

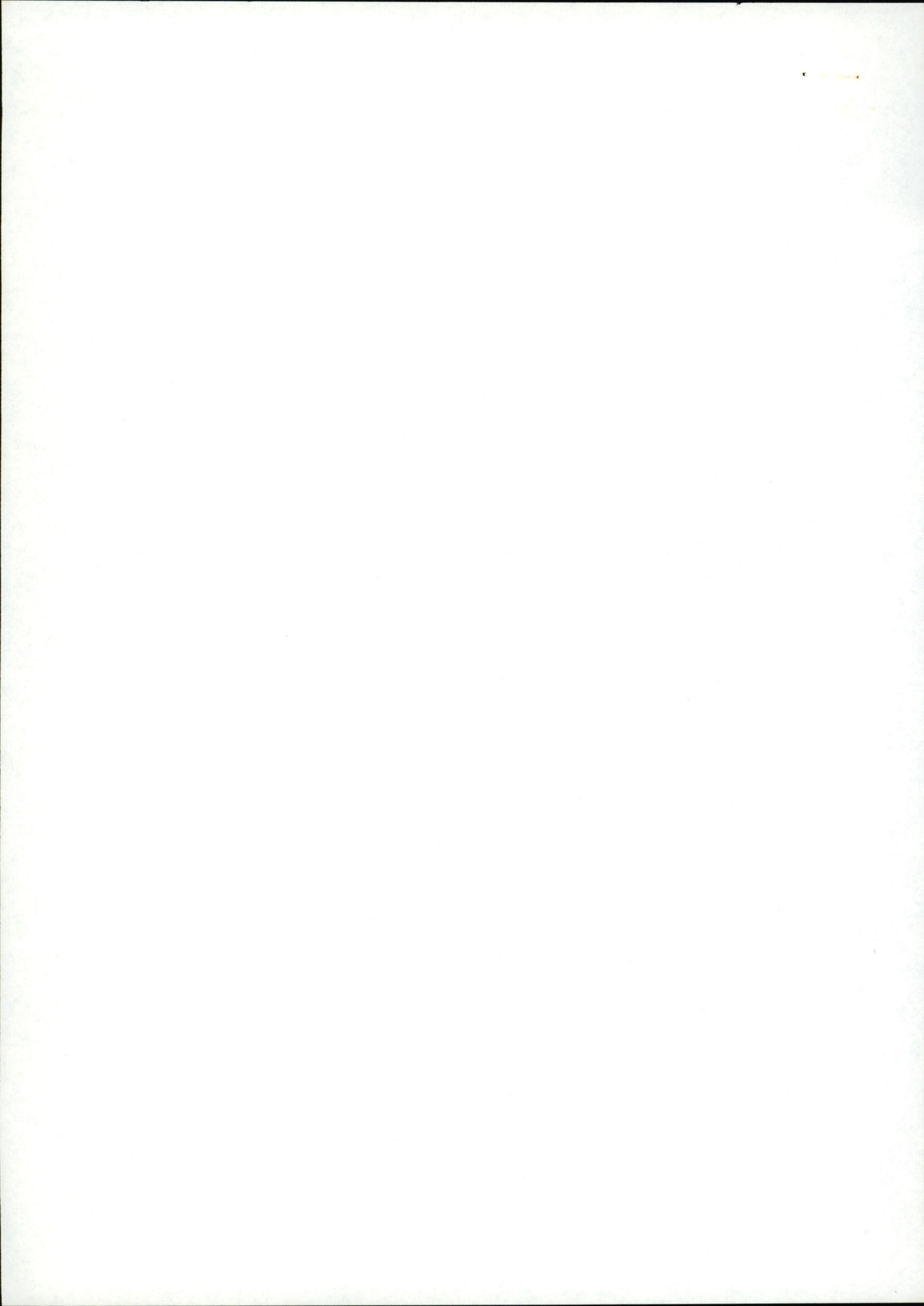
CRIMES (APPLICATION OF CRIMINAL LAW) AMENDMENT BILL

1992

SECOND READING

THE CRIMES (APPLICATION OF CRIMINAL LAW) AMENDMENT BILL 1992 SEEKS TO RESOLVE THE ISSUE OF JURISDICTION WHICH ARISES IN CERTAIN CRIMINAL CASES WHERE THERE IS NO EVIDENCE TO INDICATE THE PLACE OF COMMISSION OF ALL THE ELEMENTS OF THE CRIME OR WHERE DIFFERENT ELEMENTS OCCUR IN DIFFERENT JURISDICTIONS.

