

EXPLANATORY STATEMENT

No. 44 of 1985

SUBJECT: AUSTRALIAN CAPITAL TERRITORY CRIMES (AMENDMENT) ORDINANCE (No4) of 1985

This Ordinance is part of the ongoing review of the criminal laws of the Territory and contains a comprehensive review of all the property related offences in the Crimes Act 1900 (NSW) in its application to the Australian Capital Territory (Crimes Act 1900).

Introduction:-

The purposes of this Ordinance are:

- (1) to simplify the laws relating to larceny and associated offences enabling the Courts to focus attention on the basic question of honesty or dishonesty instead of on technical questions such as a precise legal analysis of the manner in which property came into the hands of the accused. It is designed to reflect the commercial realities of the 20th century;
- (2) to simplify the offences relating to criminal damage to property by removing distinctions based upon the nature of the property or its situation, the circumstances in which it is destroyed or, except in the case of fire or explosives, the means used to destroy or damage it;
- (3) to restate in modern language miscellaneous remaining existing offences which cannot conveniently be dealt with in the context of either theft or criminal damage.

Structure of the Ordinance

The Ordinance inserts a new Part IV into the Crimes Act 1900. This new Part IV contains 4 Divisions.

Division 1 is the basic interpretation Division. Division 2 replaces the present law dealing with the crimes of larceny, false pretences, embezzlement, robbery, burglary, blackmail and the various crimes related thereto by a short set of comprehensive modern provisions. Division 3 deals with criminal damage to property and Division 4 repeats, in modern terms, existing miscellaneous offences and procedural provisions.

Reasons for the Reforms in Division 1 and 2

The existing law is basically the common law added to by a variety of more than 150 sections in the Crimes Act 1900. The basic offence is larceny (stealing), that offence originating more than six centuries ago in the common law. Indeed as Kenny points out in his "Outlines of the Criminal Law" in the days when the common law offence of larceny came into being (as triable in the King's Courts) the economic relations of men were simple and the main need of society was for legal protection against crimes of physical force rather than against deceit.

When the law of larceny first took shape, the notions of ownership and intangible rights, the foundation of the modern commercial community, were unknown. Possession of physical objects was of importance and larceny came to be defined, as it still is, as the taking and carrying away of some physical object from the possession of some other person without that person's consent.

The judiciary and legislature have endeavoured to adapt the larceny framework to meet the needs of modern society. Up till now the steps taken have been basically to meet emergent situations, and has resulted in patchwork of judicial decisions and statutory provisions. There are many loopholes and the distinctions between the various crimes which now exist are highly technical and complicated. Some of these distinctions can be effectively met by the courts but at the cost of defying common sense. Others still defy judicial attempts at a satisfactory resolution. An example is where a person borrows money from another person, the latter person by mistake handing over a \$10 instead of a \$2 note. If the first person does not notice the error until later and then decides to keep the surplus \$8 it is doubtful whether he has stolen anything from the person from whom he borrowed it. Either he has stolen the whole \$10 of nothing at all. A layman would take the view that he had stolen \$8 but that is the one crime he has clearly not committed in the eyes of the law.

Another example is that the existing common law offence of larceny by a trick does not overlap with the statutory offence of obtaining property by false pretences. Hence if the intention of the person deceived was to part with mere possession the offence was categorised as larceny by a trick; if on the other hand the intention was to transfer ownership it was categorised as obtaining by false pretences and the two offences are mutually exclusive. "Embezzlement" is also loaded with technicalities and there are conflicting lines of judicial authority on what is meant by obtaining property "on account of" one's employer although this is the key element of the crime. Robbery is in essence larceny accomplished by violence or threats of violence, and this has many of the technicalities of larceny in addition to some of its own. Similarly burglary is a common law offence of ancient origin modified and extended by statute to meet modern conditions.

The reform of this area of law has been extensively studied in England and the United States since the end of World War II. In England the Criminal Law Revision Committee, after an intensive review which took 7 years, recommended the replacement of the entirety of the existing law by a comparatively short new statute, which in due course was enacted as the Theft Act 1968. The Theft Act 1968 (U.K.) was the basis of the Crimes (Theft) Act 1973 of Victoria. In England a further theft act namely the Theft Act 1978 was enacted in order to overcome some of the deficiencies

identified in the original Act. Those three Acts, as well as decisions of the Courts and academic discussions, have been considered in the preparation of this proposed Ordinance.

