EXPLANATORY STATEMENT

SUBJECT: AUSTRALIAN CAPITAL TERRITORY SEAT OF GOVERNMENT (ADMINISTRATION) ACT 1910
CRIMES (AMENDMENT) ORDINANCE (No 5) 1985
No. 62, 1985

Sub-section 12(1) of the Seat of Government (Administration) Act 1910 provides that the Governor-General may make Ordinances for the peace order and good government of the Australian Capital Territory.

The purpose of this Ordinance and the cognate Evidence (Amendment) Ordinance (No.2) 1985 is to reform all provisions contained in the Crimes Act 1900 New South Wales in its application to the Australian Capital Territory (Crimes Act 1900) which relate to sexual offences and to remove artificial distinctions between trials involving sexual offences and other criminal trials. The objects of this Ordinance are, inter alia:

(a) the balancing of the rights of the victim with those of the accused enabling the accused to obtain a fair trial but avoiding further degradation and humiliation of the victim;

(b) by this fairness the creation of a situation more conducive to victims reporting sexual assaults;

(c) the restating of sexual offences in a more contemporary and relevant manner so as to place emphasis on the accompanying violence and so as to include forms of penetration of the victim other than traditional sexual intercourse; and

(d) the recognition of the equality of status of all persons.

In relation to (a) above there has been a growing awareness that the criminal law has failed to adequately address the plight of victims generally. Nowhere has this occurred more than in the area of rape law where cross-examination of the victim or evidence of that person's reputation is permissible notwithstanding that it can cast such a slur on the complainant's character as to, in any other criminal trial, lead to the accused's character coming into issue. Consequently victims have a perception that it is they, not the accused, who are on trial.

With respect to (b), studies conducted in the United States and in Australia suggest that only a small proportion of alleged rapes are officially reported. Additionally it is suggested by persons working in rape crisis centres that many clients are unwilling to report such alleged offences. In 1975 the

Australian Bureau of Census and Statistics and the Australian Institute of Criminology conducted a 'self report' study entitled 'General Social Survey of Crime Victims'. According to the survey results only 28% of persons who claimed to have been raped reported the offence. Assuming that figure to remain accurate (bearing in mind that reforms have been made in a number of States) it means that about 72% of victims, for various reasons, have insufficient faith in the criminal justice system to bring the matter to notice. From a criminal law policy viewpoint this has serious implications in relation to deterrence generally. More importantly it can lead to the development of a class of persons who believe that they can repetitively engage in this type of gross anti-social behaviour with impunity.

In relation to (c) above, police authorities in New South Wales have indicated that until approximately 5 years ago traditional intercourse was involved in most rape cases. This pattern has now changed and presently in more than 50% of cases anal or oral intercourse, either in addition to or in lieu of penile/vaginal intercourse occurs. Some victims have indicated that they have felt more degraded and humiliated by what they regarded as unnatural penetration than by the traditional penetration. For this reason the offences have been widened to include other forms of penetration and for the same reason the term 'rape', which is a term of art not applicable to the wider range, has not been retained in the proposed Ordinance.

In relation to (d) both heterosexual and homosexual intercourse has been treated in the same manner, attracting the same penalties. This has been achieved by creating all offences in gender neutral terms and results in an equating of the age of consent regardless of the nature of the sexual intercourse. Finally pejorative terms such as'idiot' and 'imbecile' have been excised.

Brief Outline of the Scheme of Proposed Crimes (Amendment) Ordinance

In relation to matters other than incest, the offences fall into three categories as follows:

(i) Offences involving violence or threatened violence with an accompanying intent to engage in sexual intercourse (as defined) or with intent to commit an act of indecency. In this category of offence the intercourse or act of indecency need not occur but if it does it evidences the intention with which the violence was inflicted or the threat thereof made.

ii) Offences involving the engaging in sexual intercourse or the committing of an act of indecency without the consent of the other party.

iii) Offences involving the engaging in intercourse, or the commission of an act of indecency, with persons under the age of sixteen. With one exception consent is not in issue as the proposed law does not recognise the ability of the young person to give an effective consent.

With respect to incest, the relevant section, in addition to reflecting the genetic basis of the offence, have been drafted to apply to step-children and children in de facto relationships as well. The offences fall into three categories depending on the age of the participants. The most serious involves children under ten, the next persons under sixteen and the least serious persons over sixteen.

DETAILS OF PROPOSED ORDINANCE

Section 1 and 2 are the Short Title and formal provisions.

