CRIMINAL BANKRUPTCY

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In 1972 the United Kingdom Parliament added a new option known as a *criminal bankruptcy order* to the sentencing armoury of the criminal courts.[1] This new form of order was a deliberate amalgamation of criminal proceedings and civil remedies and was designed to be both an imaginative advance in victim compensation and a buttress to the deterrent aim of traditional criminal sentences. It was introduced at a time when new sentencing alternatives were proliferating the United Kingdom as the result of the recommendations of various Home Office advisory committees.[2] Criminal bankruptcy orders were introduced on an experimental basis and, although the experiment has not yet been completed, the imitative adoption by Victoria of many of the other United Kingdom initiatives suggests that it is worthwhile examining the nature of this disposition and the possibility and desirability of importing it to this or any other Australian state.

THE NATURE OF THE SANCTION

The concept of criminal bankruptcy was first mooted by the Council of the Law Society of Great Britain in 1965 in its submissions to the United Kingdom Royal Commission on the Penal System.[3] The idea was a product of the Society's concern over the apparent lack of deterrent effectiveness of traditional sanctions, such as imprisonment or fines, in those areas in which crime was actuated by a desire for monetary gain. The Society suggested that a more powerful deterrent to acquisitive crime would be knowledge that upon conviction the offender would be deprived, as far as possible, of the benefits of the offence and that sums so recovered would be restored to victims of the crime.

Though virtually all crimes are actionable as torts upon the initiative of the victim, the impossibility of recovering damages from seemingly

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1 *Criminal Justice Act* 1972, s. 7.

2 Home Office, *Penal Practice in a Changing Society* (London: H.M.S.O. 1963); Home Office, *Report of the Advisory Council on the Penal System: Non-Custodial and Semi-Custodial Penalties* (London: H.M.S.O. 1970); Home Office, *Report of the Advisory Council on the Penal System: Reparation by the Offender* (London: H.M.S.O. 1970).

3 Extracts of the submissions are reprinted in the Advisory Council's Report, *Reparation by the Offender* (op. cit., note 2) Appendices G. and H.

impecunious offenders dissuades most victims from pursuing their remedies at law. The Law Society suspected that many offenders profited from this sense of hopelessness in the victim, confident that no proper investigation would be made of their financial resources. Rather than leave the initiative for civil action (and liability for resultant costs) in the hands of the victim, the Law Society proposed that the state should accept responsibility for investigation of the offender's pecuniary status and for taking steps to recover such funds as were available. Though the monetary returns might be inadequate to cover the costs of the scheme, its implementation was justifiable as a powerful example of social justice rather than upon any economic cost-benefit analysis.

The Law Society perceived the civil bankruptcy code as providing the framework within which the investigation, disclosure, realization and equitable redistribution of the offender's assets could be compelled. It recommended that upon conviction of any indictable offence occasioning loss or damage to property which had not been the subject of restitution by the defendant, the sentencing court could make an order which would, of itself, constitute an act of bankruptcy, i.e. conduct (usually some obvious indicia of insolvency) which is the legal prerequisite to the initiation of involuntary bankruptcy proceedings.

> "Thereafter it would be competent for either the Official Solicitor or some other suitably qualified Government appointed agent to secure the making of an order of adjudication in bankruptcy against the offender under a simplified and shortened procedure. It would be competent for such official to take all possible steps to recover as much of the proceeds of the crime as he was able, to set aside transactions which had been previously effected with a view to protecting the miscreant against loss of property or income which he would have otherwised possessed, and generally to take all steps within his power... to ensure both that the offender was deprived of his gains and that those who had lost or suffered as a result of his criminal activity might be compensated wholly or in part out of the moneys so provided."[4]

In a later elaboration of its proposal, the Law Society suggested a minimum £100 loss or damage must have been suffered to warrant an order and although it would be sufficient for the immediate institution of bankruptcy proceedings, it was not envisaged that it would be followed by the presentation of a bankruptcy petition in every instance. The decision was to be governed by the likely prospects of recovery or (even where those prospects were remote) "the probability that the ensuing investigation was desirable to satisfy the public in general and other potential criminals in particular, that the most rigorous enquiries are pursued".[5]

[4] Appendix G, p. 73.
[5] Appendix H, p. 76.

Recognizing the investigatory difficulties likely to be created by recalcitrant offenders, the Law Society proposed that those who were adjudicated bankrupt on the basis of a requisite offence should, unlike ordinary bankrupts, have the onus placed upon them of explaining transactions involving the disposition of their assets since the date of the offence. And even where assets had been passed on to third parties for valuable consideration, they could be dislodged if the court was satisfied on reasonably cogent evidence that the purchaser or seller must have known, or ought reasonably to have known, that the property or money represented the proceeds of a criminal act. Tracing of dispersed assets would be expedited by greater use of existing *Bankruptcy Act* powers to require the attendance of wives of debtors and others to give sworn evidence regarding the bankrupt's dealings and the sources from which assets and income were derived.

So far as the ranking of debts for preference in the administration of the bankrupt offender's estate was concerned, the Law Society sought special priority for the victim of the offence. Accordingly it recommended that upon an adjudication of bankruptcy resulting from a conviction, the claims of the persons who suffered loss or damage by reason of the criminal act in question should rank as a preferential debt ahead of the preferred debts listed in the *Bankruptcy Act*

> "this . . . is no more than a reflection of the requirements of natural justice since there is no reason whatsoever why persons in general, or the Crown in particular, should gain a benefit at the expense of a citizen who has been deprived as a result of criminal behaviour."[6]

No action was taken on the Law Society's proposals until publication, in 1970, of the report of the Advisory Council on the Penal System on *Reparation by the Offender*. Though the Council supported criminal bankruptcy as an imaginative advance in victim reparation, it modified some of the proposals so radically that one commentator was moved to describe the result as the delivery of an emasculated still-born brain child instead of the more lusty specimen anticipated.[7] The Advisory Council feared the large-scale introduction of an as yet unproven concept and saw practical difficulties in implementing the original proposals. The Council estimated that 25,000 to 30,000 persons a year would be liable to criminal bankruptcy proceedings if the qualification were (as the Law Society suggested) simply conviction of an offence for causing loss or damage in excess of £100. Though in many of these cases a bankruptcy petition would not ultimately be presented, nevertheless the figures represented a six-fold increase in the annual number of civil bankruptcies

[6] Ibid. p. 78.
[7] D. Napley, "Criminal Bankruptcy" [1973] *Crim.L.R.* 31.

and this would significantly drain the resources of the bankruptcy service.[8] It recommended the selective application of criminal bankruptcy to the more serious "professional" or "white collar" property offenders and suggested that the minimum loss required to activate criminal bankruptcy procedures should be set at £15,000.[9] Because such offenders were, in all probability, subject to long custodial sentences (though this was not suggested as a pre-condition of the order) the Council doubted that the restrictions imposed by the bankruptcy process would have any significant additional deterrent effect either on the offenders in question or on criminals more generally and stressed, instead, that its deterrent effectiveness would be judged largely on the basis of its ability to deprive the offender of the fruits of his offence.

Because the Council saw criminal bankruptcy as a limited experiment, it was unwilling to embark upon any radical modification of existing bankruptcy law.[10] It thus hesitated to recommend any reversal of onus of proof so as to compel the offender's spouse, relatives or friends to prove that property in their hands was not the proceeds of the offender's crime, and the Council similarly declined to endorse the Law Society's proposal that victims should be treated as preferred creditors ahead of the Crown.[11] Though the Council acknowledged that the Law Society's suggestion would improve the victim's chances of obtaining compensation from the offender, it nevertheless thought that the change was too great a departure from orthodox bankruptcy principles and would add nothing to the primary aim of ensuring that the offender did not profit from his crime. It supported this conclusion with a recommendation that a criminal bankruptcy order should not be combined with a criminal court order for compensation. The two measures were to be mutually exclusive and if it seemed reasonably clear to the sentencing court that the offender possessed the capacity to make immediate reparation there would be no need to resort to criminal bankruptcy and a court could order compensation in the usual way.[12]

These and other suggestions were adopted by Parliament and criminal bankruptcy first made its legislative appearance in the *Criminal Justice Act* 1972 (U.K.). The relevant legislation is now contained in the *Powers*

[8] The Department of Trade's most recent *Bankruptcy General Annual Report* (London: H.M.S.O. 1975) indicates that there were 6,698 bankruptcy cases in 1975 compared with 5,208 in 1974 and an annual operational deficit of £1 million. In Australia, for the year 1974-75 there were 2061 sequestration or equivalent orders and the annual deficit to 30th June 1975 exceeded $1 million: *Bankruptcy Act: Report for the Year 1974-75*, Commonwealth Parliamentary Paper No. 84/1976, (Canberra: Government Printer 1976).