EXAMPLES OF SUCH CASES IN WHICH THE QUESTION OF JURISDICTION WOULD ARISE ARE WHERE A BULLET IS FIRED OVER THE STATE BORDER HITTING A PERSON IN THE NEIGHBOURING STATE OR WHERE IN THE COURSE OF COMMITTING FRAUD, THE ACTUAL PROCESS OF PLANNING AND EXECUTING THE FRAUDULENT ACTIONS TAKES PLACE WITHIN ONE OR MORE STATE BOUNDARIES. THIS IS PARTICULARLY RELEVANT WHEN DEALING WITH COMPUTER FRAUD.



AT COMMON LAW IT IS NECESSARY TO ALLEGE AND PROVE THE PLACE OF COMMISSION OF THE OFFENCE TO FOUND A PROPER INDICTMENT.

THIS ISSUE HAS BEEN ADDRESSED BY THE STANDING COMMITTEE OF ATTORNEYS GENERAL, AND THE LEGISLATION BEFORE YOU HAS BEEN SETTLED BY THE PARLIAMENTARY COUNSELS' COMMITTEE AND THE SPECIAL COMMITTEE OF SOLICITORS GENERAL.

THE PROBLEM OF ESTABLISHING JURISDICTION WAS HIGHLIGHTED IN THE HIGH COURT DECISION OF THOMPSON V THE QUEEN (1989) 169 CLR 1.

IN THIS CASE THE APPLICANT THOMPSON WAS CONVICTED OF MURDERING TWO SISTERS WHOSE BODIES WERE FOUND IN A CAR IN THE AUSTRALIAN CAPITAL TERRITORY, CLOSE TO THE BORDER WITH NEW SOUTH WALES.

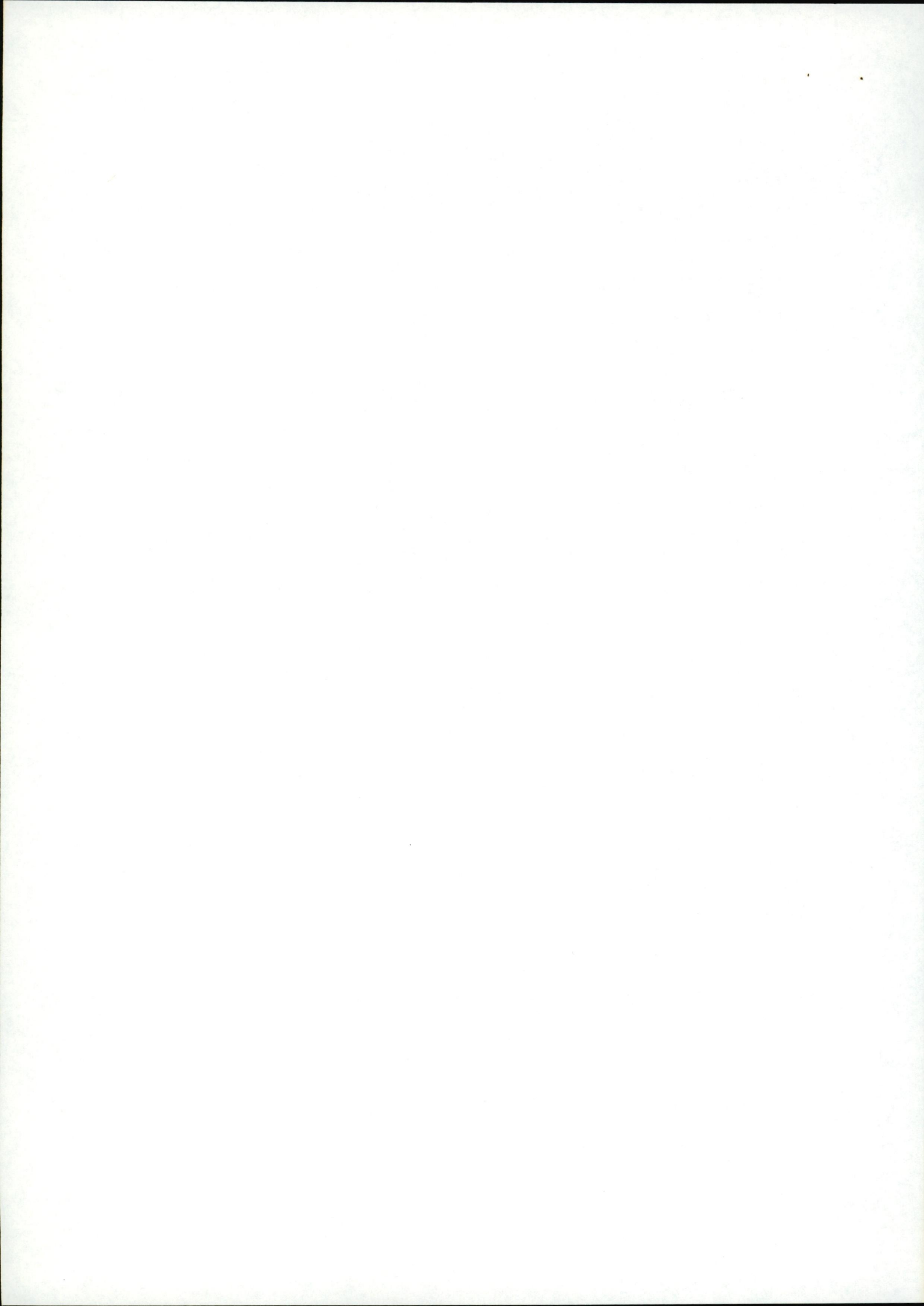
AT THE TRIAL, THOMPSON CHALLENGED THE JURISDICTION OF THE SUPREME COURT OF THE TERRITORY TO TRY HIM ON THE GROUND THAT THE CROWN HAD NOT SHOWN BEYOND A REASONABLE DOUBT THAT THE SISTERS' DEATHS OR THE CAUSE OF THEIR DEATHS HAD OCCURRED IN THE A.C.T.

