

**M O D E L  
C R I M I N A L  
C O D E**

**CHAPTER 8**

**PUBLIC ORDER  
OFFENCES**

**CONTAMINATION  
OF GOODS**

**Report**

March 1998

This Report was prepared by the Model Criminal Code Officers Committee. It does not represent the views of the Standing Committee of Attorneys-General

**MODEL CRIMINAL CODE  
OFFICERS  
COMMITTEE OF THE  
STANDING COMMITTEE OF  
ATTORNEYS-GENERAL**

# **MODEL CRIMINAL CODE**

## **CHAPTER 8**

### **PUBLIC ORDER OFFENCES CONTAMINATION OF GOODS**

#### **REPORT**

Model Criminal Code Officers Committee of the  
Standing Committee of Attorneys-General

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## **Background to the Model Criminal Code Project**

On 28 June, 1990, the Standing Committee of Attorneys-General (SCAG) placed the question of the development of a national Model Criminal Code for Australian jurisdictions on its agenda. In order to advance the concept, SCAG established a Committee consisting of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters. That Committee was originally known as the Criminal Law Officers Committee, but the name was changed in November 1993 to the Model Criminal Code Officers Committee (MCCOC/the Committee) in order to reflect the principal remit of the Committee directly.

The first formal meeting of the Committee took place in May 1991. In July 1992, the Committee released a discussion draft of the general principles of criminal responsibility (Chapter 2), and, after a great deal of public consultation, delivered a final report to SCAG which was released in December 1992. With the exception of the general principles relating to intoxicated defendants, the recommendations in that final report were accepted by SCAG and formed the basis of the Commonwealth Criminal Code Act, which was passed by the Commonwealth Parliament in March 1995.

In 1994, both the Commonwealth Government and the State and Territory Premiers' Leaders Forum endorsed the Model Criminal Code project as one of national significance. In December 1995 MCCOC released its report: 'Theft, Fraud, Bribery and Related Offences' (Chapter 3), which is currently being considered by each Attorney-General. A report on the related topic 'Conspiracy to Defraud' has just been released.

During 1996 the Committee released discussion papers on 'Offences Against the Person' and more recently 'Serious Drug Offences' (June 1997) and 'Administration of Justice Offences' (July 1997). It released the discussion paper on this topic, Contamination of Goods, on 18 July 1997.

The Committee recently began the task of considering appropriate legislative responses to the national problem of goods being contaminated. The proposed offences will form part of chapter 8 of the Model Criminal Code which will ultimately include all 'Offences Against Public Order'.

## **Contamination of Goods**

On 15 February 1997, media across Australia indicated that from 17 February 1997, there was a possibility that Arnott's biscuits may be contaminated. Six letters were reportedly sent to people in New South Wales and in Queensland, including the New South Wales Police Commissioner and the Queensland Attorney-General. A demand was made for four New South Wales police officers to undergo a lie-detector test concerning evidence the police had given at the trial of Ronald Henry Thomas for the offence of murder. Thomas was convicted on two counts of murder. If the four police

officers did not undergo this test, the threat was that Arnott's biscuits would be contaminated. Accompanying the letter of demand were packets of biscuits that had been contaminated by the addition of a pesticide. The health risk was assessed as being such that a child weighing 10 kilograms who ate one of the contaminated biscuits could die as a result.

Because of the threats, Arnott's made the decision to withdraw all of its biscuits from more than 200 supermarkets and milk-bars across Queensland and New South Wales. Within one day of the announcement of the threat, the value of the company's shares fell 25 cents, reducing the value of the company by \$35 million. Arnott's destroyed 800 truckloads of biscuits. Although no person had been arrested, on 26 February 1997, Arnott's biscuits were again on offer for sale as the threat was considered to have passed. At the time, Arnott's assessed that at best it had lost about \$10 million. Apart from the direct economic loss, there was considerable distress and disruption to consumers, retailers and approximately 300 casual staff were temporarily stood down.<sup>1</sup>

Following February 1997 the Standing Committee of Attorneys-General ("SCAG") tasked the Model Criminal Code Officers Committee ("the Committee") with reviewing the different legislative approaches for dealing with these problems in all jurisdictions within Australia. Legislation developed in the United Kingdom and the United States was also considered in producing the discussion paper on this topic and now this final report.

### **The importance of uniformity**

There would be particular advantages in having uniform legislation concerning these offences throughout Australia. The development of this type of conduct is partly due to the convergence of a number of factors relevant to the way in which Australian society functions. The development of mass markets and mass distribution of goods has resulted in an increased vulnerability in consumers concerning the safety of goods. The use of national media for the communication of information has also been important. Goods may be contaminated in such a way that the one act may have consequences in a number of jurisdictions. In some circumstances, it may even be that the motive of the person contaminating goods is that there be an impact in a number of jurisdictions in the belief that this may increase their prospects of achieving their objectives. The consultation overwhelmingly agreed with the Committee on this.

The nature of this type of activity is such that different elements of the offence may be committed outside the jurisdiction which has primarily been the victim of the activity. It would be most unfortunate if the same conduct was criminal in one jurisdiction but not in another jurisdiction,

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1 The Sydney Morning Herald, 26 February 1997, p.2.

particularly where it may actually be exactly the same conduct which simply has consequences in more than one jurisdiction at the same time.

If the same conduct does not amount to an offence in all jurisdictions, this may also impact on the investigation process. For instance, if Victoria and Tasmania have different provisions and part of the offence occurs in Tasmania where there is no offence of contaminating goods but the person has committed an offence in Victoria, because that is where the consequences of the offences arise, Victorian police may not be able to obtain search warrants in Tasmania. This is because it would not be possible to obtain a search warrant in Tasmania because the alleged conduct could not amount to an offence against Tasmanian laws. Uniform legislation would prevent such limitations in the investigation process from arising.