[9] *Reparation by the Offender*, (op. cit. note 2) paras. 28 and 104.

[10] Para. 96.

[11] Para. 105(iii).

[12] Para. 102.

of Criminal Courts Act 1973 (U.K.), ss. 39-41 and Schedule 2. Section 39 provides, inter alia

> "(1) Where a person is convicted of an offence before the Crown Court and it appears to the court that—
>
> (a) as a result of the offence, or of that offence taken together with any other relevant offence or offences, loss or damage (not attributable to personal injury) has been suffered by one or more persons whose identity is known to the court; and
>
> (b) the amount, or aggregate amount, of the loss or damage exceeds £15,000;
>
> the court may, in addition to dealing with the offender in any other way (but not if it makes a compensation order against him), make a criminal bankruptcy order against him in respect of the . . . offence or offences."

Relevant offences include not only those in respect of which the offender has been convicted, but also those which the courts take into consideration in determining his sentence.[13] The order must specify the amount of loss or damage which appears to the court to have resulted from the offence; the person or persons who suffered that loss or damage and the date on which the relevant offence (or the earliest offence, where more than one) took place.

The effect of the order is that the person against whom it is made is treated as a debtor who has committed an act of bankruptcy on the date on which the order is made and the person specified in the order as having suffered loss or damage is treated as a creditor for a debt of the amount specified in the order provable in the bankruptcy of the person against whom the order was made.[14]

Though, theoretically, once the criminal court has provided a basis for bankruptcy proceedings by making an order, any creditor is free to present a bankruptcy petition, the Act envisages that proceedings will be instituted in the public interest by an officer known as the Official Petitioner (whose functions are performed, *ex officio,* by the Director of Public Prosecutions).[15] The Official Petitioner has a discretion to determine whether it is in the public interest that he should act as petitioner on

[13] The phrase "offences taken into consideration" has a technical procedural meaning, see R. D. Margrave-Jones, "Taking Other Offences into Consideration—The History of the Convention" [1959] *Crim.L.R.* 18, 108 and 197 (in Victoria the practice is governed by *Crimes Act* 1958, s. 435A) but in *R.* v. *Anderson* [1978] 2 All E.R. 8, the Court of Appeal declined to restrict the phrase as used in the criminal bankruptcy provisions to its narrow technical sense. In that case, the offences of which the accused was convicted involved an aggregate amount below the £15,000 minimum fixed s. 39 (1)(b). But they were sample offences in respect of a series of crimes which involved sums totalling far in excess of the statutory minimum. The trial judge had sentenced on the basis that the larger sum was involved and the Court of Appeal held these other offences could be properly taken into consideration in establishing the jurisdiction for making a bankruptcy order.

[14] S. 39(2).

[15] S. 41(1).

behalf of the victim or whether he should make payments towards the expenses of others in connection with such proceedings. From their introduction in April 1973 to the end of November 1977, 161 criminal bankruptcy orders were made of which 126 (80%) were followed by a petition by the D.P.P. as Official Petitioner. The loss or damage specified in the orders totalled in excess of £15 million and the largest sum for which an order has so far been made is £1,277,667.[16]

For the purposes of making a Receiving (i.e. sequestration) Order, the act of bankruptcy and the existence of the bankruptcy debt are treated as conclusively proven by the production of a copy of the criminal bankruptcy order in question. Thereafter, in general, the Act provides for the ordinary rules of bankruptcy to apply save that the Official Receiver is to act as trustee of the bankrupt's property (outside trustees being expressly excluded). Again, the bankruptcy order specifying the amount deemed to be due as a debt is treated as sufficient evidence of the debt, but is is open to any party to the proceedings to challenge the amount stated in the order or, indeed, to assert that the loss or damage did not in fact result from any offence specified in the order. However, the question of the guilt of the offender of the offences specified in the order cannot be re-opened. All of the offender's assets, including dispositions made by the bankrupt either by way of gift or for undervalue made on or after the date of the earliest offence specified in the order, are susceptible of being applied for the benefit of all of his creditors and no preference for victims in the distribution of the offender's assets is specified in the Act.[17]

16 The annual breakdown is as follows:

Year	1973*	1974	1975	1976	1977**	Total
Criminal Bankruptcy Orders Made	15	21	29	52	44	161
Petitions Presented by D.P.P. as Official Petitioner	15	17	24	38	32†	126
% Orders Resulting in Petitions	100	81	83	73	73	78
Total of Amounts of Loss or Damage Specified in Bankruptcy Orders††	£796,851	£3,735,316	£1,253,271	£3,797,743	£6,073,644	£15,656,825
Largest Single Amount Specified	£126,488	£ 375,487	£ 154,441	£ 203,984	£1,277,667	—

* From April 1st.
** To November 30th
† A further five cases were still under consideration.
†† Since identical orders may be made against co-defendants in the same case these totals inflate the amounts actually lost. The figure is approximately 60% of the totals shown.
The figures upon which this table is based were kindly supplied by the office of the Director of Public Prosecutions and the Department of Trade, Insolvency Service. As to the amounts recovered following presentation of petitions, see fn 104 below.

17 See generally *Powers of Criminal Courts Act* 1973, Sch. 2.

APPLICATION TO VICTORIA

Unlike other imported compensation schemes, criminal bankruptcy can not readily be transposed to this or other state jurisdictions without disrupting existing bankruptcy structures and distorting orthodox bankruptcy tenets. Bankruptcy is exclusively governed in Australia by the *Bankruptcy Act* 1966 (Cth). Before 1924, when the Commonwealth first introduced bankruptcy legislation,[18] the states exercised jurisdiction under statutes which reproduced 19th century imperial legislation. In its 1928 legislative consolidation, Victoria specifically retained the *Insolvency Act* 1915 (Vic.) to preserve existing proceedings.[19] In the course of the 1958 consolidation, the *Acts Enumeration and Revision Act* 1958 (Vic.) repealed the state Act,[20] but it was subsequently restored by proclamation[21] and is still on the statute books of the state. Although the power conferred by the Australian Constitution 1900 on federal Parliament to legislate in respect of bankruptcy and insolvency is concurrent,[22] the federal Act would appear, under s. 109,[23] to cover the field of bankruptcy to the exclusion of state law. Accordingly, the unrepealed *Insolvency Act* 1928 (Vic.) is inoperative and the Court of Insolvency thereby created is devoid of state jurisdiction, although the federal Act[24] invests it and other state courts with power to exercise federal jurisdiction along with the Federal Court of Australia.[25]

Although the *Bankruptcy Act* 1966 exclusively governs the prerequisites of bankruptcy, bankruptcy proceedings and the administration of bankrupts' estates, state laws relating to matters not dealt with by the federal Act are unaffected.[26] Consequently, state legislation may instigate a system of direct enforcement of criminal compensation orders by measures falling short of bankruptcy. However, if the English scheme is to be adopted in Victoria, the co-operation of the federal government must be secured. And even then, serious consideration must be given to the capacity of the orthodox bankruptcy process to accommodate any such criminal bank-

[18] *Bankruptcy Act* 1924 (Cth).

[19] As permitted by the *Bankruptcy Act* 1924 (Cth) s. 6; *Re Ludlow; Ex parte Mayne* (1945) 13 A.B.C. 206.

[20] See the *Joint Statute Law Revision Committee Explanatory Paper* (1958) which reported that the Victorian legislation "has become progressively inoperative until now it has no direct operation".

[21] Pursuant to the *Acts Enumeration and Revision Act* 1958 s. 10, the Governor in Council reinstated the *Insolvency Act* 1928 by Proclamation dated 15th December 1959 on the grounds that it had been inadvertently repealed.