Section 3 repeals existing section 90 dealing with abduction of young persons and re-enacts it in gender neutral terms.

Section 4 is the main provision. It inserts a new Part IIIA, which contains the new provisions in relation to sexual offences, into the Crimes Act, 1900. These provisions will be explained in detail below.

Section 5 abolishes the common law offences of rape and attempted rape.

Section 6 is a transition provision in standard form ensuring that the abolition in Section 5 relates only to conduct after the commencement of the Ordinance.

Section 7 repeals sections 62 to 81, 86 to 89, 91A to 91D, 379 and 381 of the Crimes Act and repeals the Law Reform (Sexual Behaviour) Ordinance 1976.

Section 8 is a consequential amendment.

AMENDMENTS MADE BY CLAUSE 4

Section 4 inserts a new Part IIIA, headed 'Sexual Offences', into the Crimes Act 1900. New provisions are as follows -

> Section 92 provides a definition of the term 'sexual intercourse' for the purpose of this Part. The definition is significantly wider than the concept of 'penetration' which is relevant to the existing law of rape. Proposed paragraph 92(e) deems a continuation of sexual intercourse as defined in paragraphs (a) to (d) inclusive to constitute sexual intercourse. This permits bodily harm inflicted during intercourse to amount to sexual assault in the first or second degree. It also recognises the right of a person to withdraw consent at any stage although, in the absence of other factors, it is unlikely that a prosecution would result in these circumstances.

Sections 92A, 92B and 92C deal with the offences of sexual assault in the first, second and third degree respectively. In these offences the primary emphasis is placed upon the violence rather than the element of sexual contact. Provision is made for the 'pack sexual assault' so that where the offence is committed in the company of others all offenders will be subject to a higher penalty.

Section 92A creates the most serious sexual assault offence in that the offence involves the infliction of grievous bodily harm on the victim. The infliction of that harm must be accompanied by an intention to engage in sexual intercourse with the victim or another person present or nearby. The offence carries a maximum penalty of 17 years imprisonment unless committed in the company of other persons (i.e. the 'pack' situation) in which case the maximum penalty is 20 years. The reference to 'another person who is present or nearby' is designed to cover the situation where, for example, violence is directed to a child in order to overbear the will of a mother or where violence is directed to a person in order to overbear the will of the companion of that person.

Section 92B creates the offence of sexual assault in the second degree, involving the infliction of actual - as opposed to grievous - bodily harm. The proposed penalty is 14 years imprisonment and 17 years in the 'pack' situation.

Section 92C creates the offence of sexual assault in the third degree. This offence does not require the infliction of bodily harm, but is complete upon either the commission of an unlawful assault or a threat to inflict bodily harm accompanied by the requisite intent. The proposed penalties are a maximum of 12 years, 14 years in the 'pack' case.

Section 92D creates the offence of sexual intercourse without consent and the consent of the victim to sexual intercourse and the belief of the accused as to that consent are relevant and probative issues. Therefore, this offence is broadly equivalent to the existing offence of rape unaccompanied by any infliction of bodily harm. Accordingly the mens rea required for this offence is substantially the same as the mens rea required in relation to the existing common law offence of rape as stated by the House of Lords in D.P.P. v Morgan (1976) A.C. 182. Recklessness for the purpose of this section means 'subjective' recklessness. The Crown must prove the same matters in order to establish the commission of this offence as it must prove to establish the commission of the existing offence of rape. The maximum penalty is 12 years imprisonment, 14 years in the 'pack' situation.

Section 92E deals with sexual intercourse with young persons. Sub-section (1) creates the offence of engaging in sexual intercourse with a person who is under ten years of age and carries a penalty of 15 years imprisonment. The consent of the victim is irrelevant. Sub-section (2) creates the offence of engaging in sexual intercourse with a person who is between the ages of ten and sixteen years. The penalty is 12 years imprisonment. Sub-section (3) provides certain defences to a person who has been charged with an offence under sub-section (2).

Those defences are that the 'victim' consented to the intercourse coupled with either a belief on reasonable grounds that that person was sixteen years or older or that the accused was not more than 2 years older than that person. The latter provision is similar to section 48 of the Victorian Crimes Act 1958. The Tasmanian Law Reform Commission in its report 'Rape and Sexual Offences' has recommended that such a defence should always be available although it recommended an age differential of 5 years. It considered that sexual activity between persons of essentially the same age should be free from criminal sanctions. There would appear to be merit in leaving 'consensual' sexual activity of young persons to the area of child welfare law or to parental control without attracting the full rigours of the criminal law.

