



## AN BILLE UM DHAMÁISTE COIRIÚIL, 1990

### CRIMINAL DAMAGE BILL, 1990

#### EXPLANATORY MEMORANDUM

##### Main features

1. (a) The Bill simplifies and modernises the law of criminal damage to property by replacing the multiplicity of offences of damage to specific kinds of property in the Malicious Damage Act 1861 with three offences of damage to property in general.
- (b) These offences are: (i) a simple offence of damage to another's property; (ii) an aggravated offence of damage to any property, where the damage is done with intent to endanger the life of another or with recklessness in that regard, and (iii) an offence of damage to any property where there is an intent to defraud.
- (c) It will also be an offence to threaten to cause damage to property or to have custody or control of any thing with intent to cause damage with it.
- (d) The definition of damage to property is being extended to include the unauthorised modification of automated data.
- (e) Unauthorised accessing, or attempted accessing, of automated data, not involving their modification, is also being made an offence.
- (f) Courts are being empowered to require offenders to pay compensation to owners of damaged property.

The Bill is based, in the main, on the recommendations of the Law Reform Commission in Report LRC 26-1988.

2. *Section 1* defines property as including both automated data and tangible property. "Damage" includes adding to, altering, corrupting or erasing automated data or moving data to a different location or contributing to such damage (e.g. by supplying damaging software). The Bill also applies to acts done within the State that damage property outside it, to any acts done outside the State that damage property within it and to omissions causing damage (*subsection (1)*). Under *subsection (2)* property is treated as belonging to any person who has lawful custody or control of it, any proprietary interest in it (other than an equitable interest arising only from an agreement to transfer or grant an interest) or a charge over it. However, it will be an offence for a spouse who is excluded by a court order from the family home to damage the home (*subsection (3)*).

3. *Section 2* creates the main offences under the Act: a simple offence of damaging the property of another without lawful excuse, an aggravated offence of damaging any property without lawful excuse, intending to endanger the life of another or being reckless in that regard, and an offence of damaging any property with intent to defraud (*subsections (1) to (3)*). "Property" is defined in *section 1 (1)* as property of a tangible nature, whether real or personal, including money and animals that are capable of being stolen, and also automated data, including computer programs. The aggravated offence attracts a maximum penalty of an unlimited fine or life imprisonment or both. For the other offences it is a fine of £10,000 or 10 years imprisonment or both, unless the offence involves setting fire to property, when it is punishable as for an aggravated offence. On summary conviction, the maximum penalty for any of the offences is a £1,000 fine or 12 months imprisonment or both (*subsection (5)*).

4. Under the Malicious Damage Act 1861 the damage has to be done "maliciously". This element of the offence is expressed in the Bill as intention or recklessness. The present requirement that the damage must also be done "unlawfully" is retained by the use of the words "without lawful excuse". Some circumstances in which an accused may have a lawful excuse are stated in *section 6* but that section does not apply to the aggravated offence or the "intent to defraud" offence.

5. *Subsection (4)* of *section 2* provides that an offence of damaging property by fire shall be charged as arson. The common law offence of arson, i.e. the malicious and voluntary burning of the houses and outhouses of another, is being abolished by *section 14 (1)*. The definition of "reckless" in *subsection (6)* accords with the existing definition, i.e. that the accused had foreseen that the particular kind of harm might be done and yet had gone on to take the risk of it.

6. *Section 3* makes it an offence without lawful excuse to threaten to damage either property belonging to the threatened person or some other person or the threatener's own property in a way which he knows is likely to endanger the life of another. Under *section 4* it will be an offence to have any thing in one's custody or under one's control if it is intended without lawful excuse to use it or cause or permit another to use it either to damage some other person's property or to damage one's own or the intended user's property in a life-endangering way or with intent to defraud. The maximum penalty for an offence under either section is a fine of £10,000 or 10 years imprisonment or both (on summary conviction, £1,000 or 12 months or both). *Section 6* provides for circumstances in which a person charged with an offence under these sections may have a lawful excuse but not if any life-endangering element is involved.

