DEMANDING WITH MENACES: A SURVEY OF THE AUSTRALIAN LAW OF BLACKMAIL

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This article attempts to present a re-statement and criticism of the existing law of blackmail in Australia. In states other than Victoria the word blackmail is used as a generic term to cover a number of separate statutory offences. In Victoria the Crimes (Theft) Act 1973 has, inter alia, replaced previous statutory offences with a single new crime of blackmail. This article will examine the exceedingly complex set of provisions which exist in the states other than Victoria, and will attempt to show that the existing law in these jurisdictions is less than satisfactory. The Victorian legislation will then be considered, and it will be suggested that while the old law has been considerably simplified, the new provision may raise a number of difficulties of its own.

A. THE STATES OTHER THAN VICTORIA

The precise wording of the statutory offences varies slightly from state to state, but the differences are mostly immaterial. The New South Wales provisions may be taken as representative. Statements made in this article about the law in New South Wales may be taken as intended to be applicable to South Australia, Queensland, Western Australia and Tasmania unless the contrary is stated. For convenience, where cases from other jurisdictions are discussed the section referred to in the text will be the New South Wales equivalents of those under consideration. The New South Wales Crimes Act 1900 provides

> 99. Whosoever, with menaces, or by force, demands any property from any person, with intent to steal the same, shall be liable to penal servitude for seven years.
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> 100. Whosoever sends, delivers, or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing demanding any property of any person, with menaces or any threat, and without reasonable cause, shall be liable to penal servitude for ten years.
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> 101. Whosoever sends, delivers, or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing accusing or threatening to accuse a person of felony, or of having committed, or attempted to commit, an infamous crime as defined in section one hundred and four, or of having committed an offence against decency in a public place, with intent in any such case to extort or gain property from any person, shall be liable to penal servitude for fourteen years.
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> 102. Whosoever, in any manner, by words or otherwise, accuses, or threatens to accuse, either the person to whom such accusation or threat is made, or

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some other person, of any such crime or offence as is referred to in section one hundred and one, with intent in any such case to extort or gain property from any person, shall be liable to penal servitude for ten years.

103. Whosoever by unlawful violence to, or restraint of the body of, any person, or by any threat of such violence, or restraint, or by accusing or threatening to accuse a person of any such infamous crime as is defined in section one hundred and four, compels, or induces, any person to execute, make, accept, indorse, alter, or destroy, the whole or any part of any valuable security, or to write, impress, or affix, any name or seal upon, or to, any paper or parchment, with intent in any such case to defraud, shall be liable to penal servitude for fourteen years.

104. For the purposes of the three last preceding sections the term *'infamous crime'* shall include the crimes of rape, and buggery, or bestiality, with mankind, or an animal, and every assault with intent to commit, or attempt to commit, any such crime, and every solicitation, promise, or threat, offered, or made, to any person whereby to induce him to commit, or permit, any such crime.

105. It shall be immaterial whether any such menace or threat, as aforesaid, is of violence, or injury, or of an accusation to be caused, or made, by the offender, or by any other person, or whether the accusation, if made, shall purport to be that of the offender, or some other person.

These sections contain five separate crimes.

1. Sending a letter demanding property with menaces (s. 100).[1]

2. Demanding property with menaces with intent to steal (s. 99).[2]

3. Sending a letter threatening to accuse of felony or an infamous crime (s. 101).[3]

4. Threatening to accuse of an infamous crime (s. 102).[4]

5. Causing a person by violence or threats to execute a valuable security (s. 103).[5]

Each of these offences consists of a number of elements.

1. Property is demanded in a particular way (the demand).

2. The demand is accompanied by a threat of some sort (the menace).

3. The demand is made with a particular intent (the intent). Each of the offences listed and the elements which comprise them will be considered presently. Before this is done, however, in order to obtain an understanding of the scope of the law of blackmail, it will be necessary to

[1] Criminal Law Consolidation Act 1935 (S.A.) s. 159; Queensland Criminal Code s. 415; Western Australia Criminal Code s. 397; Tasmanian Criminal Code s. 241(1)(i).

[2] Criminal Law Consolidation Act 1935 (S.A.) s. 160; Queensland Criminal Code s. 414; Western Australia Criminal Code s 396; Tasmanian Criminal Code s. 242.

[3] Criminal Law Consolidation Act 1935 (S.A.) s. 161; Queensland Criminal Code s. 416(3); Western Australia Criminal Code s. 398(3); Tasmanian Criminal Code s. 241(1)(ii).

[4] Criminal Law Consolidation Act 1935 (S.A.) s. 162; Queensland Criminal Code s. 416(1), (2); Western Australia Criminal Code s. 398(1), (2); Tasmanian Criminal Code s. 241(1)(iii).

[5] Criminal Law Consolidation Act 1935 (S.A.) s. 165; Queensland Criminal Code s. 417; Western Australia Criminal Code s. 399; Tasmanian Criminal Code s. 241(2).

examine the extent to which other offences may cover a situation which in common parlance would be described as blackmail. The relevant crimes are

1. Robbery.
2. Larceny.
3. Common law extortion.

1. *Robbery*

The original common law definition of robbery was the felonious taking of money or goods from the person of another, or in his presence, by violence or by putting him in fear of violence.[6] In a series of late eighteenth and early nineteenth century cases it was established that robbery was also committed where property was obtained as an immediate consequence of a threat to accuse the victim of committing, attempting to commit, or soliciting for the purposes of committing an act of buggery.[7] This extended definition of robbery is embodied in the Tasmanian Criminal Code,[8] but not in the Queensland and Western Australian Codes.[9] The extension of the crime of robbery to cover threats to accuse of buggery or related offences, but no further, seems illogical and is explained by the extreme revulsion with which the act of buggery was viewed in the eighteenth and nineteenth centuries.[10] In modern times the rule was considered by the Court of Appeal in *R. v. Pollock and Divers*.[11] The two accused were convicted of robbery when they obtained property by threatening to report their victim to the police for attempting to commit an act of buggery upon one of them. On appeal to the Court of Criminal Appeal counsel for the accused argued that the offence of robbery by means of threats to accuse of buggery or attempted buggery no longer existed. Delivering the judgment of the Court Veal J. stated

> We hold that such a variety of robbery did exist at common law . . . We further hold that the common law offence of robbery, in all its common law forms, continues to this day . . . In particular, we hold that robbery by threat of accusation of sodomitical practices exists at common law alongside the statutory offence of demanding money by menaces.[12]

[6] W. Hawkins, *A Treatise of the Pleas of the Crown* Volume I, 212; Edward Hyde East, *A Treatise of the Pleas of the Crown* Volume II, 707; Sir Matthew Hale, *The History of the Pleas of the Crown* Volume I, 532. See also the judgment of Lord Morris in *R. v. Hall and Desmond* [1965] A.C. 960, 979.

[7] *R. v. Jones* (1776) 1 Leach 139, 168 E.R 171; *R. v. Donnally* (1779) 1 Leach 193, 168 E.R. 199; *R. v. Hickman* (1784) 1 Leach 278, 168 E.R. 241; *R v. Knewland and Wood* (1796) 2 Leach 721, 168 E.R. 461; *R. v Cannon and Coddington* (1809) Russ. & Ry. 146, 168 E.R. 730; *R. v. Egerton* (1819) Russ. & Ry. 375, 168 E.R. 852; *R. v Gardner* (1824) 1 C. & P. 479, 171 E.R. 1282.

[8] S. 240(4).

[9] Queensland Criminal Code s. 409; Western Australia Criminal Code s. 391.

[10] See *R. v. Pollock and Divers* (1966) 50 Crim. App. Rep. 149, 156-7.

[11] (1966) 50 Crim. App. Rep. 149.

[12] *Ibid.* 163-4.

