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The Partnership Bill: under starter's orders

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[Limited Partnerships Act 1907](#)

***Comp. Law. 41 Introduction**

The law of partnership has changed little since the Partnership Act 1890 ("the 1890 Act"), which codified the law relating to the general partnership, and the Limited Partnerships Act 1907 ("the 1907 Act"), which introduced the limited partnership. Partners enjoy considerable flexibility and privacy, since the law imposes few requirements on their formation, terms or termination, and although limited partnerships must be registered,¹ registered details are minimal and accounts need not be filed. Partnerships are tax transparent, as it is the partners rather than the partnership itself that are taxed.² The key difference between general and limited partnerships is that partners in the former are all jointly and severally liable without limit for debts and obligations of the partnership,³ whereas the latter need only have (as a minimum) one such general partner and one limited partner. The liability of a limited partner is limited to his capital contribution,⁴ provided he does not take in part in management.⁵ The importance to partners of flexibility, ease of operation and privacy have been cited regularly in surveys.⁶

However, globalisation, consumerism, and social, economic and technical developments have led to changes in the membership of partnerships, the services offered, and the expectations of clients. As a result, many partnerships, as well as the Department of Trade and Industry and the Law Commissions, have identified the need to reform partnership law⁷ and, in response to a request from the DTI in 1997, the Law Commissions have now produced two consultation papers "Partnership Law: a Joint Consultation Paper"⁸ ("the GP Consultation Paper") and "Limited Partnerships Act 1907: A Joint Consultation Paper"⁹ ("the LP Consultation Paper"), and are now drafting a new Bill on partnership law. The fact that this is to take the form of a single statute will be particularly advantageous to limited partnerships, which must currently refer to both Acts to ascertain the relevant law.

The purpose of this article is to discuss the reforms to partnership law proposed by the Law Commissions and therefore likely to be contained in the Bill, and those reforms which it is submitted should be included but are perhaps unlikely to be. The reforms will be considered under three broad headings; setting up a partnership, running a partnership, and terminating a partnership. Possible reforms which are beyond the Law Commissions' remit will also be briefly considered.

Reforms to the setting up of a partnership

The definition of a partnership

1. Section 1 of the 1890 Act

Section 1 of the 1890 Act defines a partnership as "the relation which subsists between persons carrying on a business in common with a view of profit". The Law Commissions propose, first, that the definition should include an agreement.¹⁰ It is not entirely clear from the GP Consultation Paper what is meant by this. If it refers to an agreement to form a partnership, this would significantly change the law, making partnerships more formal, and giving rise to problems of proving whether a partnership was intended. The fact that the Law Commissions recognise the continued existence in the future of partnerships formed unintentionally¹¹ makes this interpretation unlikely. Alternatively, the Law

Commissions may mean that there should be an agreement to carry on a business, in common, with the objective of making a profit. However, this must in practice exist, at least impliedly, whenever the current elements of the definition are satisfied, and therefore this reform would not change the law.

Secondly, the Law Commissions propose that partners need only to have the objective of carrying on business, rather than actually to do so, in order to allow a partnership to subsist before or after the business is in operation or **Comp. Law. 42* during temporary cessation, and to reflect the House of Lords' ruling in *Khan v Miah*¹² that preparatory acts are sufficient for a partnership to exist even where the intended business never comes into operation. However, if a dispute arises at a later date, it may be difficult to establish the objective of the alleged partners, and it is submitted that a better approach would be for the definition of "carrying on" business to include ancillary acts which could have no purpose other than the carrying of the business in question.

Thirdly, the Law Commissions propose that if partnerships are to have separate legal personality (see below), it should be the partnership, not the partners, which carries on a business. The difficulty with this is that s.1 provides that a partnership exists only if a business is carried on by it, but this provision would mean that until a partnership exists, a business cannot be carried on.

2. The limit on the number of partners

The Law Commissions recommended¹³ the abolition of the 20-partner limit,¹⁴ from which a number of professional partnerships were already exempted.¹⁵ This recommendation was accepted by the government and the Regulatory Reform (Removal of 20 Member Limit) Order 2002 came into force on December 21, 2002.¹⁶

3. Nature of partners

Section 1 of the 1890 Act and s.4 of the 1907 Act require that partners be "persons", and therefore companies, LLPs or individuals may be general or limited partners, but partnerships may not (unless and until they are given separate legal personality (see below)). However, the only express provision is that a corporate body may be a limited partner,¹⁷ which might imply that such a body may not be a general partner, or that other persons may not be limited partners. The Law Commissions propose to make clear that a body corporate may be either a general or a limited partner,¹⁸ but it is submitted that, in the interests of clarification, the statute should provide that any natural or legal person may be a general or limited partner. Section 3 of the 1907 Act defines as a general partner any partner who is not a limited partner. The Law Commissions have invited comments on whether to lift this prohibition on a partner being both a general and a limited partner at the same time.¹⁹ However, it is argued that this could cause confusion for partners and third parties, as to when such partners would have unlimited liability.²⁰

The Acts are silent on which partners must approve a change in the status of a partner from general to limited, or vice versa.²¹ Although the fact that the introduction of a new partner requires only the consent of the general partners²² implies that a change in status must also require only their consent, this should be set out expressly in the statute.