### **Process**

The process of issuing a discussion paper followed by a final report follows the procedure adopted by the Committee in relation to other issues. The reports are then considered by Governments.

The Committee followed a similar process in regard to these offences, that is, the Committee invited comments on the law reform proposals tentatively suggested in the discussion paper. The Committee reviewed these comments and has prepared this report for circulation and consideration by Ministers.

### **Acknowledgments**

The Committee expresses its gratitude to Mr Greg Byrne from the Victorian Department of Justice who developed the report and Mr Don Colagiuri, Deputy Parliamentary Counsel in New South Wales, who carried out the drafting on behalf of the Parliamentary Counsel's Committee of the Standing Committee of Attorneys-General.

Any further comments should be sent to:

The MCCOC Secretariat  
Criminal Law Division  
Attorney-General's Department  
Robert Garran Offices  
National Circuit, BARTON ACT 2600

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Attorney-General's Department



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## General Introduction

Before moving to the appropriate legislative approach to the issue, it is worth considering the diverse manner in which goods may be contaminated or threatened to be contaminated. For the purposes of this aspect of the discussion, “goods” and “contaminated” are words used in their widest possible sense. A number of people use different expressions such as “consumer terrorism” or “product tampering”. Contamination of goods encompasses these concepts for these purposes.

### Different ways of contaminating goods

In September 1982, seven people died in the United States after consuming a mild analgesic named Tylenol which had been deliberately contaminated with cyanide. The killings were indiscriminate. No motive was ever established for the contamination of the goods. No demand was made by the person or persons who contaminated the goods. Several weeks after the deaths, a person named James Lewis demanded \$1 million from the makers of Tylenol if they wished to end the killings. Lewis was convicted of fraud and blackmail offences but was not convicted of the murders.<sup>2</sup>

In August 1991, a person threatened to contaminate toothpaste made by Colgate-Palmolive in Sydney and Perth unless they paid \$250,000. No goods were found to have been contaminated but the company recalled and withdrew the goods from sale.<sup>3</sup>

In England in September 1992, a man named Smith rang a reporter and said that he knew that some people had contaminated some Boots’ bathroom products in a warehouse. He spoke to a journalist on the phone on several occasions over several days before being apprehended by police. He never identified which warehouse contained the allegedly contaminated goods. No goods were in fact contaminated. No publicity was obtained. No economic loss was occasioned. The motive for the offence was that the defendant believed that Boots’ tested products on animals.<sup>4</sup>

In June 1993, there were rumours in Anchorage, Alaska that cans of Pepsi contained hypodermic needles. Sales dropped by 50%. Botello bought a can of Pepsi at a local shop. He then complained in the shop, in front of other customers, that his daughter’s lip had been poked by a needle. There was an extensive investigation which revealed that Botello had put the needle into the can. The alleged contamination had been fabricated. Botello was convicted of “product tampering”.<sup>5</sup>

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2 The Weekend Australian, 15 February 1997, p.24.

3 The Weekend Australian, 15 February 1997, p 25.

4 R v Smith (1993) 15 Cr App R(S)106.

5 USA v Botello 95 CDOS 8841.

In Victoria in 1996, a man snipped the heads off pins and placed the pins in foodstuffs at three different supermarkets. People purchased those goods. No demands were made. No threats were made. The offender did not inform anyone of the contamination prior to people purchasing the contaminated goods. It was alleged that the offender was seeking to inflict harm on society in general rather than on any particular person. The offender was seeking retribution because it was society as a whole which was responsible for his conviction some years earlier of the offence of attempted murder.<sup>6</sup>

As can be seen, goods may be contaminated in a number of different ways. The contamination is sometimes associated with some form of demand or threat. However, sometimes there is only a threatened contamination of goods or a statement made that goods have been contaminated. The purpose of the contamination or threatened contamination may not be to gain something but to cause discriminate or indiscriminate harm to a person or corporation.

There are a number of features often present when a person decides to contaminate goods (or threaten to) that make it unusual when compared with more traditional notions of crime:

- A convincing threat to contaminate goods will often be as convincing as an actual contamination of goods;
- The one act may lead to there being several victims. For instance, with the Tylenol case there were the victims who consumed the contaminated tablets and died as a result. There was the company who made Tylenol which suffered losses estimated at \$85 million.<sup>7</sup> The public at large that was potentially at risk of consuming a contaminated tablet who were fearful that other tablets or goods might be contaminated;
- The consequences of the one act or series of acts may arise in a number of jurisdictions. For instance, in the Arnott's case, there were economic losses in Queensland and New South Wales and in other states despite the fact that the threat was said to be limited to Queensland and New South Wales;
- The process by which a person may become a victim of the contaminated goods is indiscriminate. If the goods are contaminated at an early point in the distribution process, contaminated goods may appear in different stores and the person(s) who contaminated the goods will not have any specific

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<sup>6</sup> This was the first and only prosecution which has been completed in Victoria.

<sup>7</sup> The Weekend Australian, 15 February 1997, p 24.

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intent to harm person A in preference to person B;

- The nature of many contaminants are such that a person will not be able to identify the goods as contaminated goods prior to consuming or using the goods;
- Copy-cat offences frequently follow genuine reports of the contamination of goods. Food and groceries industries in Victoria have estimated that for every genuine reported incident of contamination, there are about six copy-cat reports that follow. The experience in the United States is the same. The incidence of contamination of goods tends to increase markedly following a highly publicised report of product tampering (or threat thereof). This is partly because of increased consumer sensitivity where many things that would normally not be of concern, become of concern. There is also an increase in the number of fabricated or staged contaminations of goods following widespread publicity. The increase is of the order of 50-250 more reports per month. This is from a base level of between 10 to 25 reports per month;<sup>8</sup>
- To have the greatest chance of achieving success, it is often necessary for the contaminator to receive publicity.

