

# DÁIL ÉIREANN

## AN ROGHCHOISTE UM DHLÍ AGUS CEART DHLÍ AGUS CEART

### SELECT COMMITTEE ON JUSTICE

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*Dé Máirt, 23 Feabhra 2021*

*Tuesday, 23 February 2021*

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Tháinig an Roghchoiste le chéile ag 4 p.m.

The Select Committee met at 4 p.m.

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Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	
James Browne (Minister of State at the Department of Justice),	
Jennifer Carroll MacNeill,	
Patrick Costello,	
Pa Daly,	
Brendan Howlin,	
Thomas Pringle.	

Teachta / Deputy James Lawless sa Chathaoir / in the Chair.

## Business of Select Committee

**Chairman:** Before commencing the formal session, I advise members that the clerk to the committee and I have been reviewing the work programme and we hope to organise a private session next week to set out a few dates and topics, as I am keen to keep things moving despite our current restrictions. We will be in touch with members.

### Criminal Justice (Theft and Fraud Offences) (Amendment) Bill 2020: Committee Stage

**Chairman:** No apologies have been received. We are here today to consider Committee Stage of the Criminal Justice (Theft and Fraud Offences) (Amendment) Bill 2020. I welcome the Minister of State at the Department of Justice with special responsibility for law reform, Deputy James Brown, to our meeting. We will now proceed with our consideration of the Bill. In the context of efficiency, I will invite the Minister of State to make a few remarks at the end rather than at the start of our consideration, if that is in order. We will process the legislation and then invite him to make comments and give us an overview of it.

Sections 1 to 4, inclusive, agreed to.

#### SECTION 5

**Deputy Pa Daly:** I move amendment No. 1:

In page 5, line 9, after “offence.” to insert the following:

“in deciding what constitutes reasonable steps and due diligence, consideration shall be given towards the following, *inter alia*:

- (a) documented steps taken to avoid the commission of an offence;
- (b) the existence of internal controls and processes within the body corporate to avoid the commission of an offence; and
- (c) any other relevant actions to avoid the commission of an offence.”.

The amendment relates to section 5(2) which provides that “it shall be a defence for a body corporate against which such proceedings are brought to prove that it took all reasonable steps and exercised all due diligence to avoid the commission of [an] ... offence”. Our proposed amendment provides that consideration would be given to what documented steps were taken to avoid the commission of the offence; the existence of internal controls and processes within the body corporate to avoid the commission of an offence; and any other relevant actions. We are not opposed to a defence in itself but our concern relates to the wording of the defence as contained in subsection (2). There has been a difficulty with that issue in recent years, particularly with white-collar crime. If it is spelled out more, we hope companies would be incentivised to put in place proper processes. The wording in this Bill is also contained in the Counterfeiting Bill and the proposed money laundering Bill. Also, the Department of Justice has a view regarding the strict liability for bodies corporate being potentially unconstitutional. However, we note the OECD stated this defence has not been invoked yet, and the courts have yet to interpret it. The OECD also stated it was not a defence envisioned by it and that it needs more detail. That is the gist of it.

**Chairman:** Before I call the Minister of State, does any other Deputy want to comment?

**Deputy Brendan Howlin:** It is usually the Minister who speaks first.

**Chairman:** Does the Minister of State wish to respond?

**Deputy James Browne:** I thank the Deputies for their reasoned and constructive amendment and I appreciate the intent and spirit of it. Section 5 inserts a new section into the principal Act and this provides for the liability of offences for a body corporate. This is in accordance with article 6 of the directive.

The approach taken in the section reflects the general approach that is consistent with similar provisions in other recent legislation, for example, the Criminal Justice (Corruption Offences) Act 2018, the Criminal Justice (Offences Relating to Information Systems) Act 2017 and the Counterfeiting Bill 2020. That Bill was recently brought through Second Stage in Dáil Éireann. The provisions are not word-for-word identical but they are similar and they follow a similar pattern.

In this case, criminal liability is imposed on the body corporate for offences committed by an employee or other officer where the corporate body failed to exercise the requisite degree of supervision or control. This is subject to the defence under subsection (2), which requires the body to prove that it took all reasonable steps and exercised all due diligence to avoid commission of the offence. The onus is very much on the body corporate.

Before I come to the specifics of the Deputy's amendment I am keen to mention several points. First, the liability of the corporate body is in addition to that of the person committing the offence. Second, depending on the circumstances, managers may also be personally criminally liable, whether as perpetrators, insiders or accessories.