[22] S. 51(xvii).

[23] *Re Smerdon* v. *Growden* (1930) 2 A.B.C. 207, 216; *Re Dutschke; Ex parte The Trustee* (1936) 9 A.B.C. 94; compare the *Bankruptcy Act* 1966 s. 9, with the *Bankruptcy Act* 1924 s. 6.

[24] *Bankruptcy Act* 1966 s. 27; *Le Mesurier* v. *Connor* (1929) 42 C.L.R. 481; *Bond* v. *George A. Bond & Co. Ltd.* (1930) 44 C.L.R. 11.

[25] Ibid. s. 28; *Bankruptcy Amendment Act* 1976 ss. 4 and 8.

[26] *Bankruptcy Act* 1966 s. 9; *Price* v. *Parsons* (1936) 54 C.L.R. 332; *Re Pacific Acceptance Corp. Ltd.* (1963) 20 A.B.C. 263; *Re Market Investments Ltd.* (1966) 84 W.N. (N.S.W.) 499; *Re Altim Pty. Ltd.* [1968] 2 N.S.W.R. 762.

ruptcy scheme. This necessitates an examination of its impact on the two key stages of the bankruptcy process—sequestration and administration of the estate.

1. *Sequestrating the Estate*

Both in Australia and England three orthodox measures are available to regulate the estates of insolvent debtors. The first enables the debtor to enter into a consensual arrangement with creditors to administer his affairs without sequestration.[27] The second entitles the debtor to petition for his own bankruptcy.[28] The third is activated by the presentation of a creditor's petition for the sequestration of the debtor's estate.[29] Strictly, the judicial process in England does not involve a sequestration order as in Australia but, the effect being identical, it is convenient to speak of it as such. The English equivalent in fact comprises two distinct steps—the making of a receiving order[30] followed by an adjudication of bankruptcy if, after examination of the debtor's affairs, no alternative arrangement is accepted by the creditors.[31]

The first two procedures are initiated by the voluntary conduct of the debtor and are available to the convicted criminal in Australia and England under orthodox bankruptcy legislation. The criminal bankruptcy provisions, however, proceed on the assumption that the criminal is unlikely to be so co-operative, and they therefore allow for a criminal bankruptcy petition which is parallel but alternative to the creditor's petition.[32]

(a) Jurisdiction. The *Bankruptcy Act* 1966 prescribes a number of conditions which must be satisfied before a sequestration order can be made. One refers to the debtor's territorial nexus with Australia.[33] The corresponding English territorial restrictions are omitted altogether for a criminal bankruptcy petition.[34] Though the criminal bankruptcy scheme is facilitated by the relaxation of all territorial restraints, no special legislative extensions would be required in Australia because the provisions here already confer a wider jurisdiction than their English counterpart. Whereas English civil bankruptcy is confined to debtors domiciled or ordinarily resident in the jurisdiction,[35] the Australian Act applies to debtors personally present or ordinarily resident in the country when the

[27] *Bankruptcy Act* 1966 (Cth), Part X; *Bankruptcy Act* 1914 (U.K.). Ss. 16 and 17; *Deeds of Arrangement Act* 1914 (U.K.).
[28] Ibid. (Cth) s. 55; (U.K.) s. 6.
[29] Ibid. (Cth) s. 43; (U.K.) s. 4.
[30] *Bankruptcy Act* 1914 (U.K.) s. 3.
[31] Ibid. s. 18.
[32] *Powers of Criminal Courts Act* 1973, Sch. 2, paras. 2 and 5.
[33] S. 43(1)(b).
[34] Sch. 2, para. 5(2).
[35] S. 4(1), cf. s. 1(2).

act of bankruptcy is committed.[36] In all but unusual cases the convicted debtor would be present when the act of bankruptcy is committed.

(b) Debt. A second criterion is the quantum of debt. The minimum debt cognizable under the Australian Act in $500[37] and for orthodox bankruptcy petitions in England £200.[38] If a higher minimum is to be set for criminal bankruptcy proceedings (in England £15,000)[39] legislative amendment will be necessary.

The petitioner must also prove that the debtor owes him the debt which is a liquidated sum due at law or in equity payable either immediately or at a certain future time.[40] The time of payment should present no difficulties, but a victim who suffers loss or damage at the hands of a criminal may find that his right to compensation may not necessarily be enforceable on a *debt* or *indebitatus* count. He would therefore be unable to institute bankruptcy proceedings for the recovery of unliquidated damages until the amount had been reduced to a liquidated sum by judgment of a court. Rather than put the victim to the inconvenience and expense of additional proceedings in a civil court, the criminal bankruptcy scheme empowers the court which conducts the criminal trial to make a criminal bankruptcy order which, *inter alia,* establishes a debt and fixes the liquidated amount.[41] No modification to the terminology of the federal Act is necessary to transpose this concept to the Australian context. The *Bankruptcy Act* relies upon general law to determine the existence and validity of the debt. Accordingly, state legislatures are competent to deem a debt created or confirmed by judicial order in criminal proceedings.[42]

The current bankruptcy legislation empowers the bankruptcy court to scrutinize the facts upon which the debt is predicated and determine its validity in accordance with state law.[43] In orthodox proceedings, the court will not exercise its discretion to look behind a curial judgment unless there is evidence that the debt was procured by fraud, collusion or some other miscarriage of justice, for example, where no bona fide debt lay behind a default judgment.[44] These orthodox provisions would not entitle the bankruptcy court to re-examine the debtor's conviction at trial, but he may seek to re-open his liability for the debt. At trial, it may have been prejudicial to the accused's case of denial to have seriously contested

[36] S. 43(1)(b).
[37] S. 44(1)(a).
[38] *Insolvency Act* 1976 (U.K.) s. 1.
[39] *Powers of Criminal Courts Act* 1973 s. 39(1).
[40] S. 44(1)(b).
[41] Sch. 2, para. 2.
[42] The reluctance of the Federal Court of Bankruptcy to enforce criminal compensation debts is discussed in (d) below; and see s. 82(3).
[43] S. 42.
[44] *Corney* v. *Brien* (1951) 84 C.L.R. 343; *Ross-Ireland* v. *Tour Finance Ltd.* (1965) 39 A.L.J.R. 49; *Wren* v. *Mahony* (1972) 46 A.L.J.R. 163.

the quantum of the victim's loss. However, he would have been entitled to raise these issues at the sentencing stage[45] and it is unlikely that the bankruptcy court would accede to his argument. Yet the English scheme recognizes the need for an opportunity to review causation and quantum issues during the bankruptcy process, though not at the sequestration stage. For the purpose of making a receiving order the debt is conclusively proven by the production of a copy of the criminal bankruptcy order.[46] Once the receiving order is made, the orthodox legislation confers little discretion on the court when adjudging the debtor bankrupt.[47] Consequently, bankruptcy under criminal bankruptcy proceedings is almost mandatory, the policy being to place the offender under the control of the bankruptcy administration expeditiously. Thereafter, the bankrupt is free to challenge the victim's proof of debt on the grounds of causation and quantum but the issue of guilt cannot be reopened.[48]

(c) Petitioner. Under the English criminal bankruptcy provisions, the victim himself may present a criminal bankruptcy petition.[49] Likewise under the orthodox Australian system the victim, armed with a debt owing by the debtor, has the standing of a creditor who may petition for the sequestration of the debtor's estate.[50] But in addition, a key feature of the English scheme is that the Director of Public Prosecutions may, in his capacity as Official Petitioner,[51] present a petition and pursue proceedings in the public interest.[52] Moreover, the Official Petitioner's petition may take priority over an orthodox petition and any order made pursuant to a private petition may be rescinded to enable the Official Petitioner to proceed.[53] A comparable state official would have no standing to petition in Australia without amendment to the *Bankruptcy Act*, unless state legislation deemed the debt to be owing to the official who could then proceed normally in the capacity of a creditor.[54] The accountability of the official to the victim for any moneys recovered would then be a matter for state control.

