



SOLOMON ISLANDS  
LAW REFORM COMMISSION  
Review of Penal Code and  
Criminal Procedure Code  
Issues Paper 1

November 2008

Solomon Islands Law Reform Commission (SILRC)

The SILRC welcomes comments and submissions from the public. You are welcome to have your say about the questions raised in this Issues Paper. You can write a submission, send an email or fax, or ring up the Commission and speak to one of our staff.

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**Abbreviations**

AIDS	Acquired Immune-Deficiency Syndrome
Art.	Article
AUSAID	Australian Agency for International Development
Aust	Australia
CA-CRAC	Court of Appeal- Criminal Appeal Court
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the rights of the Child
CSEC	Commercial Sexual Exploitation of Children
Cth	Commonwealth of Australia
Div	Division
DPP	Director of Public Prosecutions
HC – CRC	High Court – Criminal Case
HIV	Human Immuno- deficiency Virus
ICERD	International Convention on the Elimination of all forms of Racial Discrimination.
ICESCR	International Convention on Economic, Social and Cultural Rights
J	Justice (title)
LRC	Solomon Islands Law Reform Commission
MCCOC	Model Criminal Code Officers Committee of the Standing Committee of Attorney- Generals (Australia)
NSW	New South Wales
NT	Northern Territory
NZ	New Zealand
Para.	Paragraph
PNG	Papua New Guinea
Qld	Queensland
R	Regina or Reginam (state)
s	section (ss plural)
SA	South Australia



SBCA	Solomon Islands Court of Appeal
SBHC	High Court of Solomon Islands
SILR	Solomon Islands Law Reports
Tas	Tasmania
UN	United Nations
UNDP	United Nations Development Programme
UNDHR	Universal Declaration of Human Rights
UNIFEM	United Nations Development Fund for Women
UK	United Kingdom
v	and (civil) or against (criminal)
Van	Vanuatu
Vict	Victoria
Vol	Volume
WA	Western Australia

**Terminology****Accused**

A person who is charged with committing a criminal offence.

**Act**

Written law made by parliament

**Arrest**

When a person suspected of committing an offence he or she can be arrested by the police or in limited circumstances by a civilian.

**Beyond reasonable doubt**

The standard of proof that must be satisfied before an accused can be convicted of a criminal offence. The prosecution must satisfy the court (judge or magistrate) of each element of the offence beyond reasonable doubt.

**Child**

A child is someone who has not attained the legal age of maturity which according to common law is 16 years of age. The Convention on the Rights of the Child treats children as under the age of 18 years.

**Cognisable offence**

An offence for which a police officer can make an arrest. A cognisable offence is a felony.

**Common Law**

Body of law and principles originating from English court decisions over the centuries. All court decisions of the English courts before 1978 are followed by the courts in Solomon Islands unless they are inconsistent with legislation or principles of customary law.

**Commercial Sexual Exploitation of Children**

Sexual exploitation of children for the purpose of economic gain.

**Consultation**

Consultation involves a process of contacting and liaising with stakeholders and the community in order to obtain their views on an issue or a particular area of the law in question or under review.

**Corroboration**

A requirement of law for a witness' evidence to be supported by another witness. This is often required for the prosecution of sexual offences.

**Customary Law**

Rules of customary law prevailing in an area in Solomon Islands.

**Customary marriage**

Marriage performed or recognised under the rules of custom.

**Defence**

An excuse that means a person is not liable for a criminal offence.

**Dependency**

In this paper the term 'dependency' refers to a relationship where one person is dependent on another because of age, injury or physical or mental disability.

**Domestic Violence**

Domestic violence occurs within the family environment or social setting. It is violence to members of the family including children, wife or grandparents by the perpetrator but often it is directed against the wife.

**Felony**

A very serious crime or offence

**Griffith Code**

A model of criminal law developed by Sir Samuel Griffiths for the State of Queensland, Australia and adapted for use in other jurisdictions including Solomon Islands.

**Idiot**

A person with very low mental capacity and a high degree of intellectual disability where the mental age is two years or less, and the person cannot guard himself or herself against common physical dangers.

**Imbecile**

A person with abnormally low intelligence. It indicates intellectual disability less extreme than idiocy and not necessarily inherited.

**International Convention**

An international legal agreement. A state is bound by the terms of a convention if it ratifies the convention.

**International Instrument**

An international treaty or convention.

**Jurisdiction**

This term is used in two ways. It means the power of a court and also a state or country as an entity with legal boundaries.

**Legislation**

Written law made by parliament.

**Liability**

A person's responsibility under the law.

**Misdemeanour**

An offence often considered as less serious to a felony in terms of gravity.

**Objective test**

The objective test refers to the fault element for an offence. It looks at fault from the point of view of a reasonable person. In other words, what a reasonable person would think or do under similar circumstances.

**Offence**

A breach of the criminal law.

**Optional Protocol**

An additional agreement to an international convention or treaty.

**Partial defence**

An excuse or justification, which being partial does not fully excuse a person from their responsibility for an offence or omission. A partial defence only applies to reduce murder to manslaughter.

**Perpetrator**

A person who has committed a criminal offence

**Protectorate**

The Solomon Islands prior to independence was a British protectorate. The term used in the context of the issues paper connotes this period of dependency.

**Ratification**

The legal process whereby a country agrees to be bound to an international treaty.

**Regulation**

Laws and legal instruments passed by the British administration to operate in the Solomon Islands as a protectorate.

**Sanction**

Measures taken against someone who breaches a criminal law. Also called punishment or penalty.

**Sentence**

The penalty that a court imposes on the accused after conviction or being found guilty of an offence.

**Sexual abuse**

All forms of sexual conduct directed towards children.

**Sexual assault**

In this paper the term is to refer to a broad range of sexual offences, including rape. In the term countries it is used for a specific sexual offence.

**Sexual Intercourse**

Penile penetration of the vagina. The emission of seed is not required for the act to be complete.

**Subjective test**

The subjective test is the opposite of the objective test and defines the element of fault from the accused's point of view. That is, whether the accused knew, or foresaw that his or her actions have a particular effect or intent.

**Victim**

A person who is injured or experiences harm, or risk of harm or loss, as a result of a crime

**Terms of Reference**

WHEREAS the Penal Code and the Criminal Procedure Code are in need of reform after many years of operation in Solomon Islands.

NOW THEREFORE in exercise of the powers conferred by section 5(1) of the Law Reform Commission Act, 1994, I OLIVER ZAPO, Minister of Justice and Legal Affairs hereby refer to the Law Reform Commission the following –

To enquire and report to me on –

The Review of the Penal Code and the Criminal Procedure Code;

Reforms necessary to reflect the current needs of the people of Solomon Islands.

Dated at Honiara this 1<sup>st</sup> day of May 1995.

NB: Explanation: The criminal law system in Solomon Islands has now been in operation for many years. Developments in new crimes, their nature and complexity have made it necessary to overhaul criminal law in general to keep it abreast with the modern needs of Solomon Islands.