The English and Victorian experience has shown that the task of law enforcement and of the courts has been eased. It is also of benefit to the rule of the law and the public's perception of the rule of law that the courts will be able to concentrate on the facts of the various cases they inquire into, principally on the question of dishonesty or otherwise, instead of concerning themselves with minute legal technicalities perceived to principally serve the interests of well-advised or well-informed rogues.

Whilst the Victorian and English Acts form the basis of the proposed Ordinance a number of departures have been made. Significant departures include:

The merger of the offence of theft and obtaining property by deception (in the definition of appropriation - new section 96). The definition is a logical sequel to the decision in Lawrence v the Commissioner of Police (1971) 1 QB 373 adopted by Gobbo J. in Heddich v Dike 3 A.Crim R. 139 leading to the conclusion that the two offences significantly overlap. As simplification is one of the aims of the reforms it is not considered desirable to have two overlapping offences.

Land can be the subject of theft - see definition of property. In Victoria land cannot be the subject of theft but could be the subject of the overlapping offence of obtaining by deception. There would not appear to be any valid policy reason for the distinction.

An additional factor negating dishonesty is included (new paragraph 96(4)(b)) This is directed to the "borrowing" of goods of no intrinsic value where the intent is to replace the goods with an equal quantity. For example, a person who borrows 10 litres of petrol and replaces it with another 10 litres could be convicted because he has not returned the original 10 litres. In such a case if either the borrowing would not be regarded as dishonest by community standards or if the accused honestly believed it would not be so regarded he would be entitled to an acquittal.

A new section has been inserted to deal with the dishonest use of a computer or other machine with an intent to obtain a gain or cause a loss (proposed section 115). Neither the Victorian or English legislatures would appear to have addressed this

problem. In today's society a person can per medium of a machine or computer dishonestly obtain property from the owner or operator of that computer or machine.

Reasons for Reforms in Division 3

As in the case of the law of larceny the law relating to criminal damage has become unnecessarily cumbersome. Some 55 sections of the Crimes Act 1900 deal with the subject matter with distinctions being made as to, for example, the mode of destruction or the nature of the property involved.

The new scheme follows, with two exceptions, the Victorian reforms enacted by the Crimes (Criminal Damage) Act 1978. The distinction relates to the offence of arson. Under the Victorian legislation, whilst destruction by fire is charged as arson the offence created is the general criminal damage one and there is no distinction as to penalty. After discussion with Police authorities in the A.C.T. this was not considered appropriate. According to the Police arson is an increasing problem, entails a high cost to the community and should be stigmatised by the legislature. Accordingly, separate offences of destroying property by fire or explosives have been created and these offences carry a higher penalty.

Reasons for Reforms in Division 4

Division 4 comprises the remaining miscellaneous offences contained in repealed Part IV of the Crimes Act 1900 which need to be retained but do not conveniently fall into Divisions 2 or 3. One new offence is created by proposed section 144, namely the removal of items on public exhibition. In Victoria and Britain this offence is contained in the theft provisions but this is regarded as inappropriate as the offence does not contain an element of permanent deprivation.

NOTES ON SECTIONS

Sections 1, 2 and 3: are the short title and formal provisions and include a provision that the bulk of the Ordinance shall come into operation on 1 January 1986. This will permit law enforcement agencies, the legal profession and the judiciary to become familiar with the new provisions prior to their coming into force

Section 4: amends section 3 of the Crimes Act, 1900 by providing simply that the provisions of the Act, insofar as they can be applied shall be in force with respect to all offences whensoever committed and howsoever tried without reference to the second Schedule. The second Schedule is repealed by section 13.

Section 5: deletes certain definitions from section 4 of the Crimes Act, these definitions being no longer applicable to the new theft and criminal damage provisions. Additionally the section inserts a new sub-section (3) which explicitly states that a reference to "the jury" shall include a reference to a Magistrate dealing summarily with an offence. Some doubt has been expressed, for example, whether alternative verdict provisions can be applied by Magistrates.

Section 6: is the main provision. It repeals Part IV of the Crimes Act 1900 and inserts the new provisions. These will be explained in detail below.

Section 7: deletes from section 373 of the Crimes Act 1900 the word "parceners" that word referring to a form of tenure no longer known to the law.

Section 8: empowers the Supreme Court, in certain cases, to impose a fine for offences against Part IV in addition to or instead of a sentence of imprisonment. The clause sets out the maximum fines which may be imposed for such offences determined by reference to the maximum period of imprisonment carried by the offence.

