment Services Pty Ltd	29/6/98	stakeholders and the role and balance of power of self- regulation and statute
Thomas Clarke, Professor of Corporate Governance, Leeds Business School	25/6/98	the stakeholder corporation [response covers copy of journal devoted to this issue]
Confederation of British Industry	6/7/98	Economic and commercial basis of company law; sanctions and enforcement; directors' duties; flexibility; social objectives; small firms; Review terms of reference
Law Reform Committee, General Council of the Bar	7/7/98	Protection against misfeasance; powers of court relating to Schemes of Arrangement (with creditors) under Part XIII ; use of secondary legislation
Stephen Copp, School of Finance and Law, Bournemouth University	8/7/98	the need for the Review; complexity of company law; obsolescent and ineffective provisions; corporate governance; scope of Review
Reuters Ltd	8/7/98	accessibility; harmonisation with EU law; competitiveness re other jurisdictions; globalisation; form and content of accounts; share buybacks; accounting for goodwill; international accounting standards; pre-emption rights; financial assistance
Professor David Sugarman	11/7/98	need for radical Review; implications of reform of civil justice; accessibility; empirical research; continuing oversight of company law; EU perspective; electronic communication; limited liability; directors' duties; scope of Review; self regulation and the law

Plain English Campaign	13/7/98	accessibility; comparative studies
Construction Confederation	undated; received 17/7/98	small firms; stakeholders; directors' pay; accessibility
The Chartered Insurance Institute	15/7/98	ultra vires rule; small firms; LLPs; accessibility; electronic communication; directors' duties; AGMs; directors' pay
The Solicitor, The Crown Estate	24/7/98	Tenants' management companies
Howard Jones	28/7/98	Registration of a company's insurers with Companies House
Accounting Standards Board	28/8/98	Accounting regulation and standards; effect on small firms
Local Government Competition and Quality Division, Department of the Environment Transport and the Regions (DETR)	7/9/98	Register interest in the Review and impact on local authorities, especially corporate governance and directors' duties
F A G Kay	10/9/98, 27/9/98, 7/10/98	Directors, company secretaries, powers of members, AGMs, Share capital, Resolutions, Table A, Statutory Declarations, Annual Returns
M L S Passey	14/9/98	Shareholder registers, duties and training of directors, directors pay, directors' accountability, AGMs, Shareholder communications

ANNEX B: ALPHABETICAL LIST OF RESPONSES

Name
3i plc
Abbey National plc
ACAS
Accounting Standards Board
Alliance of Independent Retailers
Analytical Solutions
Arthur Anderson
Association of British Insurers
Association of Chartered Certified Accountants
Association of Corporate Trustees
Association of Investment Trust Companies
Auditing Practices Board
Barclays Global Investors Ltd
Barclays plc
S J Berwin & Co
Douglas Bethlehem
Better Regulation Task Force
Professor John Birds, Head of Law Department, University of Sheffield
S W Blunt
John Brady
Richard Brandt, Research Fellow, Portsmouth Business School, University of Portsmouth
British Bankers' Association
British Chambers of Commerce
Business Continuity Institute
Centre for Dispute Resolution
Jonathan Charkham
Charity Commission
Chartered Institute of Management Accountants
Chartered Insurance Institute
Chethams
Chiltern International Services Limited
CISCO
Professor Thomas Clarke, Leeds Business School
Clifford Chance
Commission on the Future of Multi-Ethnic Britain
Confederation of British Industry
Construction Confederation
Coopers & Lybrand

Stephen Copp, School of Finance and Law, Bournemouth University
Crown Estate
Deloitte & Touche
Learning at Work Division, Department for Education and Employment
Department of the Environment Transport and the Regions (DETR)
Dibb Lupton Alsop
Ernst and Young
Roger Warren Evans
Faculty of Advocates
Farrer & Co
John Faulder
Federation of Private Residents' Associations
Federation of Small Businesses
Financial Services Authority
Foreign & Colonial Management Ltd
Fork Truck Association
Fraud Advisory Panel
Billy French
Garretts
Gartmore Investment Management plc
Glasgow University Library
Grant Thornton
Professor R H Gray, University of Dundee
Gregory, Rowcliffe & Milners (solicitors)
Hadfields
Hermes Pensions Management Ltd
Andrew Hicks, Senior Lecturer, Faculty of Law, University of Exeter
HM Land Registry
Hundred Group of Finance Directors
Imperial Tobacco Group plc
Industrial Society
Institute of Business Advisers
Institute of Chartered Accountants in England & Wales
Institute of Chartered Accountants in Ireland
Institute of Chartered Accountants of Scotland
Institute of Chartered Secretaries and Administrators
Institute of Company Accountants
Institute of Credit Management
Institute of Directors
Institute of Financial Accountants
Institutional Fund Managers' Association
Institutional Shareholder Services Ltd

Ralph Instone
Investor Relations Society
I-Vote Limited
Howard Jones
Jordans
John Kaler, Business School, University of Plymouth
F A G Kay
Kingston Smith
KPMG
Labour Finance & Industry Group
Laird Group
Kenneth Lavanchy
Law Reform Committee, The General Council of the Bar
Law Society
Lazard Asset Management Ltd
London International Insurance and Reinsurance Market Association
John P Lowry, Brunel University
M&G Investment Management Ltd
Professor Christine Mallin, Nottingham Trent University
Management and Investment Services Pty Ltd
Mid Yorkshire Chamber of Commerce and Industry Ltd
Andrew Morton
MSP Secretaries Limited (Chartered Secretaries)
Music Alliance (Performing Rights Society and Mechanical Copyright Protection Society)
Music Publishers Association
National Association of Pension Funds Ltd
National Council for Voluntary Organisations
National Federation of Builders
National House-Building Council
NatWest Group
New Economics Foundation
NFU Mutual Insurance Society Ltd
North West Chambers of Commerce
Norwich Union Investment Management Ltd
Michael C Nower
Steven Oliver
Osborne Clarke
Simon Pallett, Lecturer in Accounting and Finance, University of Newcastle
Pannell Kerr Forster
M L S Passey
Pensions Investment Research Consultants Ltd

