



**REFORM OF PARTNERSHIP LAW:
THE ECONOMIC IMPACT**

A Consultation Document

APRIL 2004



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REFORM OF PARTNERSHIP LAW

A CONSULTATION DOCUMENT

**ON THE ECONOMIC IMPACT OF THE LAW
COMMISSIONS' PROPOSALS**

30 April 2004

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REFORM OF PARTNERSHIP LAW

The Government is seeking views on the cost and benefits of potential changes to partnership law. The Government is not reconsulting on the proposals.

What is this all about?

Following consultation, the Law Commission and the Scottish Law Commission published, in November 2003, a joint report recommending reforms to the Partnerships Act 1890 and the Limited Partnerships Act 1907. The Law Commissions have prepared a draft Bill which would replace these Acts.

The aims of the reform are:

- (1) to preserve partnership as a flexible, informal and private business vehicle;
- (2) to encourage continuity of business by facilitating continuity of partnership;
- (3) to preserve mutual trust and good faith as critical components of the relationship between partners; and
- (4) to provide a modern law of partnership based on consistent and straightforward concepts, which are readily understood by advisers and clients alike.

- Specific reforms are recommended on the continuity of the business following changes of partners and the major innovation of conferring legal personality on partnerships, partly as a means to that end is suggested. Reforms are also suggested on the solvent dissolution and the winding up of dissolved partnerships. Other reforms include:
- clarification of what partnership agreements govern and what mechanism for agreement/amendment they may contain;
- the provision of default provisions which would apply unless the partners agreed otherwise (designed with small partnerships in mind);
- reform of the rules on litigation and enforcement of claims against a partnership; and
- reforms in respect of limited partnerships.

The draft Bill also includes a number of other amendments to partnership law (a summary of the recommendations is attached to this paper), and updates the law to make it more accessible for the wide range of users

and their advisers (for example those in business and their legal advisers) who need to refer to it.

What would the effects be for you?

The Government is seeking views on the economic and business costs and benefits of the suggested changes in partnership law. Some questions that we would like you to consider are:

- Do you consider that the reforms of partnership law will benefit your business?
- If so, please let us know how the benefit would arise and try to estimate how much this might be worth per year for your business. For example, are there costs savings that you can identify as a result of the reforms? Would they be one-off or recurring?
- Are there any costs that you might incur if these reforms are made?
- How would such costs arise, how much might they be and would they be one-off or recurring?

Attached with this paper is an initial Regulatory Impact Assessment (RIA) which sets out the main proposals and the background to them. The Government does not seek to make any recommendations but does seek to gather further information on the costs and benefits.

The implications of the proposed reforms will vary from business to business, depending on its structure, arrangements and procedures. We would like you to tell us what you think the implications of the reforms would be for your business. We have also prepared some examples of how the proposals might affect businesses. These examples are not intended to be comprehensive, and some of them may not be applicable to your situation. We hope, nonetheless, that they help you to explore what the implications would be for your business. We encourage you to consider the full list of proposals and not merely the areas for which we have provided an example. If you can identify which aspect of the reform proposals gives rise to potential costs or benefits that would be very helpful.

We will also be talking to a range of partnerships (including small partnerships) to try and estimate costs and benefits of the proposals.

There may also further matters that you would like to raise as a result of these proposals. The Government is interested in your views. Please respond in writing or email to the address at the end of this paper. If you would like to put your views or discuss these issues please contact:

William Murphy
Corporate Law and Governance
Department of Trade and Industry
Bay 4100
1 Victoria Street
London
SW1H 0ET
Tel: 020 7215 0412
Fax: 020 7215 0235
Email: Partnershiplaw@dti.gsi.gov.uk

The closing date for comments is **23 July 2004**.

Where can I get further information?

The initial RIA seeking information on the costs and benefits of the reforms is attached to this paper. Further copies can be obtained from <http://www.dti.gov.uk/consultations/#current> or by telephoning 0870 1502 500 quoting URN 04/966. A summary of the recommendations proposed is attached to this paper. A copy of the text of the full report published jointly by the Law Commission and the Scottish Law Commission (Law Com No 283/Scot Law Com No 192) is available at <http://www.lawcom.gov.uk> or <http://www.scotlawcom.gov.uk>. A summary of the report is attached to this paper and is also available at http://www.dti.gov.uk/cld/partnership_law.html.

INITIAL REGULATORY IMPACT ASSESSMENT ON PROPOSALS TO REFORM PARTNERSHIP LAW

1 Proposal

1.1 To reform the law of partnerships and limited partnerships.

2 Purpose and intended effect

(i) Objective

2.1 The reforms of partnership law are intended to: preserve partnership as a flexible, informal and private business vehicle; encourage continuity of business by facilitating continuity of partnership; preserve mutual trust and good faith as critical components of the relationship between partners; and provide a modern law of partnership based on consistent and straightforward concepts, which are readily understandable by advisers and clients alike.

2.2 The Limited Liability Partnerships Act 2000 created a new form of business vehicle that is not part of these reforms. Limited liability partnerships (LLP's) must be distinguished from limited partnerships (see paragraph 2.6), which are part of these reforms.

2.3 Devolution:

Responsibility for the law on partnerships lies with the Secretary of State for Trade and Industry. The Partnership Act 1890 ("the 1890 Act") and the Limited Partnerships Act 1907 ("the 1907 Act") are reserved areas under the Scottish and Welsh devolution legislation and therefore any resulting changes to the law of partnerships will also apply in Scotland and Wales. In Northern Ireland, matters arising from the reforms would normally be the responsibility of the Northern Ireland Executive Ministers. Whilst the Northern Ireland Assembly and executive are suspended, these functions will be discharged by the Northern Ireland Departments subject to the direction and control of the Secretary of State for Northern Ireland.

(ii) Background

2.4 The 1890 Act sets out the basic structure of partnership law and has remained unchanged in substance for over 100 years. The partners of such partnerships have unlimited liability for the debts and obligations of the partnership. The 1907 Act introduced a second form of partnership, in which the liability of one or more of the partners could be limited, whilst also retaining general partners with unlimited liability.

2.5 The flexibility of partnerships as a business vehicle is reflected in their variety. They can vary widely in size and business use from informal associations of two persons in short-term profit making ventures, to small family businesses, and large professional partnerships with many members and elaborate management structures.

2.6 Since 1987 (when the DTI and the Inland Revenue agreed guidelines on the use of limited partnerships as venture capital funds) the limited partnership has become a useful vehicle for investors who do not wish to take an active role in the management of the investment. The general partner(s) control the fund and have unlimited liability for the partnerships obligations whilst the limited partners are only liable to the extent of their contributions (unless they take part in the management of the business).

2.7 In November 1997 the DTI requested the Law Commission and the Scottish Law Commission to undertake jointly a review of partnership law. The terms of reference were:

To carry out a review of partnership law, with particular reference to: independent legal personality; continuity of business irrespective of change of ownership; simplification of solvent dissolution; a model partnership agreement; and to make recommendations. The review is to be conducted under the present law of partnership; namely the Partnership Act 1890 and the Limited Partnerships Act 1907.

2.8 In September 2000 the two Commissions issued a Joint Consultation Paper on partnership law². The Paper set out proposals for the reform of the 1890 Act. In October 2001 the two Commissions issued a further Joint Consultation Paper on proposals to reform the 1907 Act³. The two Commissions published their Joint Report on partnership law in November 2003⁴.

2.9 The Ministerial Committee on the work of the Law Commissions requires Departments to provide, at least, an interim response within 6 months of publication of the reports. A Regulatory Impact Assessment (RIA) is required for any new legislative proposals. In order to complete a full RIA, it is necessary to seek the views of business.

² Consultation Paper No 159, Discussion Paper No 111, Partnership Law A Joint Consultation Paper, September 2000

³ Consultation Paper No 161, Discussion Paper No 118, Limited Partnerships Act 1907 A Joint Consultation Paper, October 2001

⁴ Partnership Law, Law Com No 283, Scot Law Com No 192, November 2003

Key elements of the proposals

This RIA summarises very briefly the key components of the main proposals for the purpose of identifying the possible economic impacts. Attached at Annex A is a paper giving pointers to areas of partnership law where the proposals will have practical application. Respondents may find this paper useful when assessing the possible economic impacts of the proposals.

2.9 For a full description of the proposals, and the arguments in support of them, readers should refer to the report of the Law Commissions (available at <http://www.lawcom.gov.uk>). The Law Commissions' summary of the report is attached at Annex B. Part XX of the Law Commissions report summarising their recommendations is attached at Annex C.

2.10 The proposals do not include the introduction of a registered partnership. It was argued that registration might have disclosed the identity of partners and their date of joining or leaving or continuing partnership. It could potentially have offered greater certainty as to the status of partners and the duration of a partners liability for partnership debts. It might also have assisted in the ownership and transfer of property and in obtaining recognition of the partnership in foreign jurisdictions. It was also argued that registration would have created bureaucracy and administrative burdens. It could also have been costly and complex.

Continuity

2.11 One of the main aims of the reforms suggested by the Law Commissions is to encourage continuity of business by facilitating continuity of partnership. The current legal position in both England and Wales and Scotland fails adequately to secure this aim.

2.12 In English law, on changes in the membership of a partnership (whether the withdrawal of a partner or the admission of a new partner) the old partnership is technically dissolved. If the remaining partners continue in partnership (with or without additional partners) a new partnership is created. A contractual arrangement between the members of the old partnership and the new partnership is required for the new partnership to continue the old partnership's business. In addition the transfer of an obligation will normally require the consent of the creditors.

2.13 There is serious doubt as to whether a Scottish partnership continues on a change in the composition of the partnership. One view is that, in contrast with English law, partners can agree that a partnership will continue on a change of membership and the

partnership continues. The other view is that even where the partners can agree that a partnership is not to be dissolved on change of membership, any alteration in the composition of the partnership gives rise to a new partnership. On the latter approach the laws in both jurisdictions do not allow continuity of partnership.

2.14 The Law Commissions propose that there should be a presumption in favour of continuity of a partnership with a default rule that, provided two or more partners remained, the partnership should not be dissolved. Instead the outgoing partner could be bought out (after notice of withdrawal). Incoming partners would not be personally liable for the “old” debts but the property of the continuing partnership would be available to pay such debts.

Legal personality

2.15 In terms of legal innovation a major change proposed by the Law Commissions is the adoption of legal personality for English partnerships and the clarification of the legal personality of partnerships in Scotland. In English law a partnership is not an entity separate and distinct from the partners who at any time may compose it. The partnership cannot acquire rights nor can it incur obligations. A partnership also cannot hold property (e.g. buildings). Instead buildings are usually owned by 2 or 3 partners, or a company, on trust for the partnership. It is not always clear whether the buildings are available to satisfy debts of the partnership. The rights and liabilities of a partnership are the collection of the individual rights and liabilities of each of the partners.

2.16 In Scots law a partnership is recognised under the 1890 Act as a legal person distinct from the partners of whom it is composed. It is able to own property, hold rights and assume obligations. It can sue and be sued. It can be a partner in another partnership. It can have a partner in common with another partnership while remaining separate from that partnership, and it can also be its debtor or creditor. It can enter into contracts with its partners, who can thus be creditors or debtors of the partnership. These differences are defined in the 1890 Act.

2.17 The Law Commissions propose that partnerships should have legal personality. They suggest that this would be the clearest way of explaining and understanding the nature of partnership and would reflect the common commercial perception of the nature of partnerships. They also see it as a solution to practical problems, in particular lack of continuity in the partnership on a change of partners. Giving partnerships legal personality would allow them to enter into contracts and hold property. It would also bring a more coherent law between

England and Wales and Scotland, and would be similar to that which has recently been adopted in the USA⁵.

Winding up solvent partnerships

2.18 A second important innovation is the restructuring of rules on winding up the affairs of partnerships. The Law Commissions propose a new mechanism to allow a more speedy and cheaper winding up than at present when there is deadlock between the partners. They suggest that the Court should have power to appoint a partnership liquidator, with powers and duties modelled on those of a liquidator in a members' voluntary winding up of a company, who would proceed either with the sanction of the Court or the unanimous approval of the partners.

Other recommendations

2.19 Other important recommendations include clarifying the nature and content of partnership agreements and default rules for them, new rules on litigation and enforcement of claims against a partnership, setting out a general statement of the duties of partners and a statutory statement that partners should act in good faith.

2.20 There are also recommendations in relation to limited partnerships –where some partners may have limited liability status. (These include requiring disclosure of the limited liability status of some of the partners, and clarifying various aspects of registration which is necessary for such partnerships). The Law Commissions' have also addressed the issue of transitional provisions to allow for the introduction of any new measures.

3 Options

3.1 In order to assess the impact of any proposed reforms it is necessary to look at a range of options. We propose to focus on three options: full implementation of the proposals, implementation of some but not all the proposals and leaving the law unchanged. We do not wish to reopen the very full consultations carried out by the Law Commissions.

Option 1: The reforms of partnership law are implemented in full.