4. Business

The partnership business may, according to s.45 of the 1890 Act, consist of "every trade, occupation or profession". In *Smith v Anderson*,²³ the Court of Appeal held that the management of a "once for all" investment did not constitute a business, but commented that management of "a repetition of investments" would have done.²⁴ On the basis of this, the Law Commissions argue that the term "business" includes investment activities²⁵ but they consulted on whether this should be made express. It is submitted that this is desirable since limited partnerships are predominantly used as investment vehicles.²⁶

Renaming of the limited partnership entity

The Law Commissions propose that, in order to avoid confusion with the limited liability partnership ("LLP"), the limited partnership be renamed "mixed partnership" or "investment partnership".²⁷ However, it is submitted that limited partnership is an accurate description, whereas "mixed partnership" is meaningless and "investment partnership" implies, misleadingly, that limited partnerships are only for investment purposes.

Registration

1. Limited partnerships

Section 5 of the 1907 Act provides that a limited partnership must be registered, and “in default thereof” is deemed to be a general partnership. The Law Commissions assume that this applies in the event of inaccurate registration (including failure to register changes), as well as non-registration, but ***Comp. Law. 43** propose that it should not²⁸ and that a certificate of registration be conclusive evidence of proper registration²⁹ (as is the case for companies³⁰).

It is submitted that this, though welcome, clarifies rather than changes the law. While an unregistered partnership clearly cannot be a limited partnership, because registration is a precondition for the existence of such a partnership, this argument does not apply to an inaccurately registered partnership. Where there is at least one general partner, and one limited partner who has contributed the capital stated in the register, and registration has taken place, the partnership must be a limited partnership, since the definition in ss.4 and 5 of the 1907 Act is satisfied. In addition, by providing that failure to register changes renders the general partners liable to fines, s.9 of the 1907 Act implies that there is no other penalty, and loss of limited liability would certainly be a disproportionately severe penalty on the limited partners.

In any event, the Law Commissions' proposals would only protect limited partners and not third parties who rely on the registered details. A provision similar to s.42 of the Companies Act 1985 should therefore be inserted into the statute, stating that a limited partnership may not rely, as against other persons, on changes affecting the registered details if those changes have not been registered. This would also be consistent with the Law Commissions' proposal to repeal s.10 of the 1907 Act, which provides that notice of the conversion of a general partner to a limited partner is only effective when advertised in the Gazette.³¹

Similarly, the statute should also clarify the relationship between registration and ss.14 and 36 of the 1890 Act. Section 14 provides that those held out as partners are liable as such, and s.36 provides that former partners who have failed to give proper notice of their retirement continue to incur liability. The statute should state that third parties (but not partners) may rely on ss.14 and 36 even where the person concerned is not registered as a partner, or is registered only as a limited partner but is held out to be a general partner. This is not proposed by the Law Commissions.

The Law Commissions propose that limited partnerships be required to register a registered office, instead of their principal place of business as at present, in order to enable the business location to be changed without alteration of the register. They also queried whether the nature of the business and details of limited partners should continue to be stated.³² It is submitted that the former is relevant to whether business is “of the kind carried on by the firm”, and thus to whether a partner engaging in such business has apparent authority under s.5 of the 1890 Act, while the latter is relevant if a limited partner ever becomes liable as a general partner.

In addition, it is submitted that the requirement that the name be registered³³ should be accompanied by a prohibition on the use of the same name as another limited partnership, since at present the Registrar will only “advise against” the use of such a name.³⁴ This would bring the law into line with that applicable to registered companies.³⁵

In the interests of transparency, the statute should also expressly state that names which are offensive, or the use of which would constitute a criminal offence, are prohibited. It should also refer to the filing requirements imposed on certain partnerships by the Partnerships and Unlimited Companies (Accounts) Regulations 1993.³⁶

The Law Commissions propose³⁷ that the level of fines levied on general partners for default in filing information should be increased from the present sum (£1) to the level set for companies.³⁸

2. General partnerships

The Law Commissions consulted on whether registration should be required for general partnerships which wish to obtain separate legal personality (see below), although they tentatively suggest that all partnerships should have legal personality without registration.³⁹ It is submitted that the fact of registration would make partnerships less informal, and the details registered and the need to notify

alterations would impact adversely on privacy and flexibility. Filing would impose an administrative and financial burden, and default might result in civil or criminal penalties.

The agreement

Although the lack of a model agreement was one of the few issues mentioned expressly in the Law Commissions' remit,⁴⁰ and indeed they themselves had previously identified its absence as a problem for partnerships,⁴¹ they have not proposed the introduction of a model agreement. This is particularly surprising given that the government is proposing a simpler and clearer model document for companies,⁴² and that the absence of such a document undoubtedly contributes to the fact that at least half of all partnerships have no comprehensive agreement.⁴³ Such partnerships are governed, often without realising, by inappropriate default provisions in the Acts. Even partnerships which do have an agreement would benefit from a model agreement to reduce drafting costs and ensure their own agreement is comprehensive.

A model agreement should therefore be annexed to the statute. The Law Commissions' argument that partnership legislation is insufficiently extensive to form the basis of a model agreement does not apply if use of the agreement is optional, because it can then include provisions or list alternatives which are not contained in the statute.

****Comp. Law. 44 Application of the Business Names Act 1985***

Although the Business Names Act requires the names of all partners to be disclosed on documents and at the partnership's premises, neither the partnership nor individual partners need be identified as limited or general. Third parties who have not consulted the register may therefore be unaware that the assets of some partners are not available to creditors, and the Law Commissions propose disclosure of limited partnership status, through compulsory use of the suffix "limited partnership", "lp" or "limited firm".⁴⁴ It is submitted that either of the first two, but not the third, would provide sufficient notice, and that disclosure of the registered number should also be compulsory, in order to notify third parties of the fact of registration and the availability of registered details. The registered number is particularly useful if registration in the same name as other limited partnerships continues to be permitted (see above).