The scope of this form of the offence of robbery is quite limited. For the crime to be committed the property must be obtained on the same occasion as the threat is made.[13] If the blackmailer gives his victim time to pay he cannot be guilty of robbery. Further, the offence is confined to threats to accuse the victim himself. In *R. v. Edward* the accused obtained money from a married woman by threatening to accuse her husband of sodomy. It was held that the accused was not guilty of robbery. Littledale J. said '[t]he principle is that the person threatened is thrown off his guard, and has not the firmness to resist the extortion; but he could not apply that principle to the wife of the party threatened.'[14] Finally, and most importantly, in any case in which this form of robbery was to be committed an offence under s. 101 or s. 102 of the New South Wales Crimes Act would also be committed. In *R. v. Pollock and Divers* the Court of Criminal Appeal, while upholding the accused's conviction for robbery, stated that the correct course for prosecutors to adopt in future cases would be to charge the accused with the statutory offence.[15]

2. *Larceny*

A person who obtains property from another by threats can clearly be guilty of larceny, for every robbery includes a larceny.[16] Even if the threats used were not sufficient to constitute robbery, the crime of larceny may nonetheless be committed. In *R. v. McGrath*[17] the accused prevented the prosecutrix from leaving an auction room until she had paid for goods which she had not bid for. Because she was afraid of the accused and his threat that she would not be allowed to leave the room the prosecutrix paid the accused the money he demanded. The accused's conviction of larceny was upheld by the Court of Crown Cases Reserved. Blackburn J. stated

> To constitute a larceny there must be an animus furandi, i.e. a felonious intent to take the property of another against his will . . . The goods may be obtained in various ways. If by force then a robbery is committed. This would include larceny, but force is not a necessary ingredient in larceny. It is sufficient to constitute a larceny if the goods are obtained against the will of the owner. It would be a scandal to the law if goods could be obtained by frightening the owner, and yet that this should not constitute a taking within the meaning of the definition of larceny.[18]

[13] East, *A Treatise of the Pleas of the Crown* Volume I, Addendum xxi; 1 Leach 193 note (a), 168 E.R. 199.

[14] (1833) 1 M. & Rob. 257, 174 E.R. 88.

[15] (1966) 50 Cr. App. Rep. 149, 164.

[16] *R. v. McGrath* (1869) L.R. 1 C.C.R. 205, 210-1; *R. v. Holmes and Stanyon* (1885) 2 W.N. (N.S.W.) 6.

[17] (1869) L.R. 1 C.C.R. 205.

[18] *Ibid.* 210. The decision in *R. v. McGrath* was followed in *R. v. Hazell* (1870) 23 L.T. 562 and *R. v. Lovell* (1881) 8 Q.B.D. 185. See also *R. v. Parker* [1919] N.Z.L.R. 365. The effect of these cases is embodied in the definition of stealing in s. 226(2)(ii) of the Tasmanian Criminal Code. Although stealing by intimidation is not specifically mentioned in the Queensland and Western Australia *Criminal* Codes it is clear that the law is the same in these jurisdictions. See R. F. Carter, *Criminal Law in Queensland* (4th ed. 1974) 314.

While the theoretical possibility of a larceny conviction in such cases remains, in practice such a charge is unlikely ever to be brought. The various statutory offences which together comprise 'blackmail' have been interpreted in such a way that in any case in which an accused might be guilty of larceny where he obtained property by the use of threats he would certainly be guilty of one or more of the statutory offences. Since these offences all carry penalties which are as heavy or heavier than is the case with larceny,[19] a prosecutor would have no reason for bringing a charge of larceny.

3. *Extortion*

The common law knew a misdemeanour of extortion. This crime is not contained in the Codes of Queensland, Western Australia and Tasmania, but probably still exists in New South Wales and South Australia. The normal definition of extortion at common law was that it consisted of 'the corrupt collection of an unlawful fee by an officer under colour of office'.[20] In a number of cases the offence was extended to cover extortion by a person other than an official.[21] However, the scope of the offence was strictly limited by the Court of Kings Bench in *R. v. Southerton.*[22] The accused wrote a letter to his victim demanding money and threatening to put in motion a prosecution by a public officer to recover penalties from him for selling Fryar's Balsam without a stamp. It was held that this did not constitute extortion at common law. Lord Ellenborough stated

> To obtain money under a threat of any kind, or to attempt to do it is no doubt an immoral action; but to make it indictable the threat must be of such a nature as is calculated to overcome a firm and prudent man.[23]

Since any possible case of common law extortion would clearly be covered by one or more of the statutory offences, it is highly unlikely that any prosecutions for the common law misdemeanour will be commenced in Australia.

4. *Sending a letter demanding property with menaces*[24]

The offence contained in s. 100 of the Crimes Act (N.S.W.) is derived from s. 1 of the Waltham Black Act of 1722.[25] This Act is the earliest of

[19] Crimes Act 1900 (N.S.W.) s. 117; Criminal Law Consolidation Act 1935 (S.A.) s. 131; Queensland Criminal Code s. 398; Western Australia Criminal Code s. 378; Tasmanian Criminal Code ss. 234, 389(3).

[20] R. M. Perkins, *Criminal Law* (2nd ed. 1969) 319. See also W. H. D. Winder, 'The Development of Blackmail' (1941) 5 *Modern Law Review* 21, 30.

[21] *R. v. Woodward* (1707) 11 Mod. 137, 88 E.R. 949; *R. v. Southerton* (1805) 6 East 126, 102 E.R 1235; *R. v. Edward* (1833) 1 M. & Rob. 257, 174 E.R. 88.

[22] (1805) 6 East 126, 102 E.R. 1235.

[23] (1805) 6 East 126, 140, 102 E.R. 1235, 1240.

[24] Crimes Act 1900 (N.S.W.) s. 100; Criminal Law Consolidation Act 1935 (S.A.) s. 159; Queensland Criminal Code s. 415; Western Australia Criminal Code s. 397; Tasmanian Criminal Code s. 241(1)(i).

[25] 9 Geo. I, c. 22. This Act was amended by an Act of 1823 (4 Geo. IV, c. 54, s. 3) and received its modern form by an Act of 1827 (7 & 8 Geo. 4, c. 29, s. 8).

the statutory offences which now comprise blackmail.[26] It was aimed at curtailing the activities of the Waltham Blacks, deer stealers and extortionists operating near Waltham. It is to the short title of this Act that the expression 'blackmail' owes its origin.

Section 416(2) of the Queensland Criminal Code and s. 397(2) of the Western Australia Criminal Code now extend the offence to cover non-written demands.[27] In New South Wales, South Australia and Tasmania, the offence remains limited to written demands. The elements of the offence contained in s. 100 of the New South Wales Act are (a) that a letter demanding property must be sent delivered or uttered by a person knowing the contents thereof (the demand), (b) there must be a 'menace' or 'threat' (the menace) and (c) the demand must be 'without reasonable cause' (the mental element).

(a) *The Demand*

The offence consists in sending delivering or uttering the letter, and this may be done by the author of it or by some other person. It is not necessary that the letter should be delivered to the victim by the accused, or even received by him at all. It is sufficient if the letter is left in some place or with some other person with the intention that the contents be communicated to the victim.[28]

The demand need not be made expressly. In *R. v. Collister and Warhurst*[29] (a case of demanding property with menaces with intent to steal) two police officers threatened to arrest a man for importuning and, without making any express demand, conveyed to him the general impression that he would hear no more of the matter if he bought them off. It was held by the Court of Criminal Appeal that it is sufficient that an ordinary reasonable man would understand that a demand for money was being made of him.[30]

In New South Wales, South Australia and Tasmania it is necessary that 'property' be demanded for an offence to be committed. Under the Queensland and Western Australia Codes it is sufficient if it is demanded 'that anything be procured to be done or omitted to be done by any person'. Thus, if the accused's demand took the form of requiring a woman to spend the night with him he would not be guilty of blackmail

[26] For an excellent account of the historical development of blackmail see W. H. D. Winder, 'The Development of Blackmail' *op. cit.*

[27] The present sections were enacted in substitution for earlier sections limited to written demands by The Criminal Code and Other Acts Amendment Act 1961 (Qld.) s. 15 and the Criminal Code Amendment Act 1969 (W.A.) s. 3.

[28] *R. v. Wagstaff* (1819) Russ. & Ry. 398, 168 E.R. 865; *R. v. Paddle* (1822) Russ. & Ry. 484, 168 E.R. 910.

[29] (1955) 39 Cr. App. Rep. 100.

[30] *R v. Studer* (1915) 11 Cr. App. Rep. 307.

in New South Wales, South Australia or Tasmania,[31] but would be guilty of blackmail in Queensland and Western Australia. Likewise, if an accused were to demand that his victim discontinue a civil suit proceeding between them he would not be guilty of blackmail in New South Wales, South Australia or Tasmania,[32] but would be guilty of blackmail in Queensland and Western Australia.