3.2 It would be helpful to have views on the economic benefits, costs and risks of the proposals.

3.3 There may be benefits from each of the specific measures incorporated in the proposals, and it would be helpful for estimates to be

⁵ Revised Uniform Partnership Act (1994)

⁷ Small and Medium-sized Enterprise (SME) Statistics for the UK 2002, August 2003

broken down in respect of each measure. For example, there may be benefits or cost savings for partnerships from:

a). Continuity: Reduced risk of partnerships being dissolved either unintentionally or against the wishes of other partners; or benefits from saving of time in drafting partnership agreements to ensure continuity of business.

b). Legal personality: No need to set up trusts or other arrangements to hold property, or, reduced risk that suitable arrangements are not in place for holding property, and greater consistency between the laws in England and Wales and Scotland.

c). Solvent dissolution: A simpler system for determining distribution of a partnership's assets in a solvent dissolution of the partnership.

3.4 There may also be more general benefits such as greater ease of understanding from having clearer and more accessible rules, or reduced likelihood of litigation (with its uncertainty, delay and cost) because there would be an applicable set of rules in place.

3.5 These examples are only intended as pointers. We would like to hear your views on any significant costs, benefits or risks. These might apply only to certain sizes or types of partnerships, or might apply generally.

3.6 As regards costs of change, it would be helpful to have views on any one-off, as well as recurring, costs of change. These might include:

a. The costs for all partnerships of understanding the new system, and of changing their partnership agreement and drawing up a new one on the new basis;

b. The uncertainty of the introduction of a new system may have costs in addition to any costs attributable to particular reforms.

3.7 In all cases, estimates, which may well be rough, of the scale of such costs would be very helpful.

3.8 The Inland Revenue has confirmed that, following any decisions by Parliament on partnership law, Treasury Ministers currently intend to bring forward any tax legislation necessary to maintain the present policy of generally treating partnerships as transparent for tax purposes.

Option 2: Partial implementation

3.9 From the answers to option 1, it should be clear where the main costs, benefits and risks are expected to arise. In order to assess whether some but not all the reforms proposed should be implemented, it would be helpful to have views on whether it would be possible to separate out the proposals or whether they are inextricably linked. If it would be possible, to what extent could the benefits identified under option 1 be secured by implementation of more limited measures and what would they be? Would there be additional costs or risks?

Option 3: The 1890 Act and 1907 Act remain unchanged.

3.10 As no change would be made, there would obviously be no transitional or recurring costs and no benefits as such. However, **views are invited** on the extent to which the current law is causing practical difficulties, and whether there is a risk that these would increase over time if nothing was done. (The practical difficulties may reflect those identified under option 1 above, such as the difficulty of understanding the rules of partnership law, the continuance of rights and obligations, or the ownership of property).

3.11 Also, are there benefits from retaining the current system which are significant? Are circumstances are likely to change which would affect this assessment?

Business Sectors Affected

4.1 The proposals would affect all business carried on as partnerships.

4.2 At the start of 2002 there were some 568,000⁷ partnerships, with a combined turnover of £137,000 million (excluding VAT). Some 566,000 of those partnerships had less than 50 employees and 340,000 of them were owner-managed with no employees.

4.3 There are 5,940 limited partnerships registered in England and Wales and 4,429 registered in Scotland⁸. English limited partnerships have become the market standard structure for the UK private equity industry and for European venture capital funds. The UK leads Europe in this industry, accounting for 49% of total European venture capital investment in 1998.

4.4 Over the last 10 years limited partnerships have also been used increasingly for property investment. It is estimated that limited partnerships account for some £10bn of property investments⁹.

⁸ as at 31 March 2003, Companies in 2002-2003, Report for the year ended 31 March 2003 presented pursuant to the Companies Act 1985, Section 729, July 2003, DTI

⁹ The Estates Gazette, 9 June 2001.

5 Consultation with small business: The Small Firm's Impact Test

5.1 The proposals would impact significantly on small business given that over 99% of partnerships have fewer than 50 employees and 60% of partnerships are owner managed and have no employees. One of the Law Commissions' core principles in conducting their review was the "think small first" approach to regulation and legislative structure, with a simplified and accessible regime for small business.

Stage 1 Impact Test

5.2 This consultation seeks to gather information from small business in particular. Small businesses and interest groups, wanting to submit information or to have further discussions on the economic and business impact of the options, should contact:

William Murphy
Corporate Law and Governance
Department of Trade and Industry
Bay 4100
1 Victoria Street
London SW1 0ET
Tel: 020 7215 0412
Fax: 020 7215 0235
Email: Partnershiplaw@dti.gsi.gov.uk

The closing date for comments is 23 July 2004.

6 Competition Assessment

6.1 Views are invited on whether under any of the options:

- affect some businesses more than others;
- affect market structure;
- change the number or size of affected businesses;
- lead to higher set-up costs for affected businesses; or
- lead to higher on-going costs,

than at present.

7 Enforcement and Sanctions

7.1 The Law Commissions' recommend that the enforcement and sanctions, for breach of partnership and limited partnership law should be modernised. There would continue to be a range of civil remedies or consequences available through the courts.

8 Monitoring and Review

8.1 Appropriate monitoring and review procedures will be put in place, once **the way forward for the reforms of partnership law have been identified.**

9 Consultation

(i) Within Government

9.1 The DTI has consulted with the Inland Revenue, HM Customs & Excise, HM Treasury, The Department for Enterprise, Trade and Investment in Northern Ireland, The Scottish Executive, the Department for Constitutional Affairs, the Small Business Service, the Insolvency Service and the Law Commissions in preparing this initial RIA.

(ii) Public Consultation

9.2 In September 2000 the two Law Commissions issued a Joint Consultation Paper on partnership law, followed in October 2001, by a Joint Consultation Paper on limited partnership law. 84 responses were received to the partnership law paper and 42 responses were received on the limited partnership law paper. Responses were received from members of the legal profession, academics, accountants, organisations representing business, Government Departments, public bodies and individuals.

9.3 Additionally, the Institute of Advanced Legal Studies organised conferences on the proposals for partnership law and limited partnership law in June 2001 and April 2002 respectively. The Manchester Law Society and Manchester Chamber of Commerce also organised a joint conference on partnership law in December 2001.

10 **Summary and Recommendation**

11.2 The two Law Commissions consulted widely before developing considered changes to the law on partnerships. The Government is not reconsulting on the proposals themselves. Instead, it is seeking information so that full consideration can be given to the business impact, benefits and costs of the Law Commissions' proposals.

POINTERS TO POSSIBLE COSTS AND BENEFITS

1. *The implications of the proposed reforms will vary from business to business, depending on its structure, arrangements and procedures. We would like you to tell us what you think the implications of the reforms would be for your business.*

2. *We have prepared some examples of how the proposals might affect a business. These examples are not intended to be comprehensive, and some of them may not be applicable to your situation. We hope, nonetheless, that they help you to explore what the implications would be for your business.*

3. *We encourage you to consider the full list of proposals and not merely the areas for which we have provided an example.*

Dealing with a partnership

4. If a partnership needs to be sued it would, under the proposals, be possible to sue the partnership in its own name as it now becomes a legal entity, rather than needing to take action against individual partners. Claims could be served at the place of business of the partnership and the partnership's assets could be used in settling such claims. For example, if Anne wants to make a claim against a partnership of builders "Bill and Charles Builders", at present she has to enforce her claim against the individual partners (whose names and addresses have to be given on business letters and so on). If the proposals were adopted, she could sue the partnership as a whole or she could pursue proceedings against the individual partners and former partners who were responsible for the harm that gave rise to the claim.

*Question: Would this be helpful for people dealing with partnership?
What would the business implications be for partnerships?*

Entering into contracts and owning assets

5. Under the proposals a partnership as a legal entity would be able to enter into contracts in its own name. For example, if Anne and Bill are architects in partnership trading under the name “A and B Architects” and want to enter into an agreement with a builder, at the moment Anne and Bill would both be parties to the agreement. Under the proposals the contract could be in the name of “A and B Architects” in the same way as if the partnership were a company. A and B Architects could also open bank accounts and employ staff in its own name. It could also hold property, rather than needing to set up a trust or a nominee company to do so.

6. At the same time, any property that is bought with money or other assets belonging to the partnership would be presumed to be the property of the partnership. In other words partnerships would be treated like companies for these purposes.

*Question: If implemented, would this proposal require you to change your current arrangements (e.g. transfer of existing contracts or property and employment arrangements)? If so, what would be the cost of these changes?
If implemented, would this proposal affect the way you retain your staff and other third party services? For example would you be inclined to change existing employment or other third party contracts? If so, please explain how these changes will benefit your business or give rise to costs.*

Partners’ obligations to a partnership

7. At the moment, partners are jointly liable with one another for the partnership’s debts and obligations. As a general rule, all partners can be jointly sued for payment of the partnership’s debt.

8. It is proposed that partners who have unlimited liability in a partnership should be jointly and severally liable for the whole amount of the debts and obligations of the partnership. For example, Anne, Bill and Charles are in a general partnership as a firm of greengrocers trading under the name “ABC Greengrocers”. The partnership is going through financial difficulties due to poor sales in its stock and as a result has been unable to settle their suppliers’ bills of £2,000 for the last three months. Under the proposals ABC Greengrocers’ suppliers would be

entitled to recover all of the £2,000 outstanding from Anne, Bill or Charles, or from the partnership as a whole.

Question: If implemented, would you be inclined to change your current insurance policy / liability cover or to make changes to your existing partnership arrangement? If so, what would be the cost of these changes?

Continuity of partnerships

9. If you have a partnership comprised of three partners, Anne, Bill and Charles, under existing rules, that partnership will be deemed to have terminated if Anne leaves the partnership or if a new partner is admitted to the partnership. Unless your partnership agreement specifically makes provision for this, this can give rise to problems, such as any existing contracts being with the old partnership and will not bind any incoming partners.

10. In practice, many partnerships conduct their business on the basis that the same partnership continues when one partner leaves or when a new partner joins. It is proposed that, unless otherwise agreed by the partners, the law should change to reflect that commercial practice and provide that a partnership continues when a partner joins a partnership or withdraws from a partnership, provided that there remain at all times at least two partners.

Question: If implemented, would this proposal provide any benefit to your firm? If so, please explain? For example, does your partnership agreement cover what happens if partners leave or if new partners join? Would your firm need to review or make changes to its existing contracts or agreements with other parties, or to the partnership agreement? If so, would there be costs in doing so? For example, would you need legal advice? What would be the benefit of these changes? Will the proposals make any difference to your procedures for the admission or withdrawal (or retirement) of partners in the partnership? If so, please explain.

The rights of an outgoing partner

11. It is proposed that a partnership can agree its own rules for the rights of an outgoing partner, but if it does not make special provision, the partner would have the right not just to his or her share of the assets, but also a share of the goodwill valued on a going concern basis without the participation of the outgoing partner (if this is higher than what would be obtained in a liquidation). The partner would also have the right to be paid interest at a commercial rate on the value of his share from the date of withdrawal. The partner would still be liable for any existing claims against them, but would not be liable for new liabilities of the partnership.

Question: If implemented, would these proposals provide any benefit to your firm? If so, please explain? For example, would it provide some clarity to the relationship between the partners in your firm, or do you already have specific rules about these matters?

If implemented, would this proposal require you to change the current arrangements between the partners in your firm?

If so, please explain whether these changes will give rise to costs or savings? For example, would you need to change your partnership agreement or indemnity / other insurance policies or pay for accountants to value the share of an outgoing partner?

12. Where the valuation of the outgoing partner's share resulted in a sum due by the outgoing partner to the partnership, the outgoing partner should be liable to pay that sum to the partnership.

Question: If implemented, would this proposal provide any benefit to your firm? If so, please explain.

If implemented, would this proposal require you to change the current arrangements between the partners in your firm? If so, please explain whether these changes give rise to costs or savings?

Mechanism for voluntary withdrawal of partners

13. It is also proposed that there should be a set mechanism for the withdrawal of partners from a partnership.

- (a) outgoing partners would have to give at least 8 weeks' notice of resignation.

- (b) each of the remaining partners would then have the right to resign from the partnership by giving not less than two weeks' notice.
- (c) remaining partners will be entitled to break up the partnership at any time if 50% or more of the partners vote to do so.

This withdrawal mechanism will operate unless the parties agree otherwise. Under the proposals, provision is also made for what happens on death or bankruptcy of a partner and would allow a Court to decide a partner should be removed.

Question: If implemented, would these proposals provide any benefit to your firm? If so, please explain.

Would the above proposal require you to change your current arrangements between the partners? If so, please explain whether these changes will give rise to costs or savings.

For example, will the agreement between the partners need to be amended or changed? Will there be any costs that will be incurred in doing so?

Winding up solvent partnerships

14. Currently, partners normally wind up partnerships on dissolution, although it is also possible to ask for a court officer to effect the winding up. Partners retain unlimited liability for the debts of the partnership and are entitled to the distribution of any surplus. It is proposed that a new system for winding up a solvent partnership under court supervision should be established.

Question: If implemented, would this proposal provide a benefit to your firm? If so, please explain? For example would the partners benefit from the involvement of an independent party in the winding up process? Can you estimate what the cost might be from the involvement of an independent party?

Limited partnerships

15. It is proposed that in English law there should be a special limited partnership which does not have separate legal personality. This reason for this partnership is to ensure that the status of an English limited partnership being tax transparent is not threatened in jurisdictions outside the United Kingdom by the introduction of legal personality for such partnerships.

Question: If implemented, would this proposal provide any benefit to your firm? If so, please explain. Would your partnership

be likely to make use of this option and if so why? For example, would the ability to choose the type of partnership to be used for your business result in savings (e.g. savings in administrative, legal or tax costs)? If so, please explain.