## **About the Solomon Islands Law Reform Commission**

The Solomon Islands Law Reform Commission (LRC) is a statutory body established under the Law Reform Commission Act 1994. The Commission is headed by the Chairman and four part-time Commissioners who are appointed by the Minister for Justice.

The Chairman of the LRC is Frank Ofagioro Kabui C.S.I., C.M.G., O.B.E.

The part-time members of the LRC are:

- Mr Charles Levo;
- Mrs Sarah Dyer;
- Mr Leonard Maenu'u O.B.E.;
- Rt. Rev. Philemon Riti O.B.E.

The LRC's role is to review the existing laws of the Solomon Islands to simplify the law, eliminate problems in the law, identify more effective laws, and ensure that laws are fair and reflect the needs of the people of Solomon Islands. The LRC makes recommendations for reform of the law, and it is the role of Parliament to implement some or all of those recommendations and make changes to the law.

The vision of the LRC is law reform for peace, good governance and sustainable development.

The mission of the LRC is to engage with Solomon Islanders in the renewal of the law to endure that it is relevant, responsive, effective, equally accessible to all, and just.

The LRC receives references from the Minister of Justice directing the LRC to review specific areas of law. The LRC can gather information about reform of the law from a broad range of resources, including information from other countries. The research staff at the LRC undertake research, consider legal developments in other countries, and consult with special interest groups and members of the community about the references. The LRC also calls for submissions from interest groups and members of the public to assist with its research and consultations. Recommendations for changes to the law are made by the Chairman and the Commissioners on the basis of the research, submissions received by the LRC and the outcomes of consultations. Recommendations made by the LRC do not affect the law until they are implemented by Parliament passing legislation.

When it carries out reviews of the law the LRC has the power to consult with Government departments, institutions, civil society organisations, Churches and any member of the public. The LRC can also give advice

and information to any Government department and any other Government institution developing legal policy or proposed changes to the law.

The LRC also has a role in educating the community about legal issues so that members of the community, who might not otherwise have a voice in the development of Government policy and law reform, can participate in an informed manner.

### *Advisory Committee*

The LRC has established an advisory committee to assist with the review of the Penal Code and the Criminal Procedure Code. The role of this committee is to assist the LRC to identify issues, problems and defects, provide advice and comments on draft issues and discussion papers, identify sources of information, advice or assistance and to provide advice on consultation.

The members of the Advisory Committee are:

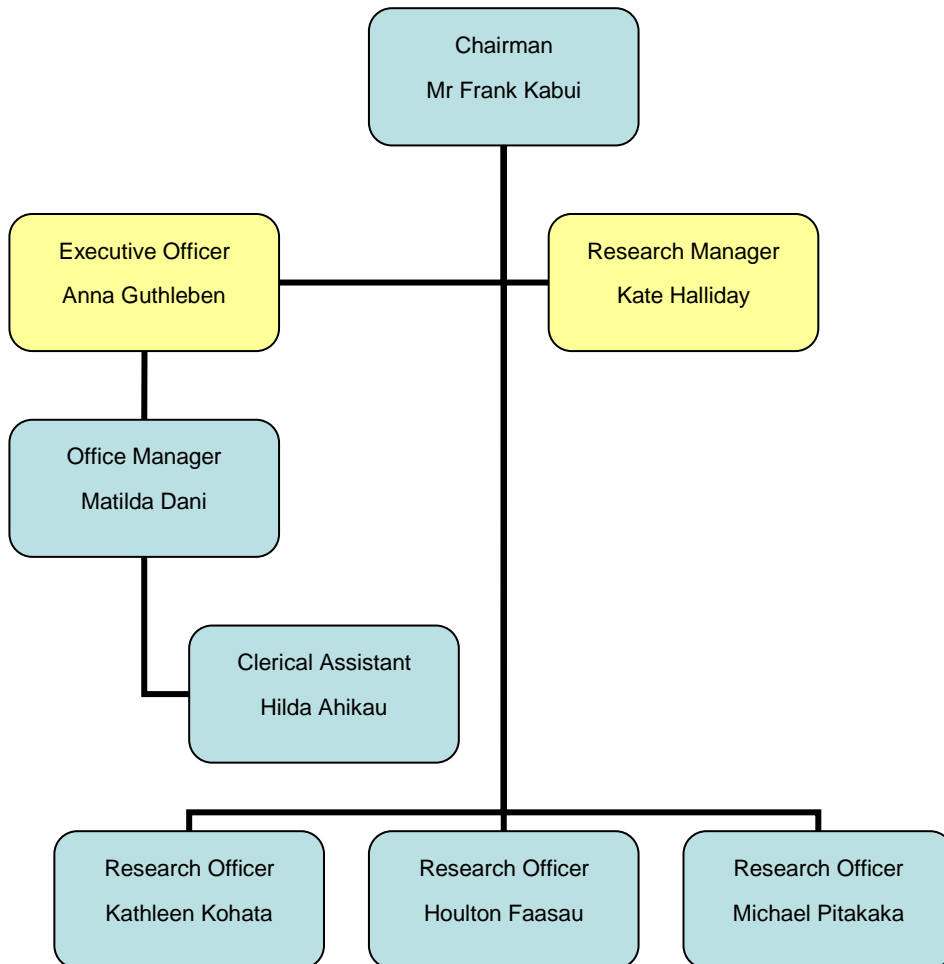
- Hon Justice F Mwanasalua – High Court of Solomon Islands;
- Leonard Maena – Chief Magistrate;
- Ronald Bei Talasasa – Director of Public Prosecutions;
- Peter Marshall – Acting Police Commissioner;
- Douglas Hou – Acting Public Solicitor;
- Lionel Aingimea – School of Law, University of South Pacific;
- Dr Miranda Forsyth – School of Law, University of South Pacific.

Thanks also to Principal Magistrate Emma Garo, Rachel Olutimayin, Gabby Brown and Peter May for their comments and suggestions.



*Staff of Law Reform Commission*

The Law Reform Commission office is headed up by Chairman Frank Kabui. The Executive Officer is Anna Guthleben and the Research Manager/Principal Legal Officer is Kate Halliday. The administration team consists of Matilda Dani and Hilda Ahikau. The legal research team consists of Kathleen Kohata, Michael Pitakaka and Houlton Faasau. Thanks also to Alison Riley who assisted with the preparation of this Paper.



## 1 Introduction

- 1.1 The purpose of criminal law is to identify and punish people who have committed offences. The Penal Code and Criminal Procedure Code are central to the criminal law in Solomon Islands. The State, or Government, through institutions such as Parliament, police, courts and correctional services, is responsible for making and administering criminal laws that apply to everyone throughout Solomon Islands.
- 1.2 The Penal Code contains rules for criminal responsibility as well as many of the criminal offences that apply throughout Solomon Islands. The Penal Code also contains rules regarding sentencing of people found guilty of offences. The Criminal Procedure Code contains police powers for arrest and the investigation of offences, and the rules for courts in handling criminal charges.
- 1.3 The Penal Code and Criminal Procedure Code were enacted in the early 1960's, prior to Independence. The concepts and laws contained in the Penal Code were developed in the UK over many years. While there was some adaptation for Solomon Islands generally speaking they were introduced concepts. The Solomon Islands Penal Code was also influenced by the Griffith code of criminal law developed for Queensland, Australia, the Indian Penal Code, English statute law and common law in force at the time of its development.