(b) *The Menace*

Section 100 of the New South Wales Crimes Act uses the words 'with menaces or any threat'. In the South Australian Crimes Act and the Tasmanian Criminal Code the word 'menaces' only is used. In the Queensland and Western Australia Codes the word 'threats' only is used. It seems clear that these differences are of no consequence.[33]

The title and preamble of the Waltham Black Act make it plain that the Act was intended to apply only to demands coupled with a threat of violence to the person or property.[34] The scope of the statute was extended by the Court of Kings Bench in *R. v. Robinson*,[35] where it was held that a threat to accuse of murder constituted an offence under the statute. Section 8 of the amending statute of 1827 cast the offence in its modern form, requiring that the demand must be made with 'menaces' and 'without reasonable and probable cause'.[36] In the mid-nineteenth century the offence was treated as being similar in scope to the common law misdemeanour of extortion.[37] Thus in *R. v. Miard*[38] it was held that a threat to expose a clergyman for having intercourse with a prostitute was of such a nature as 'to require more than ordinary firmness to resist it' and therefore sufficient to constitute the offence. The concept of 'menaces' was widened further in 1895 in the case of *R. v. Tomlinson*.[39] The threat in that case was to inform the prosecutor's wife and friends of his immoral relations with a woman. It was held that this constituted a menace. Willes J. stated

> With regard to the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind, I only desire to say that it ought, in my judgment, to receive a liberal construction in practice, otherwise great injustice may be done, for persons who are thus practised upon are not as a

[31] He would, however, be guilty of the offence of procuring or attempting to procure the defilement of a woman. Crimes Act 1900 (N.S.W.) s. 66; Criminal Law Consolidation Act 1935 (S.A.) s. 64; Tasmanian Criminal Code s. 129.

[32] It would seem that in such a case no crime would be committed. G. L. Williams, 'Blackmail' [1954] *Criminal Law Review* 79, 83.

[33] *Thorne v. Motor Trade Association* [1937] A.C. 797, 806, 817.

[34] W. H. D. Winder, 'The Development of Blackmail' *op. cit.* 34-35.

[35] (1796) 2 Leach 749, 168 E.R. 475.

[36] 7 & 8 Geo. IV, c. 29, s. 8.

[37] *R. v. Miard* (1844) 1 Cox C.C. 22; *R. v Smith* (1849) 1 Den. 510, 169 E.R. 350; *R. v. Walton and Ogden* (1863) 9 Cox C.C. 268; *R v. Robertson* (1864) Le. & Ca. 483, 169 E.R. 1482.

[38] (1844) 1 Cox C.C. 22.

[39] [1895] 1 Q.B. 706.

> rule of average firmness; but I quite appreciate the fact that the threat must not be one that ought to influence nobody.[40]

A similar approach was adopted by the Court of Criminal Appeal in *R. v. Boyle and Merchant*.[41] The threat made in that case was to publish in a newspaper articles attacking a company of which the victim was chairman so as to depreciate the market value of the company's shares. It was held that provided the threat made was 'calculated to operate upon the mind of a person of ordinarily firm mind' it was sufficient to constitute a menace.[42]

The definition of 'menaces' was considered by Lords Atkin and Wright in *Thorne v. Motor Trade Association*.[43] *Thorne*'s case was mainly concerned with the 'without reasonable cause' limb of the section, and it will be discussed in detail presently.[44] The threat made was by a trade association to place a member's name on a stop list, thereby cutting off his supply of goods from members of the association. Lord Atkin stated

> If the matter came to us for decision for the first time I think there would be something to be said for a construction of "menace" which connoted threats of violence and injury to person or property, and a contrast might be made between "menaces" and "threats" as used in other sections of the various statutes. But in several cases it has been decided that "menace" in this subsection and its predecessors is simply equivalent to threat: *Reg. v Tomlinson; Rex v. Boyle and Merchant*.[45]

Lord Wright adopted a very wide definition of menaces. His Lordship stated

> I think the word "menace" is to be liberally construed and not as limited to threats of violence but as including threats of any action detrimental to or unpleasant to the person addressed. It may also include a warning that in certain events such action is intended.[46]

In *R. v. Clear*[47] a lorry driver who had been in charge of a vehicle when it was stolen threatened the managing director of his employer company that he would change his account of how the vehicle came to be stolen in such a way as to prejudice the employer's claim against their insurance company. It was held by the Court of Appeal that this threat constituted a menace. Delivering the judgment of the Court Sellers L.J. stated

> Words or conduct which would not intimidate or influence anyone to respond to the demand would not be menaces . . . but threats and conduct of such a nature and extent that the mind of an ordinary person of normal stability and

[40] [1895] 1 Q.B. 706, 710.
[41] (1914) 10 Cr. App. Rep. 180.
[42] (1914) 10 Cr. App. Rep. 180, 191. See also *R. v Rasmussen and Spiegelglass* (1928) 28 S.R. (N.S.W.) 349.
[43] [1937] AC. 797.
[44] *Infra* p. 130.
[45] [1937] A.C. 797, 806.
[46] [1937] A.C. 797, 817.
[47] [1968] 1 Q.B. 670.

courage might be influenced or made apprehensive so as to accede unwillingly to the demand would be sufficient for a jury's consideration.[48]

This qualification was applied in *R. v. Harry*.[49] It was held in that case that the treasurer of a college rag committee could not be said to have menaced local shopkeepers when he invited them to purchase posters (the money to go to charity) to 'protect' them from 'inconvenience' resulting from rag activities.

It appears from the above cases that the word 'menaces' is to be construed widely. Adopting the words of Lord Wright in *Thorne*'s case the word covers 'threats of any action detrimental to or unpleasant to the person addressed'. This is subject to the gloss that a threat 'which would not intimidate or influence anyone to respond to the demand'[50] does not constitute a menace. Clearly such a qualification is necessary, but it is submitted that the words of Willes J. in *R. v. Tomlinson* should be remembered, and the qualification should 'receive a liberal construction in practice'. As Willes J. stated, the victim a blackmailer chooses may be of less than average firmness, and such a circumstance should not be allowed to afford an accused a defence.

(c) *The Mental Element*

What is meant by the expression 'without reasonable cause'?[51] The test laid down is clearly an objective one; it is not sufficient that the accused believes he has reasonable cause for his demand. A subjective approach had been adopted in *R. v. Miard*.[52] The accused threatened to expose a clergyman for having had intercourse with her. Tindal C.J. directed the jury that they should ask themselves whether the demand 'was made at a time when the party making it really and honestly believed that she had good and probable cause for so doing.'[53] A different approach was adopted in *R. v. Dymond*.[54] A girl, who alleged she had been indecently assaulted, wrote to the man she claimed assaulted her, demanding that he apologize and pay her money. The letter stated that if he did not she would 'summons' him and 'let the town knowed all about your going on'. It was held by the Court of Criminal Appeal that a belief on the part of the girl that she had reasonable cause for making the demand would not constitute a defence. *R. v. Miard* was overruled. Delivering the judgment of the Court, the Chief Justice the Earl of Reading stated:

[48] [1968] 1 Q.B. 670, 679.

[49] [1974] *Criminal Law Review* 32. This was a case under s. 21 of the English Theft Act 1968, which provision also contains the requirement of a menace. See *infra* p. 137.

[50] *R. v. Clear* [1968] 1 Q B. 670, 679.

[51] The phrase 'reasonable or probable cause' is used in South Australia, Queensland and Tasmania. The word 'probable' appears to add nothing to 'reasonable'. See per Lord Wright [1937] A.C. 797, 817.

[52] (1844) 1 Cox C.C. 22.

[53] (1844) 1 Cox C.C. 22, 24.

[54] [1920] 2 K.B. 260.

> In our judgment the question must be determined solely by reference to the language of the statute. The words are "without any reasonable or probable cause" and nothing . . . suggests that an honest belief by the accused in a reasonable or probable cause for the demand would negative the crime . . . It is for the jury to decide whether there was reasonable or probable cause for making the demand and it is not for them to decide whether the accused believed that she had reasonable or probable cause for making it.[55]

It is not necessarily a defence that the threat could legally be carried out. Example: A writes to B saying 'Pay me $100 or I will tell the police I saw you shoplifting.' Assuming A saw B shoplifting he is not only legally entitled to inform the police, but he has a moral duty to do so. Nonetheless, A commits an offence because although the action threatened is justifiable the demand made as an alternative to it is not.[56]

If on the other hand, the action threatened is itself unlawful the offence is committed notwithstanding that the demand, considered by itself, is perfectly proper.[57] Example: A writes to B saying 'Pay me the $100 you owe me or I will knock you down.' In such a case it is submitted that A commits the offence even if B in fact owes him $100. It has been argued that such a case is not 'blackmail' because blackmail involves the notion of a person demanding that to which he is not entitled.[58] The argument is buttressed by references to judicial observations that what has to be justified is not the threat but the demand.[59] However, these observations were made in cases in which the action threatened was perfectly lawful, and the only question for the court's consideration was whether the demand was justifiable. It is submitted that these observations should be confined to such cases. If a person is owed money or other property and chooses to attempt to enforce his claim by threats of an unlawful nature there is no good reason for suggesting that he ought not to be guilty of an offence under s. 100. The 'without reasonable cause' limb of the section appears to relate to both the demand and the threat.