The Law Commissions also propose an express provision that merely disclosing the name of a limited partner pursuant to the BNA cannot constitute holding out.⁴⁵ It is submitted that this could be prejudicial to a third party and that it is open to the partnership to state that a partner is limited if they wish to be certain that this does not hold him out as a general partner.

Reforms to the running of a partnership

The introduction of separate legal personality

Partnerships in England and Wales have no separate legal personality, unlike partnerships in other jurisdictions, such as Scotland.⁴⁶ The law does recognise the partnership as an entity for some purposes, for example, value added taxation,⁴⁷ litigation (a partnership can sue and be sued),⁴⁸ enforcement (judgments against the firm may be executed against partnership property),⁴⁹ and insolvency (an insolvent partnership is wound up as an unregistered company).⁵⁰ However, the introduction of separate legal personality could simplify a number of areas for partnerships, which are discussed below. If partnerships are given separate legal personality, their tax position will require confirmation. Scottish partnerships and LLPs, both of which have legal personality, are tax transparent, and therefore it is likely that English partnerships would be treated similarly, although the Inland Revenue has not yet confirmed this.⁵¹

1. Continuity

Legal personality would mean that partnerships would not be obliged to dissolve automatically on a change in membership (see further below).

2. Land

Legal personality would also enable a partnership to own land in its own name, instead of through up to four partners as trustees for the partnership. However, reform would then be required in two other

areas: the absence of statutory presumptions on the execution of documents by partners, and the absence of public disclosure of the authority of particular partners to transact in land.

In respect of the execution of documents, the Law Commissions propose that a provision be inserted into the statute stating that a deed would be duly executed if expressed to be so and signed by a partner.⁵² In respect of public disclosure, the Law Commissions propose that the names, or minimum number, of partners entitled to buy or sell land be registered, and that a voluntary register of such information be set up if general partnerships are not to be registered.⁵³ It is submitted that this would not provide certainty, and that instead a statutory presumption similar to s.36A of the Companies Act 1985 should be included in the statute, to the effect that due execution would be deemed to have been effected where two partners signed the document. Alternatively, the Land Registry could state on the register that details of partners authorised to transact land were available from the partnership, thus putting third parties on notice that some partners might not have authority. This latter solution would be preferable for partnerships, but the former would be simpler, and more certain for third parties.

3. Other property

Ascertaining whether property belongs to the partnership is crucial because this determines its accounting treatment and its availability to creditors, and because in the absence of contrary agreement, partnership property may only be used for the purposes of the partnership.⁵⁴ The Law Commissions assert that these provisions “do not cause any legal problems”,⁵⁵ and propose only minimal adjustments to the definition of partnership property in ss.20 and 21 of the 1890 Act to reflect the granting of separate legal personality.

It is submitted, however, that while legal personality would enable the partnership to own property, and thus simplify the process of establishing what belongs to it and what to individual partners, ss.20 and 21 would continue to cause problems. These sections define as partnership property that brought into the partnership stock, bought on account of the partnership or bought with the partnership's money. However, it can be difficult to establish that either of the first two events have in fact occurred, and if any can be established, it is unlikely that the status of the property so acquired will be disputed, and therefore ss.20 and 21 are superfluous. If none can be established, then those sections provide no assistance in determining whether the property belongs to the partnership.⁵⁶ A possible solution is for property paid for with partnership money, credited to a partner's capital account, or used regularly by more than one partner, to be **Comp. Law. 45* presumed to belong to the partnership, subject to contrary agreement.

4. Contracts

Separate legal personality would enable partnerships to enter into contracts, but it must be remembered that disputes could still arise, particularly as between partners,⁵⁷ over whether the partner(s) who signed on behalf of the partnership had authority to commit it to the contract.⁵⁸

5. Floating charges

Partnerships with separate legal personality could grant floating charges, although these would have to be registered, and therefore in the absence of a partnership register a separate register would be required.

6. International recognition of English partnerships

The introduction of separate legal personality could promote international recognition of English partnerships, but it is submitted that harmonisation of the partnership form and partnership law in the European Union would be a more significant development.⁵⁹

Sharing of profits and losses

Section 24(1) of the 1890 Act provides that, subject to contrary agreement, profits and losses must be shared equally. The Law Commissions consulted on whether the statute should provide that a limited partner's share of any losses must be offset against future or undrawn profits.⁶⁰ It is submitted that it should, since limited liability is intended only to protect personal capital and therefore ought not to apply to profits.

Amendments to the capital contribution of limited partners

A limited partner remains liable to the extent of his original capital investment even if he withdraws some of it,⁶¹ and the Law Commissions do not propose to alter this. However, it is submitted that this is disproportionate to the aim of ensuring that such partners provide actual money or property and not merely a guarantee⁶² and, in practice, it can easily be avoided by a limited partner making only a minimal capital contribution and the remainder of his contribution by way of loan. It is also inconsistent with the rules applicable to private limited companies,⁶³ since if they purchase shares from their shareholders out of capital, the shareholder ceases to have any liability in respect of those shares. It is submitted that so long as the withdrawal is disclosed on the register, and a statutory declaration of solvency is made, a limited partner should only be liable to the extent of his actual remaining contribution.

Duties

The Law Commissions consulted on whether the duty of good faith⁶⁴ should continue to apply and, if so, whether it and the fact it may not be excluded should be stated in the statute.⁶⁵ It is submitted that this duty is fundamental to partnerships and that in the interests of transparency, it should be made statutory.