(d) Act of Bankruptcy. Another prerequisite of a sequestration order is that the debtor have committed an act of bankruptcy within six months prior to the date of the petition.[55] In Australia, acts of bankruptcy are exclusively defined by the *Bankruptcy Act* and the commission of a

[45] See generally R. G. Fox and B. M. O'Brien, "Fact Finding for Sentencers" (1975) 10 *M.U.L.R.* 163.
[46] Sch. 2, para. 6.
[47] *Bankruptcy Act* 1914 (U.K.) s. 18.
[48] Sch. 2, para. 9.
[49] Sch. 2, paras. 2 and 5.
[50] S. 44.
[51] *Powers of Criminal Courts Act* 1973, s. 41.
[52] Ibid. Sch. 2, Part III.
[53] Sch. 2, para. 15.
[54] See (d) below.
[55] S. 44(1)(c).

crime does not *per se* constitute an act of bankruptcy. The creditor must be able to found his petition on any one or more of the fourteen enumerated acts of bankruptcy.[56] The most common act of bankruptcy is the debtor's failure to comply with a bankruptcy notice issued and served on him in accordance with the Act.[57] This necessitates the issue of process after the judgment which establishes the debt and before the presentation of the petition, a procedure which is inconvenient to all creditors. And although it is equally inconvenient to the criminal bankruptcy petitioner he may at least have the advantage, in serving the process, of knowing the whereabouts of his imprisoned debtor. The English criminal bankruptcy scheme obviates the need to issue a bankruptcy notice and thereby reduces the flow of process. It provides that the making of the criminal bankruptcy order constitutes the act of bankruptcy upon which the creditor may immediately petition.[58] No such procedure could be adopted in Australia without amendment to the federal Act. Even so, the victim may still utilize the orthodox process by issuing and serving a bankruptcy notice, provided he can be classified as "a creditor who has obtained against the debtor a final judgment or final order".[59]

In the 1951 decision of *Opie* v. *Opie*[60] the High Court reviewed the authorities pertaining to the corresponding provision in the 1924 Act. In that case, a court of summary jurisdiction granted a certificate to a deserted wife for the recovery of maintenance. The governing state legislation[61] permitted the applicant to file the certificate in a superior court which was directed by the statute to enter judgment accordingly. The legislation further provided that "such judgment may be enforced in any manner in which a final judgment in an action may be enforced". The High Court set aside a bankruptcy notice issued pursuant to the judgment on the grounds that it did not satisfy the requirements of the 1924 Act. In a joint judgment, Dixon and Williams JJ. concluded that the bankruptcy notice must be based on a final *judgment* in an *action,* or final *order* in a *proceeding.*[62] Although a filed judgment was enforceable as a judgment in a proceeding, it did not satisfy the statutory requirements as a judgment in an action. McTiernan J. decided the issue on the grounds that the state judgment lacked the characteristics which distinguish a *final judgment* under the bankruptcy legislation.[63] This line of reasoning apparently influenced the Federal Court of Bankruptcy when, in 1965, it

[56] S. 40.
[57] S. 40(1)(g).
[58] Sch. 2, para. 1.
[59] S. 40(1)(g).
[60] (1951) 84 C.L.R. 362.
[61] *Deserted Wives and Children Act* 1901-1939 (N.S.W.) s. 13A.
[62] (1951) 84 C.L.R. 362, 373.
[63] Ibid. 375.

rejected a state criminal compensation order as a final order within the meaning of the federal legislation.

In *Re Borg; Ex parte Paynes Properties Pty. Ltd.*,[64] Clyne J. dismissed a petition for sequestration on the grounds that a criminal compensation order made under s. 546 of the *Crimes Act* 1958 (Vic.), upon which the bankruptcy notice was based, lacked the qualities of a final order obtained by a creditor against the debtor. The state Act provided for an award of compensation to a victim which was deemed to be a judgment debt and which "may be enforced in any manner in which a judgment or order of the court for the payment of a civil debt could be enforced". His Honour took a view, which is supported by authorities,[65] that a final judgment or order must, for bankruptcy purposes, emanate from a *litis contestatio* between the parties to the bankruptcy proceedings in which the debtor was entitled to set up a counterclaim, set-off, or cross-demand in order that the court could finally adjudicate the parties' rights and liabilities.

In 1962, before *Borg's* case, a committee appointed to review bankruptcy law,[66] recommended the insertion of a provision to overcome the effect of *Opie's* case. In 1966, after *Borg's* case, the *Bankruptcy Act* 1966 was passed containing two provisions relevant to this issue. Section 40(3) provides

> "(b) a judgment or order that is enforceable as, or in the same manner as, a final judgment obtained in an action shall be deemed to be a final judgment so obtained and the proceedings in which, or in consequence of which, the judgment or order was obtained shall be deemed to be the action in which it was obtained. . . .
> (d) a person who is for the time being entitled to enforce a final judgment or final order for the payment of money shall be deemed to be a creditor who has obtained a final judgment or final order."

It would appear that these provisions overcome the objections raised in *Borg's* case. Notwithstanding that an order in favour of a victim arises from Crown proceedings, if the victim is entitled to enforce the order he shall be deemed to be a creditor for bankruptcy purposes. And that order is deemed to be a final judgment in an action if the state legislation declares it to be enforceable as a final judgment in an action. Moreover, the state legislation could validly create the debt in favour of an official comparable to the Official Petitioner. He would have no status *ex officio* under the federal Act but he could pursue the ordinary remedies of a creditor. In either event, the petitioning creditor would be obliged to issue and serve a bankruptcy notice before presenting his petition unless

[64] (1965) 6 F.L.R. 377.
[65] *Opie* v. *Opie* (1951) 84 C.L.R. 362, 375; *Re Stanton Hayeck* (1957) 19 A.B.C. 1; *Re Ravasio; Ex parte Leonard Norman Pty. Ltd.* (1965) 6 F.L.R. 373, 374; *Re Pannowitz; Ex parte Wilson* (1975) 6 A.L.R. 287, 295.
[66] See *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth (Clyne Report)* (Canberra: Government Printing Office 1962).

an alternative act of bankruptcy is available. The English scheme side-steps the inconvenience of the bankruptcy notice by equating the act of bankruptcy with the criminal bankruptcy order,[67] a solution which could not be achieved in Australia without amendment to the Federal legislation.

2. *Administering the Estate*

In Australia, the debtor becomes a bankrupt when a sequestration order is made against his estate.[68] The making of the sequestration order delineates two distinct phases in the bankruptcy process. The proceedings which culminate in the sequestration order serve as a mechanism to activate the administrative phase which ensues from the sequestration order. And although the first phase is conducted as a judicial contest between the petitioning creditor and the debtor as individuals, all traces of a *lis inter partes* disappear in the administrative phase. It is basic to bankruptcy that the administration of the bankrupt's affairs is not exercised to enforce the debt of the petitioning creditor but, as a community service, to release the bankrupt from his debts and distribute his estate for the collective benefit of all creditors.

(a) Administrator. Upon sequestration, the bankrupt's property vests in the Official Receiver in Bankruptcy[69] which is a body corporate constituted by the Official Receivers of the various Australian bankruptcy districts.[70] However, the creditors may, by resolution, replace the Official Receiver with a trustee,[71] who must be registered under the Act,[72] in which case the bankrupt's property passes to the trustee.[73] Similar provisions prevail in England for orthodox bankruptcy administration[74] but the appointment of a private trustee is prohibited for criminal bankruptcy proceedings.[75] The legislation requires the Official Receiver, appointed by the Department of Trade, to administer the estate.

Presumably, the English decision to exclude the private trustee flowed from the scheme's objective of providing investigatory facilities at government expense. A private trustee would not have the resources to undertake investigation and it would be unrealistic and unprofitable for him to incur expenses beyond the remuneration fixed by the creditors themselves —usually a percentage of the value of the realizeable estate. His primary function is of an accounting and managerial nature. On the other hand the duty of the Official Receiver is to investigate the conduct, dealings

[67] Sch. 2, para. 1.
[68] S. 43(2).
[69] S. 58.
[70] Ss. 15, 18.
[71] S. 157.
[72] S. 155.
[73] S. 132.
[74] S. 19.
[75] Sch. 2, para. 8.

and transactions of the bankrupt in the public interest irrespective of the appointment of a trustee.[76] It is therefore theoretically possible to transpose the scheme to Australia without modification of the Act but, without Commonwealth/State co-operation between the various enforcement agencies and without additional funding, it is questionable that the Official Receiver would have any better access to funds, facilities and resources to conduct enquiries of the nature contemplated.