Goods may be contaminated in new ways largely because of the nature of modern technology and society. People rely upon mass production of goods in their daily life. Few people grow all of their own vegetables and fruits and make their own bread and biscuits. Virtually everyone consumes some goods. Virtually everyone uses some goods such as cars, lifts, medicine, cosmetics, paint, glue, petrol and gas. Goods are often manufactured by corporations rather than by someone known to the ultimate consumer. The public relies upon the media for information concerning the safety of goods. If a good is unsafe for some reason, a corporation will frequently use the media to notify consumers of this fact. Corporations rely upon their public image or reputation to convince consumers to purchase their goods. Consumers rely upon a corporation's reputation that it will produce safe goods. The interplay of mass markets, the media and the importance of corporate reputations had been central to the proliferation of this type of conduct.

Are existing offences adequate?

In consultation, Mr Bronitt from the ANU raised the issue of common law and statutory offences of public nuisance, blackmail/extortion and endangerment, and submitted that these offences provided adequate coverage

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8 P.Deitz, "The Proliferation of Product Tampering," [http://www.facsnet.org/report-tool...es\\_primers/tampering/perspct3.html](http://www.facsnet.org/report-tool...es_primers/tampering/perspct3.html)(retrieved 5 February 1997), p.2.

in themselves, without need for specific contamination of goods offences. However the Committee considers that specific offences are necessary.

In determining whether a specific offence concerning the contamination of goods is necessary, it is appropriate to consider whether existing offences adequately deal with such conduct.

Most jurisdictions in Australia have offences of the following generic type:

- offences against the person (eg, murder, manslaughter, assault)
- endangering the safety of another person
- blackmail or extortion
- conspiracy to defraud
- damaging property
- threatening to assault a person
- threatening to damage property
- administering a substance to a person
- making a false report to police.

In considering whether such offences are adequate, the ways in which goods have been contaminated or threatened to be contaminated as discussed above provide useful models to consider the adequacy of offences which are not specifically drafted to address the contamination of goods.

The Arnott's case provides a useful example of the difficulties that may arise when there is no specific offence of contaminating goods. The Arnott's case was often described in the media as involving extortion. However, in a number of jurisdictions in Australia, the demand in an extortion or blackmail offence must be for money or some type of property. In the Arnott's case, the demand was not for money or property, it was for four police officers to take a lie detector test. In New South Wales and South Australia, the offence of blackmail may not have been committed by the offender in the Arnott's case. In other jurisdictions, (and in the Model Criminal Code) the offence of blackmail does not have to be for money or property. There are also difficulties associated with defining the nature of the offence:

- object of the crime - For the purposes of the offence of blackmail, was the demand directed to the four police officers individually, the police departments of New South Wales and Queensland, the governments of New South Wales and Queensland or the company which owned Arnott's? Or was it the public in each State? Public pressure may have forced the governments to meet the demands made. Or was it the public because the public were the ones at risk of being harmed by the consumption of contaminated biscuits?

- jurisdiction - If the object of the crime was each police officer (of whom it was demanded that they undergo a lie-detector test), was an offence committed in Queensland? Assuming that all of the police were in New South Wales at the time the demand was made, there may have been a demand made within the jurisdiction of New South Wales, but it is not clear how this would constitute the offence of blackmail in Queensland. Whether the threat was to contaminate biscuits in Queensland or Papua New Guinea, the place where it is proposed to carry out the threat may not be sufficient to confer jurisdiction on the State or jurisdiction that may suffer most if the threat is carried out.

This highlights the problem that the offence of blackmail does not necessarily focus on all of the relevant features of the conduct in question, namely, the loss or damage that may result to the company conducting business in Queensland and the fear and anxiety that was created in the Queensland community.

Similar difficulties may arise with more specific offences such as damaging property. For instance, consider the following case. Goods are actually contaminated in South Australia. The contaminated goods are transported to Victoria and sold in Victoria. The person who contaminated the goods knew that the goods would be sold in Victoria. An offence of damaging property has been committed in South Australia but not in Victoria. Although considerable harm may have been caused in Victoria, the property was not damaged there so the person will not have committed an offence of damaging property.

Unless such jurisdictional issues are specifically addressed, there is potential for very serious and harmful acts and statements, both economically and in terms of public anxiety, not to be proscribed by the law.

There are also limitations in the usefulness of certain offences against the person where the harm caused to each victim is minor but there may be thousands of victims. For instance, if a contaminant was added to goods that resulted in diarrhoea, this would probably constitute a sufficient harm to prosecute for offences against the person. However, even if the offender was charged with several thousand charges of such an offence, the issue arises whether this focuses on the correct aspect of the conduct of the offender, namely the impact of the conduct on the public.

The Committee considers these specific offences are sometimes inadequate or inappropriate in properly dealing with the different types of harm that may arise when goods are contaminated or where there is a threat to contaminate goods. These issues can be addressed by the creation of specific offences which focus upon different types of harm and which are not jurisdictionally limited in the manner of most traditional or existing offences.

The Committee therefore favours the approach of specifically providing for such possibilities in the model provisions. This is the approach which has been developed in Victoria.

