

**Foreword by Chairman of the Company Law Review Group
– Dr. Thomas B. Courtney**

The publication of the first of two volumes (or Pillars) of the draft Companies Bill marks the achievement of a very significant step in the reform of Irish company law. The 15 Parts containing 952 sections of law represents the proposed consolidation and reform of the law relating to Irish private companies. The purpose of publishing Pillar A of the draft Bill is primarily to provide the users of company law with an early opportunity to become familiar with the proposed new provisions and structures and to facilitate their technical interrogation by practitioners. Whilst every care has gone into the drafting of the Bill, so extensive are the proposed changes that it is quite possible that particular scenarios have not been foreseen.

Simplification and contents of Bill

I believe that the consolidation of all law relating to private companies is the single biggest step in the simplification of Irish company law. I would acknowledge, however, that there are inherent limitations on just how ‘simply’ company law can be stated. Company law is, after all, not just a facilitative framework; it also seeks to regulate the administration of companies and is shaped by principles of shareholder and creditor protection and implements public policy protections which balance the principle of separate legal personality and limited liability.

One of the core principles which it is sought to reflect in the Bill is that the Companies Acts should be confined to the law of companies: their formation, administration, operation, governance, regulation, consequences of being separate legal entities often with limited liability, winding up and dissolution. The regulation of *activities* which might be carried on by companies is not the subject of company law because if those activities can be carried on by other types of legal form or entity (e.g. partnerships, societies, corporations, foreign bodies, sole traders etc) which are not subject to company law, it is appropriate to legislate generally, and not confine the law to companies. This is why the Companies Bill does not contain provisions on important matters such as charities, management companies or whistle-blowing; these may be all matters which should be legislated for, but in enactments which apply generally and not confined to companies.

The private company

The private company has been the work-horse of commercial life in Ireland since that form of registered company was first permitted under the Companies Act of 1907 and today almost nine out of ten registered companies are private companies. Ironically, the current Companies Acts view the private company as a peculiar variation of the public company, giving rise to a classic case of the tail wagging the dog. If there is one single recommendation of the CLRG which stands out, it is the very first recommendation of our First Report published on 31 December 2001, that “*The private company limited by shares...should be the primary focus of simplification*” (at paragraph 3.2.3).

That recommendation has been accepted and the publication of the first Pillar of the draft Bill gives it effect. Whereas there are currently 15 Companies Acts and seemingly myriad statutory instruments applicable to various types of company, the first 15 Parts of the draft Bill will provide an almost exhaustive statement of the law applicable to the private company.

Significant reform of the law of private companies

The draft Bill proposes many significant changes to the law of private companies. The main features of the new model private company and reforms provided for in Pillar A include:

- It will be limited by shares – private companies limited by guarantee will be permitted but will be subject to the legal regime which will be prescribed for *designated activity companies* (DACs);
- It will have the same contractual capacity as a natural person – private companies will not have an objects clause and so will not be subject to the doctrine of *ultra vires*, making it easier to transact with confidence with private companies;
- It may have only one director – in reducing the statutory minimum number of directors to one, accountability in governance will be increased as the need for passive nominee directors to make up the numbers will fall away.
- It can have up to 99 members – whilst many will be single member companies, private companies can have up to 99 members.
- It will not be permitted to list any securities, whether shares or debts – in so providing the law relating to the model private company can be kept simple; other types of private company such as DACs will continue to be allowed to list debt securities.
- It will have a one-document constitution – the memorandum and articles of association will be replaced by one document.
- The necessity for each company to have detailed specific internal regulations (in the form of articles of association) will be removed as most of the provisions commonly provided for in articles of association on the internal administration and governance of companies will be contained in the Bill and will apply to all private companies (unless their constitution provides otherwise).
- All private companies will be permitted to have “written” AGMs – where the members consent, the need for an annual physical meeting can be dispensed with.
- Directors’ common law and equitable duties will be codified – the Bill codifies directors’ duties as they have been developed by the Courts over the last one-hundred and fifty years making the law more transparent and accessible.
- One omnibus validation procedure will apply to regulated activities (e.g. transactions with directors, financial assistance, capital reduction and solvent windings up).
- Offences created by the Bill have been categorised on a scale of 1 to 4 (where 1 is the most serious) and the punishment for those found guilty of each category clearly specified – this will facilitate a far greater transparency in the

criminal dimension to breaches of company law and facilitate enforcement since a clear and rational regime should be a prerequisite to zero-tolerance.

