



From 6 April 2008, the Companies Act 2006 does not require private companies to have a company secretary. However, many companies have a requirement in their constitution to have a company secretary, so what should they do – cull or keep? This briefing reviews the practical considerations that private companies should consider in deciding whether or not to keep the company secretary.

## Companies Act 2006

### Company secretary – do we cull or do we keep them?

#### The beginning

The company law reform process began as far back as 1998, with an independent review. White papers followed in 2002 and 2005 and a Bill was eventually published in November 2005. The Act itself finally received Royal Assent on 8 November 2006.

#### Objectives

The government's overall objective in respect of the new legislation was to simplify and modernise company law so that it better meets today's business needs and provides flexibility for the future. Whilst the reform process aimed to 'think small first', the resulting legislation has an impact on the directors, auditors, shareholders and company secretaries of private, public and quoted companies.

The Act itself has been written in simplified language with a particular focus on the small business.

#### The change

The Companies Act 2006 has removed the requirement for all private companies to have a company secretary. This enables private companies to choose whether they wish to have a company secretary or not.

In practice, as company secretaries were mandatory for all companies prior to 6 April 2008, if a company decides it no longer requires a company secretary:

- the company secretary must resign or
- the directors must resolve to remove the secretary.

#### The role of a company secretary

The duties that we have come to expect from a company secretary, or person responsible for company secretarial matters, include (but are not restricted to):

- filing documentation at Companies House
- maintaining statutory registers

- ensuring proper notice of meetings and copies of resolutions are sent to Companies House in the correct time frame and
- acting as co-signatory for the execution of documents by the company.

If a company secretary is appointed, the Companies Act 2006 specifically lays down the following duties:

- keep a register of secretaries and
- notify Companies House of any changes.

These duties still need to be undertaken, even where the company has decided not to have an appointed company secretary.

#### Who will undertake the duties?

The directors will remain legally responsible for ensuring these duties are undertaken where there is no company secretary, although they may delegate tasks to an authorised person. If the duties are not carried out, the directors may be liable to prosecution.

For this reason, as the duties will still need to be undertaken, it is envisaged that many existing companies will continue with a company secretary.

Those companies who do not consider they require a company secretary may delegate responsibility for the duties to an individual or corporate entity specialising in this administrative function.

#### What happens next?

Where there is no appointed company secretary, all relevant information will be sent to the company itself, and if it is addressed to the company secretary it will be treated as being addressed to the company.

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## Do we still need two officers?

You may recall that rules under the Companies Act 1985 required a company to have two officers. Now that the provisions are in place to enable companies to choose whether they have a company secretary, so changes have been made to allow a private company to have only one officer. This permits then a sole director and no company secretary.

The Companies Act 2006 makes no comment in respect of whether or not a sole director of a private company can also be appointed as the company secretary. The Companies Act 1985 had however specifically prohibited this. It is now unnecessary given the provisions above.

## What if a document requires two signatures and there is only one officer?

Documents requiring two authorised signatures will continue to be signed by two officers (director or secretary) of the company, where they exist.

The director will sign with a witness signature, when a company has only one officer (a sole director and no secretary). The witness does not require qualifications or experience.

## Will you cull or keep?

### Existing Companies

A realistic possibility for many small owner managed companies may be to do away with the requirement to have a company secretary. Historically, in some circumstances, the companies appointed a secretary in name alone where the duties were limited to statutory responsibilities. In this situation the director or the company accountant assumed responsibility of the secretary's duties.

The simplifications to the law, removing the requirement to have a company secretary, provide flexibility which these companies can take advantage of but the duties will still need to be undertaken.

### New Companies

Companies set up after 6 April 2008, are not required to have a company secretary. For these companies it would seem sensible for the Articles of Association to refer to secretarial duties rather than the role of company secretary. This provides the option of whether to appoint a company secretary or not. A company secretary could then be appointed if it is considered necessary, but this is not mandatory.

Many companies will still need a functioning company secretary. These are likely to be larger companies where a company secretary has a 'real' role to play. In this situation the company would be wise to consider continuing the appointment of the secretary. This should ensure that all the statutory obligations are met, with the company secretary being the chief administrative officer of the company.

## If a company secretary is retained, what are your options?

In order to act as a company secretary of a private company you need no formal qualifications however, you do require both the time and the inclination to ensure all the statutory requirements are met.

It is also very important that the obligations are understood as there are over 100 offences in the Companies Act that an officer of a company could be found guilty of. And, just like a director, secretaries can also be prosecuted.

The company secretaries of small companies will rarely have been appointed to solely act in this capacity, often they will also be a director or other employee. The company secretarial responsibilities can be undertaken as part of a job role or in many cases the role is delegated or outsourced to a third party.

Administrative services, such as those of a company secretary, are undertaken by professional chartered secretaries, solicitors and accountants.

In this situation the workload is passed to an administration provider but the responsibility is not. All work undertaken must be checked and then signed by the company secretary.

## Do they need to be a 'natural' person?

In everyday language, a 'natural' person is an individual. According to the law where a company secretary is appointed, they do not need to be a 'natural' person. A corporate entity can be appointed as the company secretary. The provisions that are being introduced where at least one director is a 'natural' person, do not apply to company secretaries.

### Comment

We are often delegated to perform these services alongside the preparation of statutory accounts and other business services. However if we act as the company's auditor we are specifically prohibited from being appointed as company secretary as it would represent a conflict of interest.

## Changing the Articles of Association

A company can only take the option to do away with a company secretary where the Articles of Association permit it. If the Articles contain specific reference to having a company secretary, this needs to be amended.

Companies House must be informed of the change by submitting a written or special resolution along with a copy of the updated Articles of Association.

However, if reference is made to the secretary's duties in the articles, no amendments are necessary as these duties will still need to be undertaken, with or without a secretary.

## How do we notify Companies House?

The company must inform Companies House within 14 days of the resignation or removal of the company secretary. This can be done by using either the online WebFiling service or by filing Form 288b.

The company is not however required to inform Companies House that it is opting not to have a secretary, therefore enabling this decision to be changed should the company choose to.

If a private company does continue to have a company secretary, they will have the same status as they have always had and will continue to be registered at Companies House.

## Are there any further changes affecting company secretaries?

From 1 October 2009, secretaries who are individuals will be able to file a service address on public record rather than, as at present, their usual residential address. This is permitted to be the registered office of the company.

From that date, corporate secretaries will be required to provide their registration number in addition to the details of where they are registered and their corporate or firm name.

## How can we help?

The changes made in the Companies Act 2006 in respect of company secretaries are providing flexibility and freedom to review the role of the company secretary. If you wish to discuss whether you require a company secretary or feel that we could assist with your statutory responsibilities, please contact us.

If you are considering setting up a limited company and wish to discuss the legal framework including the company secretary role, please contact us.