G L B Pitt
Plain English Campaign
Price Waterhouse
Professional Enterprise Group plc.
ProShare (UK) Ltd
Qui Credit Assessment Ltd
Railtrack
Railway Pension Investments Ltd
Reuters Ltd
Scope
Securities Institute
Seddon (Stoke) Ltd
Serious Fraud Office
Shakespeares Solicitors
Martin Simons Associates
SmithKline Beecham
Ian Snaith, Solicitor, Law Faculty, Leicester University
Society of Labour Lawyers
Southern Derbyshire Chamber of Commerce, Training and Enterprise Ltd
Standard Life plc
K B Stone
Brian G Strand
Stephenson Harwood
Professor David Sugarman, Department of Law, Lancaster University
K S V Thorogood
Top Pay Research Group
Bona Vacantia Division, The Treasury Solicitor
Trust Research Services Ltd
UK Company Formations Ltd
UK Shareholders' Association
Charlotte Villiers, Senior Lecturer in Commercial Law, University of Glasgow
Warrener Stewart (Chartered Accountants)
Watts Gregory & Daniel
West Midlands Autistic Society
Peter G Willoughby
Woodhall Park Limited
York Place Company Services Limited
T D Young & Co (Solicitors)

ANNEX C: LIST OF OTHER INPUTS INCLUDED IN THE SUMMARY

A Complaint about effects of section 349.

B Letter to editor from Michael Napier, Investors Chronicle, 6 February 1998

C Informal approach from CIMA

D Complaint on disclosure of limited liability status, forwarded by constituency MP

E Law Society Memorandum no 359, "The Euro:Redemonination of Share Capital", para 42 and Appendix 1

F Informal approach from NAO, May 1998

G Complaint from creditor of dissolved company, forwarded by constituency MP

H Details of complaint forwarded by Companies House

I Complaint from shareholder, forwarded by constituency MP

J Article in the Sunday Telegraph, "Making Sense of Section 430", 14 June 1998

K Details of complaint forwarded by Companies Investigation Branch

L Details of complaint forwarded by Companies Investigation Branch

M Letter from Bennett and Robertson, Solicitors, 20 July 1998

N Letter from Grant Thornton, dated 27 July 1998

O Complaint from company registrar

P Details of complaint forwarded by Companies Investigation Branch

Q Memorandum TECH 7/98 "Improvements to Company Law", the Institute of Chartered Accountants in England and Wales, February 1998

ANNEX D - RESULTS OF DIBB LUPTON ALSOP SURVEY OF YORKSHIRE'S TOP 500 COMPANIES

%age	no opinion	agree	strongly agree	disagree	strongly disagree
Current framework of company law too complex and outdated	6	62	28	4	0
Language used over technical and legalistic	4	63	28	5	0
Capital maintenance rules detailed, increase cost and reduce flexibility	28	47	12	13	0
Process for reduction in capital too complicated and costly	37	37	21	5	0
Directors' duties should take account of the following interests as well as shareholders:					
the wider community	15	33	18	27	6
the environment	10	63	18	6	3
creditors	12	60	9	14	5
employees	1	59	29	6	4
Directors' pay should be subject to shareholder approval	13	26	9	44	8
Directors' duties should be put in statute	14	53	14	18	1
Table A should be rewritten in plain English	4	46	46	4	0
Objects clause should be abolished	15	50	17	15	3
Current company law hinders competitiveness	40	9	3	45	3
Current company law a disincentive to establishing in UK	31	10	3	51	5
UK framework not sufficiently flexible for business needs	39	18	1	38	4

	don't know	always	some-times	rarely	never
Extent of attention paid to objects clause	3	12	19	40	26

	yes	no	no answer	no to previous question
Do you understand concept of par value shares?	81	14	5	-
Do you think it should be abandoned	42	36	8	14

	yes	no	no answer
Does you company hold AGMs?	62	37	1
If wholly-owned subsidiary, sensible to dispense with AGMs?	69	5	26

	reduced	no change	increased	no answer
Should shareholder participation in AGMs be reduced or increased?	3	67	27	4

	yes	no
Is public/private company distinction valid?	78	22

	yes	no	no to above	don't know
If valid, should regulatory burden on small companies be reduced	58	19	22	1

	yes	no
Do you have foreign subsidiaries/ links with foreign companies	60	40

	less restrictive	don't know	more restrictive	same as UK
Is company law of countries in which based more or less restrictive than UK?	20	26	32	22

ANNEX E: TERMS OF REFERENCE PROPOSED IN CONSULTATION PAPER

5.2 The proposed terms of reference for the exercise are as follows:

(i) To consider how core company law can be modernised in order to provide a simple, efficient and cost-effective framework for carrying out business activity which:

- **(a)** permits the maximum amount of freedom and flexibility to those organising and directing the enterprise;
- **(b)** at the same time protects, through regulation where necessary, the interests of those involved with the enterprise, including shareholders, creditors and employees; and
- **(c)** is drafted in clear, concise and unambiguous language which can be readily understood by those involved in business enterprise.

(ii) To consider whether company law, partnership law, and other legislation which establishes a legal form of business activity together provide an adequate choice of legal vehicle for business at all levels.

(iii) To consider the proper relationship between company law and non-statutory standards of corporate behaviour.

(iv) To review the extent to which foreign companies operating in Great Britain should be regulated under British company law.

(v) To make recommendations accordingly.