### *Need for reform*

- 1.4 Since the Penal Code and Criminal Procedure Code were introduced many political, social and legal changes have occurred. Solomon Islands has achieved independence and adopted a Constitution that contains significant fundamental rights and freedoms that are relevant to criminal law. As an independent state Solomon Islands has ratified a number of international treaties that are also relevant to criminal law. Outside of Solomon Islands the common law and statute law that formed the basis for the two Codes has changed significantly.
- 1.5 Both Codes need to be assessed to see whether they are consistent with the Constitution and international obligations of Solomon Islands. They also need to be assessed to see whether

they are operating effectively and fairly, and meeting the current needs of the people of Solomon Islands.

- 1.6 The existing Penal Code is lengthy and uses phrases and words that may not be commonly understood or used. Some provisions are very detailed; while some issues, such as commercial sexual exploitation of children, are not adequately addressed by the Penal Code.

*How the LRC is approaching this review*

- 1.7 The review of the Penal Code and Criminal Procedure Code has been broken down into different stages. The first stage is the preparation and release of papers on aspects of the two Codes. This first Issues Paper looks at most of the provisions in the Penal Code, except for those on sentencing. Further papers will be produced on sentencing and the Criminal Procedure Code.
- 1.8 The next stage of the review is consultation, and more detailed research and analysis of particular areas of law. This stage will focus on the most contentious or difficult areas.
- 1.9 In the last stage the LRC will present its recommendations for reform of the Penal Code and Criminal Procedure Code to the Government.
- 1.10 The aim of this issues paper is to present information about the Penal Code and to stimulate public debate and submissions about possible reform. It is written for a broad audience and attempts to provide information for people who are not lawyers who have an interest in reform of criminal law.
- 1.11 The review of the Penal Code is an opportunity to look at all aspects of the Code including its structure, the rules regarding criminal responsibility, substantive offences, rules for sentencing, and the maximum penalties for offences. The major offences contained in the Penal Code and their penalties are set out in Appendix 2.
- 1.12 The Ministry of Justice and Legal Affairs is currently working on an Evidence Bill to change the law about evidence in Solomon Islands. The Bill contains provisions that are important for the prosecution of sexual offences, such as abolishing the general rule that requires corroboration or warnings for the evidence of victims of sexual assault and limiting questions that can be asked of victims in court about prior sexual conduct. The proposed changes are consistent with

the obligations of Solomon Islands under the Convention on the Elimination of all Form of Discrimination Against Women and the Convention on the Rights of the Child.

### *Consultation and submissions*

- 1.13 The LRC wants to consult widely during the review. Consultations will be held with specific interest groups, civil society organisations, government ministries and provincial governments. In addition the LRC will hold public meetings and forums in Honiara and the Provinces. The consultation process will take into account the need to inform Solomon Islanders about the existing law and the LRC will undertake a number of public awareness activities to assist people to understand the legal system and criminal law.
- 1.14 The LRC will hold workshops and consultations on the Penal Code throughout Solomon Islands. These will be advertised. Comments and suggestions made at these consultations will be recorded by the LRC staff. In addition anyone can make a submission about changes to the Penal Code. A submission does not have to be in any particular format, and it can address some or all of the issues identified in this paper, or raise issues that have not been identified in this paper. If you make a submission it may be used in future LRC publications, and your name will be listed in future LRC reports. If you do not want your submission, or identity to be used in future publications please let us know.
- 1.15 **The closing date for submissions is 31 August 2009.**
- 1.16 Submissions will be taken into account when the LRC is developing its final recommendations for reform of the Penal Code. The LRC will also take into account research on effective reforms of the criminal law from other countries, and the Constitutional and international law obligations of Solomon Islands. The final recommendations of the LRC will be published in a report that is presented to the Minister for Justice and Legal Affairs.

### *Outline of this issues paper*

- 1.17 This Issues Paper will not consider every single offence contained in the Penal Code. Due to time and resource constraints it will address the areas that are most likely to need reform, and likely to be of interest to the community. There are

a number of offences that are probably redundant or no longer needed and the review will make recommendations about offences or provisions that should simply be repealed.

- 1.18 The next Chapter of this Paper will give information about the framework for review of the Penal Code. This includes Constitutional, human rights and customary law considerations that the LRC needs take into account in reviewing the Penal Code. Chapter 3 will consider the structure, interpretation and application of the Penal Code. Chapter 4 will consider the rules for criminal responsibility that are contained in the Penal Code. The rest of the Paper addresses the offences regarding homicide, sexual abuse, personal harm, corruption, dishonesty, administration of justice, public order, marriage and religion and libel.
- 1.19 Issues or questions are raised throughout the Issues Paper about the Penal Code. These questions are intended to stimulate debate and submissions on possible reform of the Penal Code. Submissions or suggestions for changes to the Penal Code can also address issues or questions that the LRC has not identified in this Issues Paper.

## 2 Framework for reform

### *The Law Reform Commission Act*

- 2.1 The LRC must review laws with a view to modernising and simplifying the law, eliminating defects, and adopting new and more effective methods of administration of the law and the dispensation of justice. The LRC can also make recommendations about the restatement, codification, amendment or reform of traditional or customary law.<sup>1</sup>

### *Constitution*

- 2.2 The Constitution was adopted at the time of Independence as the basic and supreme law in Solomon Islands.<sup>2</sup> It sets out fundamental rights and freedoms for all people and the relationship between customary law and other types of laws, including written law such as the Penal Code. The Preamble to the Constitution pledges that the different cultural traditions within Solomon Islands should be cherished and promoted. The Constitution says that customary law should have effect as part of the law of Solomon Islands, as long as it is consistent with the Constitution or a written law.<sup>3</sup>
- 2.3 Laws, including written laws such as the Penal Code must be consistent with the Constitution otherwise they are void and can have no effect.<sup>4</sup> Every person regardless of their race, place of origin, political opinions, colour, creed or sex is entitled to be protected by fundamental rights and freedoms. They include:
- right to life;
  - right to personal liberty;
  - protection from slavery and forced labour;
  - protection from torture and inhumane or degrading punishment or treatment;
  - protection for privacy of the home and other property;
  - freedom of conscience and expression;
  - freedom of assembly and association;

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<sup>1</sup> Law Reform Commission Act (Cap 15) s 5.

<sup>2</sup> Independence was obtained from Britain on the 7<sup>th</sup> of July, 1978.

<sup>3</sup> Constitution s 76 and Schedule 3 para 3(1).

<sup>4</sup> Constitution s 2.