If a person demands property from another, threatening action not of itself unlawful, the question whether the demand was made 'without reasonable cause' depends upon a number of factors. The factors taken into account by the courts appear to be the following:

(i) Was the threat of a type which the courts consider it proper to make in the course of demanding property?

(ii) Did the person making the demand have a legal right to the property demanded?

[55] [1920] 2 K.B. 260, 265. A similar approach was adopted in the Victorian case of *R. v. Craig* (1903) 29 V.L.R. 28. See also the Canadian case of *R. v. Pacholko* [1941] 2 D.L.R. 444.

[56] G. L. Williams, 'Blackmail' *op. cit.* 163; *Thorne v. Motor Trade Association* [1937] A.C. 797, 822.

[57] G. L. Williams, 'Blackmail' *op. cit.* 162-3.

[58] J. C. Smith and B. Hogan, *Criminal Law* (1st ed. 1965) 446-8.

[59] *R. v. Hamilton* (1843) 1 Car. & Kir. 212, 174 E.R. 779; *Thorne v. Motor Trade Association* [1937] A.C. 797, 806.

(iii) If he did not, did he believe he had such a legal right?

(iv) Did the person making the demand believe he had a moral right to the property demanded?

(v) If he had or believed he had a right to property was the amount of property demanded reasonable or excessive?

The operation and inter-action of these factors in various types of case will now be considered.

Threats of Prosecution

The view generally adopted by the courts is that it is not proper to attempt to obtain property by the threat of criminal proceedings. In *R. v. Dymond*[60] a threat to bring about a prosecution for indecent assault was held to render the accused guilty of the offence notwithstanding that she believed she had a moral right to compensation for the assault, and quite possibly also believed that she had a legal right. Further, the sum demanded (£10) would probably not have been regarded as excessive compensation for an indecent assault. The case appears somewhat harsh. Miss Dymond was semi-illiterate, and probably did not appreciate the distinction between civil and criminal proceedings. Had she done so, and consulted a solicitor who wrote a letter to the prosecutor demanding compensation and threatening to bring an action for the tort of assault, then no offence would have been committed. The case seems especially hard upon the accused, because if such a letter were written by a solicitor the effect upon the recipient would be much the same as a threat of criminal proceedings. In such a case what the victim generally fears most is public exposure of his improper conduct, and such exposure takes place equally in civil as in criminal proceedings.

R. v. Dymond is an especially unsatisfactory decision since not only did the accused believe she had a legal right to compensation from the prosecutor, but in fact she probably did have such a legal right.[61] To this extent the judgment must be regarded as *per incuriam,* for the case was considered on the basis that the accused had no such right but merely believed that she did. It appears to be the position that where a transaction exposes a person to both civil and criminal liability, then the party with the claim does not commit an offence under s. 100 if he demands compensation as an alternative to setting in motion criminal proceedings.[62] In *R. v. Nicholson*[63] the accused, believing he had been cheated by the prosecutor at dice, sent him a letter demanding the return of the money

60 [1920] 2 K.B. 260.
61 G. L. Williams, 'Blackmail' *op. cit.* 167; J. C. Smith and B. Hogan, *Criminal Law op cit.* 446.
62 G. L. Williams, 'Blackmail' *op. cit.* 166-8.
63 (1868) 7 S.R. (N.S.W.) 155.

he had lost and threatening to prosecute him for fraud if the demand was not complied with. It was held by the Supreme Court of New South Wales that since the accused may have been legally entitled to recover the money, no offence was committed.[64] It thus seems that notwithstanding the serious view taken by the courts of threats to bring about a prosecution for a criminal offence, an offence under s. 100 is not committed where the events constituting the criminal offence confer upon the person making the demand a legal right to compensation. Such a result seems desirable on principle. If I am assaulted and demand compensation from the aggressor, threatening to set in motion criminal proceedings if I do not receive it, such a demand seems reasonable and certainly ought not to constitute blackmail.

Threats of Publicity

The courts view threats to publicise discreditable conduct on the part of the victim as sufficiently improper to outweigh any or all of the other factors listed.[65] This is so whether the threat is of general publicity such as to inform the world at large that the victim has behaved improperly, or of more specific publicity, such as to inform his wife or employer. On this basis, the decision in *R. v. Dymond* appears to be justifiable. In that case the accused's letter, in addition to threatening the victim with prosecution, stated that the accused would 'let the town knowed all about your going on.' Such a threat is rightly viewed as sufficiently improper to constitute the offence even if the accused believes he has a legal or moral right to the property demanded. Further, although there is no clear authority on the point, it appears that the offence is committed even if the accused in fact has a legal right to the property demanded.[66]

However, one important qualification to the above needs to be made. No offence is committed if there is, or is reasonably believed to be, a legal or moral right to the property demanded, and the publicity threatened is limited to a threat to make known the fact that the other party has refused to meet his just obligation.[67] Thus if A buys a defective car under warranty from B, he may attempt to obtain compensation by threatening to make known that B refuses to honour his warranty, but may not threaten to publicise the fact that B is a seller of bad cars. The distinction appears desirable on principle. To threaten to expose another to the public for not meeting a claim believed to be just appears to be a reasonable way of attempting to obtain payment, while to threaten to expose him for improper conduct other than the conduct of not meeting

[64] (1868) 7 S.R. (N.S.W.) 155, 161; see also *R. v. Craig* (1903) 29 V.L.R. 28.
[65] G. L. Williams, 'Blackmail' *op. cit.* 168-9.
[66] *Ibid.* 169.
[67] *Ibid.*; A. H. Campbell, 'The Anomalies of Blackmail' (1939) 55 *Law Quarterly Review* 382, 395.

the claim does not. The point is illustrated by the civil case of *Burden v. Harris*.[68] The plaintiff, having won a bet with a bookmaker, had difficulty in obtaining payment. The plaintiff threatened to report the bookmaker to the Tattersalls committee as a defaulter. The defendant then entered into an agreement with the plaintiff promising to pay by instalments in consideration of the plaintiff not taking this action. It was held, following *Hyams v. Stuart King*,[69] that this amounted to a valid contract, and that there was nothing unlawful in the threat made.[70] This distinction may certainly involve the courts in delicate questions of characterization. Example: A single woman claims that A is the father of her child. She writes to him claiming maintenance for the child and threatening to publicise the fact that he has refused to support the child if he will not agree to pay. In such a case the court would have to decide whether the threat was in substance a threat to expose him as one who had fathered an illegitimate child, or as one who, having fathered an illegitimate child, refused to support it. A similar question would be involved in the example of the purchaser of a defective car given above. Such difficult questions of characterization appear to be inherent in the law of blackmail.

Promotion of Business Interests

In *Thorne v. Motor Trade Association*[71] the House of Lords considered whether the Secretary of a Trade Association committed an offence under s. 100 when he wrote to a trader asking for a money payment as an alternative to placing the trader, who was in breach of a price maintenance agreement, on a stop list. The effect of placing the trader's name on the stop list would have been that members of the Association would have refused to have business dealings with him. The case arose as a friendly action in order to seek a determination of the point following conflicting decisions of the Court of Criminal Appeal in *R. v. Denyer*[72] and the Court of Appeal in *Hardie and Lane Ltd. v. Chilton*.[73] In *R. v. Denyer* such conduct had been held to constitute an offence under the section. In *Hardie and Lane Ltd. v. Chilton* the plaintiffs brought an action seeking to recover money paid by them in similar circumstances. The Court of Appeal disagreed with the decision in *R. v. Denyer* and held that the plaintiffs were not entitled to recover. In *Thorne's* case the House of Lords held that the Association had a right to put a trader's

[68] [1937] 4 All E.R. 559.
[69] [1908] 2 K.B. 696.
[70] This decision was approved by Atkinson J. in *Norreys v. Zeffert* [1939] 2 All E.R. 187, 189. So far as the law of contract is concerned *Burden v. Harris* was overruled by the House of Lords in *Hill v. William Hill (Park Lane) Ltd.* However, Viscount Jowitt L.C. and Lord Normand specifically stated they did not regard such conduct as amounting to blackmail [1949] A.C. 530, 542-3, 562.
[71] [1937] A.C. 797.
[72] [1926] 2 K.B. 258.
[73] [1928] 2 K.B. 306.

name on a stop list and, overruling *R. v. Denyer*, that they also had a right to demand a money payment from him as an alternative to placing his name on the stop list. Lord Atkin stated