ON APPEAL THE HIGH COURT HELD THAT PROOF OF THE LOCALITY OF THE ELEMENTS OF AN OFFENCE WAS NECESSARY TO ESTABLISH JURISDICTION, BUT THAT GENERALLY, PROOF ON THE BALANCE OF PROBABILITIES WOULD SUFFICE.

THE RULING DID NOT, HOWEVER, RESOLVE WHAT STANDARD OF PROOF MAY BE REQUIRED WHERE THE ELEMENTS OF THE OFFENCE OR RELEVANT DEFENCES IN STATE A DIFFER FROM THE ELEMENTS OR DEFENCES IN STATE B, OR WHERE THE MAXIMUM PUNISHMENT IS SIGNIFICANTLY DIFFERENT IN STATE A TO STATE B.

QUITE APART FROM THE ISSUE OF THE STANDARD OF PROOF, THE HIGH COURT DECISION IN THOMPSON IS OF NO ASSISTANCE IN CASES IN WHICH THERE IS COMPLETE UNCERTAINTY AS TO THE LOCALITY OF THE ELEMENTS OF THE OFFENCE.

FURTHERMORE, THE HIGH COURT DECISION APPEARS TO PROCEED ON THE PREMISE THAT THE LAW OF A STATE WILL USUALLY APPLY ONLY IF ALL ELEMENTS OF THE OFFENCE OCCURRED WITHIN THE STATE.