In some cases the penalties for the specific offences are inadequate. For example administering a deleterious substance has a maximum penalty of 3-5 years imprisonment and is more suited to an incident involving an individual rather than the widespread public alarm which is caused where the proposed offences apply.

The NSW DPP submitted that additional offences are warranted, namely:

- (a) maliciously or without lawful excuse contaminating goods;
- (b) possession of contaminated goods;
- (c) maliciously or without lawful excuse contaminating goods and causing actual bodily harm;
- (d) maliciously or without lawful excuse contaminating goods and causing grievous bodily harm; and
- (e) maliciously or without lawful excuse contaminating goods with the intent of causing actual bodily harm or grievous bodily harm.

However the Committee considers that the present draft offences constitute an appropriate and extensive criminalisation of conduct. The NSW DPP proposal (b) would make the offence too broad by including conduct that could be legitimate (for example, the person might be laying a bait to kill rats). Proposals (a), (c), (d) and (e) are adequately covered by existing serious harm, manslaughter and murder offences. They are examples of how the law can be complicated by over-legislating.

The development of legislative responses

Victoria was the first jurisdiction in Australia to enact specific legislation to deal with contamination of goods. The Victorian provisions are in s.248 of the *Crimes Act 1958*. These provisions were developed from legislation in the United Kingdom.<sup>9</sup> Legislation in the United Kingdom was based on legislation which had been developed in the USA.<sup>10</sup> The federal legislation in the USA was developed largely as a result of the contamination of Tylenol goods.

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<sup>9</sup> Section 38, *Public Order Act 1986* (UK).

<sup>10</sup> 18 USC Sec.1365

<sup>11</sup> Ss.238-241, *Criminal Code* (Qld); ss.931A-931G, *Crimes Act 1900* (NSW) and amendment of Table 1, Part 9A, *Criminal Procedure Act 1986* (NSW).

Legislation has recently been introduced in Queensland and New South Wales that specifically addresses the issue of contamination of goods.<sup>11</sup> The Committee has considered the different legislative approaches. The Committee favours the approach which in broad terms follows the Victorian approach although there are a number of differences between the approach favoured by the Committee and the Victorian approach.

## CHAPTER 8 - OFFENCES AGAINST PUBLIC ORDER

### PART 8.1 - CONTAMINATION OF GOODS

#### 8.1.1 Definitions of contaminate and goods

(1) In this Part:

*contaminate* goods includes:

- (a) interfere with the goods; or
- (b) making it appear that the goods have been contaminated or interfered with.

*goods* includes any substance:

- (a) whether or not for human consumption; and
- (b) whether natural or manufactured; and
- (c) whether or not incorporated or mixed with other goods.

(2) In this Part, a reference to economic loss caused through public awareness of the contamination of goods includes a reference to economic loss caused through:

- (a) members of the public not purchasing or using those goods or similar goods; or
- (b) steps taken to avoid public alarm or anxiety or to avoid harm to members of the public.

## The contamination of goods offences

The Committee favours the approach where the possible offences have been divided into three broad categories. The first category is concerned with the actual contamination of goods or the doing of something to goods so that the goods appear as if they have been contaminated in some way. The second category is concerned with threats to contaminate goods. The third category is concerned with the making of statements concerning whether goods have been contaminated. Each category is represented by a separate offence. These three offences will be discussed in turn.

Definitions - s.8.1.1

### Contaminate

The offences include a definition of what it is to “contaminate” goods. Neither the Victorian nor United Kingdom provisions contain such a definition. However, in Queensland, “contaminate” is defined as including “to add, mix or put in a deleterious or poisonous substance.”<sup>12</sup> The difficulty with this definition is that it appears to qualify the types of substances which are capable of amounting to a contaminant. For instance if salt was added to packets of sugar, this may not amount to a “contamination” of the goods. Salt would not normally be described as a deleterious or poisonous substance. Such an alteration in the goods may cause substantial economic loss in both senses used in the proposed offences.

The advantage of providing guidance but not restricting what will amount to a contamination of goods is that the mode of the creation of the public alarm or economic loss is not the element of the offence which should limit liability. Liability should be limited by other matters such as proof of a requisite intention to produce certain consequences.

The Committee favours the broad definition which does not restrict liability because of the manner in which goods have been contaminated. This approach was broadly supported in submissions made to the Committee.

### Goods

The Committee considered that it was inappropriate to restrict the definition of “goods” to substances consumed by humans because many harmful substances would be excluded from such a definition, such as the following:

- cosmetics are used but not consumed - if a soap or perfume was contaminated this could cause considerable harm in all of the three ways identified in the proposed offences;

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<sup>12</sup> S.241, *Criminal Code* (Qld).

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- many substances are used by people although they are not consumed or used on the human body - if petrol was contaminated so that it either caused explosions or led to drowsiness in drivers, this could be harmful in all of the three ways identified in the proposed offences;
- harm may be caused even if it is not directly connected with humans - if horse-feed was contaminated, there may be harm in terms of cruelty to animals, economic effects in the racing industry and anxiety in the community that horses in general or a person's own horse may be a victim of the contamination. The potential for economic impact, albeit more closely related to human consumption than is the case with horses, was shown in recent years concerning the mad cow disease in the United Kingdom.

The Committee considers that the advantage of a broad definition of goods is that the offence is not limited by the imagination of those drafting the provisions to encompass all of the ways in which a person motivated to cause harm may in fact cause harm. In some cases, a person's motive will be to cause loss to a specific company for a specific reason (e.g. so that it ceases to test its products on animals). In other cases, some victims are merely a means to an end of the contaminator. For instance in the Arnott's case, the primary motive was alleged to have been to force four police officers to take a lie-detector test rather than to cause economic loss to Arnott's. Causing economic loss to Arnott's and creating fear in the community may have been designed to increase the pressure, either directly or indirectly, on the police to undergo lie detector tests. With a limited definition of goods, the person in the Arnott's case could have chosen to contaminate a product outside the definition of "goods" and thereby avoid liability for a very serious offence.

