

A Commissioner for Corporate Governance

The Government is currently considering its response to the consultation on its Green Paper on Corporate Governance Reform, published in November 2016. A number of the submissions to the consultation referred to a letter dated 24th January 2017 from the Institute of Directors, the TUC, the ICGN (international Corporate Governance Network) and ICSA representing Company Secretaries to the prime minister which urged her *“create a mechanism which allows those whose interests should supposedly be protected by the law to make complaint and find an appropriate remedy”* and *“ensure investors and stakeholders are involved in the governance of that mechanism”*.

This paper describes such a mechanism, in the form of a Commissioner for Corporate Governance. This would provide a means for addressing complaints and shortcomings in governance in companies. Furthermore, it would demonstrate to companies, company directors and the general public the commitment of the Government to ensuring that companies consider the wider interests of stakeholders such as minority shareholders, employees, suppliers, customers, and local communities.

Purpose:

To assist the Secretary of State in securing compliance of public companies and large private companies with Section 172 of the Companies Act 2006 (“Section 172”)

Responsibilities:

1. To receive complaints about alleged failures of companies to comply with Section 172
2. To advise complainants how to seek redress from companies that have failed to comply with Section 172
3. To advise companies on compliance with Section 172
4. To advise the Secretary of State how to respond to alleged breaches of the provisions of Section 172
5. To publish an annual report for consideration by the Secretary of State and/or the House of Commons Business, Energy and Industrial Strategy Select Committee on
 - a. compliance by quoted and larger private companies with the provisions of Section 172
 - b. complaints received by the Commissioner
 - c. how the Commissioner has discharged his/her responsibilities

Organisational form:

1. A Commissioner appointed by and accountable to the Secretary of State
2. Advised by a board of 16, comprising:
 - a. An independent chairman
 - b. 2 members appointed to be representative of quoted companies and organisations representing quoted companies
 - c. 2 members appointed to be representative of larger private companies and organisations representing larger private companies
 - d. 2 members appointed to be representative of employees and organisations representing employees
 - e. 2 members appointed to be representative of small and medium sized enterprises supplying larger companies and/or served by larger companies

- f. 2 members appointed to be representative of the consumers and organisations representing consumers
 - g. 2 members appointed to be representative of investors and shareholders
 - h. 3 members appointed to be representatives of local communities and organisations representing other stakeholders
3. A staff sufficient to support the Commissioner in the discharge of his/her responsibilities

Potential steps in response to alleged breaches of Section 172:

1. Step One: screen a complaint to ensure that it:
 - a. represents a potential breach of Section 172
 - b. is not frivolous or trivial
2. Step Two: seek confirmation that the complainant has exhausted all the options for addressing concerns about failure to comply with Section 172, including
 - a. through the company's complaints procedures,
 - b. recourse to any regulatory body or ombudsman or other disputes resolution channel applying to the industry or activity concerned,
 - c. securing the response of the chairman of the company's board of directors to the complainant.
3. Step Three (once assured that the complainant has exhausted alternative options): address the case for taking action for a breach of Section 172
 - a. seeking, on behalf of the Secretary of State, a response from the chairman of the company's board of directors, to the complaint about the alleged failure to comply with Section 172
 - b. considering whether the response demonstrates that the company has complied with Section 172
4. Step Four (if the response provided under Step Three fails to satisfy the Commissioner that Section 172 has been complied with): taking into account the seriousness of the breach and whether it is an isolated breach or part of a pattern of breaches, consider any actions to be undertaken by the Commissioner, including
 - a. advising the Company on measures to remediate the breach:
 - i. changes to corporate governance structures, processes and behaviours
 - ii. rectification of outcomes to disadvantaged parties resulting from the breaches
 - b. advising the Company on steps that may be taken by the Commissioner if remediation measures are not undertaken and if further breaches arise
 - c. issuing a formal warning notice to the Company in private
 - d. issuing a public formal warning notice to the Company
 - e. advising the Secretary of State as to whether he/she should bring an action for the disqualification of one or more of the directors (most likely to be the chairman as a

consequence of his/her responsibility for the conduct of the business of the board of directors)¹ .

Timetable for establishment

The office of Commissioner could be created under the executive powers of the Secretary of State and not require legislation. The Government should consider a limited informal consultation with key stakeholders to address potential operational considerations and sensitivities with a view to announcing in the early autumn 2017 plans for its establishment, proceeding to recruit the Commissioner and senior staff with a view to appointment in January 2018 and the advisory board with a view to appointment at the same time as the office of Commissioner is formally launched and becomes operational in April 2018.

¹ Schedule 1, Part 1 of Disqualification of Directors Act 1986: for *“Any misfeasance or breach of any fiduciary or other duty by the director in relation to the company, including in particular any breach by the director of a duty under Chapter 2 of Part 10 of the Companies Act 2006 (general duties of directors) owed to the company.”*