Section 9: is a consequential amendment removing the offences created by this proposed Ordinance from the offences in respect of which the Court may order compensation pursuant to section 437 of the Crimes Act 1900. In respect of the first mentioned offences special compensation provisions are inserted into Part IV of the Crimes Act 1900 by section 6 of this Ordinance.

Section 10: abolishes certain common law offences as the new provisions replace both the common law and the existing statutory provisions. Sub-section (2) is a transition provision in standard form so that the abovementioned abolition relates only to conduct engaged in after the commencement of this Ordinance.

Section 11: amends the Married Women's Property Act, 1901 of the State of New South Wales in its application to the Territory. The repealed provisions are replaced by a new section 148 inserted by section 6 of this new Ordinance.

Section 12: repeals 5 ancient Imperial Statutes. The offences created by them are provided for by new sections 146 and 147 inserted by section 6 of this Ordinance.

Section 13: effects the remaining consequential amendments.

THE AMENDMENTS MADE BY SECTION 6

Section 6 repeals the existing Part IV of the Crimes Act 1900 and inserts a new Part and Part heading. The new Part comprises 4 Divisions.

Division 1 - Interpretation

Section 93 - is the basic interpretation section defining the terms "blackmail", "burglary", "deception", "explosive", "firearm", "gain", "handling", "imitation explosive", "imitation firearm", "loss", "offensive weapon", "property", "robbery" and "theft" for the purposes of of Part IV of the Act.

The more important terms are:

"deception" defined as covering all types of deception, whether as to fact, law or the intention of any person and whether by word or conduct. It eradicates the many technical distinctions which have surrounded the present law relating to "false pretences".

"gain" and "loss" extend to gain and loss of any property and covers both permanent and temporary losses.
"property" includes every kind of property both real and personal and includes choses in action other than incorporeal hereditaments.

Section 94 defines, for the purposes of Part IV Division 2, "stealing" by providing that a person steals if he dishonestly appropriates another's property with the intention of permanently depriving that other person of it. The various terms used in this formulation are defined or commented upon in subsequent provisions.

Section 95 deals with the concept of property belonging to another.

Sub-section 1 provides that property is treated as belonging to any person who possesses or controls it or who has any right or interest of a proprietary nature in it (except for certain equitable interests). Hence one joint owner can steal from another.

Sub-section 2 provides that property subject to a trust is to be regarded as belonging to any person entitled to enforce the trust. It covers exceptional cases of trusts the beneficiaries of which have no immediate interest in the trust property.

Sub-section 3 relates to property received in circumstances where the receiver is under an obligation to deal with it or its proceeds in a particular way. e.g. the treasurer of an office Christmas Party Fund.

Sub-section 4 deals with the case of a person who gets property by another's mistake and is under an obligation to restore it or part of it, or its proceeds or value. To the extent of the obligation to restore, the property is regarded as belonging to the person entitled to restoration. Thus if a person mistakenly gives another a \$10.00 note when both intended a \$2.00 note to be handed over by way of loan or gift, the latter person becomes a thief of the surplus \$8.00 when he decides to keep it.

Sub-section 5 covers the unusual case of a corporation sole (e.g. the Public Trustee), and provides that property continues to belong to the corporation even if there is a temporary vacancy in the office.

Section 96 addresses the concepts of appropriation and dishonest appropriation. Sub-section 1 provides that a person appropriates property if he either:

- (a) by deception obtains ownership, possession or control of it either for himself or another or
- (b) adversely interferes with or usurps any of the rights of an owner of the property.

The latter reflects the existing judicial interpretation of the Victorian legislation - see R v Roffel (1984-unreported). The former effects the amalgamation of the offences of theft and that of obtaining property by deception as contained in the British and Victorian legislation. Both the British Criminal Law Revision Committee and the Victorian Parliament acknowledged there to be an overlap between these offences, but it seems that the overlap is more extensive than envisaged. The Committee viewed the overlap as follows; where an accused by dishonest deception induces his victim to part with possession or control of property then the offence could be categorized as either theft or as obtaining property by deception. However, where the deception induces the victim to transfer ownership then the offence was obtaining by deception only.

That distinction was clouded by the Court of Appeal in Lawrence v Commissioner of Police for the Metropolis (1971) IQB 373. In that case a non English speaking student proffered his wallet to a London cab driver who removed an amount more than the fare. The driver was convicted of theft and appealed, inter alia, on the basis that as the passenger had consented to his taking the money he could only be convicted of obtaining by deception and not of theft. In short he argued that there could not be an appropriation. The Court held that this was incorrect and that the omission of the words "without the consent of the owner" from the theft provision was deliberate and hence that element was not a prerequisite for conviction for theft. The House of Lords ((1971) 2 All E.R. 1253) agreed with this view.