- right to a fair hearing within a reasonable time by an independent and impartial court if charged with a criminal offence;
  - freedom of movement; and
  - protection from discrimination on grounds of race, place of origin, political opinions, colour, creed or sex.<sup>5</sup>
- 2.4 The rights in the Constitution are not absolute and they can be limited. The Constitution sets out in some detail how rights can be lawfully limited. Generally, rights are limited by the need to respect the rights and freedoms of others, and the public interest.<sup>6</sup>

### *Customary law*

- 2.5 Customary law plays an important role in the Solomon Islands legal system. The Constitution also says that customary law has effect as part of the law of Solomon Islands, as long as it is consistent with the Constitution or an Act of Parliament.<sup>7</sup> This includes the Penal Code and Criminal Procedure Code. The Constitution also gives Parliament the power to make laws that provide for the proof and pleading of customary law, the way or purposes for which customary law may be recognized and the resolution of conflicts of customary law.<sup>8</sup>
- 2.6 The Penal Code does not specifically refer to customary law and values. However the courts of Solomon Islands have recognised customary law and values in deciding cases under the Penal Code. Customary law and values can be taken into account when a court is assessing whether a person should be held criminally responsible for their action. Customary law and values are also taken into account when a court is deciding what sentence to impose when a person has been convicted of an offence. For example, the fact that there has been a customary reconciliation and compensation is taken into account by a court in deciding what sentence to impose on the offender.
- 2.7 The review of the Penal Code will be an opportunity to consider how customary law and values might be incorporated into the

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<sup>5</sup> Constitution Chapter II.

<sup>6</sup> Constitution s 3.

<sup>7</sup> Constitution s 76, Schedule 3, 3 (1).

<sup>8</sup> Constitution s 76, Schedule 3, 3 (3).

Penal Code. For example, in Chapter 8 that deals with corruption the issue is raised whether corruption offences should apply to people who are nominated as caretakers or representatives of custom landholders. There is also the possibility for customary law and values to contribute to the concept of property that might apply in connection with stealing and criminal damage offences. The existing offences in the Penal Code are based on English law that does not accommodate traditional forms of control or 'ownership' of land, and the resources associated with land. One example where this may be relevant is where resources (such as trees, gardens, or reefs) are intentionally damaged by a corporation seeking to exploit resources (trees, minerals) without lawful approval.

- 2.8 There is also the potential for conflict between customary law and the Constitution and other laws, as well as between customary law and human rights. In some cases this conflict can be harmonised, but in other cases this may not be possible. One major challenge lies in the difference between customary law and legislation. Customs differ from region, even from village to village, while legislation, such as the Penal Code, applies throughout Solomon Islands. Customary law is designed to facilitate negotiation and settlement of disputes in a social context where kin relationships are dominant. This means that customary law can be resilient and adaptable, however in some circumstances it is used to justify discrimination against women and others without power, and to support the interests of the most powerful members of society.
- 2.9 Colonisation and other changes such as the introduction of a cash economy have profoundly changed the nature of customary law. It is not always possible to claim that customary law known today is the same as customary law prior to colonisation. When customary law or rules are applied by courts they can be fundamentally changed.<sup>9</sup> Customary law can often be used by those in positions of power (mainly men) to

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<sup>9</sup> Zorn J, Corrin Care J, 'Pleading and Proof of Custom in the South Pacific', July (2002), Vol 51, *ICQL*, 611.



buttress or maintain their power and control over resources and decision making, and as a result can be open to criticism.<sup>10</sup>

- 2.10 Some Solomon Islanders continue to uphold many traditional values regarding discipline of both adults and children. According to custom, it is acceptable and sometimes necessary to discipline a person or a child in what may at times be viewed as a harsh manner by today's standards. These values and practices can be in conflict with rights contained in the Constitution, as well as international human rights standards. Violence against women and children is a significant problem in Solomon Islands and is often justified by customary attitudes to discipline and reproach, and beliefs about the superior status of men. Public punishment, though not encouraged, is not uncommon and depending on the circumstances can be inconsistent with the right to be free from torture and inhuman punishment.
- 2.11 The conflict between customary law and values and Constitutional rights and freedoms has arisen in some court cases under the Penal Code.
- 2.12 In one case the High Court had to decide whether corporal punishment of two children by a school teacher was inconsistent with the right not to be subjected to torture or to inhuman or degrading punishment or other treatment.<sup>11</sup> The Court decided that corporal punishment was not necessarily inconsistent with this right, and that it would depend on the circumstances and whether the punishment was degrading. In this case the fact that the punishment was given in public meant that it was unlawful.
- 2.13 In another case the Court of Appeal had to determine whether a duty to kill under Kwaio custom could reduce the responsibility of the accused so he could be convicted of manslaughter rather than murder.<sup>12</sup> The Court decided that such a duty under customary law conflicted with the right to life contained in the Constitution, so it could not reduce the responsibility of the accused. The Constitution sets out clearly the circumstances

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<sup>10</sup> K Brown, *Reconciling Customary Law and Received Law in Melanesia, the Post-Independence Experience in Solomon Islands and Vanuatu*, Charles Darwin University Press, 2005.

<sup>11</sup> *R v Rose* [1987] SILR 45.

<sup>12</sup> *Loumia v Director of Public Prosecutions* [1985-1986] SILR 158.

where a person can be deprived of their life. Those circumstances do not include situations where a person has a customary duty to kill.<sup>13</sup>

- 2.14 Parliament has made a law called the Customs Recognition Act 2000 that sets out how customary law should be used by the courts. However, this law has not commenced and is not in force. A principle underlying the legislation is that customary law must be proved as a fact similar to any other fact or foreign law.<sup>14</sup>
- 2.15 Under the Customs Recognition Act custom can be taken into account in criminal proceedings to ascertain the state of mind of a person, whether an act or omission was reasonable, to decide the reasonableness of an excuse and whether to convict someone of an offence. Custom can also be taken into account to avoid any injustice to a person.<sup>15</sup>
- 2.16 The Customs Recognition Act was modelled on the Customs Recognition Act of PNG. However in PNG that legislation has been replaced by the Underlying Law Act 2000 which takes a different approach. Under this new law customary law, along with common law, form the underlying law of PNG unless it is inconsistent with written law, or the Constitution. The existence or content of customary law is a question of law, and not a question of fact, and lawyers must call evidence and obtain information and opinions about customary law relevant to cases being heard by a court. The court can also inform itself about customary law that might apply to the case.

### *International human rights*

- 2.17 Solomon Islands has agreed to be bound by a number of international human rights treaties. They are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>16</sup> the Convention on the Rights of the Child (CRC),<sup>17</sup> the International Convention on the Elimination of all

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<sup>13</sup> Constitution s 4.

<sup>14</sup> Customs Recognition Act (2000) s 3.

<sup>15</sup> Customs Recognition Act (2000) s 7.

<sup>16</sup> Ratified 6 May 2002.

<sup>17</sup> Ratified 10 April 1995.

Forms of Racial Discrimination (ICERD)<sup>18</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>19</sup> Under international law Solomon Islands is obliged to respect, protect and fulfill the rights contained in those treaties.