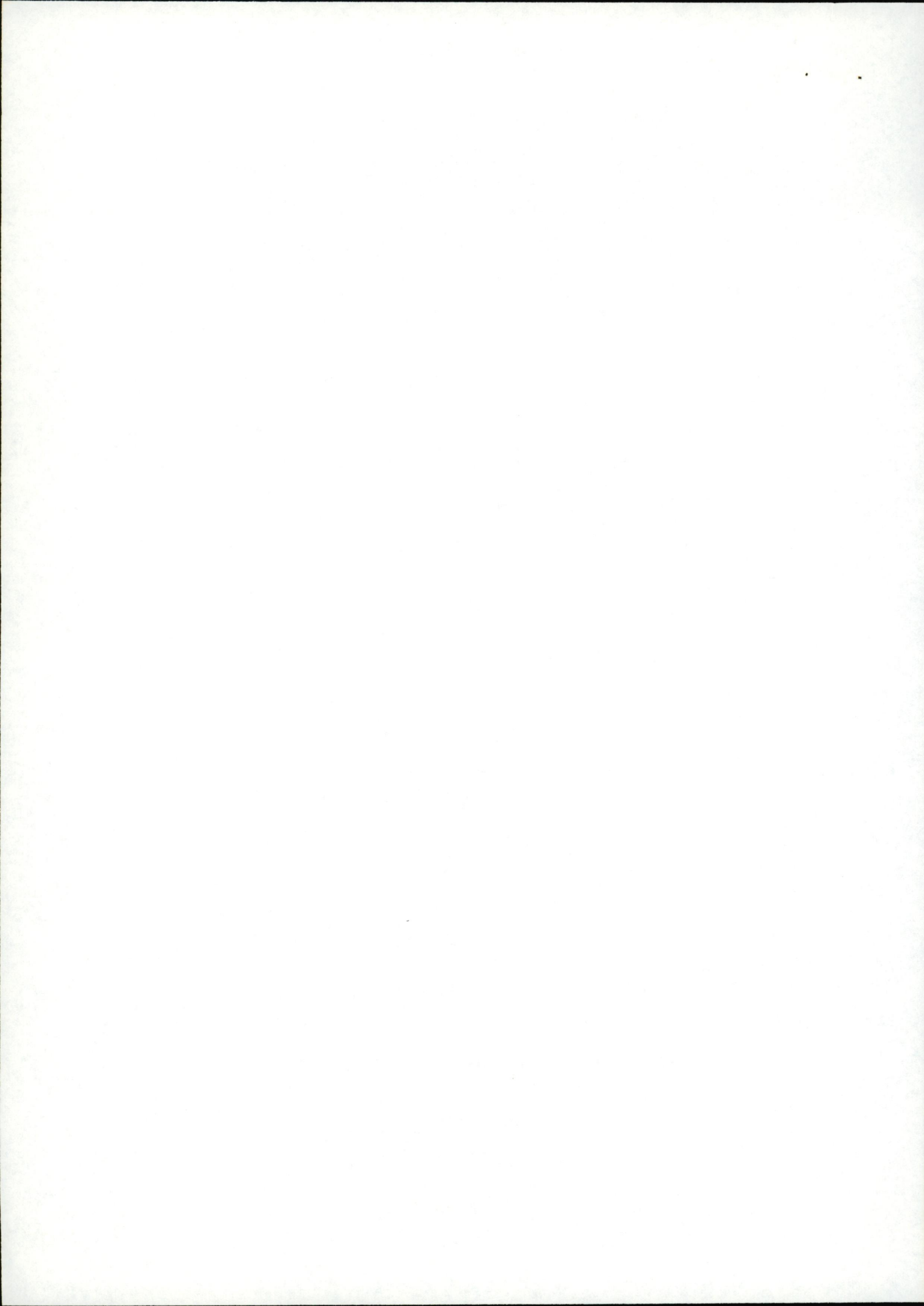


THE PROBLEM HAS BEEN SOLVED AT LEAST TO SOME EXTENT BY THE COMMON LAW WHICH IS BASICALLY THAT THE COMMON LAW COURTS EXERCISE JURISDICTION OVER ALL PERSONS WHO COMMIT CRIMINAL ACTS WITHIN THE TERRITORIAL LIMITS OF THE STATE.

AN OFFENCE MAY BE COMMITTED AGAINST THE CRIMINAL LAW OF THE STATE EVEN THOUGH SOME OF THE ESSENTIAL ELEMENTS OF THE OFFENCE ARE COMMITTED OUT OF THE STATE. EACH CASE DEPENDS ON THE NATURE OF THE CRIME, THE DEFINITION OF THE OFFENCE, THE PROVISIONS OF THE STATUTE CREATING IT OR ANY GEOGRAPHICAL LIMITATION (TREACY -V- DIRECTOR OF PUBLIC PROSECUTIONS (1971) AC 537).

HOWEVER, THE PROBLEM BECOMES MORE DIFFICULT IN CASES WHICH ARE FACTUALLY COMPLEX. FOR EXAMPLE, IN FRAUD OFFENCES WHICH MAY OCCUR ACROSS MORE THAN ONE STATE BOUNDARY WITH ELEMENTS ALLEGEDLY ARISING IN A NUMBER OF STATES.

IT IS ALSO MORE COMPLEX WHERE THERE IS MORE THAN ONE PARTY TO THE CRIME SUCH AS WHERE THERE IS A COMMON PURPOSE OR CONSPIRACY OR WHERE AN AGENT IS USED TO COMMIT AN OFFENCE.