> It appears to me that if a man may lawfully, in the furtherance of business interests, do acts which will seriously injure another in his business he may also lawfully, if he is still acting in furtherance of his business interests, offer that other to accept a sum of money as an alternative to doing the injurious acts. He must no doubt be acting not for the mere purpose of putting money in his pocket, but for some legitimate purpose other than the mere acquisition of money.'[74]

Lords Atkin, Thankerton, Wright and Roche stated that an offence under s. 100 would be committed if the sum of money demanded as an alternative to placing the trader's name on the stop list were unreasonable having regard to the business interests which were being protected.[75]

The ratio of the case is thus that where a person threatens actions which he is at liberty to commit he may, provided he is acting in the furtherance of legitimate business interests, ask for a money payment as an alternative to committing those acts. The statements that an offence would be committed if the sum demanded were extravagant would appear to have been directed to the question of whether the Association was acting in accordance with legitimate business interests and not to have been an independent criterion. In many situations a person may demand an extravagant sum yet still be acting in furtherance of legitimate business interests. Example: A proposes to build a supermarket near B's small grocery shop. A is quite entitled to demand as large a sum as he wishes from B as the price of not going ahead with the building of the supermarket. In such a case A is acting in furtherance of the legitimate business interest of making as large a profit as he can in return for refraining from the pursuit of a commercial enterprise. However, if A never intended to build the supermarket at all, but was simply out to make money from B, it is submitted that he would commit an offence under s. 100. In such a case the interest he would be pursuing would simply be that of attempting to obtain money from a small trader by threatening to drive him out of business.

5. *Demanding Property with Menaces with Intent to Steal*[76]

The offence contained in s. 99 differs from that contained in s. 100 in two important respects. The first concerns the nature of the demand, and the second concerns the mental element required to constitute the offence. So far as the threat is concerned the sections are identical; both sections

[74] [1937] A.C. 797, 807.

[75] [1937] A.C. 797, 808, 818, 824. Lord Russell expressed no opinion on the point.

[76] Crimes Act 1900 (N.S.W.) s. 99; Criminal Law Consolidation Act 1935 (S.A.) s. 160; Queensland Criminal Code s. 414; Western Australia Criminal Code s. 396; Tasmanian Criminal Code s. 242.

use the term 'menaces' and it is clear that the word has the same meaning in both contexts.[77]

(a) *The Demand*

To constitute an offence under s. 100 the demand must be contained in a 'letter or writing'. Under s. 99 the demand may be made in writing, or verbally, or in any other manner. The offence is committed when the demand is made. It does not matter that the demand is not met or that the victim is not influenced by the threat made.[78]

(b) *The Mental Element*

The mental element required to constitute the offence contained in s. 99 is an 'intent to steal'. Section 99 is derived from an English Act of 1823.[79] In the English Act the word 'menaces' clearly meant threats of physical force.[80] It was a natural corollary of this that the mental element required to constitute the crime should be an 'intent to steal', since simple larceny is not committed where property is handed over as a result of threats unless the threats are of force or false imprisonment.[81] The intention of the Act would thus appear to have been to cover only the obtaining or the attempted obtaining of property by such threats.

The gradual widening of the concept of 'menaces' created a conflict between that aspect of the offence and the requirement that the threat must have been made 'with intent to steal'. As late as 1863 it seemed possible that the latter requirement might be used to restrict the scope of the offence. In *R. v. Walton and Ogden*[82] two bailiffs were convicted under s. 99 when they threatened to levy distress against their victim unless he paid them money. Their conviction was quashed by the Court of Crown Cases Reserved. Delivering the judgment of the Court Wilde B. stated

> Where then is the proper limit to the operation of this section? It is to be found in the words "with intent to steal" . . . Now, a demand of money, with intent to steal, if successful must amount to stealing.[83]

His Honour went on to state that a voluntary handing over of property is inconsistent with an intent to steal, and that such an intent can only

[77] J. C. Smith and B. Hogan, *op. cit.* 441; *R. v. Boyle and Merchant* (1914) 10 Cr. App. Rep. 180.

[78] *R. v. Hopkins* [1924] V.L.R. 484; *R. v. Moran* [1952] 1 All E.R. 803; *R. v. Clear* [1968] 1 Q.B. 670.

[79] 4 Geo. IV, c. 54, s. 5. This section is itself based upon an Act of 1734 (7 Geo. II, c. 21) dealing with demanding property by violent threats with intent to commit robbery.

[80] W. H. D. Winder, 'The Development of Blackmail' *op. cit.* 43.

[81] *Supra*, p. 124. It is doubtful whether the offence extended to property handed over as a result of threats of false imprisonment in 1823.

[82] (1863) 9 Cox C.C. 268.

[83] *Ibid.* 271-2.

exist in cases in which the 'menace' is 'of a nature and extent to unsettle the mind of the person on whom it operates, and take away from his acts that element of free, voluntary action which alone constitutes consent.'[84]

However, subsequent cases have established that provided a 'menace' in the modern sense of the term is present, an offence under s. 99 will be committed notwithstanding that the menace was not of a kind which, if the property were to be handed over by the victim, would be sufficient to render the accused guilty of larceny. In *R. v. Boyle and Merchant*[85] the two accused made threats to the chairman of a company that attacks upon the company would be published in a newspaper, with the result that the market value of the company's shares would be reduced. They demanded money as the price of refraining from such attacks. It was held by the Court of Criminal Appeal that this constituted an offence under s. 99. In *R. v. Studer*[86] the victim, an English manufacturer of German birth, was falsely told by an employee that Scotland Yard was investigating allegations that he had been trading with the enemy. Money was demanded by the employee in order to stop the investigation. It was held by the Court of Criminal Appeal that this constituted an offence under s. 99. In *R. v. Rasmussen and Spiegelglass*[87] the two accused demanded money from a lady under threats of publishing articles in the newspapers attacking her moral character and chastity. It was held by the New South Wales Court of Appeal that they were guilty of an offence under s. 99. In *R. v. Bernhard*[88] the Court of Criminal Appeal, while quashing the accused's conviction on other grounds,[89] assumed throughout that a threat by the prosecutor's former mistress to reveal their relationship to his wife and the newspapers unless he paid her money could constitute an offence under the section. In *R. v. Clear*[90] a lorry driver, who had been in charge of a vehicle which had been stolen, demanded money from his employer as the price of not changing his account of how the vehicle came to be stolen in such a way as to prejudice the employer's claim against his insurance company. It was held by the Court of Appeal that this constituted an offence under s. 99.

In none of the cases above referred to was the threat of a kind which might have rendered the accused guilty of larceny had the property demanded been given to him. It would seem then that the expression 'with intent to steal' in s. 99 means no more than 'without reasonable cause' in s. 100. This conclusion is, however, subject to one important qualification. It has been shown that under s. 100 a belief on the part of the accused

[84] *Ibid.* 272. See also *R. v. Messervy* (1932) 49 W.N. (N.S.W.) 221.
[85] (1914) 10 Cr. App. Rep. 180.
[86] (1915) 11 Cr. App. Rep. 307.
[87] (1928) 28 S.R. (N.S.W.) 349.
[88] [1938] 2 K.B. 264.
[89] *Infra* p. 134.
[90] [1968] 1 Q.B. 670.

that he had a legal right to the property demanded does not *per se* give him a defence.[91] To a charge brought under s. 99 however, such a belief will constitute a defence. In *R. v. Bernhard*[92] the accused, a Hungarian woman, had been the mistress of the prosecutor. After their association ceased the prosecutor promised to pay her a sum of money. On the assumption that this 'agreement' was governed by English law it was, of course, void for want of consideration. The accused was, however, advised by a Hungarian lawyer that the promise was legally enforceable. She went to the prosecutor and, in order to make him honour his promise, threatened to inform his wife of their association and to insert an announcement of their relationship in a newspaper. She was convicted under s. 99, but on appeal the Court of Criminal Appeal quashed the conviction. The judgment of the Court was delivered by Charles J. who stated, following *R. v. Walton and Ogden*, that the offence is not committed unless, had the money been obtained, it could properly be said to have been stolen. An honest but mistaken belief on the part of an accused that he has a legal right to the property obtained is a defence to a charge of larceny.[93] It followed that Mrs. Bernhard, who had believed the advice of her Hungarian lawyer, could not be guilty of an offence under s. 99.

The surprising conclusion which a comparison of these cases leads to is that the words 'with intent to steal' in s. 99 both do and do not incorporate the technical definition of larceny. The words incorporate the requirement of absence of a *bona fide* claim of legal right, but do not incorporate the requirement of a taking without consent. The practical results seem equally surprising. If a person believes he has a legal right to obtain property from another, and he attempts to obtain that property by threatening to expose discreditable conduct on the part of that other person, the question of whether or not he commits an offence will depend upon the method by which he communicates his demand. If he makes his demand in writing he will be guilty of an offence under s. 100;[94] if he makes his demand orally he will, on the authority of *R. v. Bernhard*, be guilty of no offence.[95] Such distinctions reflect no credit on the law.