- 2.18 Solomon Islands has also agreed to be bound by a number of other international treaties that are relevant to the Penal Code. They include the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications,<sup>20</sup> the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery<sup>21</sup> and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.<sup>22</sup>
- 2.19 Most of these conventions require Solomon Islands to take specific action, including the adoption of legislation, to implement the obligations contained in each convention.
- 2.20 Under the terms of CEDAW, Solomon Islands is required to adopt legislative and other measures to prohibit discrimination against women, establish legal protection of the rights of women on an equal basis with men , and ensure the effective protection of women against any act of discrimination. Violence is a form of discrimination, therefore the Penal Code and Criminal Procedure Code must have effective offences and procedures to deter and punish violence against women. In addition under CEDAW a State cannot invoke custom, tradition or religious practices to avoid the obligation to eliminate violence against women.<sup>23</sup>
- 2.21 The CRC requires States to take appropriate legislative measures to protect children from all forms of physical or mental violence, injury, abuse or negligent treatment, maltreatment or exploitation including sexual abuse while in the care of parents or others who are caring for children.<sup>24</sup> They must also protect children from all forms of sexual exploitation

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<sup>18</sup> Accession 17 March 1982. Accession also means that the state consents to be bound by the treaty.

<sup>19</sup> Accession 17 March 1982.

<sup>20</sup> Accession 3 May 1981.

<sup>21</sup> Succession 3 September 1981.

<sup>22</sup> Ratified 13 April 1982.

<sup>23</sup> Article 2.

<sup>24</sup> Article 19.

and sexual abuse.<sup>25</sup> States must also ensure that children are not subjected to torture or other cruel, inhuman or degrading treatment or punishment.<sup>26</sup>

2.22 Solomon Islands must also report regularly on implementation of the CRC to the Committee on the Rights of the Child. The first report was made by Solomon Islands in 2003 and the comments made by the Committee in response to that report provide guidance on how Solomon Islands could address its obligations under the CRC. They include:

- raising the minimum age of criminal responsibility for children (currently set at 8 years of age in the Penal Code);
- prohibition of all forms of physical and mental violence, including corporal punishment, against children in the family, school and other contexts;
- taking action to address child sexual abuse, including effective systems for prosecuting cases in a child sensitive manner;
- action to prevent child prostitution, and other forms of sexual exploitation of children, while avoiding criminalising child victims of prostitution.<sup>27</sup>

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<sup>25</sup> Article 34.

<sup>26</sup> Article 37.

<sup>27</sup> Committee on the Rights of the Child *CRC/C/15/Add.208 6 June 2003* extracted in *Advancing the Implementation of Human Rights in the Pacific, Compilation of Recommendations of the UN Human Rights Treaty Bodies to the Countries of the Pacific*, (2007) 260.

### **3 Structure, Interpretation and Application of Penal Code**

- 3.1 It was intended that the Penal Code would codify the criminal law as it applied at the time in the then British Solomon Islands Protectorate. This consisted mainly of the criminal law of England as at the 1<sup>st</sup> January 1961 together with some other laws specific to the Protectorate.<sup>28</sup>
- 3.2 The structure of the Penal Code is similar to the Codes of Queensland, PNG, Nauru, Tuvalu, Fiji and Kiribati. The first parts of the Penal Code contain rules for interpretation, criminal responsibility and the territorial application of the Penal Code. They are followed by separate parts for different categories of offences. For example, the Penal Code contains parts that deal with Offences Against Public Order, Corruption and Abuse of Office, Offences Against Morality, Murder and Manslaughter and Larceny, Embezzlement and Conversion. There are over 380 provisions in the Code, contained in 41 different parts.
- 3.3 The Penal Code classifies offences as felonies or misdemeanors which was an aspect of English common law. The designation of an offence as either felony or misdemeanour is meant to indicate its seriousness and the procedures that apply to the offence. Felonies are serious crimes, while misdemeanors are less serious.
- 3.4 In most cases the Penal Code specifies the maximum punishment for each felony and a felony is punishable with imprisonment for three years or more.<sup>29</sup> Misdemeanors unless otherwise specified carry a maximum penalty of two years.<sup>30</sup> However, there are a number of misdemeanors that attract penalties significantly higher than three years imprisonment.
- 3.5 The category of felony is relevant to a number of provisions in the Criminal Procedure Code. For example, the powers of arrest contained in the Criminal Procedure Code are formulated by reference to 'cognisable offences' (defined as a felony and other offences that specifically give a police officer the power to

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<sup>28</sup> Official Report, *British Solomon Islands Protectorate Legislative Council Debates*, Third Session, First Meeting 7-9 February (1963).

<sup>29</sup> Penal Code s 4.

<sup>30</sup> Penal Code s 41.

arrest without a warrant).<sup>31</sup> As part of the review of both the Penal Code and Criminal Procedure Code, the LRC will consider these provisions, and whether the powers of arrest can be formulated in some other way.

- 3.6 In some jurisdictions categories of offences are relevant to identify which offences can be determined by lower courts (such as magistrates' courts), and which offences must be determined by a higher court. However in Solomon Islands the Magistrates' Court Act<sup>32</sup> sets out the jurisdiction of Principal Magistrates and other Magistrates to finally determine criminal charges. It does this by reference to the maximum penalty for the offence, rather than by the category of the offence. For example, a Principal Magistrate may determine an offence where the maximum penalty does not exceed 14 years imprisonment.<sup>33</sup>
- 3.7 Some offences contained in the Penal Code require the consent of the Director of Public Prosecutions before a prosecution for the offence can be instigated. These offences are set out in Appendix 1. The policy reasons for the requirement, and when it should apply to an offence, are not clear. In some cases the requirement for consent might lead to delays in a prosecution.

1. **Do the categories of felony and misdemeanor perform any useful function?**
2. **Should the distinction between felony and misdemeanor be retained?**
3. **Should every offence in the Penal Code have a specified maximum penalty?**
4. **What offences (if any) should require the consent of the Director of Public Prosecutions before a prosecution for the offence can be commenced?**

<sup>31</sup> Criminal Procedure Code ss 2, 18, 21, 51.

<sup>32</sup> (Cap 20)

<sup>33</sup> Magistrates' Court Act (Cap 20) s 27.

*Interpretation*

- 3.8 The Penal Code must be interpreted in accordance with rules of interpretation that apply in England as well as the Interpretation and General Provisions Act of Solomon Islands.<sup>34</sup>
- 3.9 Generally the courts have treated the Penal Code as a comprehensive statement of the law on the matters that it covers. However, in some cases courts have accepted the operation of common law rules, where the Penal Code contains no corresponding provisions.<sup>35</sup> As a result there may be some uncertainty as to whether fault elements derived from common law offences apply to offences contained in the Penal Code. For example, section 136 dealing with the definition of rape says “Any person who has unlawful sexual intercourse...” which gives rise to some uncertainty about whether knowledge by an accused person regarding the lack of consent by the victim is an element of rape.