Transition to new system

16. It is proposed that the new system would come into effect 2 years after it is put into place. This would mean that after that time the new provisions would apply to all partnerships. (They would be treated as legal persons able to enter into contracts and so on.) The proposals set out “default rules” (such on what happens if a partner wants to leave) which would apply unless a partnership decides to provide otherwise. If a partnership took no action these default rules would have effect.

Question: Would you want to make a new partnership agreement before the new system was introduced? If so, what would the costs of doing this be? For example, would you need legal advice?

Would you need to make changes to existing contracts or agreements? If so, what would the costs be?

PARTNERSHIP LAW

A Joint Report of the Law Commission of England and Wales and the Scottish Law Commission

SUMMARY

Partnership is the simplest form of combination to carry on a business. It arises when two or more people carry on business together with the object of making a profit.

It requires no formalities and no registration. It is very flexible.

Partnerships have existed for many centuries.

The rules of partnership law fall into two parts: external rules, which govern relations between the partnership and those dealing with it (customers, etc); and internal rules which govern relations between the partners themselves.

In 1890 the law of partnership in the United Kingdom was substantially but not completely codified in the Partnership Act. We consider that it is now due for replacement.

Partnership as a legal entity

Under English law partners are agents of each other, but the partnership does not exist as a legal entity. As mutual agents, the partners share unlimited liability for all obligations incurred to other people in the course of the partnership. They also owe each other a duty of good faith (but, provided that they act honestly, they are otherwise free to regulate their affairs between themselves as they wish).

Under Scots law a partnership is a legal entity, but the partners have the same unlimited liability towards those who deal with it, and have the same duty of good faith towards each other, as they would under English law.

We think that it would be much more satisfactory in today's world that a partnership should be a legal entity. In 1890 all partnerships were small concerns. Twenty was the maximum number of partners permitted by the law. That restriction has been removed, and partnerships now vary in size from two to many hundreds. But the framework of partnership law was simply not devised for larger partnerships.

Many people would be astonished to learn that a firm is automatically dissolved whenever there is a change of partner, or that it cannot own property, but that remains the law in England and Wales (although not in Scotland). In practice, firms habitually operate as if they were legal entities and are regarded as entities by those who deal with them. The fact that they are not presently recognised as such by the law is a throw back to the nineteenth century. We believe that it is time to end this anomaly.

The Law Commissions propose that there should be a new Partnerships Act under which partnerships in England and Wales would become legal entities, so that their legal nature would reflect their role in the commercial life of Britain today. Partnerships would be able to enter contracts and hold property; they would not be automatically dissolved on any change of partner; but partners would continue (as in Scotland) to be personally responsible for the obligations of the partnership and would continue to owe duties of good faith to each other. The result would be a largely uniform law of partnership in England, Wales and Scotland.

Legislation will be needed to ensure that this change does not result in any change in the treatment of partnerships under UK tax law. We have received confirmation from the Inland Revenue of its intention that (subject to ministerial approval) the necessary legislation will be included in a Finance Bill.

Need for flexibility

Because of the great difference in size and nature of partnerships, it is vital that partnerships should retain the maximum flexibility in the way they organise themselves. Larger and more sophisticated partnerships have formal partnership agreements, but many small partnerships do not. Small partnerships play an important role in the economy. The 1890 Act contained a number of default provisions, ie provisions which would apply unless the partners agreed otherwise. We have extended this approach in the proposed legislation by providing default clauses which together form a code of government for partnerships that will apply unless the partners choose to vary it (as they are free to do).

“Think small first”

In drafting the default code we have followed a policy of “think small first”. Large partnerships are likely to have their own tailor made agreements. Small partnerships are not. The default code is intended to make life simpler for them by providing a suitable ready made set of rules, which they can change if they wish, and to reduce likelihood of litigation (with its uncertainty, delay and cost) in the event of the partners falling out, because there will be an applicable set of rules in place.

The end of a partnership

The proposed Bill sets out a list of things which will cause the break up of a partnership. There is then a winding up process. If the partnership is solvent, the winding up will normally be carried out by the partners, but there needs to be a simple and cost effective way of resolving differences between partners which may arise at this stage. It is a serious weakness of the present law that the systems for winding up a partnership under the supervision of the court in England and Wales, or through a judicial factor in Scotland, are often cumbersome, slow and costly. We propose that differences between the partners should normally be decided by a majority, but that the court should be able where necessary to appoint a partnership liquidator with powers and duties similar to those of a liquidator of a solvent company. On some particularly important matters the liquidator would require either the agreement of all the partners or the approval of the court. We believe that our proposals should result in a system of solvent winding up which is simple, fair, quick and cost effective. Insolvent partnerships will be wound up under the regime of the Insolvency Act 1986 and the Insolvent Partnerships Order 1994 (or its successor) in England and Wales or the Bankruptcy (Scotland) Act 1985 in Scotland. (The Insolvent Partnerships Order is under separate review).

Special types of partnership

There are two special forms of partnerships: limited partnerships (introduced under the Limited Partnerships Act 1907) and limited liability partnerships (introduced under the Limited Liability Partnerships Act 2000). Although the names sound similar, they are very different.

Limited partnerships

A limited partnership differs from a general partnership in that it includes at least one partner who does not wish to take part in the general management of the firm, but merely to invest in it and whose capital at risk is limited to the amount of his investment. Limited partnerships have become popular in recent years as venture capital funds. The 1907 Act has been criticised for lack of clarity in a number of

areas. The proposed Bill takes account of those matters and would replace the 1907 Act.

Special limited partnerships

We propose that limited partnerships should (like general partnerships) become legal entities, but subject to an exception. Serious concerns have been expressed that giving legal personality to limited partnerships may affect their tax treatment overseas and we therefore propose that in English law those who wish should be able to enter into special limited partnerships which would not have separate legal personality.

Limited liability partnerships

Limited liability partnerships (LLPs) were introduced by the Limited Liability Partnerships Act 2000 in response to worries of professional partnerships about being exposed to unlimited liability for very large professional negligence claims. Despite their name, they are in many ways closer to being limited companies than partnerships and many of the provisions of the Companies Act 1985 apply to them. The limited liability of LLPs comes at the price of regulatory control to which general partnerships are not subject. Because LLPs are a recent statutory creation, they are not part of our Report and proposed Bill.

**Law Commission
Law Com No 283**

**Scottish Law Commission
Scot Law Com No 192**

18 November 2003

**REPORT OF THE LAW COMMISSIONS ON PARTNERSHIP REFORM :
SUMMARY OF RECOMMENDATIONS**

THE DEFINITION OF PARTNERSHIP

20.1 We recommend that a partnership should be defined for the purposes of the draft Bill as “an association formed when two or more persons start to carry on a business together under a partnership agreement”. (Paragraph 4.17; Draft Bill, cl1(2))

20.2 We recommend that the definition of partnership should make it clear that a partnership must be constituted by agreement. That agreement may be express, inferred from conduct or may be partly express and partly inferred from conduct. (Paragraph 4.20; Draft Bill, cls 1(1) and (2) and 76(2))

20.3 We recommend that a partnership should commence when two or more persons start to carry on a business together with the object of making a profit. (Paragraph 4.24; Draft Bill, cl 1(1) and (2))

20.4 We recommend that it should be provided that it is the partners who carry on the business of the partnership. (Paragraph 4.30; Draft Bill, cl 6(1))

20.5 We recommend that it should be provided that the main functions of the partnership are to enter into contracts and own or hold property for the purposes of the partnership business, and (subject to the partnership agreement) to provide continuity for the partnership business despite a change in the partners. (Paragraph 4.32; Draft Bill, cl 6(2))

20.6 We recommend that in the draft Bill “business” should include every trade, profession and occupation. (Paragraph 4.35; Draft Bill, cl 1(6))

20.7 We recommend that there should be a statement that the partnership’s capacity as a legal person is unlimited. (Paragraph 4.42; Draft Bill, cl 7(1))

20.8 We recommend that except so far as is provided by or under any enactment, whether expressly or by necessary implication, a partnership should not be capable of committing an offence. (Paragraph 4.47; Draft Bill, cl 8)

20.9 We recommend that the guidance in section 2 of the 1890 Act for determining the existence of a partnership should be re-enacted in modern language subject to the repeal of the proviso to section 2(3)(d). (Paragraph 4.53; Draft Bill, cl 1(7) and Schedule 1)

20.10 We recommend that a partnership agreement may be varied in accordance with its terms or with the agreement of all existing partners (or before the formation of the partnership with the agreement of all proposed partners). (Paragraph 4.55; Draft Bill, cl 4)

20.11 We recommend that:

(1) A default rule should be defined as a rule which applies in relation to a partnership if the point dealt with in the rule is not dealt with in the partnership agreement;

(2) If a default rule applies in relation to a partnership it should be treated as if it were a term of the partnership agreement; and

(3) The partners may modify or exclude the application of a default rule in relation to a partnership in accordance with the partnership agreement or if all the partners agree. (Paragraph 4.58; Draft Bill, cl 5)

SEPARATE LEGAL PERSONALITY

20.12 We recommend that:

(1) A partnership should have legal personality separate from the partners but should not be a body corporate; (Draft Bill, cl 1(3)).

(2) A partnership should be viewed as a legal person whose characteristics are determined by (a) the draft Partnerships Bill except so far as varied by contract, (b) the terms of the partnership contract (if different from the default rules of the Bill) and (c) the rules of common law and equity so far as not inconsistent with the express provisions of the draft Partnerships Bill. (Paragraph 5.40)

THE AGENCY AND LIABILITY OF A PARTNER

20.13 We recommend:

(1) That a partner should be the agent of the partnership and not the partners; (Draft Bill, cl 6(3))

(2) That a partnership should be bound by anything done by a partner for carrying on in the usual way business of the kind carried on by the partners; (Draft Bill, cl 16(1))

(3) But that a partnership should not be bound if the partner has no authority to do the thing on behalf of the partnership, and the person with whom he is dealing has notice of his lack of authority or does not know or believe him to be a partner in the partnership; (Draft Bill, cl 16(2))

(4) That the rules in (2) and (3) above are subject to the provisions of the draft Bill on the execution of deeds in England and Wales. (Paragraph 6.22; Draft Bill, cl 16(3))

20.14 We recommend that a partnership should be vicariously liable to another person for loss or injury caused by the wrongful act or omission of any partner acting in the ordinary course of the partnership business or with the actual authority of the partnership. (Paragraph 6.35; Draft Bill, cl 22)

20.15 We recommend that:

(1) It should be provided (a) that each of the partners in a general partnership has unlimited liability and (b) that a limited partnership must have one or more general partners, each of whom has unlimited liability, and one or more limited partners, each of whom has limited liability; (Draft Bill, cl 3)

(2) Each partner who has unlimited liability is personally liable for the whole amount of the debts and obligations of the partnership and his payment in discharge of that liability discharges the firm's obligation and the personal liability of any other partner for that obligation to the same extent. (Paragraph 6.59; Draft Bill, cl 23(1), (3), (4) and (5))

20.16 We recommend that:

(1) There should be the following default rules:

(a) That a partner should be entitled to an indemnity from the partnership in respect of (i) any payment made by him in the proper conduct of the partnership business or in connection with anything necessarily done to preserve the partnership business or property and (ii) any payment which he has made towards the discharge of his personal liability for a partnership obligation or in reasonable settlement of an alleged personal liability for a partnership obligation; (Draft Bill, cl 12(3))

(b) That the indemnity under (a) above should not affect any claim which the partnership or another partner may have against the partner; (Draft Bill, cl 12(4))

(c) That if the partnership does not pay the indemnity under (a) above, the partner should be entitled to contribution from any other liable partner on the same basis as if the amount unpaid were a debt for which he and each other liable partner were coguarantors in the same proportions as they would be liable to pay any partnership losses; (Draft Bill, cl 12(5))

(d) That partner A may claim against partner B as an "other liable partner" under (c) above (i) in the case of A's liability (or alleged liability) for a partnership obligation, if B was a partner when the payment was made and was liable with A for the obligation (or, in the case of settlement of an alleged liability, would have been liable if the alleged liability had been established) or (ii) otherwise, if B was a partner when the payment was made; (Draft Bill, cl 12(6))

(e) That if a firm wrongly fails to pay to a partner any other amount (for example, a loan due to the partner) for which it is liable to account to him, the partner should be entitled to contribution from the other partners in the same proportions as if the amount were a partnership loss; (Draft Bill, cl 12(7))

(f) That the personal liability for a partnership obligation in respect of which a partner may claim indemnity or contribution should include not only the partner's liability under (a)(ii) above but also his liability to contribute under (c) or (e) above and his liability to indemnify or make a contribution to a former partner; (Draft Bill, cl 12(8))

(2) That in order to allow partners to agree their obligations amongst themselves, the rule that a partner is personally responsible for the whole amount of any partnership obligation incurred while he is a partner (clause 23(1) of the draft Bill) should not apply to a partnership obligation owed by a partner (A) to a partner or former partner (B) if the partnership agreement or any other agreement to which A and B are parties makes provision about whether or not B is entitled to indemnity or contribution from A in respect of the obligation; (Paragraph 6.65; Draft Bill, cl 23(2))