For Australian purposes, Lawrence was followed in Heddich v Dike 3 A Crim R 139. At page 142 Gobbo J of the Victorian Supreme Court stated "There is considerable support for the proposition, however, that there is an overlap between the offences in SS 72 and 81 of the Crimes Act to the extent that every case of obtaining property by deception contains the offence of theft".

Accordingly the two offences are combined and, as appropriation covers the obtaining of ownership, possession or control, one of the main areas of technicality in the existing law is removed.

Finally, under the Victorian Crimes (Theft) Act land could not be the subject of theft but could be the subject of obtaining by deception. In view of the foregoing there appears no logic in this differentiation and in the proposed Ordinance land can be the subject of theft.

Sub-section 2 extends the concept of appropriation by providing in effect that a person appropriates another's property whenever he treats it as if it were his own. It expressly covers the case where he comes by another's property quite innocently and later decides to treat it as his own; e.g. where he is handed something by mistake and decides to keep it on discovering the mistake.

Sub-section 3 provides that an appropriation may be dishonest notwithstanding that the person is willing to pay for the property. Whether in the circumstances the appropriation was dishonest or not will be a matter of fact for the magistrate or jury to decide. The possession of wealth does not confer a licence to take what one wants.

Sub-section 4 deals with the concept of dishonesty and sets out 4 instances in which an appropriation of another's property is not to be treated as dishonest.

In this Ordinance, the word "dishonestly" connotes a community standard consciously understood and consciously departed from. It is used in a special sense and hence a judge must direct the jury as to what it must find before it is satisfied as to the accused's dishonesty on the particular circumstances of the case. If the accused's conduct did not amount to dishonesty by community standards then he is entitled to be acquitted. The accused's belief as to dishonesty only becomes relevant if by community standards his conduct could be regarded as dishonest.

Finally, if the belief of the accused is in issue the Crown must negative the exculpatory belief on the criminal standard of proof "beyond reasonable doubt".

The four paragraphs set out four circumstances in which an appropriation of another's property is not to be regarded as dishonest. They are:

- (a) where the appropriator believes he has a right in law to deprive the other of his property, i.e. where he acts under a claim of right;
- (b) where the appropriator believes that the appropriation will not cause any significant practical detriment to the interests of the owner in relation to that property;

A genuinely held belief, for example, that under the circumstances of the taking and by community standards, no significant detriment will be suffered where 10 litres of petrol has been borrowed and replaced would entitle an accused to an acquittal. Under present law such a belief would not assist as it was not the same 10 litres that was returned.

- (c) where the appropriator believes he would have the owner's consent if the latter knew of the circumstances; and
- (d) where the appropriator does not know who the owner is and believes that he cannot discover the owner by taking reasonable steps.

Sub-section 5 provides that a person who comes by some property in good faith and for value does not steal it if, on learning that it belongs to a third party and that the person who purported to sell or pledge it to him had no right to do so, he nevertheless keeps it. This accords with the present law. The civil rights of the true owner, of course, remain unaffected.

Section 97 deals with the concept of the intent to permanently deprive.

Sub-section 1 is the basic proposition and provides that a person shall be taken to intend to permanently deprive another person of property if it is his intention to treat the property as his own to dispose of regardless of the rights of another person.

Sub-section 2 deals with borrowing or lending of another's property and provides that such borrowing or lending amounts to a permanent deprivation if and only if the circumstances and the period of time in question make the transaction equivalent to treating the subject property as one's own.

Sub-section 3 qualifies sub-section (2). It deals with the case of one who, having another's property, parts with it under a condition as to its return which he may or may not be able to perform, and does so for his own purposes and without the owner's authority. For example, if a person, being short of funds, takes another's transistor radio and pawns it, he is to be regarded as having intended to deprive that other person permanently of his radio. Modern decisions under the present law are to the same effect.

Sub-section 4 abolishes the rule that money must be returned "in specie" in order to avoid conviction for theft. Under existing law a defendant who intended to repay an equivalent sum would be convicted whilst the defendant who intended to repay in specie (in relation to larceny) would be acquitted even though both persons may have required the money for temporary purposes only. For example, an employee who takes \$5 out of the till because he may have missed the last bus and needs a cab to get home would be exposed to conviction for larceny only if he had in fact missed the last bus, used the \$5 for a cab, and was thus unable to repay in specie.