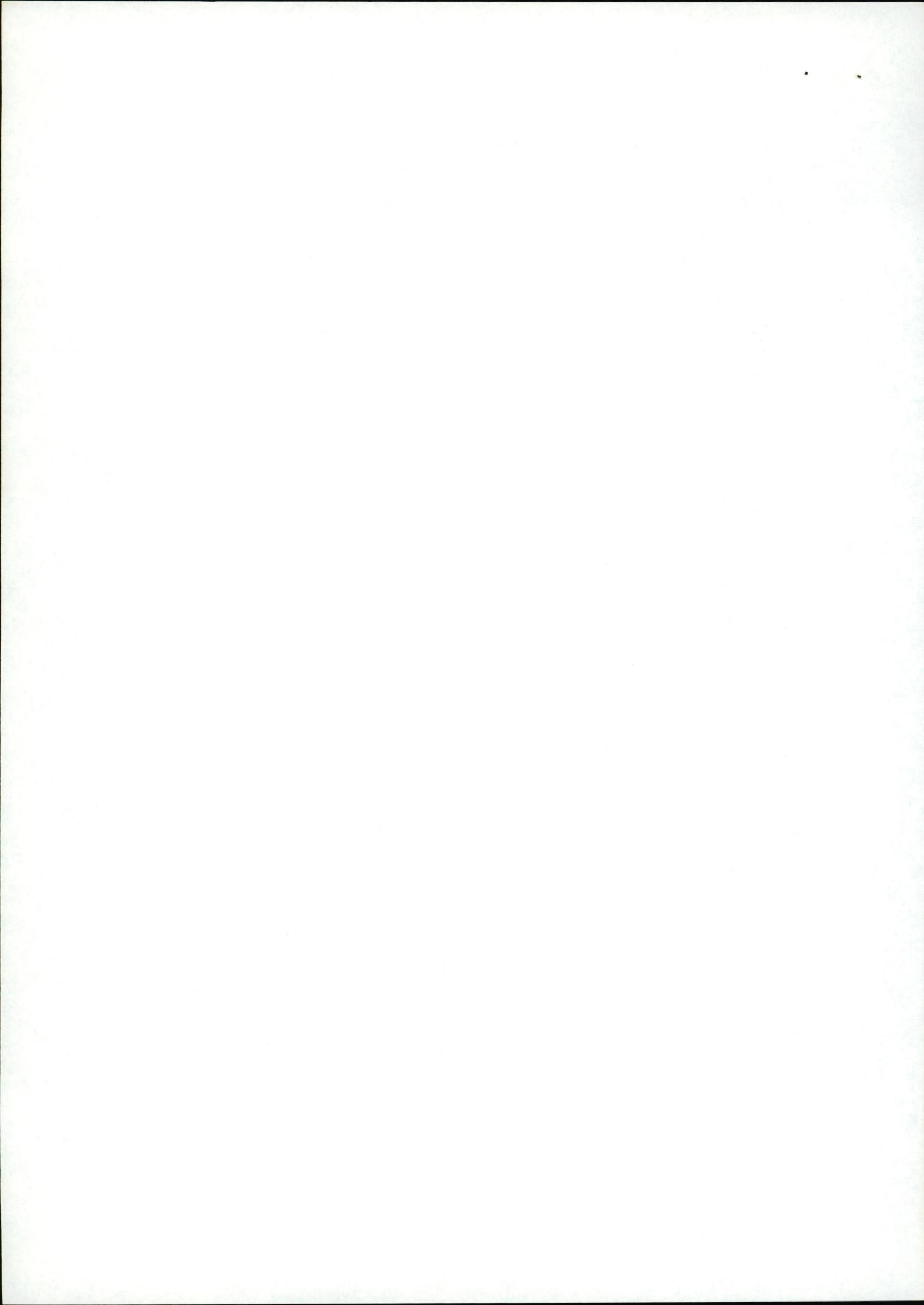


THE BILL BEFORE THIS HOUSE TODAY ADDRESSES THE ISSUE BY PROVIDING THAT THE OCCURRENCE OF ONE ELEMENT OF THE OFFENCE IN THE STATE WILL SUFFICE TO ESTABLISH JURISDICTION.

SECTION 3A PROVIDES THAT AN OFFENCE AGAINST THE LAW OF NEW SOUTH WALES IS COMMITTED IF ALL ELEMENTS NECESSARY TO CONSTITUTE THE OFFENCE EXIST AND A "TERRITORIAL NEXUS" EXISTS BETWEEN THE STATE AND AT LEAST ONE ELEMENT OF THE OFFENCE.