Secondly, the Law Commissions propose a statutory duty to the partnership to act with the skill and care to be expected of a person with the experience and qualifications possessed by that partner. However, this would add nothing significant to the duty of good faith, and in any event a subjective standard of skill is inappropriate for many modern partnerships, in which large numbers of partners and the fact that new partners often enter the firm from outside mean that expectations are likely to stem less from perceptions of the person and more from the requirements of the post.

Thirdly, the Law Commissions propose that some duties be owed to the partnership and others to the partners, instead of all duties being owed to the latter. However, this could cause confusion, and in fact most duties would need to be owed to the partners and the partnership since they would be essential both to the partnership business and the mutual trust between partners. Since the Law Commissions reject the idea of duties being owed to the partnership only, on the basis that this would cause problems with derivative actions just as the corresponding provision in company law has done,⁶⁶ or to the partners and the partnership concurrently, on the basis that this could give rise to conflicts between them as to whether the duty should be enforced, it is submitted that there should be no change.

In addition, s.29(2) of the 1890 Act provides that the duty to account for a benefit derived from use of the firm name or connection continues to apply between dissolution and winding up where dissolution is due to the death of a partner. The Law Commissions argue that no amendment is required, since their reforms to dissolution (see below) will reduce the scope for this subsection to apply. However, it is submitted that it should not apply at all, since it is anomalous and could cause problems for partners who commence work for a rival business. It should therefore be deleted.

Management and decision-making

The Acts provide, subject to contrary agreement, that decisions as to "ordinary matters" must be taken by majority⁶⁷ while decisions as to certain specified extraordinary matters must be taken by all the partners unanimously.⁶⁸ However, there is no provision for the taking of extraordinary decisions generally. The Law Commissions propose to specify additional extraordinary matters which would be subject to unanimity, and consulted on whether there should be others. ***Comp. Law. 46** It is submitted that a provision that all extraordinary decisions should be taken unanimously is required. It may sometimes be difficult to categorise decisions, but this is also true at present, and at least the procedure to be adopted subsequently would be clear.

Section 6(1) of the 1907 Act provides that a limited partner has no right to manage, and that he loses limited liability if he does take part in management. The Law Commissions' proposal that third-party knowledge of this should continue to be irrelevant is to be welcomed,⁶⁹ since it is non-involvement in management, rather than concealing involvement from third parties, which is important. By way of exception to s.6(1), s.6(5) expressly permits limited partners to inspect the books, examine the state and prospects of the business and advise other partners on these matters. As the Law Commissions suggest, further guidance should be given,⁷⁰ although the list could not be exhaustive. It is submitted

that the exercise of any power over the conduct of the business, including voting, should only be listed in so far as it is already mandated by the Acts.

The departure of partners

1. Expulsion

Section 25 of the 1890 Act permits the expulsion of a partner only if the partnership agreement so provides but, in the absence of such provision, partners can instead dissolve and re-form the partnership without the partner. However, where neither is possible, the only alternative is to apply to the court for dissolution under s.35 of the 1890 Act. The Law Commissions consulted on whether a power to expel should be given to the court.⁷¹ It is submitted that this would be less destructive and more consistent with their reforms to promote continuity (see below).

The proposed grounds are the same as those for dissolution by the court under s.35, except for the omission of the ground that the business can only be carried on at a loss where, of course, only dissolution would be appropriate. However, the Law Commissions do not refer to s.96 of the Mental Health Act 1983 as modified by s.6(2) of the 1907 Act, which provides that dissolution may be sought on grounds of the mental incapacity of a general partner, or that of a limited partner if his share cannot otherwise be realised. It is submitted that this should also be a ground for expulsion.

2. Transfer of a partner's share

If departing partners are to lose the right to trigger dissolution (see below), they are left with the options of assigning their share to an assignee, or selling it to a new partner. Section 31 of the 1890 Act provides that an assignee is entitled only to a share of the profits and not to manage the partnership, and therefore the value of the share is less than that of a full partner. However, the admission of a new partner is subject to the consent of all partners.⁷²

The Law Commissions propose that the share be automatically assigned to the other partners, with its value becoming a debt due to the departing partner. However, the other partners might be unwilling or unable to purchase the share, and the proportions in which they would own it, and their individual liability to pay for it, would be unclear. It is submitted that the remaining partners should have an option to purchase, and issues of ownership and payment would then have to be resolved before this was exercised.

3. Valuation of a partner's share

In order to value the share it is necessary to ascertain the proportion of the partnership assets and income to which the partner is entitled. At present, s.24(1) of the 1890 Act provides that income profits and capital are to be shared equally, subject to contrary agreement, and in *Popat v Shonchhatra*⁷³ the Court of Appeal held that this applied to capital contributions. This default position as to capital is clearly unsatisfactory, and the Law Commissions propose that in the absence of contrary agreement, partners would be entitled to the "return of their capital contributions in the same proportion as they were contributed".⁷⁴

The position is further complicated by s.42 of the 1890 Act, which provides an exception to s.24(1) for profits accruing after dissolution. Rather than an equal share, an outgoing partner may take either the profits attributable to the use of his share of the assets⁷⁵ or five per cent interest on that share. In *Barclays Bank Trust Co Ltd v Bluff*⁷⁶ the court ruled that this only applied to profits made in the ordinary course of business, and not to capital profits (assets over and above the firm's capital), which remain subject to s.24(1). A partner was thus entitled both to the post-dissolution income profits attaching to his share of capital (or five per cent interest), and to a proportion of the post-dissolution capital appreciation under s.24(1).