5. **Should the Penal Code retain the requirement that it be interpreted in accordance with English criminal law?**
6. **Should the Penal Code exclusively set out the law, including offences and rules for criminal responsibility, on the matters that it covers?**

*Application*

- 3.10 Traditionally the criminal law of a state only applied to offences committed within the borders of the state. However developments in international law and other jurisdictions have indicated a trend for states to extend their jurisdiction for criminal offences outside of their borders.
- 3.11 The Penal Code states that it applies throughout all of Solomon Islands.<sup>36</sup> It also applies where an act that is an offence under the Penal Code is done partly in, and partly outside, Solomon Islands.<sup>37</sup> However the provisions in the Penal Code do not address the situation where all of the acts or omissions that make up an offence occur outside of Solomon Islands, and there

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<sup>34</sup> Penal Code s 3.

<sup>35</sup> *Luavex v Regina* [2007] SBCA 13 [www.paclii.org](http://www.paclii.org).

<sup>36</sup> Penal Code s 5.

<sup>37</sup> Penal Code s 6.

are results or consequences that occur within Solomon Islands. For example, the actions that make up a fraud offence may take place outside of Solomon Islands but have an effect on property, or the rights of people who are in Solomon Islands.

- 3.12 International treaties can require a state to extend its jurisdiction outside of its borders for particular offences. Solomon Islands has ratified the Convention for the Suppression of Unlawful Acts Against The Safety of Civil Aviation which requires states to extend jurisdiction for offences that occur outside of the Solomon Islands in relation to dangerous acts on aircraft.
- 3.13 Since the introduction of the Penal Code in Solomon Islands the common law has developed more flexible and expansive tests regarding jurisdiction for offences that occur within, or have a connection with, more than one jurisdiction. Jurisdiction for offences that occurred outside of a state has been asserted on the basis that the conduct affects the 'peace, welfare or good government of a State', and where there is a 'real and substantial link' between the offence and the jurisdiction.<sup>38</sup>
- 3.14 Some states have expanded jurisdiction over offences that occur outside of their borders through legislation. For example the Australian Criminal Code specifically extends jurisdiction for certain types of offences committed anywhere in world by Australian citizens or bodies corporate.<sup>39</sup>
- 3.15 The Criminal Codes of Queensland and PNG extend the application of criminal law where actions that make up an offence occur outside of the State, but events caused by those actions occur within the State.<sup>40</sup>

<p><b>7. How should the Penal Code apply to offences that occur wholly or partly outside of Solomon Islands? Should it apply where the offence has an impact in Solomon Islands, or where there is a link between the offence and Solomon Islands?</b></p>
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<sup>38</sup> S Bronitt and B McSherry *Principles of Criminal Law* (2<sup>nd</sup> ed, 2005) 88-89.

<sup>39</sup> Criminal Code (Aust) ss 15.1, 15.4.

<sup>40</sup> Criminal Code Act (Qld) s 12, Criminal Code (PNG) s 12.



## 4 Criminal Responsibility

- 4.1 One of the underlying principles of criminal law is that a person should not be punished for a wrongdoing unless she or he is “blameworthy” or “morally responsible” for her or his action. The rules that are used to decide whether a person should be excused, or punished for their action are called the rules of criminal responsibility.
- 4.2 The Penal Code contains a number of general rules for criminal responsibility that apply to all of the offences in the Penal Code. Similar rules are found in other Griffith codes such as the Queensland Criminal Code and the Criminal Code of Papua New Guinea.
- 4.3 In addition many of the offence descriptions in the Penal Code include specific, subjective, fault elements. For example, the specified fault element for the offence of murder is ‘malice aforethought’. This means that to be responsible for murder the accused must have intended to cause death or grievous bodily harm, or known that death or grievous bodily harm would probably have been caused by their action or omission.

### *General rules for criminal responsibility*

- 4.4 Under the Penal Code a person is not criminally responsible for an event that occurs independently of their will, or occurs by accident.<sup>41</sup> Examples of where an act might not occur independently of a person’s will include a spasm or convulsion, or acts committed during sleep or while unconscious.
- 4.5 The Penal Code holds a person responsible for the results of their action, even though he or she did not intend to bring about those results of their action. This general rule does not apply for offences where intention to cause a particular result is specified as an element of the offence.<sup>42</sup> The motive of a person in doing an act, or failing to do an act, is immaterial as far as criminal responsibility.<sup>43</sup>
- 4.6 Ignorance of the law is not an excuse under the Penal Code unless the offence expressly states that knowledge of the law is

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<sup>41</sup> Penal Code s 9.

<sup>42</sup> Penal Code s 9.

<sup>43</sup> Penal Code s 9.

an element of the offence.<sup>44</sup> Under the common law it is presumed that everyone subject to the law, knows the law, and therefore any violation of the law is done with the knowledge of its unlawfulness.

- 4.7 In South Africa the courts now recognise a defence based on mistake about, or ignorance of the law.<sup>45</sup> The mistake about the law need not be reasonable, but the accused must have had an honest belief that their action was not against the law. The accused must raise evidence to support a defence about mistake of the law and the prosecution must negative the defence of mistake beyond reasonable doubt. It is not necessary to show that the accused knew he or she was committing a specific offence, it is enough to show that the accused was aware he or she did something unlawful.

<p><b>8. Should the Penal Code have a defence based on mistake of the law? Should the mistake be reasonable?</b></p>
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- 4.8 A person can be excused from criminal responsibility if he or she is mistaken about circumstances, or the existence of things. The mistake must be based on a reasonable belief about the existence of those things or circumstances.<sup>46</sup>
- 4.9 A person can be excused from criminal responsibility for a property offence if they honestly believed they had a legitimate claim to the property, and did not intend to permanently deprive the owner of their property.<sup>47</sup>

*Children, people with mental impairment or affected by alcohol or drugs*

- 4.10 The Penal Code contains specific rules of criminal responsibility for children, people who are mentally impaired and people who are affected by alcohol or other drugs.
- 4.11 Children under the age of 8 years are completely excused from criminal responsibility and cannot be found guilty of an offence.<sup>48</sup> A child between the age of 8 and 12 is also excused

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<sup>44</sup> Penal Code s 7.

<sup>45</sup> K Amirthallam 'Mens Rea and Mistake of Law in Criminal Cases: A Lesson from South Africa' (1995) Vol 18(2) *UNSW Law Journal*, 428, which discusses the decision in the case of *S v De Blom* 1977 (3) SA 513.

<sup>46</sup> Penal Code s 10.

<sup>47</sup> Penal Code s 8.

<sup>48</sup> Penal Code s14.

from criminal responsibility unless it is proved that the child had the capacity to know that he or she should have not carried out the offence.<sup>49</sup>

- 4.12 The United Nations Committee on the Rights of the Child has recommended that the minimum age for criminal responsibility in Solomon Islands should be raised to an internationally accepted standard.<sup>50</sup> The Committee has indicated that 12 years of age is an internationally acceptable minimum age of criminal responsibility. The Committee also recommended that the use of two minimum ages (such as the one currently in the Penal Code) is confusing, may lead to discriminatory practices and can lead to the lower age being used for very serious crimes such as murder.<sup>51</sup>
- 4.13 The Australian Law Reform Commission considered this issue in its 1997 report on children in the legal process. It recommended that the minimum age for criminal responsibility in all Australian jurisdictions should be 10 years, and that children up to the age of 14 years should be excused from criminal responsibility unless it is proved that he or she knew that the criminal act was wrong at the time it was committed.<sup>52</sup> The Commission argued that this approach recognises that children develop their moral and intellectual understandings of right and wrong at different ages.<sup>53</sup>

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| <p>9.</p> <p>10.</p> | <p><b>At what age should children be held responsible for criminal offences?</b></p> <p><b>Should the Penal Code retain two ages of criminal responsibility, as recommended by the Australia Law</b></p> |
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<sup>49</sup> Penal Code s 14.