20.17 We recommend that:

(1) The rule in section 17(1) of the 1890 Act that an incoming partner who joins an existing partnership does not thereby become liable to the creditors of the partnership for partnership obligations incurred before he became a partner should be re-enacted (but the capital invested by an incoming partner in an existing partnership will be available to meet prior debts); (Draft Bill, cl 23(1)) and (2) In this context an obligation of the partnership which results from the (a) breach of a duty in tort or delict (including quasi-delict) (b) breach of trust or (c) breach of a fiduciary duty

should be treated as having been incurred at the time of the act or omission which gave rise to the breach. (Paragraph 6.80; Draft Bill, cl 23(7))

20.18 We recommend:

(1) That a person who ceases to be a partner does not thereby cease to be liable for partnership obligations incurred while he was a partner; (Draft Bill, cl 33(1))

(2) That, for the purposes of the draft Bill, a partnership obligation which results from a breach of a duty in tort or delict (including quasi-delict), a breach of trust or breach of a fiduciary duty should be treated as having been incurred at the time of the act or omission which gave rise to the breach; (Draft Bill, cl 23(7)) and

(3) That a person who ceases to be a partner may be discharged from personal liability for a partnership obligation by an agreement between himself (or his estate), the partnership and the creditor of the partnership without requiring valuable consideration in English law. (Paragraph 6.88; Draft Bill, cl 33(3) and (4))

20.19 We recommend that:

(1) Where a person who is not a partner (“A”) represents himself, or knowingly allows himself to be represented, as one, and another person (“B”) deals with the partnership in reliance on that representation, A should be liable as if he were a partner for the whole amount of any obligation which the partnership incurs to B as a result; (Draft Bill, cl 26(1), (3) and (4))

(2) Where A is a partner at the date of the representation but is no longer a partner at the time when B deals with the firm in reliance on the representation, then subject to (4) and (5) below A should be liable to B for the whole amount of any obligation which the partnership incurs to B as a result; (Draft Bill, cl 26(2))

(3) If A in (1) or (2) above pays an amount in or towards discharge of his personal liability (or what he reasonably and in good faith believes to be his liability) he should be entitled to be indemnified by the partnership in respect of that amount; (Draft Bill, cl 26(5))

(4) If A was still a partner when the representation was made ((2) above), he should not be liable if more than one year has passed since the representation before B deals with the firm in reliance on it; (Draft Bill, cl 35(1) and (2))

(5) A should not incur liability under (2) above if notice of his withdrawal from the partnership was given to B or sent to B’s last known address before he dealt with the firm in reliance on the representation; (Draft Bill, cl 35(3))

(6) A should not be liable by holding out after he ceases to be a partner if the representation consists merely in the partners continuing to carry on the partnership business in the same partnership name or the partnership name continuing to include A’s name after he ceased to be a partner; (Draft Bill, cl 35(4)) and

(7) In order to protect the salaried partner who is an employee, the protections in paragraphs (4) – (6) above should be available to A if he is an employee of the partnership. (Paragraph 6.106; Draft Bill, cl 35(5))

LITIGATION AND ENFORCING JUDGMENTS

20.20 We recommend:

(1) That a partnership may sue or be sued in its own name; (Draft Bill, cl 7(2))

(2) That a creditor of a partnership may pursue claims against a partner or former partner in respect of a partnership obligation only (a) after he has established the amount (or the existence and the amount) of the liability of the partnership for the obligation by obtaining a judgment or decree or arbitral award against it in the same or earlier proceedings; (b) where the court has ordered the partnership to make a payment including an interim payment in respect of the partnership obligation; or (c) in Scotland, when the partnership obligation has been constituted in a document registered for execution in the Books of Council and Session or the sheriff court books. (Paragraph 7.22; Draft Bill, cl 24)

20.21 We recommend that rules of court should provide for service of claims and other court documents on a partnership and on the partners of the firm. (Paragraph 7.24)

20.22 We recommend that rules of court may make provision to prevent a partner from defending or to restrict the extent to which, or the way in which, a partner may defend proceedings in respect of his personal liability for a partnership obligation if he has had an opportunity to participate in earlier proceedings in which there has been a judgment or decree against the partnership establishing the existence or amount of the partnership's obligation. (Paragraph 7.26; Draft Bill, cl 25(1) and (2))

20.23 We recommend that rules of court should provide that a partnership which is suing or being sued and its partners should be under a duty to provide to the other party to the litigation, at his request by notice, the names and last known addresses, or addresses for service, of those partners who have secondary liability for the costs or expenses of the litigation or (as the case may be) for meeting the claim against the partnership if it is successful. Former partners who are involved in litigation relating to a partnership should be under a similar obligation. (Paragraph 7.29)

20.24 We recommend that:

(1) A person who deals with a partnership should be entitled, on making a request to the partnership or to any partner, to be told the full names and an address or addresses for service of all the partners; (Draft Bill, cl 74(1))

(2) A person who has a complaint against a partnership arising out of a previous dealing with the firm should be entitled, on making a request to the partnership or to any present or former partner, to be given such information as the partnership or the present or former partner is able to provide, after due inquiry, as to the names of every partner at the relevant time and an address for every partner which is either an address for service or his last known address; (Draft Bill, cl 74(2))

(3) Rules of court should be able to make provision enabling a person having a prospective claim against a partnership, or against a present or former partner after he has obtained judgment against the firm, to apply to the court before bringing proceedings in respect of the claim for an order for the supply of the information in paragraph (2) above. (Paragraph 7.31; Draft Bill, cl 74(3))

20.25 We recommend:

(1) That a creditor of a partnership may enforce a claim in respect of a partnership obligation against a partner or former partner by including the partner as a defendant/defender in the action against the partnership or by suing the partner or former partner in a separate action;

(2) That the creditor of a partnership may enforce his claim against the assets of the partners who have secondary liability for that claim without first exhausting enforcement remedies against the assets of the partnership.

(3) That a judgment, decree or arbitral award against a partnership should not be enforceable, by way of execution, diligence or otherwise, against the property of a partner. (Paragraph 7.64; Draft Bill, cl 25(4))

20.26 We recommend:

(1) That in English law, a claim against a partner in respect of his secondary liability for a partnership obligation should be subject to a special limitation period. That limitation period should end on the date of the expiration of the period of limitation (if any) applicable to an action against the partnership in respect of the relevant partnership obligation or, if later, the expiration of two years from the date of judgment against the partnership establishing the amount of the partnership's liability for the obligation; (Draft Bill, cl 25(3) and Schedule 2 paras 1-3)

(2) That in Scots law, the obligation of a partner in relation to his secondary liability for a partnership obligation should prescribe in accordance with the following special rule. The prescriptive period should begin on the date on which decree (or arbitral award) is awarded against the partnership in respect of the relevant partnership obligation and expire on whichever is the later of the following dates: (a) the date on which the prescriptive period applicable to the partnership obligation would have prescribed but for the relevant claim against the partnership which resulted in the decree (or award) and (b) the second anniversary of the date of that decree (or award). (Paragraph 7.72; Draft Bill, cl 25(3) and Schedule 2 paras 4 –10)

20.27 We recommend that in Scotland the law of arrestment and furthcoming of a partner's share in a partnership should be reformed to the following effect:

(1) A creditor of a partner who has arrested in execution a partner's share in the partnership should be entitled to obtain a decree of furthcoming at any time before the dissolution of the partnership;

(2) A decree of furthcoming should transfer the partner's share to the creditor;

(3) The creditor with a decree of furthcoming should be entitled to obtain payment of that share or part of it only when the share or the relevant part of it would otherwise have become payable to the partner;

(4) In particular the creditor with a decree of furthcoming should be entitled to receive the partner's share of the partnership's profits when that share of profits would otherwise have been payable to the partner; and

(5) The creditor with a decree of furthcoming may realise the share either when the partner in question withdraws from the partnership or when the partnership is wound up, by obtaining payment of the share when otherwise it would have been paid to the partner; and

(6) The arresting creditor who obtains a decree of furthcoming is not thereby entitled to take part in the management or administration of the partnership business. (Paragraph 7.75; Draft Bill, cl 37)

CONTINUITY OF PARTNERSHIP AND THE OUTGOING PARTNER

20.28 We recommend that it should be a default rule that a partnership continues when a partner joins a partnership or withdraws from a partnership, provided that there remain at all times at least two partners. This is achieved in the draft Bill by providing a comprehensive list of the circumstances in which a partnership breaks up and by excluding from that list a change in the membership of the firm (unless the partnership agreement otherwise provides). (Paragraph 8.30; Draft Bill, cl 38).

20.29 We recommend that there should be a default rule that where a partner withdraws from a partnership, he is bound on request to transfer to the partnership or to trustees for the partnership title to any partnership property which he held in his own name at the time of his withdrawal from the partnership. (Paragraph 8.35; Draft Bill, cl 34(7))

20.30 We recommend that a former partner, the personal representative of a deceased former partner and the insolvency practitioner in relation to a former partner should have the right to apply to the court to make an order to give relief on the ground that the partnership affairs are being conducted in a way that is prejudicial to his interests and it is just and equitable to make the order. The court should have a general discretion to make such order as it thinks fit for giving relief, including (without prejudice to the generality of the discretion) (a) requiring accounts to be drawn up, (b) requiring interim payments to be made, (c) requiring security to be provided, (d) breaking up the partnership and (e) giving directions as to the way in which the partnership is to be wound up. (Paragraph 8.48; Draft Bill, cl 53).

20.31 We recommend that there should be a default rule that on withdrawal from the partnership the outgoing partner (or his estate) has the following financial rights as a debt due by the partnership:

(1) To be paid the value of his share in the partnership calculated on the hypothesis that the partnership had broken up and its assets were sold on the date of his withdrawal at a price equal to the greater of (i) the liquidation value and (ii) the value based on a sale of the entire business as a going concern without the outgoing partner. (Draft Bill, cl 32(1), (2)(a) and (3))

(2) To be paid interest at a commercial rate on the value of his share from the date of withdrawal. The prescribed rate of interest should initially be three per cent above the Bank of England base rate. The rate should be alterable by statutory instrument to allow for changes in economic conditions. (Draft Bill, cls 32(2)(b), 76(1))

(3) To be indemnified against partnership liabilities or payments made in reasonable settlement of an alleged personal liability for a partnership obligation but the indemnity is without prejudice to any claim of the partnership or the other partners against the outgoing partner. (Paragraph 8.75; Draft Bill, cl 34(1), (2) and (3))

20.32 We recommend that where the valuation of the outgoing partner's share in terms of paragraph 8.75(1) above results in a sum due by the outgoing partner (or his estate) to the partnership, the outgoing partner (or his estate) should be liable to pay that sum to the partnership. (Paragraph 8.78; Draft Bill, cl 32(2) and (3))

20.33 We recommend that if the partnership does not pay all or part of the indemnity the former partner should be entitled to either (a) indemnity from any person who was a partner when he ceased to be a partner and who continued to be a partner thereafter or (b) contribution from any person who was liable with him for the partnership obligation (or, in case of settlement of an alleged liability, would have been liable if the alleged liability had been established) of such amount as is just and equitable. (Paragraph 8.80; Draft Bill, cl 34(4) and (5))

20.34 We recommend that the following rules should be the default rules for resignation from a partnership of undefined duration:

(1) A partner wishing to resign from a partnership of undefined duration should give each other partner eight weeks' notice of his resignation;

(2) Each of the other partners should then have a right to resign from the partnership by giving not less than two weeks' notice, such notice taking effect on the same date as the expiry of the first partner's notice period;

(3) Partners (excluding any partner who has given notice of any resignation) should be entitled to break up a partnership at any time if not less than half of the partners vote to do so. A vote to break up a partnership at the same time as a resignation notice takes effect would supersede the resignation notice and all partners will be entitled to such sums as were due to them on settlement of accounts in the winding up. (Paragraph 8.100; Draft Bill, cls 30, 34(5) and 38(2)–(4)).

20.35 We recommend that the following rules should be default rules for involuntary withdrawal from a partnership:

(1) If a partner dies (or if a non-natural legal person ceases to exist) or goes bankrupt (or if a non-natural person, an insolvent winding up order or an award of sequestration is made) the partner ceases to be a partner on the date of death or bankruptcy; (Draft Bill, cl 28(1)(c) and 29)

(2) The partner in question (or his estate) has the same financial rights as on voluntary withdrawal; (Draft Bill, cl 32)

(3) Where in a partnership of defined duration one or more persons has involuntarily ceased to be a partner, any other partner may resign from the partnership by giving each other partner not less than eight weeks' notice; (Draft Bill, cl 30)

(4) In response to the notice in (3) above each of the other partners should have a right to resign; (Draft Bill, cl 30(3))

(5) After the death or bankruptcy of a partner, the remaining partners should be entitled to break up the partnership as in paragraph 8.100 above; (Draft Bill, cl 38(2)–(4))

(6) In place of the existing right to dissolve the firm, the partners will have an option to expel a partner by unanimous vote (other than the offending partner) where: (a) (in English law) the partner allows his share in the partnership to be charged and (b) (in Scots law) a partner's share is arrested in execution. In each case the offending partner will have a period of grace of three months before the expulsion notice takes effect. The expulsion notice will be treated as having no effect if during the three-month period the charging order or the arrestment ceases to have effect. (Paragraph 8.110; Draft Bill, cl 31).