The restrictions on the scope of the offences is therefore operative in relation to other elements of the offence rather than at the point of determining whether the contamination or apparent contamination concerns "goods". The broad definition of "goods" was supported in submissions received by the Committee.

The submission from the Hon. Justice Scott from the Supreme Court of Western Australia recommended that the offences be extended to cover damage to intellectual property such as contamination of data stored on computers. The Committee considered that this would represent a significant extension of the scope of the offences without adequate consultation. However these issues will at a later stage be dealt with in the broader public order and property damage provisions of the Model Criminal Code.

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The Law Society of NSW submitted that “reasonable” be inserted before “steps” in subparagraph 8.1.1(2)(b) in order that a reasonableness test be imposed upon a complainant. This would avoid the possibility of needless expenses being claimed from the offender, or the company in question using a subsidiary security or advertising company or the like and claiming the whole of the expenses from the offender. However the Committee considers that whilst the question of mitigation of damages could be raised in the context of seeking reparation from the offender it is not an element that should arise in the context of prosecution of an offender.

**Economic Loss**

This definition is discussed in the context of the first offence.

**8.1.2 Contaminating goods with intent to cause public alarm or economic loss**

A person who contaminates goods with the intention of:

- (a) causing public alarm or anxiety; or
- (b) causing economic loss through public awareness of the contamination,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

Contaminating goods with intent to cause public alarm or economic loss - s.8.1.2

### **Physical elements of the offence**

This offence is concerned with conduct that in some way results in the contamination of goods or in making goods appear as if they have been contaminated. In accordance with the approach that the Committee has adopted to the development of a Model Criminal Code, the elements of this offence will be discussed in the context of the general principles of criminal responsibility that have already been considered by the Committee.

The physical element of this offence is concerned with goods which have actually been contaminated or appear to have been contaminated. Goods that appear to have been contaminated are treated in the same manner as goods that have actually been contaminated. This is because both the consequences and the motive for committing each type of act will often be the same. If goods are actually contaminated, there is potential that there will be a number of victims of such activity. The types of victims are discussed in the consequence of the fault elements as the fault element is concerned with the consequences intended to be produced by the person who contaminates goods.

### **The fault element of the offence**

To be liable for this offence, a person who has committed the physical elements of the offence must also commit the fault element of the offence. The fault element of this offence will be present if the person has the intention to produce any one of the three consequences which are specified in the provision, namely:

- causing public alarm or anxiety; or
- causing people to not purchase or use the goods; or
- causing a person to take action to avoid public alarm or anxiety or to avoid harm to members of the public.

These different consequences reflect the different types of victims of contaminated goods. First, if the contamination causes harm to people upon use or consumption of the good, then there will be the victims who will have suffered a direct physical or psychological harm. Second, there may be public anxiety concerning the safety of the goods. Third, the manufacturer or retailer of the goods may suffer economic loss as a result of public concern as to the safety of the goods or by taking preventative action to avoid harm being caused to members of the public.

This first consequence, causing public alarm or anxiety, will usually occur where there has been publicity concerning the dangers associated with a

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good. For instance, in the Arnott's case, the extent of the alarm or anxiety created was illustrated by the fact that even in jurisdictions which were not the subject of the threat, Arnott's suffered considerable losses in sales. One would expect that the public alarm or anxiety would have been much greater in the States that were the subject of the threat. However, because this consequence focuses upon the public reaction to a contamination, it is not necessary that there be any loss occasioned to a manufacturer or retailer. Nor is it necessary that there be people who were or could have been harmed by the contamination or apparent contamination.

The second type of harm occurs where, as a consequence of the contamination or apparent contamination, the public does not purchase or use such goods. The focus in this instance is upon the direct economic loss that may be caused to a person or corporation that suffers because the public is concerned about the safety of the goods on offer for sale. The Committee was concerned to ensure that economic loss form part of the relevant considerations in determining what type of conduct should be made unlawful. For instance, in the Arnott's case, no person was actually harmed as a result of the contamination of any biscuits. However, the impact of the threat to contaminate goods was such that the corporation manufacturing Arnott's biscuits suffered an economic loss of at least \$10 million.

This approach is broader than that which is provided in either the Victorian or United Kingdom legislation. The Victorian provisions relate to economic loss which is based upon people "refraining from purchasing" goods. The United Kingdom provision refers to people "shunning" goods. The Committee favours the broader definition that potentially includes goods that are hired or supplied rather than purchased.

Third, economic loss may be occasioned in that the manufacturer or retailer of goods may have to spend money to minimise losses. By way of example, Arnott's recognised that there may be alarm and anxiety in the community. It published a letter in major newspapers to inform the public about the threat and established phone lines to receive customer inquiries concerning the safety of Arnott's biscuits.<sup>13</sup> Another instance of public alarm or anxiety concerning the safety of consumable goods arose in relation to the finding of salmonella in Kraft peanut butter in June 1996. This was not a result of intentional contamination of goods, but the relevant factors from a consumer's perspective were very similar, namely were the goods safe. Kraft established phone lines for consumer questions and received 110,000 phone calls in one week.<sup>14</sup>

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13 The Age, 15 February 1997, p.14.