Sections 92F, 92G and 92H create assault offences involving an intent to commit an act of indecency in the first, second and third degree respectively in the same manner as the three degrees of sexual assault. A definition of the term 'act of indecency' has not been included in order to avoid the possibility of unnecessarily restricting the application of these offences bearing in mind that some conduct presently regarded as being merely indecent will hereafter constitute sexual intercourse. The maximum penalties are imprisonment for 15 years 12 years and 10 years respectively.

Section 92F (act of indecency in the first degree) creates the offence of inflicting grievous bodily harm with intent to commit an act of indecency. The penalty is 25 years imprisonment.

Section 92G (act of indecency in the second degree) creates the offence of inflicting actual bodily harm with intent to commit an act of indecency and carries a penalty of 12 years imprisonment.

Section 92H (act of indecency in the third degree) creates the offence of unlawfully assaulting or threatening to inflict bodily harm with intent to commit an act of indecency and carries a penalty of 10 years imprisonment.

Section 92J makes it an offence to commit an act of indecency without consent. It is in similar form to section 92D which deals with sexual intercourse without consent and the comments made in relation to that section are equally applicable here. The penalty is a maximum of 5 years imprisonment; 7 years in the 'pack' situation.

Section 92K creates offences in relation to acts of indecency with young persons. These offences are similar in terms to those involving sexual intercourse created by section 92E. Sub-section (1) creates the offence of committing an act of indecency upon or in the presence of a person under ten years of age and carries a penalty of 12 years imprisonment. Sub-section (2) creates an offence of committing an act of indecency upon or in the presence of a person between the ages of ten and sixteen years and carries a penalty of 10 years imprisonment. Sub-section (3) provides defences identical to those contained in sub-section 92E(3) and the comments made in relation to that sub-section are applicable to this sub-section.

Section 92L deals with incest and related offences. Sub-section (1) creates the offence of engaging in sexual intercourse with a person who is under the age of ten years who to the knowledge of the accused is a blood relation or with whom the accused has a parental relationship. The offence carries a penalty of 20 years imprisonment. Sub-section (2) creates the offence of engaging in sexual intercourse with a person who is between the age of ten and sixteen years who to the knowledge of the accused is a blood relation or with whom the accused has a parental relationship and carries a penalty of 15 years imprisonment. Sub-section (3) creates an offence of engaging in sexual intercourse with a person who is above the age of sixteen and who to the knowledge of the accused is a blood relation and carries a penalty of 10 years imprisonment. Sub-section (4) provides that the Director of Public Prosecutions, or some person authorised by him, must consent to the institution of proceedings for an offence under this section. The justification for this is that there may be cases where there are compelling medical, psychological or other reasons for adopting a course other than prosecution. Sub-section (5) provides that where evidence has been adduced that a person charged with an offence against either sub-section (2) or (3) acted under the coercion of the person with whom the offence was committed, the person may not be convicted unless the Crown rebuts such evidence beyond reasonable doubt. Sub-section (6) provides that the accused is presumed to have known at the relevant time that he was related to the person with whom the offence is alleged to have been committed unless there is evidence to the contrary.

Section 92M creates a new offence of abduction with intent to have sexual intercourse in gender neutral terms and carries a penalty of 10 years imprisonment. This section is substantially in accordance with the recommendation of the Tasmanian Law Reform Commission Report. In realtion to existing abduction offences (e.g. section 86 of the Crimes Act, 1900) the Commission stated that they were an -

"... Historical anachronism which displays an attitude to women which must have been outdated in 1924".

Section 92N creates the offence of employing any person under the age of sixteen for the prupose of prostitution and carries a penalty of 10 years imprisonment. The offence is in gender neutral terms.

Section 92P deals with the question of 'consent' in cases where the consent of the alleged victim is relevant to the offence or where an honest belief as to such consent held by an accused would entitle him to an acquittal. The effect of the section is to retain existing defences in relation to offences involving sexual intercourse but to extend them to offences involving acts of indecency. In other words the defences available as enunciated in D.P.P. v Morgan, (1976) A.C. 182, remain available. On the other hand if the Crown can prove beyond reasonable doubt that the accused was aware that the 'consent' was caused by any of the objective factors set out in sub-section (1) then the accused must be convicted. This also folllows from the decision in D.P.P. v Morgan which requires that any belief as to the consent of the victim must be honestly held.