Section 98 deals with stolen property and related matters.

Sub-section 1 applies those provisions to property stolen or obtained by blackmail, and to property so obtained outside the A.C.T. but brought within it. Finally it applies the stolen property provisions to the proceeds of sale of such property and to other property into which the original stolen property has been transmuted or broken down.

Sub-section 2 provides that for the purpose of proposed sub-section 98(1)(c) the expression "thief" includes a person who has obtained property by blackmail.

Sub-section 3 provides that property ceases to be stolen property if it is restored to its rightful owner, possessor or custodian, or when any right to restitution in respect of the property ceases to exist.

Division 2 - Theft and related offences

Section 99 creates the offence of theft and provides a maximum penalty of imprisonment for 10 years. The maximum penalty is the same as that in the English and Victorian counterparts. At present larceny provisions carry differing penalties, some of them 10 years (see for example provisions dealing with the theft of cattle and larceny by clerks and servants). So also do embezzlement and fraudulent conversion, which now become forms of theft. As the courts temper sentences to the circumstances of each case, the maximum penalty of 10 years (i.e. the penalty available in the more serious cases under the present law) is considered appropriate.

Section 100 creates the offence of robbery in simple terms as, in effect, stealing accomplished by the use of force or threats thereof and carrying a maximum penalty of imprisonment for 14 years.

Section 101 creates the offence of armed robbery carrying a maximum penalty of imprisonment for 25 years.

Section 102 deals with burglary. The present law requires a breaking and entering of a dwelling house with intent to commit an offence. The concept of "breaking" is a highly technical one and the proposed offence is presently covered by a series of sections with maximum penalties ranging from 7 to 20 years imprisonment depending on the type of building involved, the time of day the offence is committed and the nature of the offence involved.

Sub-section 1 provides that burglary is committed by entering, or remaining in, a building as a trespasser and doing so with intent to steal or to commit certain offences carrying a minimum penalty of 5 years imprisonment. The maximum penalty for burglary is imprisonment for 14 years.

Sub-section 2 provides that "building" includes part of a building as well as any vehicle or vessel in or on which a person resides regardless of whether the vehicle or vessel is at the time occupied.

Section 103 creates the offence of aggravated burglary, consisting of burglary committed by a person who, when entering, has with him any firearm, imitation firearm, offensive weapon, explosive or imitation explosive. Each of these terms is defined in proposed section 93. The maximum penalty is imprisonment for 20 years, consistent with existing law.

Section 104 creates the offence of dishonestly obtaining a financial advantage, carrying a maximum penalty of 5 years.

Sub-section 2 provides the definition of "obtaining a financial advantage". The offence is not theft as no "property" is obtained.

Section 105 creates the offence of dishonestly obtaining services from another. The offence carries a maximum penalty of imprisonment for 5 years and its source is the U.K. Theft Act 1978.

Section 106 creates the offence of by deception dishonestly securing the remission of an existing liability, inducing a creditor to wait for, or forego, payment or obtaining any exemption from or abatement of liability with the intention to make permanent default. The offence carries a maximum penalty of imprisonment for 5 years and applies only to a legally enforceable liability. It cannot, therefore, be relied on in relation to unenforceable contracts e.g. a minor cannot commit the offence in respect of his "liability" under a contract he had no legal competence to enter into. Similarly, it cannot be invoked in relation to a debt unlawfully incurred such as one arising from unlawful gambling or prostitution.

Section 107 creates the offence of making off without payment in circumstances where the offender knows that immediate payment is required or expected and he intends to avoid payment. The offence carries a maximum penalty of imprisonment for 2 years and is restricted, by sub-section 2, to lawful transactions.

Section 108 makes it an offence to destroy or falsify accounts or accounting documents, or to knowingly use false accounts or documents, either with a view to gain or to cause loss to another. The notion of falsification is explained in sub-section 2. The offence carries a maximum penalty of imprisonment for 7 years.

Section 109 makes directors, officers, and in some cases, members of bodies corporate, equally liable, with the body corporate itself, for offences involving dishonesty committed with their consent or connivance and makes them punishable accordingly.

Section 110 makes it an offence, punishable by a maximum penalty of imprisonment for 7 years, for an officer of an unincorporated association to knowingly publish a false statement about the affairs of the association with intent to gain for himself or another or, to cause loss to any other person.