<sup>50</sup> Committee on the Rights of the Child, *CRC/C/15/Add.208* 6 June 2003 extracted in *Advancing the Implementation of Human Rights in the Pacific, Compilation of Recommendations of the UN Human Rights Treaty Bodies to the Countries of the Pacific*, (2007) 260.

<sup>51</sup> Committee on the Rights of the Child, General Comment No 10 (2007) *Children's rights in Juvenile Justice* CRC/C/GC/10.

<sup>52</sup> Australian Law Reform Commission, Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process*, Report No 84, Commonwealth of Australia (1997) 470.

<sup>53</sup> Australian Law Reform Commission, Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process*, Report No 84, Commonwealth of Australia (1997).

<b>Reform Commission, or have one age, as recommended by the Committee on the Rights of the Child?</b>
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- 4.14 It is presumed that every person accused of an offence is 'of sound mind'. A person is excused from criminal responsibility for their action if he or she was incapable of understanding what they were doing, or knowing that what they were doing was wrong, because he or she was suffering from mental illness at the time of the offence. Wrong in this context means morally wrong, according to the every day standards of reasonable people.<sup>54</sup>
- 4.15 However where a person is not criminally responsible for an offence because of mental illness the court must find that the person was not guilty but insane.<sup>55</sup> The person must then be detained in prison, a mental hospital, or other safe place of custody until the Governor-General orders that he or she can be released. This process will be addressed in more detail when the LRC considers the procedures contained in the Criminal Procedure Code regarding people with a mental illness who are charged with an offence.
- 4.16 Intoxication, or being affected by alcohol or other drugs, can excuse a person from criminal responsibility in some specified circumstances. This defence is only available where the accused person was so intoxicated they did not understand that what they did was wrong, and their intoxication was caused by another person without his or her consent, or the accused was temporarily insane because of the intoxication.<sup>56</sup>
- 4.17 Intoxication can also be taken into account by a court to decide whether the actions of the accused occurred by accident, or whether the accused had formed the specific intention required for the offence.<sup>57</sup> For example, in the case where an accused stabs the victim the court can take the intoxication of the accused into account in deciding whether or not the physical action of the accused was voluntary, or occurred by accident.

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<sup>54</sup> *R v Ephrem Suraihou* [1993] SBHC 8 [www.pacii.org](http://www.pacii.org).

<sup>55</sup> Criminal Procedure Code s 146.

<sup>56</sup> Penal Code s 13(2).

<sup>57</sup> *R v Kauwai* [1980] SBHC 1 [1980-1981] SILR 108 [www.pacii.org](http://www.pacii.org).

- 4.18 By comparison under the Queensland Criminal Code self induced intoxication cannot be used to argue that an event occurred by accident.<sup>58</sup>

### *Compulsion*

- 4.19 A person can be excused from criminal responsibility under the Penal Code if he or she carried out the offence because of threats of death or grievous harm made by a co-offender.<sup>59</sup> In Solomon Islands this excuse operates quite broadly and is available to all offences, including murder, manslaughter, treason and piracy.<sup>60</sup>
- 4.20 Under the common law, and some criminal codes, the excuse of duress operates on a more restricted basis. It is not available for the offences of murder and attempted murder, or piracy<sup>61</sup> or where the accused has joined in a conspiracy or association formed to carry out unlawful activities and the offence is committed following a threat from another member of that association.<sup>62</sup> In some cases, for example under the Queensland Criminal Code, the excuse is also only available where the actions of the accused are reasonable necessary to resist threats of unlawful violence.<sup>63</sup>
- 4.21 A recent report by the UK Law Commission recommended that a limited form of compulsion (called duress in the report) be available for the offence of murder. The defence would not be available where the accused unjustifiably exposed him or herself to the risk of being threatened.<sup>64</sup>

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<sup>58</sup> Criminal Code Act (Qld) s 28.

<sup>59</sup> Penal Code s 16.

<sup>60</sup> *Kelly v Regina* [2006] SBCA 17; CA-CRAC 019 of 2006 (Unreported, Lord Slynn of Hadley, McPherson JA, Morris JA, 25 October 2006), *Kejoa v R* [2006] SBCA 6; CA-CRAC 028 and 031 of 2005 (Unreported, Lord Slynn of Hadley, Williams JA, Ward JA, 31 May 2006).

<sup>61</sup> *R v Howe* [1987] AC 417, Criminal Code (NT) s 40, Criminal Code (Qld) s 31, Criminal Code (Tas) s 20, Criminal Code (WA) s 31 and Criminal Code (PNG) s 32.

<sup>62</sup> *R v Hasan* (2005) UKHL 22, Criminal Code (Qld) s 67(1), Criminal Code (PNG) s 32, Criminal Code (NT) s 40(2), Criminal Code (WA) s 32 (3).

<sup>63</sup> Criminal Code (Qld) s 31.

<sup>64</sup> UK Law Commission, *Murder, Manslaughter and Infanticide* (2006)14.

- 4.22 In Solomon Islands a series of recent prosecutions for murders committed during the period of ethnic tension has contributed to some developments of this area of the law.
- 4.23 In one case two men were charged with aiding and abetting the murder at Auki of a member of the UNDP Delegation for the Demobilisation of Special Constables. They were acquitted of murder on the basis that they were compelled by the person who shot the victim to provide assistance, even though there was no evidence of any direct threats made by him to kill them, or cause them grievous harm. The Court relied on the general evidence given by witnesses about the character and reputation of the person.<sup>65</sup>
- 4.24 In the most recent case the Court of Appeal had to consider whether the defence of compulsion was available to a person who participated in an unlawful association or conspiracy to kill someone. The Court decided that the excuse of compulsion was not automatically excluded because the accused were members of the Guadalcanal Liberation Front who were charged with murder.<sup>66</sup> However, the excuse should only be available if there was a direct threat to the accused, the accused carried out the offence solely as a result of the threats, and the accused had no opportunity to stop being a member of the GLF or the taking part in the activities of the GLF.
- 4.25 The Penal Code also contains a separate excuse of compulsion by a spouse, which is not available for murder or treason. There is no need for the spouse to make any threat of death or grievous bodily harm.<sup>67</sup> This defence is derived from a common law presumption that certain offences committed by a married woman in the presence of her husband were committed under his coercion.
- 4.26 In Vanuatu the excuse of compulsion is available where a person commits an offence under the coercion of a parent, spouse, employer or other person who has authority (including moral authority) over the accused.<sup>68</sup>

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<sup>65</sup> *Regina v Oeta* [2004] SBHC 123; HC-CRC 173 of 2003 (Unreported, Palmer CJ, 3 June 2004).