The Law Commissions propose to replace the alternatives with a simple right to interest at the Bank of England base rate or a certain amount above it.⁷⁷ This would be preferable to five per cent, which is often uneconomic either for the partnership or for the partner, but it seems unduly restrictive to remove the option to take a share of the profits, since this could be more valuable. It is also submitted that the profits to which s.42 applies should also be made clear.

Having ascertained the share to which the partner is entitled, it is then necessary to value that share.

In the absence of dissolution giving rise to a realisation of the assets, the valuation is based on an account,⁷⁸ to be taken on the basis of any express provision in the partnership agreement or, if none, the conduct of the partners.⁷⁹ The Law Commissions propose a statutory method of valuation and consulted on two alternative methods. The first, a notional sale of the business, requires clarification as to whether the sale would be as a going concern, or on a break-up basis, or the more (or less) valuable of the two. The second, the accounting practice in the last annual accounts, may not be **Comp. Law. 47* apt to apply to the situation which has arisen.⁸⁰ The first option, properly clarified, is therefore preferable. Since it is for the court to take an account, a statutory method of valuation would entail no further loss of flexibility or privacy, and would provide certainty and the opportunity to plan the financing of the payment.

4. Liability of departing partners

Section 17 of the 1890 Act provides that a partner who “retires” remains liable for debts incurred prior to their departure. The Law Commissions propose that this should apply to all partners who leave, but it is submitted that although replacing the word “retiring” with “departing” or “leaving” would clarify the law, it would not alter it. The word “retiring” in the 1890 Act encompasses all voluntary departures, as indicated by s.26 of the 1890 Act, the title of which uses this word in relation to termination by notice.

The Law Commissions also consult on whether a time limit should be imposed on the liability of limited partners.⁸¹ However, it is submitted that there is no inherent unfairness in continuing liability for limited partners as opposed to general partners, and therefore no justification for introducing a time-limit.

Reforms to dissolution and winding up

Automatic dissolution and continuity

Sections 32 to 34 of the 1890 Act provide that partnerships which have no contrary agreement dissolve automatically on the death, bankruptcy, or departure of a partner or illegality affecting only one partner.⁸² This is less likely to apply to limited partnerships because s.8(e) of the 1907 Act requires their term to be registered and Form LP5, on which a limited partnership is registered, requires that if the term is not fixed the “conditions of existence of the partnership” must be stated. Automatic dissolution is unlikely to reflect the wishes of the partners, and may give rise to problems, particularly as a result of the temporary non-existence of the partnership prior to re-formation.⁸³ It also runs counter to the rules governing taxation, since the Revenue now recognises only actual discontinuance of the business,⁸⁴ rather than automatic dissolution followed by re-formation.

The Law Commissions propose that there be no automatic dissolution, subject to agreement to the contrary in the partnership agreement in respect of death, bankruptcy⁸⁵ or illegality.⁸⁶ It is not clear why contrary agreement is not to be permitted where a partner leaves,⁸⁷ and it is submitted this is inconsistent and liable to cause confusion. In addition, requiring contrary agreement to be in the partnership agreement is unduly inflexible, since the partners might prefer to make such decisions as the need arises.

The Law Commissions consulted on whether a partnership which is reduced to one partner should be given time to find a new partner before automatic dissolution applies, on the ground that this would avoid having to transfer contracts and property.⁸⁸ This would reflect the position for other organisations with a minimum membership, the public company⁸⁹ and the LLP,⁹⁰ but those bodies are not formed by a “relation” (or “voluntary association” as proposed by the Law Commissions⁹¹), whereas such a relationship is fundamental to partnerships. It is therefore submitted that it would be inappropriate for a partnership of one partner to be permitted.

Section 33(2) of the 1890 Act as amended by s.6(5)(c) of the 1907 Act provides that if the share of a general (but not a limited) partner is charged for a private debt, the partnership may be dissolved by the other partners. The Law Commissions argue⁹² that this option is exercisable by all partners unanimously, and propose that this be set out expressly in the statute. It is submitted that the statute is ambiguous and, since the financial position of limited partners is already protected by their status, their consent is unnecessary. The statute should therefore state this expressly.

Dissolution by the court

Dissolution may be ordered by the court on the application of one or more partners on the grounds set out in s.35 of the 1890 Act and s.96 of the Mental Health Act 1983. Although the Law Commissions consulted on whether further grounds are required for limited partnerships,⁹³ it is submitted that they are not, since there are no material differences between limited and general partnerships in this respect.

Dissolution by the partners

As discussed above, ss.32 to 35 of the 1890 Act set out the circumstances giving rise to dissolution; expiration of the term or undertaking, notice, bankruptcy, death, charge, illegality or court decree. However, the Act omits to state that the partners may at any time unanimously dissolve the partnership. While this may be obvious, it is submitted that since the statute sets out all other grounds for dissolution, this should also be included.

Winding up

Solvent partnerships may be wound up by the partners themselves, or by the court through a receiver and/or manager. The Law Commissions consider that where the partners are in dispute but the partnership is solvent, the business should be wound up not by the court but by a partnership ***Comp. Law. 48** "liquidator". The liquidator would have the powers of a receiver to get in the assets and pay the debts, but would also be able to carry on business, determine the rights of the partners (instead of the court taking an account) and do all other acts necessary for winding up the partnership. The unanimous approval of the partners would be required in order for the liquidator to make arrangements with creditors, compromise a partner's liability to contribute under s.44 of the 1890 Act, or carry on the business.