14 The Weekend Australian, 15 February 1997, p.24.

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A corporation may need to spend millions of dollars to retain or minimise its loss of market share, or to maintain or restore consumer confidence in its goods. It may do this and as a result not suffer a direct economic loss of the type referred to in the second consequence outlined above. In some instances, this type of loss may be in addition to the types of losses referred to in the second consequence. This type of loss is different from that referred to in the second type of consequence. Suppose that goods are contaminated but because of an extremely successful advertising campaign a corporation is able to assure its customers that its goods are safe. Therefore, its customers do not cease to purchase the corporation's goods. The only "loss" that the corporation has suffered is the money that it has expended in preventing other types of losses. This expenditure may be substantial. The success of the victim in responding to the contamination of goods should not prevent liability from arising. Accordingly, this type of consequence has been included in the relevant types of consequences to consider in determining liability.

Sir Harry Gibbs identified the need for 'economic loss' to encompass situations where the loss is occasioned by the victim's own actions; for example a corporation may foresee that the contamination may result in the public becoming alarmed and therefore ceasing to purchase its goods or services. To counteract this, a corporation may withdraw the goods from sale or hire, or may spend considerable sums of money to assure the public that its goods are safe (if and when they are) so that the public continues to, or resumes, buying its goods. This may involve a substantial amount of money. In such a situation the economic loss need not be occasioned "through public awareness of the contamination" because the corporation may take this action before the public becomes aware of any danger. The Committee accepted that the fault element must be broadened to capture such instances, and the provisions of 8.1.2, 8.1.3 and 8.1.4 have been amended from the draft provisions which were included in the Discussion Paper.

It is not necessary that these consequences actually occur. The relevant issue is that the person intends that these consequences occur. Accordingly, it is not necessary for police to wait for there to be public alarm or economic loss before charging a person if the police are in a position to prevent those consequences from occurring.

Other submissions considered that intention to cause unspecified harm be incorporated into the offences (AIC, NSW DPP) or that the intentional contamination of goods for any reason would be more appropriate (Tasmania Police). The Committee examined these submissions and considered that the present fault element structure represents the most appropriate balance for an offence with such a substantial penalty. The open-ended proposal from the Tasmania Police would be so broad it would cover legitimate and socially beneficial conduct.

Code

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The NSW Council for Civil Liberties submission considered that the gravamen for contamination of goods offences should be the protection of consumers and the public from harm, and accordingly economic loss should be omitted as a basis for the contamination of goods offences. However the Committee noted that a perpetrator's intent, and indeed the sole consequent result, may be limited to causing substantial economic loss. The Committee considered that such conduct formed an indivisible component of contamination-related criminal activities and therefore must be criminalised within the scope of the contamination of goods offences. Property offences have comparable penalties - theft and fraud attract a maximum penalty of 10 years imprisonment.

**8.1.3 Threatening to contaminate goods with intent to cause public alarm or economic loss**

- (1) A person who makes a threat that goods will be contaminated with the intention of:
  - (a) causing public alarm or anxiety; or
  - (b) causing economic loss through public awareness of the contamination,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

- (2) For the purposes of this section, a threat may be made by any conduct, and may be explicit or implicit and conditional or unconditional.

Threatening to contaminate goods with intent to cause public alarm or economic loss - s.8.1.3

### **The physical elements**

The first offence is concerned with actual or apparent contamination of goods. This offence is concerned with threatening to contaminate goods. Although it is not necessarily the case, generally this offence will apply where goods have not in fact been contaminated at the time that the threat is made. If the information conveyed by the person concerns past conduct such as having contaminated goods or having made goods appear to have been contaminated with, then this is regarded as a statement rather than a threat. As a statement, the appropriate offence to consider is the third offence. Further, it is not necessary that the threat be associated with any demand.

As discussed above, the Committee considers that it is necessary to have an offence specifically directed to threats to contamination of goods. This is because threats have the capacity to be as detrimental as actual or apparent contamination of goods, in terms of their impact on public anxiety and economic losses that may be suffered.

The offence also provides a definition of threat that is broad in nature to cover any type of conveying of information.

### **The fault element**

This offence adopts the fault elements from the first offence. Effectively this means that the relevant state of mind is one of intending to produce any one or more of three consequences:

- causing public alarm or anxiety
- causing people to not purchase or use the goods
- causing a person to take action to avoid public alarm or anxiety or to avoid harm to members of the public.

The manner in which these consequence provisions are designed to operate was discussed above in relation to the first offence.

**8.1.4 Making false statements concerning contamination of goods with intent to cause public alarm or economic loss**

- (1) A person who makes a statement that the person believes to be false:
- (a) with the intention of inducing the person to whom the statement is made or others to believe that goods have been contaminated; and
  - (b) with the intention of thereby:
    - (i) causing public alarm or anxiety; or
    - (ii) causing economic loss through public awareness of the contamination,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

- (2) For the purposes of this section, making a statement includes conveying information by any means.

Making false statements concerning contamination of goods with intent to cause public alarm or economic loss - s.8.1.4

### **The physical elements**

This offence is concerned with the making of a statement or the conveying of information about the contamination of goods. As discussed above, this offence focuses upon statements about what has been done or alleged to have been done to goods, namely an existing or a past state of affairs. If there is an actual or apparent contamination of goods then the first offence would be available to cover such a situation.

### **The fault element**

The person who makes the statement or conveys information concerning goods must have an intention to induce another person(s) to believe that goods have been contaminated with and thereby produce one of three consequences:

- causing public alarm or anxiety
- causing people to not purchase or use the goods
- causing a person to take action to avoid public alarm or anxiety or to avoid harm to members of the public.