6. *Sending a Letter Threatening to Accuse of an Infamous Crime*[96] *and Threatening to Accuse of an Infamous Crime*[97]

These two offences are best treated together. The only difference be-

[91] *Supra.*
[92] [1938] 2 K.B. 264.
[93] C. Howard, *Australian Criminal Law* (2nd ed. 1970) 232.
[94] *Supra.*
[95] He would, however, be guilty of offences under the Queensland and Western Australia Codes. Queensland Criminal Code s. 416(2); Western Australia Criminal Code s. 397(2).
[96] Crimes Act 1900 (N.S.W.) s. 101; Criminal Law Consolidation Act 1935 (S.A.) s. 161; Queensland Criminal Code s. 416(3); Western Australia Criminal Code s. 398(3); Tasmanian Criminal Code s. 241(1)(ii).
[97] Crimes Act 1900 (N.S.W.) s. 102; Criminal Law Consolidation Act 1935

tween them is that s. 101 is restricted to written threats, while s. 102 extends to verbal threats. The elements of these two offences are

(a) that a letter must have been sent (s. 101) or a statement made (s. 102).

(b) accusing or threatening to accuse another of felony, or of having committed or attempted to commit an 'infamous crime', or of having committed an offence against decency in a public place.[98] The expression 'infamous crime' is defined by s. 104 as including rape, buggery, bestiality, and any attempt to commit or solicitation to commit or permit any such crime.

(c) The threat to accuse must have been made 'with intent . . . to extort or gain property.'

The offence contained in s. 101 is derived from an Act of 1757;[99] that in s. 102 from the same Act of 1823 which introduced the precursor of what is now the offence of demanding property with menaces with intent to steal.[100] In 1757 it would still have been thought that the word 'demand' in the Waltham Black Act 1722 extended only to demands coupled with a threat of violence to the person or to property.[101] Thus this provision was seen as an important extension to the offence contained in the Waltham Black Act. In the Act of 1823, the offence of demanding property with menaces with intent to steal was intended to be limited to threats of physical force.[102] Thus, it was natural for the draftsman to add a provision similar to that contained in the Act of 1757 making it unlawful to utter verbal threats to accuse another of serious crime with intent to extort.

At present, however, there seems little scope for these offences. The term 'menaces' in ss. 99 and 100 has been widely defined, and clearly a threat to accuse of one of the crimes referred to in ss. 101 and 102 would constitute a 'menace' for the purposes of ss. 99 and 100. There is no clear authority on what is meant by the words 'with intent . . . to extort or gain property', but they are probably best regarded as the equivalent of 'without reasonable cause' in s. 100.[103] It seems possible to imagine only one type of case which would fall within one of these sections but would not fall within either s. 99 or s. 100. This is the case in which an accused verbally demands property which he believes himself entitled to,

(S.A.) s. 162; Queensland Criminal Code s. 416(1), (2); Western Australia Criminal Code s. 398(1), (2); Tasmanian Criminal Code s. 241(1)(ii).

[98] The crimes which are referred to vary somewhat from jurisdiction to jurisdiction.

[99] 30 Geo. II, c. 24, s. 1.

[100] *Supra,* f.n. 79.

[101] *Supra.* p. 124.

[102] *Supra* f.n. 80.

[103] G. L. Williams, 'Blackmail' *op. cit.* 244.

and supports that demand with a threat of the type referred to in ss. 101 and 102. Such a case would not fall within s. 100 because the demand was verbal,[104] nor would it fall within s. 99 because there was no 'intention to steal'. It would, however, fall within s. 102.

It is suggested that all cases which might fall within s. 101 are covered by s. 100, and, with this single exception, all cases which would fall within s. 102 are covered by s. 99. Nonetheless a prosecutor might still wish to bring a charge under s. 101 or s. 102 rather than s. 100 or s. 99. This is because of the higher maximum penalties under s. 101 and s. 102. The maximum penalty under s. 100 is ten years penal servitude, while that under s. 101 is fourteen years penal servitude.[105] The maximum penalty under s. 99 is seven years penal servitude, while that under s. 102 is ten years penal servitude.[106]

7. *Causing a Person by Violence or Threats to Execute a Valuable Security*[107]

Section 103 makes it an offence either by (a) the use or threat of violence or restraint, or (b) the accusation or threatened accusation of an 'infamous crime' as previously defined[108] to compel another to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to do other specified acts, with intent to defraud or injure. Because the word 'property' used in the sections thus far considered is defined very widely,[109] there is a considerable overlapping of offences. However, s. 103 does cover one class of case not covered by any of the other sections. This is the case in which the accused obtains no tangible property at all from his victim as where he compels the victim to endorse a cheque which he, the accused, has already in his possession.[110]

B. VICTORIA

The law of blackmail in Victoria now consists of a single statutory crime of blackmail contained in s. 87 of the Crimes Act 1958 as amended by the Crimes (Theft) Act 1973. The Crimes (Theft) Act 1973 came

[104] It would, however, fall within s. 415(2) of the Queensland Criminal Code and s. 397(2) of the Western Australia Criminal Code.

[105] A similar difference in maximum penalty exists in the other states with the exceptions of South Australia and Tasmania.

[106] A similiar difference in maximum penalty exists in the other states with the exception of Tasmania.

[107] Crimes Act 1900 (N.S.W.) s. 103; Criminal Law Consolidation Act 1935 (S.A.) s. 165; Queensland Criminal Code s. 417; Western Australia Criminal Code s. 399; Tasmanian Criminal Code s. 241(2).

[108] *Supra.* p. 135.

[109] Crimes Act 1900 (N.S.W.) s. 4; Criminal Law Consolidation Act 1935 (S.A.) s. 5(1); Queensland Criminal Code s. 1(1); Western Australia Criminal Code s. 1(1); Tasmanian Criminal Code s. 1.

[110] J. C. Smith and B. Hogan, *Criminal Law op. cit.* 451.

into force on 1 October 1974.[111] That Act is, with some modifications, based on the English Theft Act 1968. Section 87 of the Victorian Act reproduces s. 21 of the English Act. Prior to the coming into force of these Acts the law in both jurisdictions was similar to that outlined above in relation to the other Australian states.[112] The English Theft Act and the Victorian Crimes (Theft) Act are far reaching pieces of legislation, replacing entirely the previous law of theft in both jurisdictions. They create new crimes (theft, obtaining property by deception, obtaining a financial advantage by deception, *etc.*) and re-define and simplify existing crimes (robbery, burglary, handling stolen goods, *etc.*).[113]

The English Theft Act came about as a result of recommendations contained in the Eighth Report of the Criminal Law Revision Committee.[114] The Committee was highly critical of the existing law of blackmail, particularly its extreme complexity.[115] While admitting that '[i]n practice [the various provisions] work reasonably well' they stated that 'this is due rather to restraint and common sense of prosecutors in limiting prosecutions to what is clearly recognizable as blackmail in the ordinary sense than to any merits in the sections themselves'.[116] The Committee drew particular attention to the anomalous situation that a belief on the part of the accused that he had a legal right to the property demanded does not *per se* amount to a defence when the demand was made in writing, but does constitute a defence when the demand was made orally.[117] The Committee decided that it was 'necessary to go back to first principles',[118] and drafted a new, single statutory offence of blackmail which became s. 87 of the Theft Act 1968. This provision was adopted without change in the Victorian Act.

Section 87 of the Crimes Act 1958-73 provides

> (1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—
>
> (a) that he has reasonable grounds for making the demand; and
>
> (b) that the use of the menaces is a proper means of reinforcing the demand.
>
> (2) The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces relate to action to be taken by the person making the demand.

[111] *Government Gazette* 3rd April 1974, 790.
[112] Larceny Act 1916 (Eng.) ss. 29-31; Crimes Act 1958 ss. 121-126.
[113] For a fairly brief explanation of the Victorian Act see C. R. Williams, 'The Crimes (Theft) Act 1973' (1974) 48 *Law Institute Journal* 75; reprinted in *An Introduction to the Crimes (Theft) Act* 1973 (Law Department, Victoria 1974).
[114] *Theft and Related Offences* (1966) Cmnd. 2977.
[115] *Ibid.* para. 108.
[116] *Ibid.*
[117] *Ibid.* paras. 113-4. See *supra.* p. 134.
[118] *Ibid.* para. 115.

