

HUMAN RIGHT

- SOCIAL SECURITY
- SEEK AND ENJOY ASYLUM
- MARRY AND FOUND A FAMILY

APPLICATION TO HIV/AIDS

- Promote equal access of women to social security and other available benefits in case of termination of marriage/employment
- Prevent discrimination for HIV+ people in access to social security
- Prohibit *refoulment* on basis of HIV status
- Promote humane/generous grant of asylum for HIV +
- Prevent pre-marital mandatory HIV testing
- Prevent prenatal mandatory HIV testing
- Provide information/ counselling regarding risks/prevention

PUBLIC HEALTH RATIONALE

- Women should have alternative to relationships that threaten them with infection, and to support, if husband dies
- HIV + people need means of support
- No public health rationale to deny asylum
- Refugee cannot return home to persecution
- HIV + married people can practice safe sex
- Only 1 in 3 babies born infected if mother infected, much less if AZT used. (A)

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Ireland

Rogue directors – time to change careers?

by Pat Igoe

In October a former leading member of the Irish Brokers Association, Tony Taylor, was sentenced by a Dublin court to five years in jail for fraud and related offences. Businessmen finding themselves on the wrong side of prison walls in Ireland are no longer the stuff of fantasy. New laws are now fast demanding new respect.

Earlier this year, the UK Trade and Industry Secretary, Patricia Hewitt, received a 559-page report from the Company Law Review Steering Group which, in the group's words, provided an 'opportunity to bring British company law from the nineteenth to the twenty-first century'. Similar and possibly even more significant improvements are being put in place in Ireland. They are long overdue.

Laws that are not enforced or enforceable fall into disrepute and then ridicule. Prior to the enactment this year of the *Company Law Enforcement Act*, the *Companies Code* was boring and turgid and too often ignored. It is still boring and turgid, but the new penalties for infringements by businessmen are real. Restriction and disqualification from acting as directors, and personal exposure of wrongdoings, will now be real risks and not just subjects for seminars attended mainly by academic lawyers.

Company directors queuing before the District Court and mumbling when their case is called that they thought that their accountants had filed the annual returns get short shift. In addition to the cost and inconvenience of spending up to half a day in court waiting for their case to come on, erring

businessmen have found themselves facing fines averaging IR£400 or 10 days in prison – and this at the venial end of the scale of corporate wrong-doing.

The *Companies Act* 1963 in Ireland (which, incidentally, is substantially modelled on the British *Companies Act* 1948) probably has a greater number of criminal sanctions than any other Act on the statute book. Despite this, up until recently nobody greatly cared, and enforcement was regarded mainly as a private matter. Now all is changed, and changed utterly: enter a serious system of enforcement regime, exit the *ancien regime*.

The *Company Law Enforcement Act* complements legislation which established the Criminal Assets Bureau (CAB) five years ago. In its current annual report, the CAB reported that the High Court made 19 orders freezing assets which were shown, on the civil standard of proof, to be the proceeds of crime. The assets exceeded IR£3,900,000 in value.

The CAB is also charged with instituting tax collection enforcement proceedings on moneys derived from suspected criminal activity. The Ireland of recent financial scandals, with tribunals established by Parliament uncovering murky dealing in high places, and where the circumstances of the death of murdered journalist Veronica Guerin are still clearly remembered, is no longer a tolerant environment towards delinquent business people. Like drink driving, commercial crime is no longer regarded as 'OK'.

Since mid-summer the CAB has been joined by the Director of Corporate Enforcement, a corporation with sole responsibility for ensuring that the companies *and their officers* treat the law with respect, rather than contempt or indifference. The Director's powers are unprecedented in Ireland, and it is believed that they are being closely examined in other jurisdictions. They serve notice that this time the *Companies Code* is not just something for lawyers. Now, company directors and other officers who continue to commit any of the wide variety of criminal offences contained in the *Companies Act 1963* and the amending Acts at last risk being seriously investigated and seriously prosecuted.