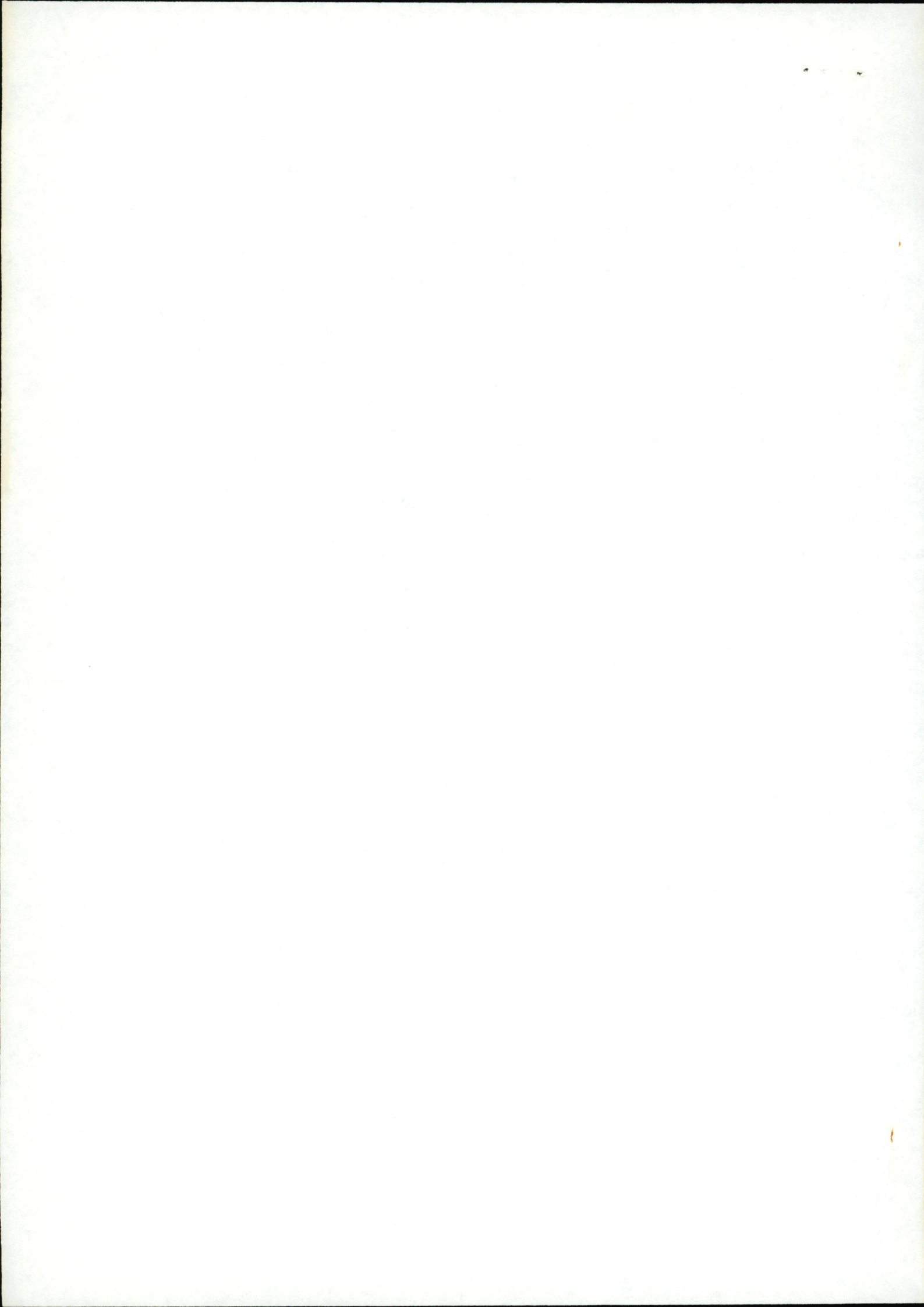
SUCH A "TERRITORIAL NEXUS" EXISTS IF THE ELEMENT IS (OR INCLUDES) AN EVENT OCCURRING IN THE STATE OR THE ELEMENT OCCURS OUTSIDE THE STATE BUT WHILE THE PERSON ALLEGED TO HAVE COMMITTED THE OFFENCE IS IN THE STATE.

THE EXISTENCE OF THE "NECESSARY TERRITORIAL NEXUS" BETWEEN THE STATE AND AN ELEMENT OF AN OFFENCE IS PRESUMED AND IS CONCLUSIVE UNLESS THE PERSON CHARGED WITH THE OFFENCE DISPUTES THE EXISTENCE OF THE TERRITORIAL NEXUS AND THE COURT OR JURY IS SATISFIED, ON THE BALANCE OF PROBABILITIES, THAT THE NEXUS DOES NOT EXIST.



THE BILL ALSO REPEALS SECTION 25 OF THE CRIMES ACT 1900 THAT ALLOWS A CASE OF HOMICIDE (WHERE THE CAUSE OF DEATH OCCURS OUTSIDE THE STATE BUT THE DEATH OCCURS INSIDE THE STATE, OR VICE VERSA) TO BE DEALT WITH AS IF THE OFFENCE HAD BEEN WHOLLY COMMITTED WITHIN THE STATE. THIS SECTION IS SUPERSEDED BY SECTION 3A WHICH APPLIES TO ALL OFFENCES AGAINST THE CRIMINAL LAW OF THE STATE.

I COMMEND THE BILL TO THE HOUSE.



FIRST PRINT

**CRIMES (APPLICATION OF CRIMINAL LAW) AMENDMENT
BILL 1992**

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

In the case of *Thompson v The Queen* (1989) 169 C.L.R. 1, the High Court held that proof of the locality of the elements of an offence is necessary to establish jurisdiction and that generally proof on the balance of probabilities is sufficient. The object of this Bill is to amend the Crimes Act 1900 to confirm the decision of the High Court in *Thompson's case* and to clarify the "territorial" application of the criminal law of New South Wales.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act will commence on a day to be appointed by proclamation.

Clause 3 gives effect to the Schedule of amendments to the Crimes Act 1900.

Schedule 1 contains the following amendments to the Crimes Act 1900:

- Schedule 1 (1) is a consequential amendment.
- Schedule 1 (2) inserts proposed section 3A which provides that an offence against the law of New South Wales is committed if all elements necessary to constitute the offence exist and a "territorial nexus" exists between the State and *at least one element of the offence*. Such a "territorial nexus" exists if the element is (or includes) an event occurring in the State or the element occurs outside the State but while the person alleged to have committed the offence is in the State. The existence of the "necessary territorial nexus" between the State and an element of an offence is presumed and is conclusive unless the person charged with the offence disputes the existence of the territorial nexus and the court or jury is satisfied, on the balance of probabilities, that the nexus does not exist.