There is an additional fault element for this type of offence. The person who makes the statement or conveys information must believe that the statement is false. The Victorian provisions apply to statements which are “known or believed to be false”.<sup>15</sup> If a statement is known to be false then it will also be believed to be false. The Committee was particularly concerned that if this offence has too broad an application, much socially useful and important information could potentially become subject to the criminal law. For instance, if a spokesperson for the housing industry became aware that certain types of building materials had been found to be unsafe and that it was necessary for this information to be conveyed to both people with houses made with such materials and to prevent people from purchasing such goods in the future, such statements may be intended to produce the following consequences:

- cause public anxiety (as the houses that some people are living in may be unsafe)
- cause people to not purchase or use such housing materials (for their own safety)
- cause the corporation to suffer economic loss by spending more

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<sup>15</sup> Section 248(3) *Crimes Act 1958* (Vic).

Code

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money on the materials so that they are safe and then people will continue to use the materials.

The difference between the people making statements for socially beneficial purposes and those making them for other reasons is based upon the person's motive. The difficulty is in drafting the offence so that only the socially undesirable type of statements are the subject of the criminal law.

For this reason, the Committee considers that it is necessary that the person who makes a statement or conveys information must, when making the statement, believe that the statement is false. If a person makes a statement concerning the contamination of goods and believes that the statement is true, then that person will not have committed an offence. In the above example, the housing industry spokesperson presumably will not have committed an offence because she or he will have believed that the statement made was true. With this qualification of the fault element that a person must have, the police and representatives from Arnott's would not be guilty of making a statement concerning the contamination of goods when they provided information to the public so that the public could avoid being harmed by any contaminated goods. Without this qualification, both the police and Arnott's representatives may well have committed the offence of making a statement concerning the contamination of goods.

The Tasmania Police submission considered that the present fault element would be difficult to prove and recommended an objective test, namely that a reasonable person would have known that the statement was false. However the Committee considers that the subjective test is the correct basis for fault for such a serious offence, as reflected in the remainder of the Model Criminal Code.

An alternative approach to this problem is provided in the United Kingdom legislation. It specifically provides that a person who threatens to contaminate goods, does not include a person who in good faith, reports or warns, that goods have been contaminated or appear to have been contaminated. In this way, people who are motivated by a desire to help the public, such as the person warning that a house may be unsafe, will not be included in the type of people who are liable to be prosecuted for what they say about what will or what has happened to goods. Queensland does not have any similar provision in its legislation.

The Committee considers that the United Kingdom approach is an improvement upon the Queensland provisions. However, the Committee considers that by confining the offence to false statements provides a much more simple solution to this problem. The Committee's approach was strongly supported by the submissions from Coles Myer Ltd and the Law Society of NSW.

**8.1.5 Territorial nexus for offences**

- (1) It is immaterial that the conduct of a person constituting an offence under this Part occurred outside the jurisdiction, so long as the person intended by that conduct:
  - (a) to cause public alarm or anxiety in the jurisdiction; or
  - (b) to cause economic loss in the jurisdiction through public awareness of the contamination.

### Territorial nexus for offences - s.8.1.5

The Arnotts case demonstrated that the conduct of a person in one jurisdiction can readily cause public alarm or anxiety or economic loss in other jurisdictions. This is particularly evident in the modern era of inter-State trade and rapid communications and transport.

The Committee is concerned that persons engaging in such conduct be capable of being prosecuted in another jurisdiction where they intended that their actions would result in public alarm or anxiety or economic loss in that jurisdiction. The test is subjective, namely the intention of the perpetrator at the time of committing the conduct governs whether the necessary jurisdictional nexus was established. This conforms with the subjective intention requirement underpinning the remainder of the Model Criminal Code. The provision will provide a sufficient territorial nexus in the case of the above public order offences if the *only* territorial nexus with the jurisdiction is an intention to cause public alarm or anxiety, or economic loss, in the jurisdiction.

The model offences in the discussion paper did not specifically address the issue of the jurisdiction of the charges within the definition of the offence itself. This is because the Code will further provide, in chapter 2, general provisions concerning the issue of jurisdiction. As a general rule the Code will provide that an offence will have been committed within a jurisdiction if one of the physical elements of the offence has taken place within that jurisdiction.

However the Committee considers there is a special need for the offence of contamination of goods to have greater extra-territorial operation than would be the case for most offences. In Victoria, it is not necessary that any of the physical elements of the offence be committed within Victoria. There is jurisdiction to prosecute an offence if a person has an intention to produce a consequence in Victoria such as causing public alarm or economic loss. This approach was supported in the submissions from Coles Myer Ltd, the NSW Chief Magistrate, the ABCI, the WA DPP, Sir Harry Gibbs and the Australian Food Council. The AIC submitted that the presence of one of the elements in a jurisdiction would be a sufficient basis to raise an offence in that jurisdiction. The Committee therefore agreed to insert an additional clause in the form of subsection 8.1.5 to take account of the particular jurisdictional issues which are likely to arise under this class of offences.

The advantage of this broader approach is that any type of contamination of goods will be captured by the offence provided that some harm was intended to be caused within the jurisdiction. If the offence does not have this extended operation, it is possible that some undesirable conduct will not be captured. For instance, if goods are actually contaminated in one jurisdiction and the goods are only sold in another jurisdiction, it may be concluded

Code

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that the contaminator intended to produce harmful consequences in the second jurisdiction. As no physical element of the offence was committed in the second jurisdiction, no offence would have been committed.

While the disadvantage of this approach is that it may be thought that the connection between the contaminator and the jurisdiction is too remote, the Committee believes a broader approach based on the Victorian law is appropriate for an offence of this nature. It is an offence which will almost invariably have cross-border consequences.