Section 111 creates the offence of by deception dishonestly procuring the execution of a valuable security.
Sub-section 2 extends the meaning of "the execution" of a valuable security and
Sub-section 3 defines "valuable security". The offence carries a maximum penalty of imprisonment for 7 years.

Section 112 replaces a number of existing provisions relating to extortion by a new single simply-worded provision. This new offence of blackmail created carries a maximum penalty of imprisonment for 14 years.

Sub-section 2 specifies that a demand with menaces is unwarranted unless the person making it believes that he has reasonable grounds for making it and that the use of menaces is a proper method for reinforcing the demand. These provisions avoid the many technicalities of the present law, and provide a proper test, and one which a jury can readily apply, for distinguishing the true blackmailing demand from a genuine claim. The Crown must disprove such a belief beyond reasonable doubt.

Section 113 creates a new offence of handling stolen goods, to replace the present "receiving" offence, and to cover several similar activities, all of which involve helping the thief to realize his ill-gotten gains.

Sub-section 1 defines the offence in appropriate terms. It is specified that the goods must be stolen goods and that the "handler" must know or believe the goods to be stolen. He must act dishonestly in the matter. The maximum penalty provided is imprisonment for 14 years, which is higher than the penalty for the new offence of theft. The higher penalty is designed to deter the "fence" whose existence makes the activities of professional thieves possible.

Sub-section 2 makes it clear that the thief cannot be convicted both of theft and handling arising from the theft alone.

Section 114 recreates the existing offence of abstraction of electricity in view of the English decision of Low v Blease (1975) Crim LR 513 which held that electricity was energy, as opposed to property, and hence incapable of being stolen. The maximum penalty is imprisonment for 5 years.

Section 115 creates a new offence of dishonestly using a computer or other machine with intent to gain or to cause loss to another. "Gain" and "loss" are defined in the new section 93. As a result the provision is restricted to an intent relating to the gain or loss of property. It is not intended to cover the field in the area of what is commonly called "computer crime". It is specifically directed to, for example, automatic telling machines, electronic funds transfers and coin operated vending machines.

Section 116 creates the offence of having, away from one's place of abode, any article for use in the course of or in connection with any burglary or theft. The offence carries a maximum penalty of imprisonment for 3 years. Sub-section 2 makes proof of the possession of any article, made or adapted for use in committing a burglary or theft, prima facie evidence that the possessor had it with him for such use. If

the reason for the possession is in issue, however, the prosecution must satisfy the jury beyond reasonable doubt that the possession was criminal. By virtue of sub-section 3 on conviction any such article is forfeited to the Commonwealth.

Section 117 repeats in modern form the present law providing a minor penalty for advertising for the return of stolen goods "with no questions asked". The maximum penalty is a fine of \$1,000. The existing provision is section 528.

Sections 118 and 119 recreate the existing provisions dealing with stolen property held by dealers and the disposal of stolen property in cases where the true owner cannot be ascertained. The existing provision are section 93A and 93B which are to be repealed by clause 6.

Section 120 creates the offence of unlawfully taking a vehicle or driving or riding in a vehicle knowing it to have been taken without lawful authority. The maximum penalty is imprisonment for 5 years. Permanent deprivation is not an element of this offence.

Sub-section 2 provides that a person is not guilty if he either had lawful authority or if he believed that the owner would have consented under the circumstances. Again the Crown must disprove such a belief beyond reasonable doubt.

Sub-section 3 is an alternative verdict provision which permits a jury to convict of this offence in cases where the charge is theft but the jury finds an absence of an intent to permanently deprive.

Sub-section 4 defines "owner" and "vehicle".

Section 121 provides that where a court convicts a person of an offence of theft, blackmail, or handling stolen goods, it may make an order for restitution of the goods, or for the payment of compensation, either to the owner of the goods or to any person who has, since the theft occurred, in good faith bought them or lent money on them. The court is not to act in this regard unless in its opinion the relevant facts have appeared in evidence at the trial or appear in available documents. This section replaces existing provisions with similar effect. Unlike the Victorian provisions, the limit of any restitution order is not restricted by the amount of money found on the person found guilty at the time when he was arrested. Additionally, the amount of any order made becomes a debt due to the person in whose favour the order is made.

Section 122 permits a court to order the payment of compensation in cases where a motor vehicle has been stolen, the subject of an attempted theft or taken without lawful authority and it or property contained in it has been damaged or destroyed.