Sub-section (1), paragraphs (1) to (j) list the objective factors which, if proven, will negate the consent of the victim to an act of sexual intercourse or act of indecency. The sub-section is substantially in accordance with the recommendations contained in the Tasmanian Law Reform Commission Report. Sub-section (2) provides that a person who does not show actual physical resistance should not by reason only of that fact be regarded as consenting to the sexual intercourse or the act of indecency. It has been suggested in some cases that there must be a clear outward manifestation by the victim of lack of consent. Any such general requirement would exclude from the operation of the law the imposition of sexual conduct upon persons in a condition of unconsciousness, infancy, mental disability, or persons who submit for fear of injury to a third party such as for example, a mother whose child is threatened or a person whose companion is threatened. Both latter examples are not unusual occurrences, at least in other jurisdictions. Sub-section (3) provides that where the Crown has proven that the person charged knew at the relevant time that the consent of the victim was caused by any of the means set out in sub-section (1) then the first-mentioned person cannot be held to have an honest belief in the consent of the victim to the act of sexual intercourse or act of indecency.

Section 92Q abolishes the irrebuttable common law presumption that a boy under the age of fourteen is incapable of carnal knowledge.

Section 92R abolishes the immunity of a husband against conviction for the rape of his wife. The immunity has been abolished completely in New South Wales and partially in Victoria and South Australia. Reasons for the abolition include:

(a) The first classical statement of the rule is found in Hale's 'Pleas of the Crown' in 1736. This was a time when the wife had no property rights and could be assaulted for disciplinary reasons by her husband. This is inconsistent with today's notions of equality in the eyes of the law.

(b) Marriage is now regarded by the law as a secular institution, no longer being governed by ecclesiastical law as in Hale's time.

(c) A wife can revoke consent as to cohabitation and by extension should be capable of revoking consent to sexual activity. Furthermore in R v Reid 1973 Q.B. 299 it was held that a husband does not have the right to kidnap his wife.

(d) An unmarried cohabitant can withdraw consent, rendering the other party guilty of rape. So viewed it may appear that marriage amounts to a licence to commit brutal or inhumane acts.

(e) To discourage domestic violence. Domestic violence has become a recognised problem in the community and it is hoped that the abolition of the immunity will have a long term educative effect.

(f) Whilst it might be argued that lack of consent, where this is relevant, may be difficult to prove under these circumstances, the law should not turn a blind eye merely because the offence is difficult to prove.

(g) The immunity applied only to traditional sexual intercourse and not to other acts embraced by the proposed definition of sexual intercourse.

Section 92S provides for a number of alternative verdicts. Sub-section (1) provides that where the jury is satisfied that the accused did not inflict grievous bodily harm but are satisfied that he inflicted actual bodily harm with the requisite intent they are able to convict him of the latter offence. Sub-section (2) provides that where the jury is satisfied that the accused committed an offence but it is not satisfied that he acted in company with other persons when this is alleged by the Crown, then it

may convict of the offence without that element of aggravation. Sub-sections (3) and (4) provide that where the jury is satisfied that the accused inflicted grievous or actual bodily harm but are not satisfied that such harm was inflicted with the requisite intent when they are able to convict him of the offence of maliciously wounding or inflicting grievous bodily harm or assault occasioning actual bodily harm as appropriate. This overcomes a glaring deficiency in the existing law.

Section 92T provides for the addition of a count for an offence of act of indecency without consent in an indictment for an offence of sexual intercourse without consent. This re-enacts existing section 379 which is repealed by clause 7.

Section 92U provides that it is not necessary to describe the act constituting the act of indecency in an indictment for an offence of act of indecency without consent. This re-enacts existing section 381 which is repealed by clause 7.

Ord. 25/84

Authorised by the
Attorney-General

Section 1 - is the short title

Section 2 - amends section 477 of the Crimes Act 1900 by:

. deleting reference to 'a prescribed charge' in paragraphs 477(6)(c), (7)(c) and 9(b);

- the effect of this will be that the consent of the accused will always be required before an offence to which this section applies can be dealt with summarily.

. inserting a new sub-section 477(10);

- as this sub-section need no longer provide a penalty in the case of 'a prescribed charge'.

. deleting the definition of 'a prescribed charge' in sub-section 477(13).

Authorized by the
Attorney-General

Ord. 68/85