It is submitted that these proposals have a number of flaws. First, the Law Commissions criticise the current system on the grounds that the receiver has frequently to consult partners who are in dispute with each other, yet its proposals involve the liquidator obtaining unanimous support from such partners for key decisions. Secondly, the court should be the final arbiter of the determination the rights of the partners *inter se*, and therefore the liquidator's decision on entitlements should be subject to court approval. Finally, as the Law Commissions accept, the name "liquidator" is pejorative, whereas the name "receiver" is not, and is already widely understood. The statute should therefore provide that a partnership receiver has powers not only to get in assets and pay debts, but also to manage and to take an account subject to court approval.⁹⁴

Other matters

A number of other matters not falling within the Law Commission's remit, but also touching on partnership law, require reform. Since the focus of this article is the reforms which may appear in the Bill, these will be mentioned only briefly. First, the exemption of limited partners from the prohibition of discrimination on grounds of sex or race under s.11(5) of the Sex Discrimination Act 1975 and ss.10(1) and (4) of the Race Relations Act 1976 should be abolished.⁹⁵

Secondly, the Insolvent Partnerships Order 1994 ("IPO"),⁹⁶ which applies to partnerships which the courts in England and Wales have jurisdiction to wind up, requires reform. It fails to specify what proportion of "members" must apply for a voluntary arrangement,⁹⁷ administration⁹⁸ or winding up,⁹⁹ and, although case law indicates that an application may be made by a single partner,¹⁰⁰ the IPO should be amended to make this clear. It should also include a definition of the term "director" in the context of partnerships, since the offence of wrongful trading under s.214 of the Insolvency Act 1985 applies only to directors, a term which is not defined in the IPO, although the offence applies to partnerships. In particular, it is unclear whether the term applies to limited partners since it can be argued that their position, unlike that of general partners, is not analogous to that of directors.

Thirdly, Sch.1 to the CPR re-enacting Ord.81 RSC refers to the possibility of enforcing a judgment in the firm name against the partners, without distinguishing between general and limited partners.¹⁰¹ As this might prejudice third parties by implying that they can enforce a judgment against the private assets of a limited partner, it should be amended to make it clear that this is not possible unless that partner has engaged in management.

Conclusion

Although the sheer coverage of the Consultation Papers and the number of alternative reforms put forward by the Law Commissions make it difficult to predict the exact content of the forthcoming Bill, this analysis has indicated a considerable number of probable reforms, together with a number which, though less likely, are desirable.

However, two cautionary comments should be made. First, the current Acts have the merits of brevity (50 sections in the 1890 Act and 17 in the 1907 Act) and, as a result, simplicity and transparency, particularly when compared to the Companies Act 1985 (over 700 sections). With rationalisation and deletions, a new statute could be kept to 50 or 60 sections, and the fact that the draft Companies Bill¹⁰² is less than half the length of the Companies Act 1985 is an encouraging sign, although it is to be hoped that concision will not be achieved through excessive reliance on secondary legislation as occurred with the Limited Liability Partnerships Act 2000.¹⁰³

In the meantime, the option of forming an LLP is resulting in the diversion, since April 6, 2001, of some existing--and possibly some would-be--partnerships, particularly large professional partnerships.¹⁰⁴ It will be interesting to see whether reforms to partnership law are mirrored by reforms to the Limited Liability Partnerships Regulations 2001,¹⁰⁵ which utilise a number of provisions from the 1890 Act as the default provisions for LLPs.¹⁰⁶

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Comp. Law. 2004, 25(2), 41-48

1. s.5 of the 1907 Act.
2. s.111 of the Income and Corporation Taxes Act 1988 ("ICTA") and s.59 of the Taxation of Chargeable Gains Tax 1992 ("TCGA").
3. ss. 9 and 12 of the Act and s.4 of the Civil Liability (Contributions) Act 1978.
4. s.4(2) of the 1907 Act.
5. s.6(1) of the 1907 Act; *cf.* members of a limited liability partnership (LLP), who all have limited liability but who may retain personal liability for their own wrongdoing (s.6(4) of the Limited Liability Partnership Act 2000). See further V. Finch and J. Freedman, "The Limited Liability Partnership: Pick and Mix or Mix-Up?" (2002) September *Journal of Business Law* 475 and E. Deards, "Partnerships and the Problem of Unlimited Liability" (2000) *Commercial Liability Law Review* 73 on the uncertainty surrounding the extent of this liability.
6. Surveys of limited companies, sole traders and partnerships conducted by J. Freedman and M. Godwin at the Institute of Advanced Legal Studies as part of the ESRC Small Business Programme, covering over 400 firms (J. Freedman, "Small Business and the Corporate Form: Burden or Privilege?" (1994) 57 *Modern Law Review* 555); by J. Smallcombe, covering over 150 firms (A. Hicks, R. Drury and J. Smallcombe, *Alternative Company Structures for the Small Business* (ACCA Research Report, Certified Accountants Educational Trust, London, 1995); and by the Business Development Centre, Manchester Business School, covering almost 200 firms (The Forum of Private Business, *A Report into Business Legal Structures* (1991)).
7. See n. 6 above, and the Law Commissions' 1994 Feasibility Study incorporated in the DTI consultative document *Company Law Review; the Law Applicable to Private Companies* (URN 94/529).
8. Law Commission Consultation Paper No.159 and Scottish Law Commission Discussion Paper No.111, 2000. See also E. Deards, "Partnership Law in the 21st Century" [2001] J.B.L. 357 and D. Faber, "The Law Commissions' Review of the Law of Partnership" (1997) June *Butterworth's Journal of International Banking and Finance Law* 242.
9. Law Commission Consultation Paper No.161 / Scottish Law Commission Discussion Paper No.118. See also E. Deards, "Limited Partnerships: limited reforms?", forthcoming.
10. GP Consultation Paper, n.8 above, at 5.26.
11. GP Consultation Paper, n.8 above, at 6.23.
- 12.