20.36 We recommend that contractual doctrines such as acceptance of repudiatory breach of contract and frustration and rescission for fraud or misrepresentation should be excluded by a provision which sets out exhaustively the grounds upon which a partnership breaks up and the grounds upon which the court may order the break up of a partnership. (Paragraph 8.124; Draft Bill, cls 38 and 47)

20.37 We recommend that the court should have power:

(a) To order the removal of a partner (other than the applicant partner) on the following grounds:-

(1) The partner is suffering from a mental or physical condition which renders him incapable of performing his duties under the partnership contract and the incapacity is likely to be permanent;

(2) The partner's conduct (which may or may not amount to breach of contract) is such as to affect adversely the carrying on of the partnership business;

(3) The partner is in serious or persistent breach of the partnership agreement or a provision of the draft Bill;

(4) The partnership agreement was entered into or modified as a result of fraud, misrepresentation or non-disclosure by the partner;

(5) An event has occurred which makes it unlawful for the partner to remain a partner;

(6) There is no reasonable prospect of the partnership business being carried on at a profit unless the partner is removed;

(7) It is just and equitable for any other reason to make the order.

(b) To order the removal of the applicant partner where any of grounds (a) (1)–(4) above apply to a partner other than the applicant or where it is just and equitable for any other reason to make the order;

(c) To order the break up of the partnership on the following grounds:

(1) Any of the grounds (a) (1) – (5) above;

(2) An event has occurred making it unlawful for the partnership business to be carried on;

(3) There is no reasonable prospect of the partnership business being carried on at a profit;

(4) It is just and equitable for any other reason to make the order. (Paragraph 8.126; Draft Bill, cl 47 and Schedule 3)

20.38 We recommend:

(1) That, where a partner applies for his own removal from the partnership, the court should have power to backdate the removal and give directions to put the applicant and other persons in the position they would have been in if the partner had ceased

to be a partner at that date or so near that position as is just and equitable; (Draft Bill, cl 47(5) and Schedule 3 paras 1(2) and 3(2)).

(2) That where the court orders the removal of a partner, that partner will, subject to the directions of the court, have the same rights as he would have had to realise his share in the partnership on resigning from the partnership; (Draft Bill, cls 32, 47(5) and Schedule 3 para 3(1)).

(3) That where the court orders the removal of a partner or the break up of a partnership, it should have power to give such directions as it thinks fit for giving effect to its order; (Draft Bill, cl 47(5) and Schedule 3 para 3(1)).

(4) That the court may combine an order to break up a partnership with an order to appoint a liquidator to wind up the partnership's affairs or to appoint a provisional liquidator; (Draft Bill, cl 47(5) and Schedule 3 para 2).

(5) That, in an application to remove a partner, the court should have power to make an interim order prohibiting a partner from taking part in, or limiting the extent to which he may take part in the partnership business or affairs, subject to such conditions as it thinks fit and to give such directions as it thinks fit for giving effect to its interim order. (Paragraph 8.131; Draft Bill, cl 48)

20.39 We recommend that where the order of the court is on the ground of fraud, misrepresentation or non-disclosure, the following parties should, subject to the directions of the court, have the following rights against the partner at fault:

(1) The applicant partner or partners should be entitled to be indemnified by the partner at fault in respect of any liabilities which are attributable to the fraud, misrepresentation or non-disclosure; and

(2) Where the court orders the break up of the partnership, any partner not at fault should be entitled on a distribution of partnership assets to be paid any money paid by him to purchase his share in the partnership and what is due to him from the partnership in respect of loans or capital before any amount is paid to the partner at fault. (Paragraph 8.136; Draft Bill, cls 10(6) and 47(5) and Schedule 3 paras 4 and 5).

20.40 We recommend that the Secretary of State should be empowered, if he thinks it expedient in the public interest that a partnership should be broken up, to apply to the court for an order breaking up the partnership and the court may grant that order if it thinks it just and equitable to do so. The court may combine an order breaking up the partnership with an order appointing a liquidator or provisional liquidator. (Paragraph 8.146; Draft Bill, cl 49)

PARTNERSHIP PROPERTY AND THE EXECUTION OF DEEDS

20.41 We recommend:

(1) That partnerships (with separate legal personality) can own property of any kind in their own name unless statutory rules exclude them from doing so; (Draft Bill, cls 7(1) and 18(1))

(2) That property of any kind may be held in trust for such partnerships; (Draft Bill, cls 7(1) and 18(2)) (3) That partnerships should be allowed to own British ships and British fishing vessels;

(4) That the Hovercraft (General) Order 1972 be amended to allow English partnerships (with separate legal personality) to own hovercraft;

(5) That Art 4(3)(g) of the Air Navigation Order 2000 should be revoked; and

(6) That the Bodies Corporate (Joint Tenancy) Act 1899 should be extended to partnerships. (Paragraph 9.51; Draft Bill, cl 17(2)) 20.42 We recommend that where a partnership (“the former partnership”) has broken up, but a partner of the former partnership or a partner who has entered into partnership with that partner in a successor partnership transfers property, or creates an interest in property, belonging to the former partnership and apparently on its behalf or in its name, the title of the recipient of that property, or interest in property, who receives it in good faith and for value shall not be challengeable on the ground that the property was in fact partnership property of the former partnership. (Paragraph 9.65; Draft Bill, cl 42)

20.43 We recommend:

(1) That there should be a rule that property which is held in the name of one or more of the partners and which has been acquired on behalf of the partnership or contributed as capital to the partnership is partnership property and is held on trust for the partnership; (Draft Bill, cl 18(2))

(2) That there should be a rebuttable presumption that property which is acquired with money or other assets belonging to the partnership is partnership property; (Draft Bill, cl 18(1)) but

(3) The existing rule in section 20(3) of the 1890 Act, which creates a presumption that additional land bought out of the profits of a partnership involving the use of co-owned land is not partnership property, should be re-enacted. (Paragraph 9.80; Draft Bill, cl 19)

20.44 We recommend:

(1) That, in English law, “partnership property” should be defined as property to which the partnership is beneficially entitled, whether or not the property is held in the partnership name; (Draft Bill cl 17(1)(a)) and

(2) That, in Scots law, “partnership property” should be defined negatively as not including property held by the partnership in trust. (Paragraph 9.83; Draft Bill, cl 17(1)(b))

20.45 We recommend:

(1) That, in English law, a document is validly executed by the partnership as a deed if and only if (a) it is signed by at least two partners, each of whom has authority to execute the document as a deed on behalf of the partnership and (b) it is expressed to be executed by the partnership and (c) it is delivered as a deed;

(2) The document referred to in (1) above is presumed to be delivered upon its being executed in accordance with (1) above, unless a contrary intention is shown;

(3) If a partnership is being wound up by the partners and there is only one partner remaining, the rule in paragraph (1)(a) above should be taken as satisfied if the document is signed by the partner, whether or not he had authority to execute the document;

(4) If a limited partnership has only one general partner, the rule in (a) in paragraph (1) above should be taken as satisfied if the general partner signs the document and he has authority to execute the document as a deed on behalf of the partnership;

(5) If the partner is not an individual a document should be treated (for the purposes of this provision) as signed by that partner if it is signed by an individual who has authority to sign on behalf of the partner; (Draft Bill, cl 20);

(6) In favour of a purchaser in good faith and for valuable consideration there is a presumption of due execution; (Draft Bill, cl 20(7) and (8)) and (7) In Scots law, the formal validity of a document signed by a partnership in accordance with the Requirements of Writing (Scotland) Act 1995 is not affected by a partner's lack of authority to sign the document, but the partnership or another interested party should be able to seek the reduction of such a document if the partner had no authority or apparent authority to sign the document on behalf of the partnership. (Paragraph 9.98; Draft Bill, cl 21)

PARTNERS' FINANCIAL AND MANAGEMENT RIGHTS, EXPULSION AND RETIREMENT

20.46 We recommend that:

(1) The default rule (currently section 24(1) of the 1890 Act) which provides for equality between partners should be confined to profits and losses and should not refer to capital; (Draft Bill, cl 11)

(2) As a default rule, partners should be entitled to a commercial rate of interest on advances which they make to a partnership; (Draft Bill, cls 13 (1), (4) and (5) and 76(1))

(3) There should be no statutory rules providing for decision making by special majorities but the distinction between "ordinary matters" which can be decided by majority vote and other matters which require unanimity should remain the default rule and it should be clarified that the question whether a partnership should raise or defend legal proceedings is an ordinary matter; (Draft Bill, cl 14(1), (3), (4) and (5)).

(4) There should be a default rule that the agreement of all the partners is required for a partner to be entitled, or required, to contribute capital to the partnership or vary the amount of his capital contribution; (Draft Bill, cl 13(1) and (2))

(5) Other default rules of section 24 of the 1890 Act (the requirement of unanimity for a change in the nature of the partnership business, no entitlement to remuneration, no entitlement to interest on capital, entitlement to take part in the management, unanimous agreement to the introduction of a new partner) should be re-enacted. (Draft Bill, cls 6(4), 12(1) and (2), 13(1) and (3), 14(1) and (2) and 27)

(6) A partner's right to indemnity should be clarified so that he should be entitled to indemnity from the partnership where in good faith and reasonably he pays (or contributes towards) a claim made against the partnership. (Paragraph 10.30; Draft Bill, cl 12(3)(b), (5) and (8))

PARTNERS' DUTIES

20.47 We recommend:

(1) That there should be a statutory statement that a partner must act in good faith towards the partnership and each of the other partners in relation to any matter affecting the partnership; (Draft Bill, cl 9(1))

(2) That that overriding duty of good faith, not being a default rule, should not be capable of being excluded by the partnership agreement and that partners must act in good faith in the context of the particular rights and duties to which they agree in their partnership agreement; (Draft Bill, cl 9(1) and (3))

(3) That the specific duties in sections 29 and 30 of the 1890 Act (to account for private profits and not to compete with the partnership) be re-stated as default rules in the draft Bill: in each case the partnership may consent to the receipt of the profits or the competition; (Draft Bill, cl 9(2), (5) and (6))

(4) That a partner must keep each of the other partners fully informed of matters affecting the partnership of which the other partners would reasonably expect to be kept informed; (Draft Bill, cl 9(2) and (4))

(5) That any modifications of the rules in (3) and (4) above must be in ways that are compatible with the duty of good faith in (1) above. (Paragraph 11.32; Draft Bill, cl 9(3))

20.48 We recommend, as default rules, that:

(1) A partner should be under a duty to ensure that proper accounting records are kept of transactions affecting the partnership in which he is involved and of which the other partners would reasonably expect such records to be kept;

(2) A partner should be under a duty to ensure that such records are made available, on request, to the partnership and each of the other partners; and

(3) A partner should be under a duty to co-operate with any person who keeps partnership records or draws up partnership accounts on behalf of the partnership. (Paragraph 11.34; Draft Bill, cl 15)

20.49 We recommend that persons who negotiate to enter into partnership with a prospective partner should be under a duty to disclose to the prospective partner anything known to them (or which they reasonably ought to have known) which a (hypothetical) prudent prospective partner would reasonably expect to be disclosed in order to decide whether to enter into partnership with those persons. This duty may be waived by the prospective partner. In return the prospective partner should be under a duty to disclose to the other prospective partners (or partners in an existing partnership which he plans to join) anything known to him (or which he reasonably ought to have known) which a (hypothetical) prudent partner would reasonably expect to be disclosed in order to decide whether to enter into partnership with the prospective partner. Again, that duty may be waived. (Paragraph 11.40; Draft Bill, cl 10)

20.50 We recommend that there should not be a statutory default definition of the standard of care owed by a partner to the partnership and the other partners. (Paragraph 11.66)

20.51 We recommend that partners should owe all duties arising out of the duty of good faith both to the partnership and to the partners. (Paragraph 11.70; Draft Bill, cl (1))

WINDING UP PARTNERSHIPS AND SETTLING PARTNERS' ACCOUNTS

20.52 We recommend:

(1) That the winding up of a partnership should be a three-step process: (1) the break up of the partnership which commences the winding up, (2) the winding up and (3) the dissolution of the partnership on completion of the winding up. The partnership would continue as a legal entity until dissolution (Step 3); (Draft Bill, cls 38, 39(1) and (2) and 45)

(2) That a partnership should continue to exist as an entity (for certain limited purposes) when the number of partners is reduced to one; (Draft Bill, cls 39(1) and (2) and 43)

(3) That when a partnership breaks up it may be wound up by one or more of the partners but that where only one partner remains, his authority to bind the firm is limited to acts which are necessary to wind up the firm and complete any transactions begun but unfinished at the time of the break up; (Draft Bill, cl 43(1) and (4))

(4) That after a partnership breaks up (and there are two or more partners remaining) the partners may agree (unanimously) to carry on the partnership business with a view to the beneficial winding up of the partnership and to confer authority on a partner or partners for that purpose; there should be a default rule that other matters connected with the winding up may be decided by majority; (Draft Bill, cl 43(2), (3), (5) and (6)) and

(5) That the third step (dissolution) should not occur until all of the partnership property and property held by the firm on trust has been distributed and all claims and liabilities of the partnership have been discharged or extinguished through the passage of time. (Paragraph 12.23; Draft Bill, cls 39(2) and 45)

20.53 We recommend that on or after the break up of a partnership a person may not cease to be a partner voluntarily and that a person whose resignation notice has led to the break up of a partnership is to be treated as continuing to be a partner during the winding up of the partnership. (Paragraph 12.25; Draft Bill, cl 40)

20.54 We recommend that:

(1) Partners will continue to be able to wind up the partnership themselves;

