

9.1 Draft clauses for a future Companies Bill have been prepared covering the formation and status of companies formed under the new legislation together with a number of related provisions. These are included among the clauses, and covered by explanatory notes, set out in Chapter 16. They reflect the proposals in *Company Formation and Capital Maintenance*, modified in the light of responses to that document.

9.2 We recommend that the law should provide for the formation of new companies of each of the types available now – a private company limited by shares or by guarantee; an unlimited private company; and a public company limited by shares. The ability of a single person to form a company, which now applies only in the case of a private company, would be extended to a public company.

9.3 We recommend that the law should specify the liability of the members when a company of each type is wound up. Otherwise the members would have no liability for the company's debts. (The present law starts from the proposition that the liability of the members is *unlimited* on a winding up, and then limits it. But the end result is the same.)

9.4 We recommend that companies formed under the new legislation should not have a separate memorandum and articles of association. Instead, the constitution should be in a single document. When the founder members (in present terminology, the subscribers to the memorandum) apply to form a company, they would have to deliver to the Registrar the proposed constitution, along with additional information set out in the Act. This would include: the proposed name of the company; whether it is to be situated in England and Wales (or Wales) or Scotland; the address of the registered office; details of the share capital (or guarantee); the names of the founder members; and details of the first directors and of the secretary if there is to be one. There should be a power for the Secretary of State to vary by order the information required. Apart from the move away from the separate memorandum and articles, there would be

one significant change from the present law. The details of share capital given by companies with shares would no longer be of authorised share capital – a concept which would disappear from the statute – but of the share capital to be allotted to members on formation.

9.5 This information would have to be accompanied by a formal statement by a director or secretary that the material delivered met the legal requirements, and that the company was formed for a lawful purpose. This would replace the requirement in the present law for a statutory declaration. The directors and secretary would have to confirm their agreement to serve as such, and the directors would also have to confirm that they had read the new statement of directors' duties (see Annex C).

9.6 When the Registrar has received this information, and is satisfied that all the statutory requirements are met, it should be his duty to issue a certificate of incorporation. As now, this would be conclusive evidence that a company with the name and other characteristics stated in the certificate had been formed.

9.7 There would be provision for the Secretary of State to prescribe model constitutions for companies of each type (apart from an unlimited company with no share capital). As at present, companies would be free to adopt a model constitution in whole or in part, or to propose a constitution of their own. If a constitution failed to provide for a matter covered in the relevant model constitution, the model constitution would, as in the present law, apply to that matter by default, unless specifically excluded.

9.8 The members of a company would be able to change the constitution by special resolution, but would also be able, if they all agreed, to “entrench” certain provisions by providing that they might only be changed by unanimity, or by a majority higher than the 75 per cent needed for a special resolution. Where the company was formed with its situation as “Wales”, entitling it to deliver certain information in Welsh, it would in future be able by special resolution to change its situation to “England and Wales”. This is not now possible.

9.9 Where a new company is formed as a public company, additional requirements would continue to apply. As well as a certificate of incorporation, a new public company would need a trading certificate before it could commence business or borrow money. To obtain the trading

certificate, it would, as now, have to have an initial share capital equal at least to the “authorised minimum” of £50,000 nominal value, with a quarter of the nominal value and the whole of any premium paid up. These implement requirements of the Second Directive.

9.10 Companies formed under the new legislation would have unlimited capacity. Those doing business with such a company would no longer need to concern themselves with the question whether the company has the capacity to enter into a transaction, whether or not the company has an “objects clause” in its constitution. Provisions would also be included, similar to those in the present law, clarifying the law on when the directors are deemed to have authority to bind the company, or to authorise others to do so. (It is intended that the special position of charitable companies on these two points will be preserved.)

9.11 The clauses on company formation in Chapter 16 are drafted to apply only to companies formed under the new legislation. It will be necessary later to prepare detailed transitional provisions which determine the extent to which these provisions are to apply to companies already in existence when the new legislation enters into force. But we have made clear in *Company Formation and Capital Maintenance* (paragraph 2.15) that we do not intend that such companies should have to re-register under the new legislation.