(3) A person guilty of blackmail is guilty of felony and liable to imprisonment for a term not exceeding fourteen years.'

The offence consists of four elements

(a) A demand must be made.

(b) It must be reinforced by a 'menace'.

(c) It must be made 'with a view to gain . . . or with intent to cause loss'.

(d) It must be 'unwarranted'.

These elements will be examined in turn.

(a) *The Demand*

Action which will amount to the making of a 'demand' under either s. 99 or s. 100 of the New South Wales Crimes Act 1900 will equally constitute a 'demand' under this section.[119] In addition, the Victorian provision has a wider ambit. To constitute an offence under s. 99 or s. 100 of the New South Wales Act 'property' must be demanded.[120] Section 87(2) of the Victorian Act provides that the 'nature of the act or omission demanded is immaterial'. This is not such a wide extension of the law as it may at first sight appear to be, since an offence is committed only if the accused acted 'with a view to gain for himself or another or with intent to cause loss to another', and these words are limited to 'gain or loss in money or other property'.[121] However, if an accused were, with menaces, to demand his victim destroy memoirs which referred to the accused, he might be guilty of blackmail under the Victorian Act, since he intended to cause the loss of the memoirs to the victim, but would not be guilty of an offence under the New South Wales provisions.

The offence may be committed even though the demand is not received by the intended victim.[122] In *Treacy v. D.P.P.*,[123] a letter demanding money with menaces was written and posted by the accused in England to a Mrs. X in West Germany. It was held by the House of Lords that the offence was committed in England, and was completed on the posting of the letter. Lord Diplock stated that the test to be applied in deciding when a demand is made is the test of when would a man in ordinary conversation be prompted to say 'I have made a demand'. His Lordship stated 'that it would be natural for him to say "I have made a demand" as soon as he had posted the letter, for he would have done all that was in

[119] See *supra*. p. 123.
[120] *Supra*. p. 119.
[121] s. 71(1). See *infra*, p. 139.
[122] This is also the position in the other Australian jurisdictions. See *supra* p. 123; and *Treacy v. D.P.P.* [1971] A.C. 537, 552, 557, 565.
[123] [1971] A.C. 537.

his power to make the demand'.[124] In the converse case of a written demand sent from outside the jurisdiction, the offence would be treated as a continuing one and the accused would, in this case also, be held to have committed an offence within the jurisdiction.[125]

(b) *The Menace*

It is clear that it was the intention of the Criminal Law Revision Committee to preserve the old law relating to what constitutes a 'menace'.[126] In *R.* v. *Harry*[127] the Court proceeded upon the assumption that the old law was still applicable. It is submitted that all that was said about the word 'menaces' in relation to s. 99 of the New South Wales Crimes Act is equally applicable in the present context.[128]

(c) *With a View to Gain or Intent to Cause Loss*

The expressions 'gain' and 'loss' are defined by s. 71(1), which provides

> 'Gain' or 'loss' are to be construed as extending only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; and—
> (a) 'gain' includes a gain by keeping what one has, as well as a gain by getting what one has not; and
> (b) 'loss' includes a loss by not getting what one might get, as well as a loss by parting with what one has.

This limitation on the scope of the offence seems surprising. If A demands with menaces that a woman spends the night with him he will not be guilty of blackmail because his demand is not made with a view to gain 'in money or other property'. He would be guilty of the offence of procuring by threats under s. 57(1) of the Crimes Act. However, this offence is a misdemeanour only, punishable by up to five years imprisonment. If, however, A were to demand with menaces that the woman spend the night with B, and he were to do so believing that B would pay him for procuring the woman, then he would be guilty of blackmail, a felony punishable with up to fourteen years imprisonment. He would be guilty of blackmail in this case because he would be acting 'with a view to gain', and s. 87(2) provides that '[t]he nature of the act . . . demanded is immaterial'. Yet the accused's moral culpability seems no greater in this case than in the former. What justification is there for limiting blackmail to cases where the accused acts with a view to gain or intent to cause loss in money or other property? Professor J. C. Smith suggests that this limitation is

[124] *Ibid.* 565.
[125] *R.* v. *Baxter* [1972] 1 Q.B. 1, 13. See also *Treacy* v. *D.P.P.* [1971] A.C. 537, 543, 558, 564.
[126] Eighth Report, *op. cit.* para. 123.
[127] [1974] *Criminal Law Review* 32. See also *R.* v. *Lawrence and Pomroy* (1973) 57 Crim. App. Rep. 64.
[128] *Supra* pp. 124-126.

justified as part of a general policy of limiting the provisions of the Act to the protection of economic interests.[129] Such a justification seems inadequate. The offence of burglary extends beyond the protection of economic interests,[130] and there seems no reason in principle why blackmail should not also. It is submitted that the offence should have been drafted so as to cover an accused who, by menaces, obtains sexual gratification or any other non-proprietary gain or advantage, or who causes any non-proprietary loss or disadvantage to his victim.

It seems that the offence may be committed in cases where the accused had a legal right to the property demanded. This was clearly the intention of the Criminal Law Revision Committee. They stated

> In our opinion . . . there are some threats which should make the demand amount to blackmail even if there is a valid claim to the thing demanded. For example, we believe that most people would say that it should be blackmail to threaten to denounce a person, however truly, as a homosexual unless he paid a debt. It does not seem to follow from the existence of a debt that the creditor should be entitled to resort to any method, otherwise non-criminal, to obtain payment.[131]

However, some commentators have suggested that the Act does not achieve this result. It is argued that a person does not act with a view to gain or intent to cause loss when he attempts to obtain that to which he is entitled.[132] Other commentators have argued that in such a case a gain is sought, the person making the demand is acting with a view to getting that which he does not have, namely, possession of the money or other property to which he is entitled.[133] It now seems clear that the latter argument is the one accepted by the courts. In *R. v. Lawrence and Pomroy*[134] the Court of Appeal upheld the accused's conviction for blackmail. Although this point was not raised, the Court assumed that the accused acted with a view to gain despite his belief that he was merely enforcing a debt owing to him. In *R. v. Parkes*[135] the accused demanded money which was in fact owing to him. It was submitted that he had not, therefore, acted 'with a view to gain'. The trial judge referred to the definition of 'gain' as including 'getting what one has not', and ruled that by intending to obtain 'hard cash' as opposed to a mere right of action in respect of the debt the accused was getting more than he already had.

The offence may be committed even if the accused intends to return an economic equivalent of that which he obtains. If an accused demands

[129] J. C. Smith, *The Law of Theft* (2nd ed. 1972) 122. See also J. C. Smith and B. Hogan, *Criminal Law* (3rd ed. 1973) 468.

[130] Crimes Act 1958-1973 s. 76. See *R. v. Collins* [1972] 2 All E.R. 1105; [1972] 3 W.L.R. 243.

[131] Eighth Report, *op cit.* para. 119.

[132] B. Hogan, 'Blackmail: Another View' [1966] *Criminal Law Review* 474, 476; J. M. Collins, 'The Theft Act and its Commentators' [1968] *Criminal Law Review* 638, 646.

[133] J. C. Smith, *op. cit.* 127-8; J. C. Smith and B. Hogan, *op. cit.* 469-70.

[134] (1973) 57 Cr App. Rep. 64.

[135] [1973] *Criminal Law Review* 358.

with menaces that he be given paid employment he acts with a view to gain even though he intends to provide full value for his salary.[136] The gain or loss may be 'temporary or permanent'.[137] The intention to permanently deprive, which is an essential ingredient of theft, robbery, and obtaining property by deception,[138] is not a requisite of the offence of blackmail. A view to gain 'includes a gain by keeping what one has'; an intent to cause loss 'includes a loss by not getting what one might get'.[139] Thus, if an accused owed money to another, and by menaces induced the other to accept a smaller sum in full satisfaction of the debt, he would be guilty of blackmail.[140]

Problems may arise where the accused makes a demand with menaces, realizing that some proprietary gain may follow if his demand is met, but the obtaining of this gain is not his sole or even his main object.[141] Examples: (i) A university student threatens his examiner in order to obtain a pass in a subject. His immediate object is to obtain his degree, but he realizes that financial gain will flow from the obtaining of the degree. Does he commit blackmail? (ii) A person attempts to obtain membership of a lodge by menacing the president. His primary purpose is to enjoy the fellowship of the lodge, but he believes the social contacts membership will bring may ultimately result in some financial advantage. Does he commit blackmail? No confident answer can be given to problems such as these. It is submitted that the courts should determine such cases by asking 'was the prospect of financial or other proprietary gain an important consideration in the mind of the accused when he made the demand?' If the answer is 'yes', the accused should be guilty of blackmail even though other considerations were as important or more important to him.