- The directors of private companies meeting certain thresholds will be required to make compliance statements in line with the more proportionate and reasonable regime recommended by the CLRG in our 2005 *Report on Directors' Compliance Statement*.
- Private companies will be permitted to engage in domestic mergers along the lines which are currently only capable of being used in the case of cross-border mergers.

There are many more innovations and reforms contained in Pillar A.

Change and transition

While all of these changes are positive for Ireland and the users of Irish company law, change brings its own challenges. The CLRG was very conscious of the importance of regulatory impact assessment and the Bill seeks to provide an elective regime in respect of certain matters (such as the adoption of one-document constitutions) whereby existing private companies can decide, within the transition period, whether and when they wish to opt-in to the streamlined regime for the model private company.

Pillar B of the Bill will contain the provisions applicable to *designated activity companies* (DACs). These companies will also be private companies but will not have the attractiveness of the new model private company provided for in Parts 1 to 15. So, for example, they will have an objects clause and a memorandum and articles of association. All existing private companies will following a transition period, by default, become new private companies. The policy is to encourage the take up of the new structure. If, however, an existing private company wishes to opt-out of the new regime, it will be possible to do this at minimum cost to the company if it files to this effect and replaces the word "Limited" or "Ltd" in its name to "DAC" or "Designated Activity Company". It is thought, however, that the advantages of being a new model private company far outweigh any once-off inconvenience in adopting a new fit-for purpose constitution.

Other types of company

Of course there are other types of companies and the CLRG's recommendation is that the law relating to each distinct type of company will be set out in a separate Part of the Bill. These Parts will form the basis of Pillar B of the Bill. In those Parts, appropriate provisions from the law applicable to private companies in Parts 1 to 15 will be applied to each company type as will distinct provisions relevant only to that type of company. So public limited companies, guarantee companies, unlimited companies, designated activity companies, unregistered companies and investment companies will each have their own Part. Work continues on Pillar B and it is hoped that this will be published in approximately 12 months.

Acknowledgements

The importance of the consolidation of company law was recognised by the Working Group on Company Law Compliance and Enforcement chaired by Mr Michael McDowell SC which issued its Report in 1998. It was that Report which led to the establishment of the Company Law Review Group on an administrative basis in 2000 and ultimately a statutory basis pursuant to the Company Law (Enforcement) Act 2001. In the years since 2000 there are a great many people who worked as part of the CLRG who have provided valuable contribution to the process that has resulted in the publication of the draft Bill and I would like to thank all present and former members of CLRG for their efforts. While there are too many to mention individually, I would like to acknowledge the very significant contribution made by the Steering/ Drafting Group which prepared the Heads of Bill and thank Mr Paul Egan, Mr Paul Farrell, Mr William Johnston, Mr Ralph MacDarby and Mr Vincent Madigan.

Throughout that period, CLRG and myself as Chairperson, have received tremendous support and assistance from the secretariat of the CLRG and civil servants in the Department of Enterprise Trade and Innovation. The present Secretary to the CLRG, Mr John P Kelly and his predecessors, Mr Eugene Forde and Dr Pat Nolan all believe in the vision of a modern state-of-the-art Companies Act for Ireland and led committed and able teams in helping to secure the delivery of that vision.

Mr Conor Verdon was involved initially from February 2005 to July 2007 in the CLRG Secretariat during the preparation of the General Scheme, and subsequently assumed the critical role of leading the Department's team in its interaction with the Office of the Parliamentary Counsel (OPC) from December 2007 to date during the preparation of the Bill by OPC and the Department. Mr Vincent Madigan has been a leading contributor at the Department, and the only Department official involved throughout the entire process, from the McDowell Group in 1998, the ad-hoc CLRG in 2000, and as a CLRG member during the preparation of the General Scheme, including on the CLRG Steering Committee, and throughout the preparation of the Bill by the OPC and the Department.

Successive Attorneys General have supported this project in resourcing the drafting of the Bill. I think it important to acknowledge the superb work of the Principal Drafter in the OPC who was assigned the drafting of the portion of the proposed Bill that is now published and who, together with the other staff of the OPC, wishes to continue the time-honoured tradition of not being identified in connection with particular items of drafting work undertaken by that Office.

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May 2011