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## Conclusion

There are some additional issues that need to be addressed:

### **Demands made in association with the offence of contaminating goods**

The Committee has also considered the issue of whether there should be an additional penalty if the offence of contamination of goods is committed in circumstances where it is associated with the making of a demand. Neither the United Kingdom legislation nor the Victorian legislation provides any such increase in maximum penalty. Queensland and New South Wales provisions provide that where there is a threat to contaminate goods or make goods appear to have been contaminated with and there is a demand made, then a higher maximum penalty applies.

This aspect of the offending is what is often described as extortion. The typical example being where a demand is made for money with the threat that if the demands are not met, goods will be contaminated. The Committee does not recommend having an increased penalty where the contamination is accompanied by a demand because such a circumstance would amount to the offence of blackmail as defined in the Model Criminal Code. Having a demand as a circumstance of aggravation may be considered desirable in jurisdictions that do not have the offence of blackmail defined in the same way as it is defined in the Model Criminal Code.

### **Maximum penalty**

The Committee recommends that the offence be punishable by a maximum term of 10 years imprisonment. This reflects the serious nature of the offence and that the most serious forms of this offence, when contamination of goods is associated with a demand, will actually amount to the more serious offence of blackmail. Accordingly, the maximum penalty should be less than that which applies to the offence of blackmail. In the Model Criminal Code, the offence of blackmail is punishable by a maximum of 12 years and 6 months imprisonment. Victoria, New South Wales, Queensland and the United Kingdom have set the maximum term at 10 years imprisonment for offences of the type recommended by the Committee.<sup>16</sup> These penalty levels were generally supported by submissions which addressed this point.

Some of the penalties for existing specific offences are too low and more suitable for an offence that applies to individuals rather than widespread public alarm. For example, administering a deleterious substance has a maximum penalty of 3-5 years imprisonment.

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<sup>16</sup> Queensland has different penalties for other types of contamination of goods offences. These offences have not been included in the Model Criminal Code.



## CHAPTER 8 - OFFENCES AGAINST PUBLIC ORDER

### PART 8.1 - CONTAMINATION OF GOODS

#### 8.1.1 Definitions of contaminate and goods

(1) In this Part:

*contaminate* goods includes:

- (a) interfere with the goods; or
- (b) making it appear that the goods have been contaminated or interfered with.

*goods* includes any substance:

- (a) whether or not for human consumption; and
- (b) whether natural or manufactured; and
- (c) whether or not incorporated or mixed with other goods.

(2) In this Part, a reference to economic loss caused through public awareness of the contamination of goods includes a reference to economic loss caused through:

- (a) members of the public not purchasing or using those goods or similar goods; or
- (b) steps taken to avoid public alarm or anxiety or to avoid harm to members of the public.

#### 8.1.2 Contaminating goods with intent to cause public alarm or economic loss

A person who contaminates goods with the intention of:

- (a) causing public alarm or anxiety; or
- (b) causing economic loss through public awareness of the contamination,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

**8.1.3 Threatening to contaminate goods with intent to cause public alarm or economic loss**

- (1) A person who makes a threat that goods will be contaminated with the intention of:
  - (a) causing public alarm or anxiety; or
  - (b) causing economic loss through public awareness of the contamination,is guilty of an offence.  
Maximum penalty: Imprisonment for 10 years.
- (2) For the purposes of this section, a threat may be made by any conduct, and may be explicit or implicit and conditional or unconditional.

**8.1.4 Making false statements concerning contamination of goods with intent to cause public alarm or economic loss**

- (1) A person who makes a statement that the person believes to be false:
  - (a) with the intention of inducing the person to whom the statement is made or others to believe that goods have been contaminated; and
  - (b) with the intention of thereby:
    - (i) causing public alarm or anxiety; or
    - (ii) causing economic loss through public awareness of the contamination,is guilty of an offence.  
Maximum penalty: Imprisonment for 10 years.
- (2) For the purposes of this section, making a statement includes conveying information by any means.

**8.1.5 Territorial nexus for offences**

It is immaterial that the conduct of a person constituting an offence under this Part occurred outside the jurisdiction, so long as the person intended by that conduct:

- (a) to cause public alarm or anxiety in the jurisdiction; or
- (b) to cause economic loss in the jurisdiction through public awareness of the contamination.

**Note:** It is also proposed to add a provision to Chapter 2 of the Code dealing with establishing a territorial nexus between a jurisdiction and the physical elements of an offence. In the case of the above public order offences, the provision will have the effect that it does not matter if one or more of the physical elements of the offence occurs outside the jurisdiction, as long as at least one of them occurs in the jurisdiction.

## Appendix 2

### **Contamination of Goods Offences Submissions**

Submissions were received from the following contributors and were considered by the Committee in preparing this report:

ACT Attorney-General's Department, Legal Policy Division  
Australian Bureau of Criminal Intelligence  
Australian Federal Police  
Australian Food Council  
Australian Institute of Criminology  
Coles Myer Ltd  
Criminal Bar Association of Victoria  
The Hon Justice Scott, Supreme and District Courts Model Criminal Code Committee (WA)  
Law Society of New South Wales  
Law Society of Western Australia  
Legal Aid Western Australia  
National Council of Women of Tasmania  
NSW Chief Magistrate of the Local Courts  
NSW Council for Civil Liberties Inc  
NSW Director of Public Prosecutions  
NSW Police Service  
Queensland Police Service  
Mr Simon Bronitt, Senior Lecturer, Australian National University  
Sir Harry Gibbs  
South Australia Police  
Tasmania Police  
Victoria Police  
WA Director of Public Prosecutions

The Committee is grateful to all contributors for their thoughtful submissions.