(b) Proof of debts. The first administrative function is to identify the creditors who are eligible to share in the distribution of the bankrupt's estate or rather, to admit the claims which are provable within the meaning of the *Bankruptcy Act*. A claim is provable if it is a debt or liability incurred before bankruptcy, but not if it is a demand for unliquidated damages arising other than by way of contract or breach of trust.[77] Accordingly, a claim for unliquidated damages in tort is not provable until judgment reduces it to a liquidated debt.

It should be borne in mind that a statutory debt in the nature of a criminal order is an advantage not only to the victim who presents a petition for sequestration, but also to the victim who wishes to prove his claim after sequestration has been ordered pursuant to another creditor's petition. If the victim's claim rests in contract or quasi-contract he does not need judgment to prove his debt. But if his claim lies in tort for damages, the statutory debt will spare him the expense and inconvenience of obtaining the judgment which would otherwise be necessary. As in the case of the petitioning creditor, this assumes that the criminal order creates an acceptable debt.

The English criminal bankruptcy provisions enable any party, at the proof of debt stage, to challenge causation and quantum of the criminal bankruptcy debt.[78] The provisions stipulate that any party may prove that the amount of the victim's loss is greater or less than the amount specified in the order or that the loss did not result from the offences specified in the order. Even this approach could be comfortably accommodated under the orthodox Australian provisions. Under the Act as it stands it is open for the Official Receiver, the bankrupt, the creditor concerned, or any other creditor to take proceedings to have a provable debt expunged or reduced.[79] No specific mention is made of an increase in the amount because the creditor who lodges the proof of debt is free to claim on lodgement an amount in excess of the criminal order. The Official Receiver would undoubtedly reduce the amount to the level of the order, but from such a decision the lodging creditor has a right of appeal.

76 S. 19.
77 S. 82.
78 Sch. 2, para. 9.
79 S. 99.

Subject to a technicality which is raised under the next heading, the orthodox provisions governing proof of debt present no particular barriers to the criminal bankruptcy concept.

(c) Recovery of Property. The most difficult facet of administration is the investigation and recovery of assets available for distribution. Should this necessitate the tracing of criminal proceeds which have been secreted away or carefully disguised, the investigation becomes onerous and highly specialized. The decisive issue is not so much the powers contained in the Act but whether the Official Receiver is equipped to undertake such a burden. As the *Bankruptcy Act* stands, the Official Receiver has access to property under two forms of provision. The first deals with property of the bankrupt, the second with property disposed of by the bankrupt to third parties.

(i) If, when the Official Receiver takes effective control of property, it is still owned by the bankrupt, there are few problems in principle, because the property of the bankrupt at the date of sequestration and property acquired by him after sequestration and before discharge is legislatively vested in the Receiver.[80] But not all property is available for distribution among creditors. The Act exempts specified property such as wearing apparel, necessary household items and tools of trade to a certain value.[81] It also excludes certain policies of life assurance and annuities to a limited value which have been in force for prescribed periods of time. It follows that if ill-gotten gains have been invested in policies which satisfy these conditions they are inaccessible to creditors unless the transactions can be set aside. But more important again is the question of income.

The bankrupt is entitled to retain income after sequestration unless, upon the application of the Official Receiver, the court orders that all or a portion of it be paid for the benefit of the bankrupt's creditors.[82] In exercising this discretion, courts treat the creditors as entitled to any surplus over and above what is reasonably necessary for the support of the bankrupt and his family. Courts will not make an order which will have the effect of pauperizing the bankrupt and compelling him to seek the protection of the bankruptcy courts again or depriving him of the employment situation he holds.[83] In its memorandum, the Council of the Law Society suggested that "the court might make greater use of the power to order payment of instalments by a debtor out of income, wages

[80] S. 58.
[81] S. 116.
[82] S. 131.
[83] *Re Potter; Ex parte Official Receiver* (1893) B.C. (N.S.W.) 85; *Federal Commissioner of Taxation* v. *Official Receiver* (1956) 95 C.L.R. 300, 314, 319, 331, 338; *Falstein* v. *Official Receiver* (1962) 108 C.L.R. 523, 526; *Re McLachlan* (1975) 8 A.L.R. 162.

or salary". No specific legislative direction of this nature ultimately was given to the courts, but if they accede to the suggestion it would have serious repercussions of hardship to the bankrupt and his family. And if the bankrupt is sentenced to imprisonment, the rehabilitative value of work-release and intermittent detention schemes (in which the offender is able to earn income) may be compromised if prisoner earnings are vulnerable to attachment.

Apart from the discretion exerciseable toward income and the exempted categories of property, it is basic to bankruptcy that all property beneficially owned by the bankrupt is available for the benefit of all creditors. As a consequence of that statement it is necessary to explore an issue whose outcome may not justify the attention paid to it but for the fact that it does not appear to have been canvassed by the proponents of the English criminal bankruptcy scheme. The issue concerns property which is the fruit of the bankrupt's criminal activity and which is capable of being traced according to the doctrines of law and equity.[84] It presupposes that the property is capable of being identified, either in its original form or as converted property, and that it is either retained by the bankrupt or was disposed of to a third party who is not a bona fide purchaser. In such instances the bankrupt or third party either has no legal title to the property or if he does, holds the property on constructive trust for the victim from whom it was wrongfully acquired. In neither case does the property form part of the divisible estate of the bankruptcy. The victim retains a beneficial proprietary interest in that property which is not available to other creditors, and the victim therefore is entitled to the property.

This issue exposes two subsidiary matters. The first is a policy observation that in these circumstances the bankruptcy machinery and state resources are used to investigate and discover assets for the benefit of a single creditor and enforce his claim in disregard of creditors generally. Of course this situation is not peculiar to criminal bankruptcy, but if bankruptcy machinery is to be employed for criminal compensation, it must be recognized that in such a situation the machinery would be applied in a manner inconsistent with the underlying policy of bankruptcy. The second matter is a technical problem which arises in conjunction with these hypothetical facts. Where a creditor is secured and can satisfy his debt by exercising proprietary rights over property, he cannot utilize the bankruptcy process in an attempt to recover the value of his secured interest unless he is prepared to relinquish it for the benefit of creditors generally. If the secured creditor wishes to petition for sequestration on a debt which is secured, he must elect to surrender

[84] See *Re Hallett's Estate* (1880) 13 Ch.D. 696; *Sinclair* v. *Brougham* [1914] A.C. 398; *Re Diplock* [1948] Ch. 465.

his security[85] and a secured creditor who wishes to lodge a proof of debt must do likewise.[86] If these concepts are adhered to, the first matter considered above would present no difficulty. The difficulty, though, is that at the time the victim presents his petition or lodges his proof of debt he may not know whether he has a right to trace the property. This will depend upon factors of identifiability and circumstances surrounding possession—factors which may not be revealed until the bankruptcy machinery has investigated the bankrupt's affairs. The existing legislative provisions do not contemplate the need for a retrospective election. If the victim, upon discovering his security, is entitled to realize it for his own benefit, the general purpose of bankruptcy is frustrated. If, to avoid this, the victim is required to undertake that he surrenders any security which may be discovered, the legislation should be amended accordingly.

(ii) The Official Receiver has certain powers to recover property of which the bankrupt has disposed to third parties. The *Bankruptcy Act* contains a variety of provisions by means of which the Official Receiver can hold a third party liable for property or proceeds received from the bankrupt before and after sequestration.[87] By and large, the Official Receiver can enforce his claim if the third party was not bona fide and did not give valuable consideration or did not act in the ordinary course of business. The feature of these provisions in the context of a criminal restitution scheme is that they have degrees of retrospective operation. A fraudulent disposition, for example, has no time limit.[88] A preference can be set aside if made within six months before the petition[89] and the doctrine of relation back applies to a period commencing with the first available act of bankruptcy within six months before the date of petition.[90] Certainly there is some scope under orthodox legislation for the official receiver to recover the fruit of a crime which is disposed of by the offender before conviction.