I recognise and appreciate that the amendment is well-intentioned in clarifying what is meant by "reasonable steps" and "due diligence". However, my concern is that a suggested definition of those terms may not always be appropriate. I would argue respectfully that this is better dealt with on a case-by-case basis. Otherwise, the section may inadvertently be weakened by suggesting that there is a formulaic approach to these terms. I prefer to see the matter left to the courts. I do not believe the defence weakens the section. Rather, it reflects that if we are to impute criminal liability, then there must be some culpable wrongdoing on behalf of the person, in this case the legal person, who will be punished. The requirements of the section are strong. The body corporate must prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence. To successfully raise the defence, the court would have to see evidence. I expect that it would be difficult for the body corporate to prove that it took reasonable steps in the absence of having documented them. If internal controls and processes were not in place, I imagine it would be difficult to prove the exercise of all due diligence.

This question has been examined recently in great depth by the Law Reform Commission in its 2018 report on regulatory powers and corporate offences. I refer in particular to two statements from that report. The first is in paragraph 10.04 of the report and it refers to due diligence in general by reference to section 78 of the Consumer Protection Act 2007. It states:

...a corporate defendant will need to produce evidence of the systems and procedures it had in place to avoid the commission of the offence, and that these included all steps that should reasonably have been taken to avoid its commission. The mere production of

policies and procedures, without effective implementation, monitoring, communication and oversight, will not suffice.

The second statement is contained in paragraph 10.17 of the report and is in respect of the type of defence that arises here and which combines requirements for reasonable steps and due diligence. It states:

The elements are distinct but related. As already seen, reasonable steps or precautions refers to setting up a system. Due diligence is ensuring that the system is working as intended. To establish the defence, therefore, an appropriate system must have been put in place, there must have been effective measures or controls implemented to monitor the effective operation of the system and it must be demonstrated that the system was operating at the time the offence was committed.

Finally, the report notes in paragraph 10.03 that due diligence has been recognised as being a concept not susceptible of precise definition. This is the nub of the issue. What reasonable steps and due diligence are can only realistically be assessed on the facts of each case. I suggest that task should be left to the courts based on the facts of the particular case in question. In the circumstances, unfortunately, I cannot accept the amendment but I accept the good intentions of the Deputies concerned.

**Chairman:** Does any member wish to comment on this? Deputy Howlin, do you wish to come in?

**Deputy Brendan Howlin:** I wondered whether there was a legal definition already. It is interesting to quote from the report. Does that have the force of law? I am surrounded by lawyers. Are the terms “due diligence” and “all reasonable steps” common enough in criminal proceedings to be understood in a way that would not weaken the burden we want to place on all corporate bodies to comply with the law?

**Deputy James Browne:** I have done some corporate law. My understanding is that it would be common in corporate law and criminal law. I am confident that the courts are well able to interpret what these terms mean. The concern is that if we start listing what is in fact due diligence, then it can become a tick-the-box exercise. That is my concern. There is a principal in law that if the Legislature puts in a list, it is assumed this is done to the exclusion of other factors. That is the concern I have.

**Deputy Pa Daly:** I will not press the amendment at this stage. We might come back to it on Report Stage.

**Chairman:** As the Deputy will know, the fact that a defence is raised does not mean it will work. Less is more sometimes in terms of the discretion of the courts. I thank the Deputy for moving the amendment and note he will not press it. I thank the Minister of State and the other members for the debate.

Amendment, by leave, withdrawn.

Section 5 agreed to.

Sections 6 to 13, inclusive, agreed to.

Schedule agreed to.

23 FEBRUARY 2021

Title agreed to.

Bill reported without amendment.

### **Message to Dáil**

**Chairman:** In accordance with Standing Order 101, the following message will be sent to the Dáil:

The Select Committee on Justice has completed its consideration of the Criminal Justice (Theft and Fraud Offences) (Amendment) Bill 2020 without amendment.

As there is time, I will invite the Minister of State to make some closing remarks if he wishes.

**Minister of State at the Department of Justice (Deputy James Browne):** I thank the Cathaoirleach and the Deputies for facilitating the Bill through Committee Stage today. At the time of my appointment last September we were significantly behind on several transpositions but we have made significant progress with several Bills. My thanks to the Seanad, Dáil and committees for facilitating us. I am confident that by the summer, if not the autumn, we will have all the backlog in transpositions addressed. My thanks to everyone again for their support.

**Chairman:** Thank you, Minister of State. We will certainly work with you on that to expedite any other matters of a similar nature. That concludes our deliberation for today. The joint committee will hold a private meeting in the coming days or week to consider other matters but today's business is at an end.

The select committee adjourned at 4.20 p.m. until 4 p.m. on Tuesday, 2 March 2021.