(2) Partners will continue to be able to appoint an agent to wind up the partnership on their behalf;

(3) The courts in England and Wales will continue to have power to appoint a receiver or a receiver and manager to a partnership, and in Scotland the courts will continue to have power to appoint a judicial factor; and

(4) In addition there should be a new statutory system for winding up a solvent partnership under court supervision, involving the appointment of a partnership liquidator. (Paragraph 12.49)

20.55 We recommend that:

(1) Only the court should have power to appoint a partnership liquidator to a partnership which has broken up; (Draft Bill, cl 50(1))

(2) The following persons should have the right to apply to the court for the appointment of a partnership liquidator:

(a) A partner,

(b) A person who ceased to be a partner on or after the break up of the partnership,

(c) The personal representative of a deceased former partner who but for his decease would have been entitled to take part in the winding up,

(d) The insolvency practitioner in relation to a former partner who but for his insolvency would have been entitled to take part in the winding up, and

(e) A creditor of the partnership. (Draft Bill, cl 50(2) and (5))

(3) In addition, the court on ordering the break up of a partnership, on the application of a former partner (or his personal representative or insolvency practitioner) who claims that the partnership affairs are being conducted in a way that is prejudicial to his interests, should be empowered to appoint a partnership liquidator, if it considers the appointment to be necessary or expedient. (Paragraph 12.53; Draft Bill, cl 53(4) and Schedule 3, para 2)

20.56 We recommend that:

(1) The court should have power on an application to appoint a partnership liquidator to appoint a provisional liquidator; (Draft Bill, cl 51)

(2) The duty of the provisional liquidator should be to preserve partnership property and property held by the partnership on trust pending the determination of the application to appoint a partnership liquidator; and (Draft Bill, Schedule 5, para 2)

(3) The court should have discretion to confer on the provisional liquidator such of the statutory powers of a partnership liquidator (being the powers exercisable with or without sanction or approval) as it considers expedient for the performance of his duty. The provisional liquidator may also exercise such powers with the unanimous approval of the partners. (Paragraph 12.56; Draft Bill, Schedule 5, para 3)

20.57 We recommend that:

(1) The liquidator should not be required to have a statutory qualification but the court should be given discretion to appoint a suitable person;

(2) The court should be given discretion to determine whether any and what security is to be given by a liquidator (or provisional liquidator) on his appointment; (Draft Bill, cls 50(3) and 51(4)) and

(3) Rules of court should provide for the appointment of the liquidator (or provisional liquidator) and the giving, varying and release of security. (Paragraph 12.60)

20.58 We recommend that:

- (1) All the powers of the partners cease on the appointment of the partnership liquidator, except so far as the liquidator sanctions their continuance; (Draft Bill, Schedule 4, Part 1, para 1(1))
- (2) All powers of the partners should be suspended on the appointment of a provisional liquidator, except so far as the provisional liquidator sanctions their continuance; (Draft Bill, Schedule 5, para 1(1))
- (3) Partnership property should not vest automatically in the partnership liquidator on his appointment;
- (4) A partnership liquidator should nonetheless have a right to apply to the court to vest all or any part of the partnership property in him by his official name; (Draft Bill, Schedule 4, Part 1, para 6)
- (5) The partners should be under a duty to co-operate with the partnership liquidator (or provisional liquidator) in the performance of his duties from the time of his appointment; (Draft Bill, Schedule 4, Part 1, para 1(2) and Schedule 5, para 1(2))
- (6) Persons interested in the winding up (namely a person who ceased to be a partner on or after the break up, (if deceased) his personal representative or (if insolvent) an insolvency practitioner appointed in relation to him) should owe a duty of good faith towards the partnership and the partners in relation to the functions of the partnership liquidator or provisional liquidator; (Draft Bill, Schedule 4, para 1(3) and Schedule 5, para 1(3)) and
- (7) The appointment of a partnership liquidator (or provisional liquidator) should not restrict the rights of creditors of, or claimants against, the partnership from pursuing and enforcing their claims against the partnership (or the partners with subsidiary liability) or from applying to wind up the partnership, or in Scotland to sequestrate the partnership's estate. (Paragraph 12.66)

20.59 We recommend that the duties of the partnership liquidator should be (a) to get in and realise the partnership's assets; (b) to pay the partnership's debts and discharge its liabilities to persons other than partners (c) to distribute any remaining proceeds of realisation in accordance with the default rules or any substitute provisions in the partnership agreement and (d) to secure that all trust property is transferred to the person entitled to it or a trustee for that person. (Paragraph 12.68; Draft Bill, Schedule 4, Part 1, para 2)

20.60 We recommend that:

- (1) A contract entered into by a liquidator (or provisional liquidator) in the performance of his functions should be taken as entered into on behalf of the partnership, unless the contract provides that he should be personally liable on it; and
- (2) If the liquidator (or provisional liquidator) assumes personal liability under the contract, he should be entitled to an indemnity out of partnership property in respect of that liability. (Paragraph 12.70; Draft Bill, Schedule 4, Part 1, para 5 and Schedule 5, para 4)

20.61 We recommend that:

(1) The court should be able to give the partnership liquidator wide powers to carry out the winding up of the partnership without requiring the approval of the partners or the sanction of the court for the exercise of these powers; and

(2) The following powers should be exercisable without approval or sanction:

(a) Power to bring or defend any action or other legal proceeding in the name or on behalf of the partnership;

(b) Power to sell any partnership property by public auction or private contract;

(c) Power to do all acts and execute, in the name and on behalf of the partnership, all deeds, receipts and other documents;

(d) Power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any debtor of the partnership or any partner or former partner and to receive dividends from the insolvent's estate;

(e) Power to borrow any money required on the security of the partnership's assets;

(f) Power to appoint an agent to do any business which it would be unreasonable for the liquidator to have to do himself; and

(g) Power to do all such things as may be necessary for winding up the partnership's business and affairs and distributing the proceeds of the realisation of partnership property. (Paragraph 12.74; Draft Bill, Schedule 4, Part 1, para 3 and Part 3)

20.62 We recommend that:

(1) The partnership liquidator be empowered to exercise the following powers only with the unanimous approval of the partners or the sanction of the court:

(a) Power to carry on the partnership business for the beneficial winding up of the partnership; (Draft Bill, Schedule 4, Part 1, para 3 and Part 2, para 21)

(b) Power to make a compromise or arrangement with alleged creditors or claimants against the partnership; (Draft Bill, Schedule 4, Part 1, para 3 and Part 2, para 19)

(c) Power to compromise debts and liabilities subsisting or supposed to subsist between the partnership and other persons, including partners or former partners; (Draft Bill, Schedule 4, Part 1, para 3 and Part 2, para 20)

(2) The partnership liquidator should have power to distribute partnership property in its existing form instead of realising the property and distributing the proceeds of realisation (a) if permitted to do so in the partnership agreement, (b) with the unanimous approval of the partners or (c) with the sanction of the court. (Paragraph 12.78; Draft Bill, Schedule 4, Part 1, para 4)

20.63 We recommend that:

(1) The draft Bill should include a power to make subordinate legislation to empower a partnership liquidator to disclaim onerous property (with the approval of the partners or the sanction of the court); (Draft Bill, Schedule 4, Part 1, para 7)

(2) In Scotland, a partnership liquidator should be empowered (with approval of the partners or sanction of the court) to terminate a lease of land or buildings of which the partnership is the tenant, where he has not disposed of the partnership's interest in the lease within one year after the date of his appointment and he is satisfied that a provision in the lease or a rule of law prevents the disposal of the interest. The liquidator should give the landlord a specified period of notice depending on the type of lease. In an agricultural lease the notice should be either a period of between one and two years ending in the term of Whitsun or Martinmas or such period as is agreed with the landlord. In any other lease the period should be six months or such shorter period of notice as is required by any other enactment. The termination should not affect any claim for compensation or damages in respect of the termination of the lease by any person (including a landlord or sub-tenant). The claim for damages or compensation should be a claim against the partnership and not the liquidator personally. (Paragraph 12.83; Draft Bill, Schedule 4, Part 1, para 8)

20.64 We recommend that:

(1) If the winding up by the partnership liquidator continues for more than one year, he should be obliged to summon a meeting of the partners and any person interested in the winding up at the end of the first year after the date of his appointment and of each succeeding year;

(2) The partnership liquidator must lay before the meeting a full and true account of his conduct of the winding up during the preceding year; (Draft Bill, Schedule 4, Part 1, para 10)

(3) As soon as he has completed the winding up of the partnership's business, the partnership liquidator must prepare a full and true account of the winding up, summon a meeting of the partners and any person interested in the winding up and lay the account before that meeting and explain it; (Draft Bill, Schedule 4, Part 1, para 11)

(4) If the partnership liquidator fails to make up accounts or to summon a meeting, he should be guilty of an offence; (Draft Bill, Schedule 4, Part 1, paras 10(5) and 11(8)) and

(5) Any partner or person interested in the winding up who is not satisfied with the way in which the partnership liquidator is conducting the winding up may apply to the court for an order that an account be taken of the partnership's affairs. (Paragraph 12.86; Draft Bill, Schedule 4, Part 1, para 12)

20.65 We recommend that:

(1) The partnership liquidator, a partner, a person interested in the winding up, a creditor of the partnership or a person who ceased to be a partner before the break up of the partnership may apply to the court to determine any question arising in the winding up of the partnership; and (2) The court should have discretion whether to determine the application, to impose such terms and conditions as it thinks fit on its determination and to make any other order on the application. (Paragraph 12.88; Draft Bill, Schedule 4, Part 1, para 13)

20.66 We recommend that:

(1) If a partnership is unable to pay its debts and there is no reasonable prospect of it becoming able to pay its debts, the partnership liquidator should be under a duty,

within one month of the insolvency, to apply to the court for a winding up order (in England and Wales) or (in Scotland) for sequestration of the estate of the partnership; (Draft Bill, Schedule 4, para 9)

(2) If the partnership liquidator has reasonable grounds for believing that the court does not have jurisdiction to make the orders in (1) above, he should be under a duty to apply to the court for directions; (Draft Bill, Schedule 4, Part 1, para 9)

(3) If the partnership liquidator fails without reasonable excuse to comply with (1) or (2) above, he should be guilty of an offence; (Draft Bill, Schedule 4, Part 1, para 9)

(4) The partnership liquidator should have (in English law) standing to present an application to the court for the partnership to be wound up under the successor order to the Insolvent Partnerships Order 1994 and the existing time limit for presenting an application for winding up a partnership should not apply to a partnership liquidator; and (5) The partnership liquidator should have title and interest (in Scots law) to apply to the court for sequestration of the partnership's estate and the estate of an insolvent partner under the Bankruptcy (Scotland) Act 1985. (Paragraph 12.94; Draft Bill, Schedule 4, Part 4)

20.67 We recommend that (a) if for any reason there is no partnership liquidator acting, the court should have power to appoint a partnership liquidator and (b) the court may, on cause shown, remove a partnership liquidator and appoint another. (Paragraph 12.96; Draft Bill, Schedule 4, Part 1, para 15)

20.68 We recommend that:

(1) A partnership liquidator should be able to resign his office by giving notice to the court, each partner, each person interested in the winding up, and (if he was appointed on an application by a creditor) the creditor; (Draft Bill, Schedule 4, Part 1, para 14)

(2) A partnership liquidator may apply for release in the first instance by summoning a meeting of the partners and any persons interested in the winding up, which failing by application to the court; (Draft Bill, Schedule 4, Part 1, para 16) and

(3) The release should have effect to discharge the partnership liquidator of all liability to the partnership, the partners, former partners and the estates of former partners in respect of any act or omission in the exercise of his functions and otherwise in relation to his conduct as liquidator (unless the liquidator has obtained his release by fraud or deliberate concealment of wrongdoing). (Paragraph 12.99; Draft Bill, Schedule 4, Part 1, para 16)

20.69 We recommend that all expenses properly incurred in the winding up, including the remuneration of the partnership liquidator and any provisional liquidator should be payable out of the partnership's assets in priority to all other claims. (Paragraph 12.101; Draft Bill, Schedule 4, Part 1, para 17)

20.70 We recommend that:

(1) A provisional liquidator should be able to resign his office by giving notice to the court, each partner, each person interested in the winding up, and (if he was appointed on an application by a creditor) the creditor; (Draft Bill, Schedule 5, para 5)

(2) A provisional liquidator should cease to hold office on the determination of the application to the court to appoint a partnership liquidator; (Draft Bill, Schedule 5, para 7)

(3) If for any reason there is no provisional liquidator acting, the court may appoint a provisional liquidator and the court may, on cause shown, remove a provisional liquidator and appoint another; (Draft Bill, Schedule 5, para 6)

(4) A provisional liquidator (or if he has died his personal representative) should be able to apply for release to the court and the court may order his release from the time specified in the order; (Draft Bill, Schedule 5, para 8(1) and (2))

(5) On release a provisional liquidator should be discharged from all liability to the partnership, partners, former partners and the estates of former partners in respect of any act or omission in the exercise of his functions and otherwise in relation to his conduct as provisional liquidator, (unless the liquidator has obtained his release by fraud or deliberate concealment of wrongdoing). (Paragraph 12.104; Draft Bill, Schedule 5, para 8(3)) 20.71 We recommend that the Secretary of State should be empowered to make rules for the purpose of giving effect to the provisions of the draft Bill in relation to the solvent winding up of partnerships and in particular to provide for the remuneration of the partnership liquidator and the provisional liquidator. (Paragraph 12.106; Draft Bill, Schedule 4, Part 1, para 18 and Schedule 5 para 9)

20.72 We recommend that the following should be the default rules on settlement of partners' accounts in a winding up:

(1) First, partners are to pay any sums which they are due to the partnership.