The English criminal bankruptcy legislation adds to the arsenal of the Official Receiver. The court is there empowered to order that a third party reimburse "such amount as the court thinks just" if the third party received the property as a gift or at under value.[91] This provision has two advantages over existing Australian legislation. First, it overcomes the defence of good faith which a third party could raise, notwithstanding that he did not give full value for the disposition. This would improve the Official Receiver's chances of substantiating a claim against a receiver of stolen property. Secondly, the retrospective time limit is extended to the

[85] S. 44.
[86] S. 90.
[87] *Bankruptcy Act* 1966, Part VI, Div. 3.
[88] Ibid. s. 121.
[89] Ibid. s. 122.
[90] Ibid. s. 115.
[91] Sch. 2, para. 10.

date of the criminal offence. The present time limits in Australia bear no relation to the commission of the criminal offence unless the Official Receiver can establish that the third party acted in fraud of creditors generally.

(d) Priority. Having admitted the claims of creditors and assembled the divisible property, the third stage of administration is to realize the estate and pay dividends to the creditors. For the purposes of distribution, debts rank equally in proportion to the amount involved, subject to an order of priority laid down by bankruptcy legislation.[92] An unsecured creditor who is not preferred must therefore share the recovered proceeds of crime with fellow creditors. When the Council of the Law Society proposed criminal bankruptcy legislation, it recommended that the victim be given priority over other creditors. It has been shown that if the victim can trace funds this result is achieved, but otherwise the English legislation did not accede to the recommendation. In this respect the orthodox Australian legislation is identical. If the victim is to be given super-preferred status, legislative amendment will be required.

(e) Powers. In the course of administering the estate, the Official Receiver may resort to a number of sections designed to extract information about the bankrupt's affairs. The English legislation does not differ significantly from the orthodox Australian legislation, save that the Official Petitioner may stand in the shoes of the victim.[93] After sequestration, the bankrupt is required to file a statement of his affairs upon threat of contempt of court.[94] He is also obliged to submit himself for public examination of his conduct, trade dealings, property and affairs[95] and at any time the bankrupt or his spouse or any person suspected to have possession of the bankrupt's property or any person able to give information may be summonsed to give evidence.[96] The bankrupt is bound to disclose and deliver up his property.[97] These and other provisions controlling the bankrupt's person and affairs carry sanctions of imprisonment. But beyond the ability of the Official Receiver to initiate proceedings of enforcement no powers of investigation, search and seizure are conferred upon him.

The advantage of the English criminal bankruptcy scheme over orthodox administration is that the Official Petitioner, being the Director of Public Prosecutions, has access to the necessary investigatorial apparatus to complement the function of the Official Receiver. Moreover, since the creditor himself may initiate many of the proceedings exercising

92 Part VI, Div. 2.
93 Sch. 2, para. 17.
94 S. 54.
95 S. 69.
96 S. 81.
97 S. 77.

control of the bankrupt, the Official Petitioner as creditor surrogate may conduct most of the fact finding functions and relieve the Official Receiver of all but the formal and managerial duties. The policing function could only operate efficiently in Australia with inter-government and inter-departmental co-operation.

(f) Discharge. The underlying concept of bankruptcy is twofold: to divest the bankrupt of assets which are then distributed to creditors in partial satisfaction of his debts, and to release the bankrupt from those debts in order that he may make a fresh start. Bankrupty would be futile if creditors could continue to enforce debts against the bankrupt. Consequently, the bankrupt is released from provable debts when he is discharged from bankruptcy.

The criminal bankruptcy legislation does not alter the law relating to discharge. In both Australia and England the bankrupt may apply for discharge at any time after the public examination is concluded.[98] Failing this, the bankrupt is entitled to an automatic discharge after five years of bankruptcy, unless the court otherwise extends the period.[99] In exercising its discretion the court is required to take into account the conduct of the bankrupt both before and after sequestration. And the court is entitled to refuse discharge for want of commercial morality on the part of the bankrupt in that he did not co-operate with the Official Receiver or that his bankruptcy was brought about by reckless living or that he was fraudulent.[100]

Broadly, there are three reasons to keep a bankrupt undischarged. First, any property which he acquires or devolves upon him before discharge vests in the Official Receiver and may be divisible among creditors. Unless a windfall or inheritance can be anticipated this is unlikely to be a dominant reason for retaining a criminal bankrupt. Second, if evidence suggests that he is likely to jeopardize creditors again by incurring debts he cannot satisfy, there is some justification for withholding discharge in order to protect the community. In the case of a criminal bankrupt the penal system is already attempting to control his recidivist potential and withholding discharge from bankruptcy would add little additional protection. Third, so long as he remains undischarged the court, through the creditors and the Official Receiver, can exercise powers over the bankrupt to compel disclosure of information and the divulging of property. This factor is particularly appropriate to a criminal bankrupt who is suspected of having secreted funds which have not been uncovered. But even if he is discharged, his secreted property, if ultimately

98 (Cth) s. 150; (U.K.) s. 26.
99 (Cth) s. 149; (U.K.) *Insolvency Act* 1976 s. 7.
100 Section 150(5); *Re Haines* (1937) 10 A.B.C. 83; *Re Gray* (1960) 19 A.B.C. 29; *Re Prince; Ex parte The Bankrupt* (1961) 19 A.B.C. 39; *Re Carter* (1960) 20 A.B.C. 14.

discovered, remains vested in the Official Receiver by virtue of the original sequestration and the creditors' right to it is not prejudiced by the discharge.

CRITICISM

Australian States cannot implement the English criminal bankruptcy scheme without relying on federal bankruptcy machinery but the introduction of an identical scheme would necessitate some important amendments to the *Bankruptcy Act* (Cth). A somewhat modified version could be adapted by state legislation utilizing existing orthodox bankruptcy legislation, but its success would still depend upon the co-operation of federal and state instrumentalities. Alternatively, state governments could institute a system of direct enforcement executed by state agencies against the assets of the convicted criminal under powers of attachment similar to those granted under the *Crown Proceedings Act* 1958 (Vic.). Supplementary provisions would be necessary to trace ill-gotten gains but even so execution under such state legislation could still be suspended at the instance of another creditor's petition in bankruptcy.[101] In any event, the investigation into the mechanics of a criminal compensation and recovery scheme, of whatever nature, presupposes the desirability of such a scheme. And it is to this policy question that criticism of the English criminal bankruptcy scheme may be most forcefully directed.

The criminal bankruptcy proposal is motivated by both deterrent and compensatory considerations. The Advisory Council on the Penal System declared that the concept underlying the sanction was that

> "if a person commits a serious crime against property or against the person, his assets should be susceptible of being tapped to the fullest possible extent, with a view to fulfilling one or more of the following objects:
>
> (a) strengthening the means available to the community, through the courts and other agencies, of preventing convicted criminals of enjoying, sooner or later, the fruits of their offences;
>
> (b) deterring offenders and would-be offenders by increasing the unpleasant consequences of detection and conviction;
>
> (c) improving the prospects of procuring compensation for the victims of crime from those who have perpetrated it, either by uncovering the assets of those offenders or by attaching their earnings. . . ."[102]

It is doubtful whether, in attempting to achieve these disparate objectives —both deterrence and compensation—by a single scheme, the sanction serves either one well.

Belief in the value of both special and general deterrence rests on the assumption that potential miscreants are individuals who think before

[101] S. 58(3).

[102] *Reparation by the Offender*, op. cit. p. 34.

they act, rationally weighing the balance between gains and losses in the contemplated venture. These assumptions, dear to many legislators, have long been abandoned by behavioural scientists who have replaced rational man with a more impulsive, less predictable model. And even if Bentham's principle of enlightened self-interest is operating, it is more likely to respond to the fear of detection than contemplation of the possible consequences of conviction. Since acquisitive crime is usually not committed unless the perceived certainty of apprehension and punishment is very low, the additional punitive consequences of a criminal bankruptcy order will weigh insignificantly in the deterrent calculus. The work of Hawkins and Zimring[103] on deterrence demonstrates very clearly the limitations of deterrent responses and more scientific data is needed on its selective efficacy before general deterrence can stand as a major justification for criminal bankruptcy. Moreover, since the offender is already suffering punishment under other criminal sanctions these, not bankruptcy, should be seen as providing the primary vehicle for deterrence in the disposition of the case. This is particularly true in the English setting where the £15,000 minimum loss limit curtails any possible general deterrent impact on all but large scale offenders. Moreover, since it appears that the majority of property offenders are without means or have dissipated their ill-gotten gains,[104] the pursuit of an ineffectual sanction will carry no weight from the point of view of special deterrence.