The new Director of Corporate Enforcement, Paul Appleby, is a former principal officer in the Department of Enterprise, Trade and Employment. His office is charged with the prevention, investigation and prosecution of corporate wrongdoing. His job also enables him to ask the court for injunctions where necessary. The Director must present a report each year to the Minister for Enterprise, Trade and Employment as well as 'accounting to' an appropriately established committee of the *Dáil* or *Seanad*, Ireland's lower and upper chambers of Parliament.

The Act also places the Company Law Review Group on a permanent basis. It provides that its agenda in monitoring company law and making recommendations to the Minister will be set every two years. The requirements for a progress report each year, and a new programme or agenda set every two years, represent a far remove from the time when attention to legislative provisions ended once the parliamentary draftsmen began their work.

The most often-quoted figure exposing former attitudes is stark. In the late 1990s, an appalling 13 per cent of companies filed their annual returns on time in the Companies Registration Office – a staggering 87 per cent non-compliance with the most elementary rule companies must observe. Yet, out of a total of 137,654 companies and well over a quarter of a million Irish company directors at the end of 2000, a mere four directors were disqualified, while only 113 had restrictions imposed on them in acting as directors. If the Director of Corporate Enforcement performs – and it should be emphasised that any lack of performance will be publicly visible – significant change is inevitable.

The main provisions of the Act's 10 parts include significant improvements in:

- investigations of companies and their officers;
- seeking restrictions and disqualifications of directors;
- winding-up and insolvency provisions;
- measures to improve compliance with obligations to file returns in the Companies Office;
- controls on auditors.

The Director takes over the role of the *Tánaiste* and Minister for Enterprise, Trade and Employment in initiating and conducting investigations into the behaviour of companies and their officers. The Director is a civil servant and 'shall be independent in the performance of his or her functions'. In any parliamentary democracy, a pivotal role in enforcing a strict regime without grace or favour, whether on the bench or

otherwise, requires independence from interference. Investigations into the affairs of such companies as Ansbacher Cayman, National Irish Bank NIB Financial Services Limited, Michael Lowry's Garuda Limited and Ciaran Haughey's Celtic Helicopters will be taken out of the political arena. Attorney General Michael McDowell, who chaired the committee that ultimately led to the Act, insists that the new order will be sensitive to commercial realities and to the needs of small business. It will not be a Frankenstein stalking the land.

Section 145 of the Act merely requires companies to keep the minutes of general meetings and directors' meetings indefinitely, whereas the new Act enables the Director to demand production to him of a company's books. It requires companies to 'give to the Director such facilities for inspecting and taking copies of the contents of the book or books as the Director may require'.

The Act has benefited from experience and from attempts to thwart its purpose. The definition of 'related companies', which can also be investigated, will now include companies that have a 'commercial relationship' with the investigated company – and such a relationship exists 'where goods or services are sold or given by one party to another'.

In relation to the cost of enforcement of company law, it has not been proposed that the Director's Office should be self-financing. However, the personal exposure of directors of companies which trade while insolvent is now seriously discussed across solicitors' desks. Awards of costs by the courts can be a significant deterrent to wrong-doing: individuals who are convicted on indictment and ordered to pay damages or to restore property may be ordered to personally pay up to one-tenth of the costs of the investigation.

In drafting the legislation, the draftsmen had to walk a fine constitutional line. A statement by a company director may not be used in evidence in proceedings for a criminal offence, other than perjury in the statement. This of course is similar to the situation in Britain, where a person under investigation under the *Criminal Justice Act 1987* is required to provide answers under section 2. But these answers are inadmissible in proceedings other than for giving false information, or for making a statement inconsistent with answers already given.

The Act also provides for the Director to take prosecutions directly in summary cases and to refer cases to the Director of Public Prosecutions. He can seek restriction or disqualification orders against company directors and injunctions restraining companies and their officers from continuing certain practices.

So at last, the personal liability of directors becomes a realistic possibility in Ireland. A company director's Sunday morning golf will not be any better for thinking of an appearance in the High Court the following day to be cross-examined on precisely why the company went into insolvent liquidation. Enforcement has fast become the key word in Irish company law: this new determination, backed up by an alert and sometimes angry public, means that rogue directors should consider a career change. 

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