[2000] 1 W.L.R. 2123. See further R. Linsell, "When does a partnership exist?" (2001) 19 January *Solicitors' Journal* 45.

13. GP Consultation Paper, n.8 above, at 5.61. See also P. Myners, "Institutional Investment in the United Kingdom: A Review" March 6, 2001 at 12.104.
14. s.717 of the Companies Act 1985 and s.4(2) of the 1907 Act.
15. See ss.716-717 of the Companies Act 1985 and related statutory instruments. s.716 of the Companies Act 1985 exempts solicitors, accountants and stockbrokers, and various Partnerships (Unrestricted Size) Regulations exempt certain other professionals. The Limited Partnerships (Unrestricted Size) No.4 Regulations S.I. 2002/376 exempt limited partnerships which take the form of collective investments.
16. S.I. 2002/3203.
17. s.4(4) of the 1907 Act.
18. LP Consultation Paper, n.9 above, at 3.3.
19. LP Consultation Paper, n.9 above, at 3.7.
20. See, for example, *Haughton Graphic Ltd v Zivot and Herbert Marshall*, Supreme Court of Ontario, unreported, noted in (1986) 1/3 *Journal of International Banking Law* N97.
21. s.9 of the 1907 Act provides that such changes must be registered and s.10 of the 1907 Act provides that a change from general to limited status must be advertised in the Gazette.
22. s.6(5)(d) of the 1907 Act.
23. (1880) 15 Ch. D 247.
24. *Per* Brett L.J. at 279. See also C-80/95 *Harnas v Helm CV v Staatssecretaris Van Financiën* [1997] E.C.R. I-745 in which the Court of Justice ruled that a Dutch limited partnership which held investments and received dividends and interest did not carry out an economic activity for the purposes of charging value added tax.
25. GP Consultation Paper, n.8 above, at 5.10.
26. Since the Inland Revenue confirmed that a limited partnership used as a venture capital investment fund would be treated as a limited partnership for tax purposes (British Venture Capital Association/Inland Revenue Statement, May 26, 1987), they have become the most popular vehicle for investment in private equity in the United Kingdom (see "Finance Special" (2001) 9 June *Estates Gazette* 65, P. Mitchell, "Limited Partnerships" (1996) May *Compliance Monitor* 112 and AltAssets Research, "The Limited Partner Perspective: A Survey of European Institutional Investors" (2002) May), since they are less highly regulated than authorised unit trusts or investment trusts (see further J. Watson, "Private Equity Limited Partnerships" (1998) 1 *The Corporate Law Tax Review* 371) and enable investors which are wholly or partially tax exempt to invest jointly with tax paying bodies (see further P. Soares, "Using a Limited Partnership for Property Transactions" (1997) 18 *Property Law Bulletin* 7 and J. Martin and G. Chase "Joint Venture Agreements" (1999) 39 *The Property Law Journal* 10).
27. LP Consultation Paper, n.9 above, at 1.14.
28. LP Consultation Paper, n.9 above, at 3.48.
29. *ibid.* at 3.26.
30. s.13(7) of the Companies Act 1985.
31. LP Consultation Paper, n.9 above, at 3.30.
32. *ibid.* at 3.22 and 3.17.
33. s.9 of the 1907 Act.

34. Companies House Guidance on Limited Partnership Registration at Pt 8.
35. s.26(1)(a) of the Companies Act 1985.
36. S.I. 1993/1820. If all general partners are limited companies, or unlimited companies or Scottish firms all of whose members are limited companies, the partnership must file annual accounts, an annual report and an auditors' report.
37. LP Consultation Paper, n.9 above, at 3.47-3.48.
38. £1,000 plus £100 per day (s.352(5) and Sch. 4 to the Companies Act 1985).
39. GP Consultation Paper, n.8 above, at 4.32.
40. The others were separate legal personality, continuity and reforms to solvent dissolution (GP Consultation Paper, *ibid.* at 1.1).
41. The Law Commissions' 1994 Feasibility Study, n.9 above, at 5.63. See also J. Freedman, n.6 above.
42. Department of Trade and Industry *Modernising Company Law* (2002) July Cm 5553 at p.8.
43. The Forum of Private Business, n.6 above.
44. LP Consultation Paper, n. 9 above, at 3.34.
45. *ibid.* at 3.39.
46. s.4(2) of the 1890 Act.
47. s.45 of the Value Added Taxes Act 1994. However, there is no joint assessment to income tax in the partnership's name. Instead, partners are taxed under the self-assessment regime and each partner includes his share of partnership income in his personal tax return and is solely liable for the tax on it.
48. Schs 1 and 2 to the CPR re-enacting RSC Ord.81 and CCR Ord.5 r.9.
49. Sch. at RSC Ord. 81 and CCR Ord. 25 r.9 and r.10.
50. Insolvent Partnerships Order 1994 S.I. 1994/2421.
51. GP Consultation Paper, n.8 above, at 3.12.
52. *ibid.* at 19.11.
53. *ibid.* at 11.23.
54. s.20 of the 1890 Act.
55. GP Consultation Paper, n. 8 above, at 11.4.
56. See, for example, *Miles v Clarke* [1953] 1 All E.R. 779 and *Waterer v Waterer* (1873) L.R. 15 Eq. 402.
57. s.5 of the 1890 Act permits a *bona fide* third party to rely on the appearance of authority when dealing with an unauthorised partner.
58. See, for example, *Mercantile Credit Co Ltd v Garrod* [1962] 3 All E.R. 1103, *United Bank of Kuwait Ltd v Hammoud* [1988] 3 All E.R. 418 and *Re Briggs & Co ex parte Wright* [1906] 2 K.B. 209.
- 59.