(d) *Unwarranted*

The test for determining whether a demand with menaces is unwarranted is twofold. Such a demand is unwarranted unless made in the belief (a) that there are reasonable grounds for making it, *and* (b) that the use of menaces is a proper means of reinforcing the demand. Both tests are entirely subjective in nature.[142] For a conviction to be obtained it must be shown either that the accused himself did not believe he had reasonable grounds for making the demand, *or* that he did not believe that the use of menaces was a proper means of reinforcing the demand.

[136] J. C. Smith, *op. cit.* 128.
[137] Crimes Act 1958-73 s. 71(1).
[138] Crimes Act 1958-73 ss. 72, 75, 81.
[139] Crimes Act 1958-73 s. 71(1).
[140] J. C. Smith, *op. cit.* 129.
[141] See *ibid.* 129-30; J. C. Smith and B. Hogan, *op. cit.* 468.
[142] Sir B. MacKenna, 'Blackmail: A Criticism' [1966] *Criminal Law Review* 466, 468-9; J. C. Smith and B. Hogan, *op. cit.* 467; *R. v. Lambert* [1972] *Criminal Law Review* 422.

The adoption of a wholly subjective test, making the accused's criminality depend upon his own view of the propriety of his actions, is a surprising departure from the approach taken in other offences contained in the Crimes (Theft) Act. It is a requirement of offences such as theft, obtaining property by deception, and robbery[143] that the accused be shown to have acted 'dishonestly'. The standard to be taken for determining what constitutes dishonesty is objective.[144] Whether the accused has acted dishonestly is a question to be determined by the jury, applying 'the current standards of ordinary decent people'.[145] Thus a modern Robin Hood who asserted quite sincerely that he believed he was acting honestly in robbing from the rich to give to the poor would have no defence to a charge of theft or of robbery. This is because 'ordinary decent people' do not believe it to be honest to rob from the rich to give to the poor. However, if Robin were to be charged with blackmail, it would seem that his beliefs would give him a defence. The subjective nature of the test is well illustrated by the case of *R. v. Lambert*.[146] The accused suspected his wife of having an affair with X. He informed X that £250 would buy X's rights to his [the accused's] wife, and that if X did not pay he [the accused] would inform X's employer and X's wife of his suspicions. The accused was charged with blackmail and acquitted. The trial judge directed the jury in the following terms

> [the prosecution] must negative any allegation that the defendant believed that he had reasonable grounds [for his demand]. The defendant's belief need not be reasonable. The question is whether the defendant honestly held that belief . . . His guilt or innocence depends upon his own opinion whether he was acting rightly or wrongly in the circumstances. You have to be satisfied, sure in your own minds before you can convict. Feelings of repugnance must not enter into your deliberations.[147]

The acquittal of the accused in *R. v. Lambert* because he subjectively believed he was entitled to demand money in such circumstances seems surprising and unsatisfactory. More extreme examples can easily be imagined. We live in times when members of terrorist organizations often act in the name of some higher morality which they assert, quite sincerely, justifies both their aims and any methods they choose to adopt to achieve those aims. If such people were to engage in activities which would, viewed objectively, be said to constitute blackmail, could their own beliefs, however extreme, afford them a defence? One commentator has

[143] Crimes Act 1958-73 ss. 72, 75, 81.

[144] The nature of the concept of dishonesty in the Crimes (Theft) Act 1973 is elaborated in an earlier article by the present author. 'The Crimes (Theft) Act 1973' (1974) 48 *Law Institute Journal* 75, 80-82; reprinted in *An Introduction to the Crimes (Theft) Act* 1973 (Law Department, Victoria 1974) 16, 20-23. See also I. D. Elliott, 'Three Problems in the Law of Theft' (1974) 9 *Melbourne University Law Review* 448; 466-76.

[145] *R. v. Feely* [1973] 1 All E.R. 341, 345; [1973] 2 W.L.R. 201, 204.

[146] [1972] *Criminal Law Review* 422.

[147] [1972] *Criminal Law Review* 422, 423.

described the view that they could as 'scarcely conceivable',[148] yet such a result seems to follow with remorseless logic from the wording of the section. In his book *The Law of Theft* Professor J. C. Smith has suggested that such a result may be avoided by saying that a person can only believe he has reasonable grounds for making a demand when he believes that reasonable men would regard the grounds as reasonable.[149] However attractive on policy grounds such a view may be, it is submitted that the words of the section are clear, and no objective requirement can be spelt out of them.

It is submitted that it is correct that the first limb of the twofold test (*i.e.* did the accused act in the belief that he had reasonable grounds for making the demand) should be subjective in form. The case of *R. v. Dymond,* where it was held that under the pre-Theft Act provisions the accused's belief in a legal and/or moral claim to the property demanded would not constitute a defence, has been criticised.[150] It is submitted that the Criminal Law Revision Committee was right to reverse this decision and make this limb of the twofold test entirely subjective.[151] However, it is submitted that the second limb of the twofold test (*i.e.* did the accused act in the belief that the use of the menaces was a proper means of reinforcing the demand) is unduly favourable to the accused. If an accused makes a demand coupled with a threat of criminal action or a threat to disclose discreditable conduct on the part of the victim, there seems to be no reason of principle why his guilt or innocence should depend upon his own beliefs as to whether the occasion justified the menaces used. It would seem that a subjective test in this context grants an unwarranted advantage to persons of low or divergent moral standards. It is submitted, therefore, that s. 87(1) should be re-drafted so as to convert the test contained in paragraph (b) into an objective test.

CONCLUSION

It has, it is hoped, been shown that the present law of blackmail in Australia is less than satisfactory. In the states other than Victoria the various sections which together comprise the law of blackmail originated at different points of history. The two main provisions (Crimes Act 1900 (N.S.W.) ss. 99, 100) bore quite different meanings at the time of first enactment from what they presently bear. The result has been a needless duplication of offences.

[148] Note [1972] *Criminal Law Review* 423, 424. See also the remarks of Lord Stow Hill in the House of Lords debate in the English Theft Bill, United Kingdom, *Parliamentary Debates,* House of Lords, Vol. 291, col. 122.

[149] J. C. Smith, *op. cit.* 131-2. The argument is not repeated in J. C. Smith and B. Hogan, (3rd ed.) *op. cit.* 466-8.

[150] *Supra.* p. 128.

[151] Eighth Report, *op. cit.* para. 118.

Taken as a group, the sections are highly complicated and quite unnecessarily so. There is no need for two sections dealing with written demands only (Crimes Act 1900 (N.S.W.) ss. 100, 101) and three sections dealing with oral *or* written demands (Crimes Act 1900 (N.S.W.) ss. 99, 102, 103). Sections 101 and 102 of the Act seem to serve little if any useful purpose at all. Section 103 is only necessary because ss. 99 and 100 are restricted to demands for property. The fact that different experssions are used in the various sections to convey the same basic idea adds further needless complexity to this area of the law. The phrases 'with intent to steal' (Crimes Act 1900 (N.S.W.) s. 99), 'without reasonable cause' (Crimes Act 1900 (N.S.W.) s. 100), 'with intent . . . to extort or gain property' (Crimes Act 1900 (N.S.W.) ss. 101, 102) and 'with intent . . . to defraud' (Crimes Act 1900 (N.S.W.) s. 103) are used to express the mental element required to constitute the different offences comprising the law of blackmail. The sections can also be criticised on grounds other than their complexity. There can be no justification for the situation that where a person, with menaces, demands property from another believing he has a legal right to that property, the question of whether or not he commits blackmail depends upon whether his demand is made orally or in writing.[152]

Section 87 of the Victorian Crimes Act 1958-73 constitutes an important and welcome reform of this area of the law. It replaces the previous blackmail provisions with a single offence drafted in reasonably clear language. However this provision is nonetheless open to two criticisms. First, the limitation of the scope of the offence to demands for money or other property seems undesirable on principle. If a person makes a demand of a non-proprietary nature (e.g. a demand for sexual favours) and the other requirements of the section are satisfied, there appears to be no good reason why he should not be guilty of blackmail. Secondly, it is submitted that the section should be re-drafted so as to turn the test of whether the use of menaces constituted a proper means of reinforcing the demand from a subjective to an objective test. These two defects could be simply remedied by removing the definitions of 'gain' and 'loss' from s. 71(1) and re-drafting s. 87(1) in the following form:

> A person is guilty of blackmail if he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless
> (a) the person making it does so in the belief that he has reasonable grounds for making the demand; and
> (b) the use of the menaces constitutes a reasonable means of reinforcing the demand.

[152] *Supra*, p. 134.