Crimes (Application of Criminal Law) Amendment 1992

- Schedule 1 (3) omits a section of the Crimes Act 1900 that allows a case of homicide (where the cause of death occurs outside the State but the death occurs inside the State, or vice versa) to be dealt with as if the offence had been wholly committed within the State. The section will be superseded by the new section 3A which applies to all offences against the criminal law of the State.
 - Schedule 1 (4) amends the Second Schedule to the Crimes Act 1900 to include a reference to the new section 3A. The Second Schedule contains a list of provisions of the Crimes Act 1900 that extend to all offences.
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FIRST PRINT

**CRIMES (APPLICATION OF CRIMINAL LAW) AMENDMENT
BILL 1992**

NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Amendment of Crimes Act 1900 No. 40

SCHEDULE 1—AMENDMENTS

**CRIMES (APPLICATION OF CRIMINAL LAW) AMENDMENT
BILL 1992**

NEW SOUTH WALES



No. , 1992

A BILL FOR

**An Act to amend the Crimes Act 1900 to clarify the territorial application
of the criminal law of New South Wales.**

Crimes (Application of Criminal Law) Amendment 1992

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Crimes (Application of Criminal Law) Amendment Act 1992.

5 Commencement

2. This Act commences on a day to be appointed by proclamation.

Amendment of Crimes Act 1900 No. 40

3. The Crimes Act 1900 is amended as set out in Schedule 1.

SCHEDULE 1—AMENDMENTS

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(Sec. 3)

(1) Section 1 (**Short title and contents of Act**):

After the matter relating to Part 1 (3), insert:

(3A) *Territorial application of the criminal law of the State—s. 3A*

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(2) Section 3A:

After section 3, insert:

Territorial application of the criminal law of the State

Territorial application of the criminal law of the State

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3A. (1) An offence against the law of the State is committed if:

(a) all elements necessary to constitute the offence (disregarding territorial considerations) exist; and

(b) a territorial nexus exists between the State and at least one element of the offence.

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(2) A territorial nexus exists between the State and an element of an offence if:

(a) the element is or includes an event occurring in the State; or

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(b) the element is or includes an event that occurs outside the State but while the person alleged to have committed the offence is in the State.

Crimes (Application of Criminal Law) Amendment 1992

SCHEDULE 1—AMENDMENTS—*continued*

(3) The existence of the territorial nexus required by subsection (1) (b) (the “**necessary territorial nexus**”) is to be presumed and the presumption is conclusive unless rebutted under subsection (4).

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(4) If a person charged with an offence disputes the existence of the necessary territorial nexus, the court is to proceed with the trial of the offence in the usual way and if at the conclusion of the trial the court, or, in the case of a jury trial, the jury, is satisfied on the balance of probabilities that the necessary territorial nexus does not exist, it must, subject to subsection (5), make or return a finding to that effect and the charge is to be dismissed.

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(5) If the court, or, in the case of a jury trial, the jury, would, disregarding territorial considerations, find the person not guilty of the offence (but not on the ground of mental illness) the court or jury must make or return a finding of not guilty.

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(6) The issue of whether the necessary territorial nexus exists must, if raised before the trial, be reserved for consideration at the trial.

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(7) A power or authority exercisable on reasonable suspicion that an offence has been committed may be exercised in the State if the person in whom the power or authority is vested suspects on reasonable grounds that the elements necessary to constitute the offence exist (whether or not that person suspects or has any ground to suspect that the necessary territorial nexus with the State exists).

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(8) This section applies to offences committed before or after the commencement of this section but does not apply to an offence if:

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(a) the law under which the offence is created makes the place of commission (explicitly or by necessary implication) an element of the offence; or

(b) the law under which the offence is created is a law of extraterritorial operation and explicitly or by necessary implication excludes the requirement for a territorial nexus between the State and an element of the offence; or

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Crimes (Application of Criminal Law) Amendment 1992

SCHEDULE 1—AMENDMENTS—*continued*

- (c) proceedings are pending at the commencement of this section in relation to the offence.
- 5 (9) This section is in addition to and does not derogate from any other basis on which the courts of the State may exercise criminal jurisdiction.
- (10) In this section:
- 10 “event” means any act, omission, occurrence, circumstance or state of affairs (not including intention, knowledge or any other state of mind);
- “the State” includes:
- (a) the territorial sea adjacent to the State; and
- (b) the sea on the landward side of the territorial sea that is not within the limits of the State.
- 15 (11) If a person charged with a particular offence could be found guilty on that charge of some other offence or offences, that person is, for the purposes of this section, taken to be charged with each offence.
- 20 (12) To avoid doubt, a reference in this section to a trial (whether or not a jury trial) includes a reference to a special hearing within the meaning of the Mental Health (Criminal Procedure) Act 1990.
- (3) Section 25 (Trial where the death or cause of death occurs out of New South Wales):
- 25 Omit the section.
- (4) Second Schedule (Application of certain Parts and sections of Act):
- Omit “Sections 4 to 10”, insert instead “Sections 3A to 10”.
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**CRIMES (APPLICATION OF CRIMINAL LAW) AMENDMENT
ACT 1992 No. 83**

NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Amendment of Crimes Act 1900 No. 40

SCHEDULE 1—AMENDMENTS

**CRIMES (APPLICATION OF CRIMINAL LAW) AMENDMENT
ACT 1992 No. 83**

NEW SOUTH WALES



Act No. 83, 1992

An Act to amend the Crimes Act 1900 to clarify the territorial application of the criminal law of New South Wales. [Assented to 27 November 1992]

Crimes (Application of Criminal Law) Amendment Act 1992 No. 83

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Crimes (Application of Criminal Law) Amendment Act 1992.

Commencement

2. This Act commences on a day to be appointed by proclamation.

Amendment of Crimes Act 1900 No. 40

3. The Crimes Act 1900 is amended as set out in Schedule 1.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

(1) Section 1 (**Short title and contents of Act**):

After the matter relating to Part 1 (3), insert:

(3A) *Territorial application of the criminal law of the State—s. 3A*

(2) Section 3A:

After section 3, insert:

Territorial application of the criminal law of the State

Territorial application of the criminal law of the State

3A. (1) An offence against the law of the State is committed if:

- (a) all elements necessary to constitute the offence (disregarding territorial considerations) exist; and
- (b) a territorial nexus exists between the State and at least one element of the offence.

(2) A territorial nexus exists between the State and an element of an offence if:

- (a) the element is or includes an event occurring in the State; or
- (b) the element is or includes an event that occurs outside the State but while the person alleged to have committed the offence is in the State.

Crimes (Application of Criminal Law) Amendment Act 1992 No. 83

SCHEDULE 1—AMENDMENTS—*continued*

(3) The existence of the territorial nexus required by subsection (1) (b) (the “**necessary territorial nexus**”) is to be presumed and the presumption is conclusive unless rebutted under subsection (4).

(4) If a person charged with an offence disputes the existence of the necessary territorial nexus, the court is to proceed with the trial of the offence in the usual way and if at the conclusion of the trial the court, or, in the case of a jury trial, the jury, is satisfied on the balance of probabilities that the necessary territorial nexus does not exist, it must, subject to subsection (5), make or return a finding to that effect and the charge is to be dismissed.

(5) If the court, or, in the case of a jury trial, the jury, would, disregarding territorial considerations, find the person not guilty of the offence (but not on the ground of mental illness) the court or jury must make or return a finding of not guilty.

(6) The issue of whether the necessary territorial nexus exists must, if raised before the trial, be reserved for consideration at the trial.

(7) A power or authority exercisable on reasonable suspicion that an offence has been committed may be exercised in the State if the person in whom the power or authority is vested suspects on reasonable grounds that the elements necessary to constitute the offence exist (whether or not that person suspects or has any ground to suspect that the necessary territorial nexus with the State exists).

(8) This section applies to offences committed before or after the commencement of this section but does not apply to an offence if:

- (a) the law under which the offence is created makes the place of commission (explicitly or by necessary implication) an element of the offence; or
- (b) the law under which the offence is created is a law of extraterritorial operation and explicitly or by necessary implication excludes the requirement for a territorial nexus between the State and an element of the offence; or

Crimes (Application of Criminal Law) Amendment Act 1992 No. 83

SCHEDULE 1—AMENDMENTS—*continued*

(c) proceedings are pending at the commencement of this section in relation to the offence.

(9) This section is in addition to and does not derogate from any other basis on which the courts of the State may exercise criminal jurisdiction.

(10) In this section:

“event” means any act, omission, occurrence, circumstance or state of affairs (not including intention, knowledge or any other state of mind);

“the State” includes:

- (a) the territorial sea adjacent to the State; and
- (b) the sea on the landward side of the territorial sea that is not within the limits of the State.

(11) If a person charged with a particular offence could be found guilty on that charge of some other offence or offences, that person is, for the purposes of this section, taken to be charged with each offence.

(12) To avoid doubt, a reference in this section to a trial (whether or not a jury trial) includes a reference to a special hearing within the meaning of the Mental Health (Criminal Procedure) Act 1990.

(3) Section 25 (**Trial where the death or cause of death occurs out of New South Wales**):

Omit the section.

(4) Second Schedule (**Application of certain Parts and sections of Act**):

Omit “Sections 4 to 10”, insert instead “Sections 3A to 10”.

[Minister's second reading speech made in—
Legislative Assembly on 15 October 1992
Legislative Council on 19 November 1992]

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