A final major objection to the proposed use of bankruptcy procedures for the deterrent punishment of criminals is that it directly conflicts with recently proposed bankruptcy reforms whose main thrust has been the decriminalization of the civil bankruptcy process. Though bankruptcy was originally treated as a crime and the debtor akin to a criminal whose property could be seized and person imprisoned, the evolution of bankruptcy law and practice has been marked by a strong trend towards separating the bankruptcy process from the machinery of criminal justice. To once again use bankruptcy as a deterrent arm of the criminal law would be to undermine the reformers' objectives of removing the punitive elements from civil bankruptcy, concentrating its procedures on

[103] F. E. Zimring and G. J. Hawkins, *Deterrence—The Legal Threat in Crime Control* (Chicago: University of Chicago Press 1973). See also J. Andenaes, *Punishment and Deterrence* (Ann Arbor: University of Michigan Press 1974).

[104] In 1976 an assessment of the assets and liabilities, as then known, of 44 criminal bankruptcies between 1st April 1973 and 31st December 1975 disclosed total liabilities amounting to £4,282,734. Assets (as per statements of affairs, or estimated, and including possible recoveries under extended relation back provisions) amounted to £233,573. This represents 5½p. in the £ and does not take into account statutory fees, costs and administration expenses. Source: personal communication, Department of Trade, Insolvency Service. The equivalent figure for civil bankruptcies is approximately 16p. in the £. Source: *Bankruptcy General Annual Report* (London: H.M.S.O. 1975) p. 1. For related evidence of the impecuniosity of offenders see P. Softley, *Compensation Orders in Magistrates' Courts*, Home Office Research Study Report No. 43 (London: H.M.S.O. 1977).

promoting the equitable reorganization of relationships between creditors and debtor in respect of the debtor's property, and facilitating the financial rehabilitation of the debtor. As the *Report of the Study Committee on Bankruptcy and Insolvency Legislation* in Canada puts it

> "The proposed system provides for an automatic bankruptcy in the case of every crime occasioning loss or damage to property for which there has been no restitution, whether or not the criminal is solvent. However, the bankruptcy process is primarily designed for, and should be confined to, the administration of the estates of insolvent debtors . . . it would be a mistake to use the bankruptcy process against anyone but insolvent debtors . . . we believe that the problem that the recommendations of the Law Society of England were designed to solve should be approached directly through a re-examination of certain features of the criminal law process, such as [the compensation sections] of the *Criminal Code* and the powers and responsibilities of peace officers to investigate criminal conduct and, in particular, to trace and locate the fruits of criminal activity. In our view it would be unwise to manipulate the bankruptcy process to do indirectly, and probably less satisfactorily, what could be better and more satisfactorily accomplished by direct action at the real source of the problems."[105]

Criminal bankruptcy is also justified as facilitating victim compensation. It does this only partially. It must be pointed out that bankruptcy is, in all cases, the ultimate method of enforcing a judgment and where an offender has failed to comply with a compensation order made by a criminal court or a victim has obtained civil judgment for liquidated damages arising out of a criminal event (whether or not the offender has been brought to trial or convicted) execution against the criminal debtor will, if pursued to the end, be by petition for civil bankruptcy. Criminal bankruptcy makes this process available to the victim irrespective of the criminal's insolvency and allows for foreshortened and speedy enforcement of claims against the assets of convicted criminals utilizing the investigatory powers of a senior law officer as Official Petitioner on behalf of the victim. To this extent it operates in aid of victim compensation but, in as much as it is dependent on the orthodox bankruptcy framework, it grants the victim no greater priority in access to the offender's assets than other unsecured creditors who must take behind secured and preferred creditors whose claims usually do not arise out of criminal losses. For the goal of victim compensation to be pursued effectively not only should all victims be entitled to obtain reparation

[105] *Report of the Study Committee on Bankruptcy and Insolvency Legislation,* (Ottawa: Information Canada 1970) 147-8. See also British Section of the International Commission of Jurists (JUSTICE), *Report on Bankruptcy* (London: Stevens 1975)—though it did not examine criminal bankruptcy procedures, its general tenor was to minimize harshness and stigma in the treatment of bankrupts. See particularly Australian Law Reform Commission, *Report No. 6—Insolvency: The Regular Payment of Debts* (Canberra: Australian Government Publishing Service 1977) paras. 142-3.

irrespective of the amount of loss, but they should be entitled to take ahead of other classes of creditor, particularly agencies of government, such as the Commissioner of Taxation, who are already classified as preferred creditors.

To make victims of crime a super-preferred category of creditor can, perhaps, be justified on the basis that whereas ordinary creditors must always have in contemplation the risk that their debtors may become insolvent and are ordinarily free to decline to enter relationships which give rise to debt, victims of crime are out of pocket as the result of being involuntarily subjected to behaviour which the state formally condemns as unlawful but which it has failed to prevent. Though it is unrealistic to assert that the state has an absolute duty to protect every citizen at all times against the depredations of other citizens, the fact that the state largely deprives its citizens from carrying weapons for self-protection against crime creates at least an assumption that it will provide general conditions of civil peace and access to some indemnification against personal injury and property loss or damage when it occurs. The victim is otherwise being forced to bear both the experience of the crime and the burden of paying for it. Placing the victim of crime at the head of the list of preferred creditors in bankruptcy proceedings by legislative amendment to the *Bankruptcy Act* (Cth), coupled with a state legislative direction that the enforcement of costs and fines against an offender should be secondary to the satisfaction of compensation orders, would reshape priorities away from protection of state and commercial interests towards personal reparation to the victim by the offender.

Though the criminal law shared with the law of torts common origins in deterrence and compensation,[106] the criminal law has hitherto been less concerned with restitution than with communal protection through responses of a punitive nature.[107] The criminal bankruptcy proposal is consistent with the groundswell of recent concern for the victims' real needs and the fact that these have been inadequately served by the range of sanctions hitherto available to the criminal courts and by the

[106] W. Holdsworth, *A History of English Law* (4th ed., London: Methuen, 1936) Vol. II 43-54; M. E. Wolfgang, "Victim Compensation in Crimes of Personal Violence" (1965) 50 *Minnesota L.R.* 223; G. MacCormack, "Revenge and Compensation in Early Law" (1973) 21 *American J. Comparative Law* 69; J. M. Kay, "The Making of English Criminal Law" [1977] *Crim.L.R.* 45. See also the discussion of the punitive role of exemplary damages in *Broome* v. *Cassells & Co.* [1973] A.C. 1027 per Lord Reid at 1086-7 and Lord Wilberforce at 1114.

[107] The U.K. White Paper, *Penal Practice in a Changing Society* (London: H.M.S.O. 1959) paras. 24-7 has made the point that though the basis of the early law was personal reparation by the offender to the victim, the modern criminal law almost completely ignores this concept on the assumption that the victims' claims are sufficiently satisfied by the punishment of the offender. But this becomes less persuasive as society, in its dealings with miscreants, increasingly emphasizes the reformatory aspects of punishment. Indeed, in the public mind, the interests of the offender may often be seen to be placed before those of the victim.

unintegrated connection between criminal dispositions and civil remedies.[108]

Should the bankruptcy process be made the bridge between the civil and criminal courts? Criminal bankruptcy presupposes the apprehension and conviction of an offender capable of substantially satisfying a judgment or order. Where this is true, the conventional bankruptcy process will adequately serve the victim's interest in deriving compensation from the offender's assets. On the other hand, where there has been no apprehended or convicted offender, or his assets are negligible, there seems little to be gained for the victim by modification of the bankruptcy process in the name of deterrence. Not only would maximizing punitive components of the process and the possible creation of a super-preferred class of creditors interfere with developments in insolvency laws designed to obtain reduction in stigma in favour of the financial rehabilitation of the debtor and the equitable distribution of loss among *all* creditors, but the new sanction would also divert attention away from communal obligations to provide compensation to victims of crime regardless of whether offenders are identifiable or able personally to make reparation.