(2) Secondly, the assets of the partnership, including the sums repaid by partners in (1) above, are to be distributed in the following manner and order:

(a) In paying the debts of the partnership to persons who are not partners;

(b) In paying to each partner what is due from the partnership to him (other than in respect of capital);

(c) In paying to each partner rateably what is due from the partnership to him in respect of capital; and

(d) In dividing the ultimate residue, if any, among the partners in the proportion in which profits are divisible.

(3) If the partnership has insufficient assets to pay sums due to third party creditors and to repay to partners the sums due to them (other than in respect of capital), the partners individually shall contribute to the partnership towards that deficiency in the proportions in which they were liable to share partnership losses;

(4) The partners who are liable to contribute under (3) above are those who are personally liable for the partnership obligations or who would be personally liable for an indemnity granted by the partnership to a former partner in respect of those obligations;

(5) If a partner is not liable or, as a result of insolvency, is not able to make his contribution to the deficiency in (3) above, the other partners shall contribute the

additional amount needed to meet the deficiency in the proportions in which those partners are liable (as between themselves) to contribute to that deficiency; and

(6) In this context a “partner” includes a person who ceased to be a partner on or after the break up. (Paragraph 12.128; Draft Bill, cl 44)

MISCELLANEOUS REFORMS, AND PROPOSALS WE HAVE NOT TAKEN FORWARD

20.73 We recommend that section 3 of the 1890 Act (which postpones the rights of certain creditors of a partnership) should not be re-enacted in the draft Partnerships Bill. (Paragraph 13.5)

20.74 We recommend that section 18 of the 1890 Act is not re-enacted. (Paragraph 13.9)

20.75 We recommend that sections 23(2) and (3) of the 1890 Act should be re-enacted in modern language. (Paragraph 13.12; Draft Bill, cl 46)

20.76 We recommend that assignees of a partner’s share (whether by voluntary assignment or by involuntary assignment on death, insolvency or otherwise) should not be allowed to take part in the management of the partnership business or affairs. Such assignees should not be entitled to inspect the partnership’s records. (Paragraph 13.17; Draft Bill, cl 36)

20.77 We recommend that section 37 of the 1890 Act (publicity for departure of a partner or break up of partnership) should be re-enacted in modern language. (Paragraph 13.20; Draft Bill, cl 41)

20.78 We recommend that the substance of section 40 of the 1890 Act should be reenacted:

where a partner in a fixed term partnership has paid a premium to another partner in respect of the formation of the partnership and the partnership breaks up before the end of its term, the court should have power to order the repayment of the whole or part of the premium. (Paragraph 13.22; Draft Bill, cl 52)

20.79 We recommend that the Business Names Act 1985 should be amended in consequence of our recommended reforms of partnership law. (Paragraph 13.24; Draft Bill, cl 75 and Schedule 11)

20.80 We recommend that section 70 of the Criminal Procedure (Scotland) Act 1995 should be amended to provide for the prosecution of partnerships as well as bodies corporate. (Paragraph 13.26)

20.81 We recommend that a partnership should not be capable of engaging a partner as an employee. (Paragraph 13.43; Draft Bill, cl 7(4))

TRANSITIONAL PROVISIONS

20.82 We recommend that:

(1) There should be a transitional period of two years starting with the commencement date of the new Partnerships Act; (Draft Bill, cl 79(4))

(2) During the transitional period a partnership formed before the commencement date (“an old partnership”) will, subject to (3) below, continue to be governed by the mandatory and default rules of the 1890 Act; (Draft Bill, cl 79(1))

(3) If during the transitional period an old partnership decides, by unanimous decision which is signed and in writing, that the provisions of the new Partnerships Act should apply to it before the end of the transitional period, the new provisions will apply from the date of, or provided for in, that decision; (Draft Bill, cl 79(3)(b))

(4) At the end of the transitional period the provisions of the new Partnerships Act will apply to all partnerships whenever formed; (Draft Bill, cl 79(3)(a))

(5) A partner in an old partnership may, during the transitional period unilaterally elect that the partnership shall after the end of the transitional period continue to be governed by the default rules of the 1890 Act. The election must be in writing and be signed by the electing partner; (Draft Bill, cl 79(3)(d))

(6) Partnerships formed after the commencement date, whether or not during the transitional period, will, from their commencement, be subject to the provisions (including, where applicable, the new default rules) of the new Partnerships Act; (Draft Bill, cl 79(1) and (2))

(7) A “new” partnership, which is created during the transitional period merely by a change in membership of an old partnership, will not be treated as formed after the commencement date (for the purposes of (6) above) provided (a) its membership is substantially the same as the old partnership and (b) it succeeds to the whole or substantially the whole of the business of the old partnership. This rule applies also to subsequent “new” partnerships so created during the transitional period; (Draft Bill, cl 79(3)(c))

(8) Neither the default scheme under the 1890 Act nor the default scheme under the new Partnerships Act will apply to a partnership whose agreement provides for different terms. (Paragraph 14.21)

20.83 We recommend that there should be a transitional provision that the partnership property of an old partnership on the date when the provisions of the Partnerships Act first apply to that partnership will be treated as partnership property under the new Partnerships Act for so long as it would have been treated as partnership property under the 1890 Act. (Paragraph 14.24; Draft Bill, cl 79(2))

ESTABLISHING AND OPERATING A LIMITED PARTNERSHIP (1): REGISTRATION AND DE-REGISTRATION

20.84 In the light of our proposals on registration discussed above, we recommend that:

(1) A limited partnership should exist from the date of registration of the limited partnership as stated in the certificate of registration; (Draft Bill, cls 54(1) and 67)

(2) The registrar should be obliged to register the partnership or proposed partnership as a limited partnership, if satisfied that the statutory requirements are complied with, and to supply it with a registration certificate. (Paragraph 15.21; Draft Bill, cl 67(1))

20.85 We recommend that the certificate of registration of a limited partnership should contain the following information: (a) the name of the limited partnership, (b) the fact of its registration as a limited partnership and (c) the date of registration. (Paragraph 15.23; Draft Bill, cl 67(2))

20.86 We recommend that:

(1) The certificate of registration should be conclusive evidence (a) that all registration formalities have been complied with, (b) that the partnership was registered as a limited partnership on the date stated in the certificate and (c) that the partnership name is as specified in the certificate; (Draft Bill, cl 71(1))

(2) The certificate of a change in the name of a partnership should be conclusive evidence (a) that the partnership was registered as having a new name on the date specified in the certificate and (b) that its partnership name is as specified in the certificate; (Draft Bill, cl 71(2))

(3) A copy or extract from an original document sent to the registrar should if signed by the registrar be admissible in evidence in all legal proceedings as of equal validity with the original document. (Paragraph 15.25; Draft Bill, cl 71(3))

20.87 We recommend that:

(1) The requirement for the registration of a principal place of business, initially in the United Kingdom, should be abolished and be replaced by the requirement to have a registered office in England or Wales, or in Scotland; (Draft Bill, cl 62)

(2) The register should contain the following information concerning the limited partnership:

(a) The name under which the partnership is registered;

(b) The name and address of the proposed general partner (or, if there is more than one, all of them);

(c) The name of each limited partner and the amount of any capital contribution made by him to the partnership;

(d) Whether the registered office of the partnership is in England or Wales, or in Scotland;

(e) The address of the registered office;

(f) If the partnership existed before registration, the date of formation of the partnership. (Paragraph 15.38; Draft Bill, cl 66)

20.88 We recommend that a change of partnership name will not have effect until the change is registered. To effect such a change a notice must be delivered to the registrar who, if satisfied that the statutory requirements in relation to the name are met, must alter the register and supply the partnership with a certificate of the change of name. The certificate will be conclusive evidence of the partnership name and the registration of the new name on the date specified in the certificate. (Paragraph 15.41; Draft Bill, cls 68 and 71(2) and Schedule 7, para 1)

20.89 We recommend that a person should become a limited partner only on his registration as such. Notice that a person is a proposed limited partner, specifying his name and any capital contribution to the partnership, should be delivered to the registrar. If the proposed limited partner is a general partner in the partnership (and is applying to become a limited partner) the notice must state that fact. On receiving the notice the registrar must register the person as a limited partner (and, where the applicant was a general partner, record the fact that the partner has ceased to be a general partner in the partnership). (Paragraph 15.43; Draft Bill, cls 54(1) and 68 and Schedule 7, para 3)

20.90 We recommend that a person should become a general partner on the date agreed between him and the limited partnership and that notification of his joining the limited partnership as a general partner should be made to the registrar within twenty-eight days after he joins. (Paragraph 15.45; Draft Bill, cl 68 and Schedule 7, para 5)

20.91 We recommend that:

(1) A person should cease to be a general partner in accordance with the rules of law in relation to general partnerships or the terms of the partnership agreement but he may incur liability to third parties by holding out until his change of status is published in the register; (Draft Bill, cls 26 and 68 and Schedule 7, para 5(5))

(2) Subject to paragraph (3) below, a person should not cease to be a limited partner until his change of status is published in the register; (Draft Bill, cls 54(2) and 68 and Schedule 7, para 4(7))

(3) A person should cease to be a limited partner on death or (if a non-natural person) dissolution and the fact that he has ceased to be a general partner or limited partner (as the case may be) should be registered within twentyeight days after the death or dissolution. (Paragraph 15.49; Draft Bill, cls 54(3) and 68 and Schedule 7, paras 4(1) and 5)

20.92 We recommend that a limited partnership should, during its continuance, be under a duty to deliver to the registrar a notice of any of the following changes within 28 days of the event:

(1) A change of name of an existing general or limited partner;

(2) A change of address of an existing general partner; and

(3) An increase or withdrawal of the capital contribution of a limited partner. (Paragraph 15.51; Draft Bill, cl 68 and Schedule 7, para 5)

20.93 We recommend that a limited partnership may change the address of its registered office only by delivering notice of the change to the registrar who must alter the register. The change in address should have effect only from the date when it is registered. (Paragraph 15.53; Draft Bill, cl 68 and Schedule 7, para 2)

20.94 We recommend that, on the application of a general partner or another person who has authority to make the application on behalf of the partnership, the registrar should be empowered to register a correction to the register and that, if he does so, he should be required to supply the partnership with a revised certificate. (Paragraph 15.55; Draft Bill, cl 68 and Schedule 7, para 6)

20.95 We recommend that the registrar should be empowered to approve the form and means by which a document may be delivered to him and that where the registrar directs that documents are to be delivered to an authorised person at a specified address, delivery of a document to another address should not be treated as delivery. (Paragraph 15.57; Draft Bill, cl 68 and Schedule 9, para 1)

20.96 We recommend that the registrar should be empowered to keep the registered information in any form he thinks fit, provided that it is possible to inspect the information and to produce a copy of it in legible form. The registrar should be required to keep original documents, which are sent to him, for ten years. (Paragraph 15.59; Draft Bill, cl 68 and Schedule 9, para 2)

20.97 We recommend that any person should be entitled to inspect information kept by the registrar and to require a copy of information kept in the register or a certified copy of, or extract from, the original of any document. A person should also be able to require a certificate of the registration of a limited partnership or a certificate of the registration of a change in the name of a limited partnership. (Paragraph 15.61; Draft Bill, cl 68 and Schedule 9, para 3)

20.98 We recommend that the Secretary of State should have power to make regulations to:

(1) Impose fees in respect of (i) registration of a limited partnership or of information relating to such a partnership, (ii) the inspection of the register or any documents or information relating to a limited partnership or (iii) the provision of a certificate or an extract or copy of any document;

(2) Provide for the performance by the assistant registrar or other officers of acts which the registrar is required to perform in relation to limited partnerships; and

(3) Make provision for the translation of documents delivered to the registrar which relate to limited partnerships whose registered office is in Wales. (Paragraph 15.63; Draft Bill, cl 68 and Schedule 9, para 4)

20.99 We recommend that a limited partnership should not be registered by a name:

(1) Which is the same as a name appearing in the registrar's index of company and corporate names, unless the person whose name appears in the index consents;

(2) The use of which as the name of the partnership would in the opinion of the Secretary of State constitute an offence; or

(3) Which in the opinion of the Secretary of State is offensive. (Paragraph 15.66; Draft Bill, cl 63(3) – (5))

20.100 We recommend that:

(1) The name of a limited partnership must end with either "limited partnership" or the abbreviation "lp" or "LP" ; (Draft Bill, cl 63(1))

(2) If the registered office of the limited partnership is in Wales the alternative suffix may be "partneriaeth cyfyngedig" or the abbreviation "pc" or "PC"; (Draft Bill, cl 63(2))

(3) The name of the limited partnership (which includes the suffix) and the address of its registered office must be stated on any partnership document. (Paragraph 15.71;

Draft Bill, cl 65(1) and (2)) 20.101 We recommend that only (a) a limited partnership, (b) a partner in a limited partnership, (c) a partnership registered outside Great Britain and in which one or more of the partners by registration has limited liability for partnership obligations (“oversea limited partnership”) and (d) a partner in an oversea limited partnership should be allowed to use the expression “limited partnership”, its Welsh equivalent or contractions or imitations of those expressions at the end of their business names. Any other person using those expressions in the last words of their business name or title should be guilty of an offence. (Paragraph 15.78; Draft Bill, cl 64)