Section 123 permits a court to cancel or suspend the licence of a person or, where he is not the holder of a licence, to disqualify him from obtaining such a licence, after finding him guilty of stealing, attempting to steal or of unlawfully taking a motor vehicle.

Section 124 restates the existing general deficiency provision (section 161) which permits conviction in respect of the deficient sum in cases where individual thefts cannot be identified.

Section 125 is procedural, and deals with the number of persons who may be charged in one indictment relating to the same stolen property and evidence of despatch or failure to receive where property is stolen in the course of transmission.

Section 126 restates the alternative verdict provision in relation to the new offences of theft and handling stolen goods. If the jury is satisfied that the accused either stole or handled but is unable to determine which offence was committed it shall convict of theft - that offence carrying the lowest penalty.

Division 3 - Criminal Damage to Property

Section 127 is the interpretation section for the purpose of this Division.

Sub-section 1 provides a definition of the term "property" for the purposes of this Division.

Sub-section 2 deals with the concept of property belonging to another. Paragraph (a) provides that property is to be treated as belonging to any person who possesses or controls it. Paragraph (b) provides that property is to be treated as belonging to any person who has a proprietary right or interest in the property (except for certain equitable interests). Paragraph (c) provides that property is to be treated as belonging to any person who has a charge on the property.

Sub-section 3 provides that property subject to a trust is to be regarded as belonging to any person entitled to enforce the trust.

Sub-section 4 provides that property of a corporation sole (e.g. the Public Trustee) continues to belong to the corporation even if there is a temporary vacancy in the office.

Sub-section 5 deals with the concept of when a person is to be taken to have acted intentionally in destroying or damaging property. Paragraph (a) provides that a person will be taken to have acted intentionally if he intended to destroy or damage any property. Paragraph (b) provides that a person will be taken to have acted intentionally if he acted with the knowledge or belief that the relevant consequences were more likely than not to flow from his conduct.

Sub-section 6 states when a person is to be taken to have intended by destruction or damage of property to endanger the life of another. Paragraph (a) provides that a person will be taken to have acted intentionally if he intended to endanger the life of any other person and Paragraph (b) provides that a person will be taken to have acted intentionally if he acted with the knowledge or belief that relevant consequences were more likely than not to flow from his conduct.

Section 128 creates three offences of destroying or damaging property by means other than fire or explosive.

Sub-section 1 creates the offence of intentionally damaging or destroying property belonging in whole or in part to another. The maximum penalty is imprisonment for 10 years.

Sub-section 2 creates the aggravated offence of destroying or damaging any property, including the accused's own, with intent to endanger the life of another. The maximum penalty is imprisonment for 20 years. Finally,

Sub-section 3 creates the offence of damaging or destroying property including the accused's own, with an intent to gain or to cause loss. The maximum penalty is imprisonment for 15 years.

Section 129 creates the same offences as proposed section 128 except that the means of damage or destruction is by the use of fire or explosive. The maximum penalties are imprisonment for 15, 25 and 20 years respectively.

Section 130 deals with the concept of "lawful excuse" for the purposes of sections 128 and 129. This provision operates in addition to any existing defences of "lawful excuse" recognised by law.

Sub-section 1 provides that where a person is charged with an offence under proposed new sub-sections 128(1) and 129(1) that person shall be taken to have a "lawful excuse" if at the time of the alleged conduct he believed that:

- (a) the property damaged or destroyed belonged solely to him;
- (b) he had a right or interest in the property which authorised him to engage in the conduct; or
- (c) he would have the owner's consent if the latter knew of the circumstances OR if he engaged in the alleged conduct in order to protect property (or a right or interest in property) belonging to him or another and at the time of such conduct he believed that:
 - (i) the property he sought to protect was in need of immediate protection, and
 - (ii) the means by which he protected the property were reasonable in all the circumstances.

Sub-section 2 deals with the concept of "right or interest in property" for the purpose of this section.

Section 131 dealing with the defacing of premises, re-enacts existing section 546 which is repealed by section 13 of this Ordinance. The maximum penalty is a fine of \$1,000 or imprisonment for 6 months.

Proposed Section 132 creates the offences of:

- (a) threatening in any manner to destroy or damage property belonging wholly or partly to another; and
- (b) threatening in any manner to destroy or damage ones own property in a manner which is likely (to the knowledge or belief of the offender) to endanger the life of another.

These offences carry a maximum penalty of imprisonment for 10 years.

Section 133 creates the offence of possessing an article with the intention of that article being used for the commission of an offence against proposed new sections 128 and 129. The maximum penalty is imprisonment for 10 years.