There are a number of possible alternative approaches to victim compensation. One is to call upon the victim to absorb the loss himself. This seems, in fact, to be the most common response to victimization. It is not a remedy but rather the default of one, and as such is unacceptable as policy. Another possibility is the traditional requirement that the victim pursue his right of action at common law against the offender for recovery of property or damages. These rights are to be enforced in the civil courts and, ultimately, by bankruptcy but are seldom exercised because, as a rule, the assailant is either unknown or impecunious. Criminal bankruptcy is embroidery on this mode of response. A third option, and one increasingly invoked, is a scheme of state funded compensation. This acknowledges the reality of both the undetected and insolvent offender and asserts that it is anomalous that the state which makes provision for compensation in so many of the non-criminal mischances of life, should not also make similar provision for assisting victims of criminal offences as such.

[108] E.g. the rule in *Hollington* v. *Hewthorn* [1943] K.B. 587 that evidence of a conviction in criminal proceedings is inadmissible in evidence in civil proceedings relating to the same set of facts (see *Re 396 Bay Street Port Melbourne* [1969] V.R. 293; abolished in England by the *Civil Evidence Act* 1968) and the rule in *Smith* v. *Selwyn* [1914] 3 K.B. 98 which prescribes that civil actions brought on the basis of felonious injury or damage should be stayed until prosecution of the felony. (Affirmed in *Wonder Heat Pty. Ltd.* v. *Bishop* [1960] V.R. 489 and *Hatherley & Horsfall Pty. Ltd.* v. *Eastern Star Mercantile Pty. Ltd.* [1965] V.R. 182; see also C. L. Pannam, "Felonious Tort Rule" (1965) 39 *A.L.J.* 164. While acknowledging that the compensation order provisions in s. 546 of the *Crimes Act* 1958 (Vic.) are designed, not as an additional form of punishment for the offender, but as a foreshortening of civil procedure, the courts have nevertheless indicated that they will refuse to make such an order in cases involving complex or extensive investigation into the compensation claims. "[T]he machinery of a compensation order is intended for clear and simple cases since the civil rights of the victim remain": *R.* v. *Braham* [1977] V.R. 104, 110; *R.* v. *Kneeshaw* [1975] Q.B. 57, 60.

State funded Criminal Injuries Compensation Boards or equivalent bodies originated in New Zealand in 1963 and are now found in the United Kingdom, Canada and all Australian states.[109] Though the Home Office Working Party on *Compensation for Victims of Crimes of Violence* denied that there was any constitutional or social principle which compelled the state to indemnify its citizens against personal injury or property damage[110] (and Atiyah asserts there is none which warrants separating victims of crime for special treatment over and above any other group of citizens in need),[111] compassion for innocent victims and economic self-interest have been accepted as justifying these special programmes. The schemes have been criticized as inadequate in their coverage and no more than cosmetic in placating anxious public opinion threatened by apparent increases in aggressive crime.[112] And even though the upper limit on state funded compensation for personal criminal injury is $10,000,[113] their operation independent of the apprehension or conviction of the assailant and their ability to deal with cases liberally and expeditiously, presents them as a more comprehensive and effective form of victim compensation than anything that could be attained through the introduction of criminal bankruptcy orders in this country.

The mixture of charitable impulse and self-interest which motivated the introduction of the criminal injury compensation schemes, does not embrace property loss or damage consequent upon crime. The community

[109] *Criminal Injuries Compensation Act* 1967 (N.S.W.); *Criminal Code Amendment Act* 1968 (Qld.); *Criminal Injuries Compensation Act* 1969-1974 (S.A.); *Criminal Injuries Compensation Act* 1970-1976 (W.A.); *Criminal Injuries Compensation Act* 1976 (Tas.). The maximum payable in N.S.W., Qld., W.A. and S.A. is $2,000, in Victoria $5,000, in W.A. $7,500 and in Tasmania $10,000.

[110] *Report of The Home Office Working Party on Compensation for Victims of Crimes of Violence,* Cmnd. 1406 (London: H.M.S.O. 1961) para. 17.

[111] P. S. Atiyah, *Accidents, Compensation and the Law* (London: Weidenfeld & Nicolson 1970) ch. 13; cf. British Section of the International Commission of Jurists (JUSTICE), *Report on Compensation for Victims of Crimes of Violence* (London: Stevens 1962). Atiyah argues in favour of universal compensation schemes similar to that proposed in the *Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia* 1974 though, at this point of time, such schemes have been exclusively concerned with compensation for personal injury: see H. Luntz, *Compensation and Rehabilitation* (Sydney: Butterworths 1975). The point should be made that, at least in Australia, the earliest victim compensation legislation was aimed at encouraging the public to assist the police execute their peace-keeping duties by offering compensation to citizens injured in supplying such assistance: *Police Assistance Compensation Act* 1964 (W.A.) and *Police Assistance Compensation Act* 1968 (Vic.).

[112] D. Chappell, "Providing for the Victim of Crime: Political Placebos or Progressive Programs" (1972) 4 *Adelaide L.R.* 294; H. Edelhertz and G. Geis, *Public Compensation to Victims of Crime* (New York: Praeger 1974) 4.

[113] See fn 108 above. There are also significant legislative differences between the states; see L. Waller, "Compensating Victims of Crime in Australia and New Zealand", I. Drapkin and E. Viano (eds.), *Victimology: A New Focus* (Lexington Books, 1974) Vol. II ch. 15; W. T. Westling, "Some Aspects of the Judicial Determination of Compensation Payable to Victims of Crime in Australia" (1974) 48 *A.L.J.* 428. Where the criminal injury is suffered during the course of employment, compensation would be payable under the *Workers' Compensation Act* 1958 (Vic.) to a maximum of $29,000.

is apparently less compassionate towards those who suffer property loss and damage and sees its own economic self-interest as less threatened by the incidental costs of such events. In part this is due to the availability of insurance as a well-established means of obtaining indemnification against property offences. However Chappell[114] has pointed out, following an Australian survey of insurance coverage, that crime insurance protection is related to the socio-economic status of citizens and that such insurance coverage is beyond the means of many citizens who might benefit substantially from it. Drawing on American experiences, he has suggested that, as voluntary insurance schemes can no longer be viewed as a satisfactory mode of providing compensation for victims of property crime, consideration should be given by the federal or state governments to the introduction of a subsidized crime insurance programme designed to ensure all citizens enjoy equal access to indemnification of losses resulting from theft, injury and other criminal interference with their property.[115] Elaboration of this proposal is beyond the scope of the present article, but it too offers more realistic prospects of crime compensation than under the criminal bankruptcy concept. The existence of a major crime insurance office exercising the subrogated rights of claimants would, incidentally, provide the type of investigatory staff and resources for recovery of property and tracing of assets which the appointment of the D.P.P. as Official Petitioner sought to achieve under the criminal bankruptcy scheme.

The substantial problem with criminal bankruptcy is that, although it was presented as an innovative scheme of victim compensation and an effective deterrent to acquisitive crime, it is neither. On balance, it attains little that cannot already be achieved through the orthodox bankruptcy machinery; it is likely to disrupt moves to decriminalize bankruptcy procedures and, in focussing on spectacular losses, it diverts attention away from the need to develop comprehensive and effective compensation schemes for ordinary victims of crime.

[114] Chappell, op. cit. pp. 301-3.

[115] Ibid. p. 302. In the commercial world, those who risk causing physical injury to others have become conscious of their potential tortious liability and usually take out liability insurance. Where they are insufficiently responsive to the risk, the state may compel (and subsidize) such insurance, e.g. compulsory workers compensation and third-party motor vehicle insurance schemes. Such schemes do not yet apply to liability for property damage but, if the social interest is sufficient, there is no reason why they should not do so. In the criminal context it is unreal to contemplate potential offenders taking out liability insurance and it is functional only to explore the possibility of victims gaining reparation through their own loss insurance. See J. E. Starrs, "A Modest Proposal to Insure Justice for Victims of Crime" (1965) 50 *Minnesota L.R.* 285; J. D'Fucci, "The Federal Crime Insurance Program" (1971) 8(8) *Security World* 20.