20.102 We recommend that:

(1) The registrar should have power to de-register a limited partnership:

(a) If the registrar receives an application for de-registration after all the partners of the limited partnership (or former partners of a dissolved limited partnership) have agreed; (Draft Bill, cl 68 and Schedule 8, para 1) or

(b) If after inquiry the registrar has reasonable grounds for believing that one of the grounds for doing so exists; (Draft Bill, cl 68 and Schedule 8, para 2)

(2) The grounds for de-registering a limited partnership referred to in paragraph (1)(b) above are (a) that it has been dissolved, (b) that it does not have one or more general partners and one or more limited partners, (c) that it does not have a registered office and (d) that where a limited partnership, which was not previously a general partnership, has been formed by registration, the partners have not begun to carry on business together during a period of at least two years immediately after registration; (Draft Bill, cl 68 and Schedule 8, para 2(2) and (4))

(3) Before the registrar de-registers a limited partnership under paragraph (1)(b) above, the registrar must have made preliminary inquiries by sending two letters to the registered office of the limited partnership, the second letter following six weeks after the first letter. In the letters the registrar should state his belief that a ground for de-registering exists and invite a reply showing why the partnership should not be de-registered. Where there are reasonable grounds for believing that the partnership does not have a registered office the letters of inquiry may be sent to the general partner or partners and to any limited partner whose address is known to the registrar; (Draft Bill, cl 68 and Schedule 8, para 3)

(4) In addition, before de-registering under either of paragraph (1)(a) or (b) above, the registrar must publish a de-registration warning in the Gazette at least three months before he de-registers a limited partnership; (Draft Bill, cl 68 and Schedule 8, paras 1(1)(b), 2(1)(c) and 4)

(5) If the registrar de-registers a limited partnership, he must publish notice of the fact in the Gazette and de-registration takes effect on the date specified in the notice; (Draft Bill, cl 68 and Schedule 8, para 5)

(6) If the de-registered partnership re-registers itself as a limited partnership, the court should be able on the application of the partnership or any partner, within 3 years of de-registration, to make an order to backdate the limited liability of the limited partners to the date of de-registration and otherwise to put the limited partnership and other persons in the position they would have been in if the limited partnership had not been deregistered; (Draft Bill, cl 68 and Schedule 8 para 6(1), (5) and (6))

(7) The court may make the order in paragraph (6) above if it is satisfied (a) either that the application for de-registration had not been properly authorised or that none of the grounds for de-registering the partnership existed when it was de-registered and (b) that it is just and equitable to do so. (Paragraph 15.83; Draft Bill, cl 68 and Schedule 8, para 6(2), (3) and (4))

ESTABLISHING AND OPERATING A LIMITED PARTNERSHIP (2): THE GENERAL PARTNER AND OTHER MATTERS

20.103 We recommend that a general partner should be defined as a person who is a partner in a limited partnership but is not a limited partner. (Paragraph 16.4; Draft Bill, cl 54(4))

20.104 We recommend that:

(1) General partners should be fully responsible for the registration formalities and (subject to (4) below) should have authority to sign the original registered particulars and any amendments, and where applicable authorised managers should have the same responsibility and authority except for signing the original application for registration;

(2) Where there is default of registration formalities, the general partner or general partners, or where applicable the authorised manager, should be liable for daily fines similar to those which apply to companies;

(3) Default in registration formalities should not of itself remove the limited liability of the limited partners; and

(4) A limited partner should sign a notice of a person ceasing to be a limited partner only if (a) he is the person ceasing to be a limited partner and is to become a general partner and (b) the partnership does not have one or more general partners and limited partners should sign an application to de-register a limited partnership only if there are no general partners. (Paragraph 16.14; Draft Bill, cls 66(2) and 68; Schedule 7, paras 1(3), 2(3), 3(4), 4(4), 4(5), 5(2), 5(7), 6(1); Schedule 8, paras 1(4) and (5))

20.105 We recommend that:

(1) There should be a default rule that any difference arising as to ordinary matters connected with the partnership business may be decided by the general partner, or if there is more than one general partner, by a majority of them. (Draft Bill, cl 59(4))

(2) There should be a default rule that differences about other matters relating to the partnership must be decided by the general partner, or if there is more than one general partner, all of them; (Draft Bill, cl 59(5))

(3) There should be a default rule that a decision whether a limited partner should be given authority to act on behalf of the partnership is not an ordinary matter; (Draft Bill, cl 59(6))

(4) There should be a default rule that a person may become a partner in a limited partnership only with the consent of the general partner, or if there is more than one general partner, all of them, or, if there are no general partners, all the limited partners; (Draft Bill, cl 60(1) and (3))

(5) A general partner who without reasonable excuse fails to ensure that the name of the limited partnership and the address of its registered office are stated on any partnership document should be guilty of an offence and liable to a fine; (Draft Bill, cl 65(3))

(6) There should be a default rule that, unless the court orders otherwise or there are no general partners, the general partner, or if there is more than one general partner, all of them are responsible for winding up the partnership. (Paragraph 16.19; Draft Bill, cl 61(2))

20.106 We recommend that a limited partner should not take part in the management of the partnership business. (Paragraph 16.21; Draft Bill, cl 55(1))

20.107 We recommend that a limited partner should have no implied authority to bind the partnership. (Paragraph 16.23; Draft Bill, cl 59(2))

20.108 We recommend that where a partnership has not been formed before registration, the partnership is formed when it is registered as a limited partnership. (Paragraph 16.29; Draft Bill, cl 67(3))

20.109 We recommend that:

(1) A person should be guilty of an offence if, when he makes an application to register or de-register a limited partnership, he knows that information in it is false or is aware that the information may be false;

(2) A person who is guilty of an offence under (1) above should be liable on summary conviction to imprisonment for up to six months or a fine not exceeding the statutory maximum, or both, or on conviction on indictment, to imprisonment for up to two years or a fine, or both;

(3) A person should be guilty of an offence if, when he delivers a notice to the registrar of a change in the particulars of a limited partnership, he knows that information in it is false or is aware that the information may be false; and

(4) A person who is guilty of an offence under (3) above should be liable on summary conviction to imprisonment for a period not exceeding six months or a fine not exceeding level five on the standard scale, or both. (Paragraph 16.32; Draft Bill, cl 69)

20.110 We recommend that if a body corporate commits an offence under the draft Bill with the consent or connivance of an officer of the body corporate or the offence is attributable to neglect on the part of such an officer, the officer as well as the body corporate should be guilty of the offence. If the affairs of the body corporate are managed by its members, a member of the body may similarly be guilty of an offence. (Paragraph 16.34; Draft Bill, cl 70)

THE LIABILITY OF THE LIMITED PARTNER

20.111 We recommend that there should be a list of permitted activities in which limited partners may engage without loss of their limited liability and that the loss of limited liability should not be contingent upon knowledge of a third party dealing with the partnership. (Paragraph 17.7)

20.112 We recommend that a limited partner should be prohibited from taking part in the management of partnership business but that it should be provided that that prohibition does not prevent a limited partner from doing the following things:

- (1) Taking part in a decision about the variation of the partnership agreement;
- (2) Taking part in a decision about whether to approve, or veto, a class of investment by the limited partnership;
- (3) Taking part in a decision about whether the general nature of the partnership business should change;
- (4) Taking part in a decision about whether to dispose of the partnership business or to acquire another business;
- (5) Taking part in a decision about whether a person should become or cease to be a partner;
- (6) Taking part in a decision about whether the partnership should end;
- (7) Taking part in a decision about how the partnership should be wound up;
- (8) Enforcing his rights under the partnership agreement (unless those rights are to carry out management functions);
- (9) Approving the accounts of the limited partnership;
- (10) Being engaged under a contract by the limited partnership or by a general partner in the limited partnership (unless the contract is to carry out management functions);
- (11) Acting in his capacity as a director or employee of, or a shareholder in, a corporate general partner;
- (12) Taking part in a decision which involves an actual or potential conflict of interest between a limited partner (or limited partners) and a general partner (or general partners);
- (13) Discussing the prospects of the partnership business;
- (14) Consulting or advising a general partner, or general partners, about the activities of the limited partnership or about its accounts (including doing so as a member of an advisory committee of a limited partnership). (Draft Bill, cl 55(1) and (2) and Schedule 6

20.113 We also recommend that the Secretary of State should have power by subordinate legislation to amend this list (by adding, modifying or omitting a permitted activity). (Paragraph 17.17; Draft Bill, cl 55(3))

20.114 We recommend that the protection available to a limited partner should be clarified by providing:

- (1) That a limited partner is not personally liable (whether to third parties or by contribution to the liability of the general partner) for any partnership obligation

incurred while he is a limited partner, unless he receives back all or part of his capital contribution; (Draft Bill, cl 56)

(2) Where a limited partner takes part in the management of the partnership business he is personally liable for any partnership obligation incurred as a result of his taking part in management and for any other partnership obligation during the period when he takes part in management. (Paragraph 17.23; Draft Bill, cl 57)

20.115 We recommend that:

(1) While a person remains a limited partner he is not entitled either directly or indirectly to withdraw or receive back any part of his agreed capital contribution (“the relevant capital contribution”) to the partnership; (Draft Bill, cl 56(2))

(2) A partner’s “relevant capital contribution” should mean a capital contribution consisting of either or both of a sum or sums of money and property which has an agreed capital value. (Paragraph 17.31; Draft Bill, cl 56(4))

20.116 We recommend that if a limited partner withdraws or receives back all or part of his agreed capital contribution he should be personally liable for partnership obligations incurred while he is a limited partner, but that his liability should not exceed the amount of his capital contribution drawn out or received back. (Paragraph 17.33; Draft Bill, cl 56(3))

20.117 We recommend that the requirement that a limited partner make a contribution should be replaced by an option to make a capital contribution; (Paragraph 17.36; Draft Bill, cl 56(2))

THE RIGHTS AND OBLIGATIONS OF PARTNERS IN A LIMITED PARTNERSHIP

20.118 We recommend that it should remain a default rule that the consent of limited partners should be needed for (a) any change to the partnership agreement and (b) any change to the nature of the business and (c) the retirement of a general partner. (Paragraph 18.7; Draft Bill, cls 4, 6(4) and 28(1))

20.119 We recommend that:

(1) In the absence of an agreement to the contrary, a limited partner should not be under a duty to keep the other partners fully informed of partnership matters or a duty to account to the partnership for profits made by him in a competing business; and

(2) In the absence of an agreement to the contrary, a limited partner should not be under duties to ensure that accounting records are maintained and to co-operate with persons keeping partnership records. (Paragraph 18.12; Draft Bill, cl 59(1))

20.120 We recommend that an assignee of a partner’s share should be able to become a partner in a limited partnership in place of the assignor if either (a) the general partner agrees to the substitution or, if there is more than one general partner, all of them agree to it, or (b) the substitution is made in accordance with the partnership agreement. (Paragraph 18.18; Draft Bill, cl 60(3))

20.121 We recommend that the power to expel a partner against whom a charging order is made or whose share is arrested in execution should not apply to a limited partner. (Paragraph 18.20; Draft Bill, cl 60(2))

20.122 We recommend that a limited partnership should break up (a) if the general partner decides, or if there is more than one general partner at least half of the general partners decide, to end the partnership, or (b) if there are no general partners, at least one half of the limited partners decide to end the partnership. (Paragraph 18.22; Draft Bill, cl 61(1))

20.123 We recommend that:

(1) The general partner or general partners should have responsibility for winding up the partnership business and affairs, unless the court orders otherwise or there are no general partners; (Draft Bill, cl 61(2))

(2) A limited partner should not have the right to take part in a decision by the partners to approve the exercise by the liquidator or partnership liquidator of powers which require the approval of partners, unless the partnership agreement provides otherwise or the partnership has no general partners; (Draft Bill, cl 61(3) and (4))

(3) Unless the partnership agreement provides otherwise or there are no general partners, the persons entitled to attend meetings to consider the liquidator's annual accounts or final accounts should not include a limited partner, former limited partner or personal representatives of, or insolvency practitioners for, former limited partners. (Paragraph 18.27; Draft Bill, cl 61(3) and (5))

SPECIAL LIMITED PARTNERSHIPS

20.124 We recommend that in English law there should be a special limited partnership which does not have separate legal personality. (Paragraph 19.22; Draft Bill, cl 73 and Schedule 10)

CODE OF PRACTICE ON WRITTEN CONSULTATIONS

The following criteria apply to all UK national public consultations, and have been applied to this consultation paper.

1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.
5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.
6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.
7. Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.

Responses to the consultation should be sent to the address given at paragraph 5.2 of the consultation document. If, however, you wish to make any comments about the handling of this consultation, please contact:

Philip Martin
Better Regulation Team
Department of Trade and Industry
Room 725
1 Victoria Street
London SW1H 0ET
Philip.Martin@dti.gsi.gov.uk

Further information about this code of practice can be found at:
www.cabinet-office.gov.uk/servicefirst/index/Consultation.htm.



Printed in the UK on recycled paper with a minimum HMSO score of 75
April 2004 Department of Trade and Industry. <http://www.dti.gov.uk>
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