7. *Section 5* makes the unauthorised operation of a computer with intent to access data an offence, whether or not any data accessed are modified. (Any such modification after access has been obtained constitutes damage to the data and is an offence under *section 2*.) The section applies whether the data are kept within or outside the State and irrespective of how the unauthorised access is achieved, whether by remote means, usually over a telephone line, or by direct use of the equipment on which the data are kept, say by an employee who is either not authorised to operate the equipment or not authorised to access the particular data. Unauthorised accessing of data from outside the State is also covered. The section applies too whether or not the intention is to gain access to particular data or a particular

category of data or data kept by a particular individual or firm. This is made clear by *subsection (2)*. The maximum penalty for the offence is a fine of £500 or 3 months imprisonment or both. Provision in relation to lawful excuse is made in *section 6*.

8. *Section 6*, in providing for certain special lawful excuses in addition to any existing recognised defences, reflects the element of unlawfulness included in the existing offence of malicious damage to property. However, these excuses do not apply if the offence involves danger to life or intent to defraud (*subsection (1)*). In general, the person charged will have a lawful excuse under this section if he believed that the person or persons entitled to consent to or authorise the damage had done so or would have done so if they had known the circumstances. The person charged will also have a lawful excuse under the section if he acted to protect a person or property or a right or interest in property and believed that the person, property, right or interest concerned was in immediate need of protection and that the means of protection used or proposed to be used were or would be reasonable having regard to all the circumstances. The section applies also in relation to the offence under *section 5* of accessing, or attempting to access, data without lawful excuse. In that case it provides for a lawful excuse where the person charged believed that consent or authorisation in relation to the access had been given or would have been given or where the person charged was himself the person entitled to consent to or authorise access. *Subsection (3)* provides that it is immaterial whether a belief is justified or not if it is honestly held.

9. *Section 7* confers jurisdiction in proceedings for offences under *section 2* or *5* alleged to have been committed by persons outside the State in relation to data or other property within the State (*subsection (1)*). *Subsection (2)* provides that in proceedings in relation to damaging property belonging to another (*section 2*), or threatening or intending to damage it (*sections 3* and *4*), the name of the person to whom the property belongs need not be stated. It also provides for a rebuttable presumption that the damaged property belonged to another. For offences under *section 2* or under *section 5* (unauthorised accessing of data) provision is made for a similar presumption that the person entitled to consent to or authorise the damage (or, in the case of an offence under *section 5*, accessing of the data) had not done so. That presumption does not apply to offences relating to data where the person charged is an employee or agent of the person keeping the data concerned. *Subsection (3)* provides that a person charged under *section 2* with modifying data may be found guilty under *section 5* of unauthorised access to data if the evidence does not warrant a conviction for the *section 2* offence but does so for the offence under *section 5*.

10. *Section 8* provides that the doctrine of ouster of jurisdiction shall not preclude the District Court from trying offences under the Bill. Under this doctrine the jurisdiction of the District Court is ousted if, in giving a decision on the case before it, it is called upon to adjudicate on a dispute of title to real property.

11. *Section 9* enables a court to require a person who has been convicted of damaging property to pay the owner compensation not exceeding the amount of the damages that in the court's opinion would be recovered in a civil action. A compensation order may not be made unless it is possible to ascertain readily both the owner of the damaged property and the approximate cost of making good the damage or replacing the property. The court must have regard to the

means of the offender or, in the case of a person under 17, those of the parent or guardian. If the compensation is to be paid by instalments, the period for payment must not exceed 12 months. Where it is appropriate both to impose a fine and to make a compensation order but the means of the offender, or of the parent or guardian, are insufficient to pay both an appropriate fine and appropriate compensation, the court may give preference to compensation, though it may impose a fine as well. Provision is made for adjusting the amount payable under a compensation order if it appears subsequently that the means of the convicted person are insufficient to satisfy the order in full or that the damage is less than it was taken to be for the purposes of the order. In the latter event, the owner of the property may be ordered to repay any amount overpaid. A compensation order or an order for repayment is treated, for enforcement purposes, as if it had been made in civil proceedings.