A useful summary of these is provided in *Company Law in Europe* (Butterworths).

60. LP Consultation Paper, n.9 above, at 5.19.
61. s.4(3) of the 1907 Act.
62. See further *Rayner and Co v Rhodes* (1926) 24 Ll. Rep .25.
63. s.162 *et seq.* of the Companies Act 1985 provide exceptions to the general prohibition in s.143 on a private company purchasing its own share capital. The DTI proposes to reform these provisions (see further *Modernising Company Law*, n.42 above).
64. *Const v Harris* (1924) Turn. & R. 496, 37 E.R. 1191.
65. See also J. Thurston, "Partnership Act 1890--Time for Reform?" [1988] J.B.L.155.
66. *Foss v Harbottle* (1843) 2 Hare 461, 67 E.R. 189.
67. s.6(5)(a) of the 1907 Act.
68. ss.19, 24 (7) and 24(8) of the 1890 Act and s.6(5)(d) of the 1907 Act.
69. LP Consultation Paper, n.9 above, at 4.19.
70. *ibid.* at 4.16.
71. GP Consultation Paper, n.8 above, at 6.42.
72. s.24(7) of the 1890 Act and s.6(5)(d) of the 1907 Act.
73. [1997] 3 All E.R. 800.
74. GP Consultation Paper, n.8 above, at 12.8.
75. See, for example *Hugh Stephenson & Sons Ltd v Aktiengesellschaft für Carton Nagen Industrie AG* [1918] A.C. 239.
76. [1981] 3 All E.R. 232.
77. GP Consultation Paper, n.8 above, at 7.26.
78. See further the CPR, Pts 25 and 40 and relevant Practice Directions.
79. *Cruickshank v Sutherland* [1922] All E.R. 716.
80. See, for example, *Re White (Deceased), White v Minnis and another* [2000] 3 All E.R. 618 in which the accounts valued partnership property at cost, but the court held that it should be valued at current market value for the purposes of dissolution or retirement of a partner.
81. LP Consultation Paper, n.9 above, at 4.49.
82. ss.32-34 of the 1890 Act.
83. The European Commission has recommended that partnerships should continue on the death of a partner (Art.5 of Commission Recommendation 94/1069 on the transfer of small and medium-sized enterprises ([1994] O.J. L384 /14)). The Commission has recently reaffirmed this view, criticising the effect of the present situation on business efficacy, in a further Communication on the transfer of small and medium sized business enterprises ([1998] O.J. C93/2).

84. s.113(2) of the Income and Corporation of Taxes Act 1988, as amended by the Finance Act 1994.
85. GP Consultation Paper, n.8 above, at 6.23.
86. *ibid.* at 6.25.
87. *ibid.* at 6.19.
88. *ibid.* at 6.64.
89. s.24 of the Companies Act 1985.
90. s.24 of the Companies Act as modified by reg.4 and Sch. 2 Pt I of the Limited Liability Partnerships Regulations 2001 S.I. 2001/1090.
91. GP Consultation Paper, n.8 above, at 5.26.
92. *ibid.* at 5.35.
93. LP Consultation Paper, n.9 above, at 5.39.
94. This would involve consequential amendments to Ord.30 RSC as reenacted and applied to the High Court and the County Court by Sch.1 to the CPR.
95. The prohibition on race discrimination is also inapplicable to any partnership with five or fewer partners, although the equivalent exemption in the Sex Discrimination Act 1975 was amended by s.2(2) of the Sex Discrimination Act 1986 after the ruling on Case 61/81 *Commission v United Kingdom* [1982] E.C.R. 2601. It was originally envisaged as applying only to professional partnerships with more than eight partners (Home Office, *Equality for Women*, Cmnd 5724 (September 1974, HMSO: London), at para.53. A similar rationale applies to the Race Relations Act (Home Office, *Racial Discrimination*, Cmnd 6234 (September 1975, HMSO: London) at paras 48 and 50).
96. Insolvent Partnerships Order 1994 S.I. 1994/2421. See further E. Deards, "Partnerships --When the View is No Longer of Profit" (1995) 4/2 Nott.L.J. 165.
97. s.1 of the Insolvency Act 1986 as modified by Art.4 and Sch.1 to the IPO. Where the partnership is in administration or liquidation, the petition may be present by the administrator or liquidator.
98. s.9 of the Insolvency Act 1986 as modified by Art.6 and Sch.2 to the IPO. A petition may also be present by the creditors.
99. s.221A of the Insolvency Act 1986 as modified by Art.9 and Sch.5 to the IPO. A petition may also be presented by a creditor, the Secretary of State or, where the partnership or a partners is subject to a voluntary arrangement, administration, liquidation or bankruptcy, by the supervisor, administrator, liquidator or trustee (ss.221 and 221A of the Insolvency Act 1986 as modified by Art.7 and Sch.3 to the IPO).
100. *Re Greek Taverna* [1999] B.C.C. 153.
101. See also Pt.6 and PD 10 to the CPR.
102. *Modernising Company Law*, n. 42 above.
103. See further Deards, n.5 above.
104. J. Fleming, "Wragge and Co pioneers limited liability trail" (2001) 98/03 15 January *Law Society Gazette* 1.
105. N.90 above.
106. *Ibid.* at Part VI.

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