Section 134 creates an offence in relation to "hoax" communications. That is, the section creates the offence of knowingly making in any manner an untrue representation that any person (including the person making the communication) or property or both are in danger and carrying a maximum penalty of imprisonment for 5 years.

Section 135 is an alternative verdict provision in relation to offences in this Division. The provision enables a jury to return an alternative verdict where they are satisfied that the accused is not guilty of the offence charged but is guilty of another offence under this Division carrying a lesser penalty.

Division 4 - Miscellaneous

Section 136 creates an offence of hindering the working of a mine carrying a maximum penalty of imprisonment for 7 years. This section re-inserts existing section 223 which is repealed by section 6 of this Ordinance.

Section 137 creates an offence of unlawfully removing any article etc which is used for securing a wall of a river, canal etc carrying a maximum penalty of imprisonment for 7 years. This section re-inserts existing section 226 which is repealed by section 6 of this Ordinance.

Section 138 creates offences relating to the obstructing of any navigable river or canal carrying a maximum penalty of imprisonment for 7 years. This section re-inserts existing section 226 which is repealed by section 6 of this Ordinance.

Section 139 creates offences in relation to railways carrying a maximum penalty of imprisonment for 10 years. This section re-inserts existing section 230 which is repealed by section 6 of this Ordinance.

Section 140 creates the offence of obstructing railway engines carrying a maximum penalty of imprisonment for 3 years. This section re-inserts existing section 232 which is repealed by section 6 of this Ordinance.

Section 141 is an alternative verdict provision enabling a jury to return an alternative verdict where they are satisfied that a person is not guilty of an offence charged against proposed section 139 but are satisfied that he is guilty of an offence against new proposed section 140. The provision is a re-enactment of existing section 231 which is repealed by section 6 of this Ordinance.

Section 142 creates the offence of displaying a false signal with intent to endanger a vessel carrying a maximum penalty of imprisonment for 10 years. This section re-inserts existing section 240 which is repealed by section 6 of this Ordinance.

Section 143 creates offences relating to buoys etc carrying a maximum penalty of 7 years. This section re-inserts existing section 242 which is repealed by section 6 of this Ordinance.

Section 144 creates the offence of unlawfully removing articles on public display from a building open to the public for the viewing of that display. Such a removal does not constitute theft, since it does not involve dishonesty or an intention to permanently deprive. The maximum penalty is imprisonment for 5 years.

Section 145 recreates the offences contained in the repealed section 114 of the Crimes Act 1900 (section 6 of this Ordinance) relating to being found with intent to commit an offence. The maximum penalty is imprisonment for 5 years.

Section 146 and 147 create the offences which presently exist by virtue of the Imperial Forcible Entry Acts dating back to 1381. Those Acts are repealed by section 13 of this Ordinance. The maximum penalty is a fine of \$2000 or imprisonment for 12 months.

Section 148 applies the provisions of Divisions 2 and 3 to the property of married persons including jointly owned property. Sub-section 1 provides that spouses can steal or damage such property, and be criminally liable for doing so, as if they were not married.

Sub-section 2 provides that one spouse may bring proceedings for theft or damage to property against the other as if they were not married, and that a spouse who does so shall be a competent witness for the prosecution. However, the sub-section does not go so far as making the spouse a compellable witness.

Sub-section 3 requires the consent of the Attorney-General or the Director of Public Prosecutions (or a person authorized by the Director of Public Prosecutions) to the institution of proceedings at the instance of the other party to the marriage. However,

Sub-section 4 provides that the consent of the Attorney-General or the Director of Public Prosecutions is not required where:

- (a) a third person is charged jointly with the offending spouse, or
- (b) at the time of the alleged offence the spouses were living separate and apart.

Sub-section 5 provides that the consent requirement does not prevent the arrest, or the remand in custody or on bail, of any person charged with an offence, if the arrest is made without a warrant or the warrant issued on the information of a third party. However the matter cannot proceed further without the consent required pursuant to proposed sub-section 3. This exception is to protect the interests of a spouse whose partner may be seeking to leave the jurisdiction with either the joint property or the property of the remaining spouse.

Proposed Section 149 is procedural and deals with the description of joint owners etc in indictments.

Proposed Section 150 is procedural and deals with the description of title deeds indictments.

Proposed Section 151 deals with the description of money or any valuable security in an indictment.

Authorised by the
Attorney-General.

ORD 32/84