12. *Section 10* provides that the operation of a compensation order will be suspended for a month after the date of the conviction or, if an appeal is lodged against the conviction, sentence or compensation order within that time, until the appeal is finally disposed of or withdrawn or abandoned. The compensation order will not take effect if the conviction is reversed. The appeal court may annul or vary the compensation order, whether the appeal is against conviction or sentence or merely against the order itself.

13. *Section 11* deals with the effect of a compensation order on civil proceedings in relation to the damage. Any damages awarded in such proceedings must not be more than the amount (if any) by which the damages awarded exceed the amount paid under the compensation order. If the damages assessed are less than any amount paid under the order, the owner of the damaged property may be ordered to repay the difference. Once damages are awarded or an order for repayment made, the compensation order ceases to have effect.

14. *Section 12* provides for powers of arrest without warrant for offences under the Bill relating to damage to property. In this regard the section reproduces section 19 of the Criminal Law (Jurisdiction) Act 1976 and restates the common law rules in relation to powers of arrest for felonies. *Subsection (4)* also gives a power of arrest without warrant to a member of the Garda Síochána in respect of an offence under *section 13 (4)*, i.e. obstructing or impeding a member acting under the authority of a search warrant or failing to give such a member a correct name or address. *Subsection (8)*, which provides that the section does not prejudice any other power of arrest conferred by law, is intended to cover, for example, the common law power to arrest in order to prevent personal injury.

15. *Section 13* provides for the issue by a district justice of a search warrant where there is reasonable cause to believe that any person has any thing in his custody or under his control or on his premises that has been used, or is intended to be used, without lawful excuse either to damage property or to access data. Where data are involved, Gardaí acting under the warrant may operate or cause to be operated any data equipment in the premises, inspect any data found there and extract information from the data. There is the usual offence provision (*subsection (4)*) in relation to obstruction of Gardaí acting under the warrant or failure to supply them on request with a correct name and address.

16. *Section 14* contains a number of minor and consequential amendments to existing law. *Subsection (1)* abolishes the common law offence of arson which is being replaced by the offence of damaging property by fire (*see section 2 (4)*). *Subsection (2)* updates the definition of telegraph in section 37 of the Malicious Damage Act 1861, which deals with damage to telegraphs and preventing or obstructing telegraphic communications. It also brings the penalties in section 40 and 41 of the 1861 Act for killing or maiming animals into line with those in the Bill. (Sections 37, 40 and 41 are among the provisions of the 1861 Act that are not being repealed.) *Subsection (3)* is a transitional provision which maintains in operation, for the purposes of the Criminal Law (Jurisdiction) Act 1976, certain existing offences of malicious damage to property that that Act makes punishable if committed in Northern Ireland, i.e. the common law offence of arson and the offences of damaging property by fire in sections 1 to 7 of the 1861 Act. Provision is made in *subsection (4)* for updating the 1976 Act to take account of the replacement of these offences by the arson offences in *section 2* of the Bill. This subsection will be brought into operation in due course by order of the Minister for Justice in conjunction with reciprocal provisions in the United Kingdom, and thereupon *subsection (3)* will cease to have effect.

17. *Section 15* repeals the Malicious Damage Act 1861 except for sections 35 and 36 (interference with railways), 37 and 38 (interference with telegraphs), 40 and 41 (killing or maiming animals), 47 (exhibiting false signals to shipping), 48 (cutting away buoys, etc.), 58 (Act to apply whether or not malice against owner of property) and 72 (admiralty offences).

18. *Section 16* provides for the short title and commencement. The Act (except *section 14 (4)* — *see paragraph 16* above) will come into operation one month after the date of its passing.

*An Roinn Dlí agus Cirt,  
Meán Fómhair, 1990.*