<sup>66</sup> *Kejoa v Regina* [2006] SBCA 6; CA-CRAC 028 & 031 of 2005 (Unreported, Lord Slynn of Hadley, Williams JA, Ward JA, 31 May 2006).

<sup>67</sup> Penal Code s 19.

<sup>68</sup> Penal Code (Van) (Cap 135) s 26.

11. **Should the excuse of compulsion be available for serious offences such as murder, attempted murder and piracy?**
12. **Should the excuse only be available if the threat to kill or cause serious harm is made by a co-offender, or should it be available if the threat is made by anyone?**
13. **Should the excuse of compulsion be available where the accused has joined a conspiracy, or criminal gang or terrorist organisation, or has exposed him or herself to the risk of compulsion?**
14. **Should the excuse of compulsion be amended so it is confined to circumstances where the accused's responses to threats of unlawful harm were reasonably necessary, or reasonably proportionate?**
15. **Should the Penal Code retain an excuse of compulsion by a spouse? Should it be extended to coercion by a parent, employer or other person in authority?**

### *Necessity, emergency*

- 4.27 The Penal Code does not contain any provisions to excuse the commission of an offence on ground that it was necessary to commit the offence in order to avoid a greater danger. This type of excuse is referred to as necessity, duress of circumstances or emergency.
- 4.28 Under the common law necessity as an excuse may be available where a person commits an offence to avoid a greater danger or evil to themselves or others. There is some uncertainty in the common law about whether, and when, offences such as murder, attempted murder or treason might be excused or justified on the basis of necessity.<sup>69</sup>
- 4.29 There is a risk that an excuse based on necessity may encourage people to 'take the law into their own hands' and to use force because of a belief that it was necessary in the circumstances. It is also argued that the availability of necessity for offences such as murder is inconsistent with human rights standards such as the right to life, and equality.<sup>70</sup>

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<sup>69</sup> *Re A (Children)* [2000] HRLR 721.

<sup>70</sup> *Ibid.*

- 4.30 Under the Solomon Islands Constitution no person should be intentionally deprived of their life.<sup>71</sup> This right can only be limited by laws that deal with defence of people from violence, defence of property, arrest, escape from lawful custody, riots, or laws to prevent the commission of an offence.<sup>72</sup> It is therefore unlikely that any law regarding necessity could excuse intentional killing in Solomon Islands.
- 4.31 Despite there being no provision in the Penal Code regarding necessity the Court of Appeal has recently accepted that the common law doctrine of necessity is preserved by the Penal Code, and might be raised as an excuse to a charge of murder.<sup>73</sup> In other code jurisdictions the operation of this type of excuse is framed so it is confined to situations of sudden and extraordinary emergency.<sup>74</sup>
- 4.32 The doctrine of necessity was considered in the UK in relation to whether doctors should be authorised by a court to surgically separate conjoined twins. The elements of the excuse of necessity identified by one of the judges in the case are that the act by the accused was necessary to avoid inevitable and irreparable evil; the accused should not do any more than is reasonably necessary and the evil inflicted must not be disproportionate to the evil avoided.<sup>75</sup>
- 4.33 Under the Queensland Criminal Code a person is excused from criminal responsibility if his or her actions were in the circumstances of a sudden or extraordinary emergency.<sup>76</sup>
- 4.34 A defence of necessity has been recognised by the courts in the Pacific region, but not for the offence of murder. In Samoa the Court decided that necessity is available where there was imminent peril or danger, there was no reasonable legal

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<sup>71</sup> Constitution s 4(1), this section contains an exception for execution of a person following conviction for a criminal offence, if the law provides for capital punishment.

<sup>72</sup> Constitution s 4 (2).

<sup>73</sup> *Luavex v Regina* [2007] SBCA 13; CA-CRAC 31 of 2006 (Unreported, Lord Slynn of Hadley, McPherson JA, Ward JA, 18 October 2007).

<sup>74</sup> Criminal Code (Qld) s 53(1), Criminal Code (Aust) s 10.3.

<sup>75</sup> *Re A (Children)* [2000] HRLR 721, judgment of Brooke LJ.

<sup>76</sup> Criminal Code (Qld) s 25.



alternative available to the accused, and that the harm inflicted by the accused was in proportion to harm avoided.<sup>77</sup>

**16. Should the Penal Code contain an excuse of sudden or extraordinary emergency, or necessity?**

*Self-Defence, and defence of another or property*

- 4.35 The use of force to defend a person or property from a threat is allowed under the Penal Code and can excuse a person from criminal responsibility for an offence. However the Penal Code itself does not contain the rules that apply to self-defence, it just states that they should be determined by reference to the English common law. In the UK the law on self defence is now covered by legislation, as it is in Australian as well as other Pacific jurisdictions.
- 4.36 In summary the law on self-defence as applied by the courts in Solomon Islands appears to be:
- A person can use force to defend themselves or another person, or property.
  - Only in the most 'extreme circumstances of clear and very serious danger' would a person be entitled to use force that results in death to defend property.<sup>78</sup>
  - The accused must believe on reasonable grounds that it was necessary to do what they did.<sup>79</sup>
- 4.37 The common law on self-defence, as well as some of the legislation on self-defence, has been criticised for its complexity and uncertainty.<sup>80</sup> Where self-defence has been codified it permits the use of force in self-defence where the accused believes their action is necessary, and their conduct is a reasonable response in the circumstances as perceived by them. In these jurisdictions self-defence is not available where a

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<sup>77</sup> *Police v Apelu* [2004] WSSC 8 (Sapolu CJ, 10 August 2004), also accepted in Tonga in *Tapa'atoutai and Mateaki Lolohea v Police* [2004] TOSC 29; AM 008-009 2004 (Hon. Ford J, 9 June 2004) .

<sup>78</sup> *R v Zamagita* SILR [1985-86] 223.

<sup>79</sup> *R v Cawa* [2005] SBHC 18; HCSI-RC 320 of 2004 (Unreported, 28 October 2005) where Naqiolevu J adopts the test used in the Australian High Court case *Zecevic v DPP* (1987)162 CLR 645 ; 71 ALR 641;25 A Crim R 163.

<sup>80</sup> *R v Zamagita* SILR [1985-86] 223; Criminal Law Officers Committee of the Standing Committee of Attorneys-General *Model Criminal Code, Chapter 2 General Principles of Criminal Responsibility*, Final Report (1992) 67.

person intentionally causes death, or serious harm, in the defence of property or to prevent or deal with criminal trespass.

<sup>81</sup>

- 4.38 Under the common law self-defence is available where the attack or threat giving rise to the conduct of self-defence is lawful. Legislation in some jurisdictions has altered this so that self-defence is not available as an excuse where the attack or threat is lawful and the person acting in self-defence knows that the attack is lawful.<sup>82</sup>

17. **Should the Penal Code contain specific provisions about self defence, defence of another, and defence of property?**
18. **What should be the rules that apply to the use of force in self-defence, or defence of another person?**
19. **What should be the rules that apply to the use of force to defend property, or stop trespass to property?**

### *Arrest and Use of Force*

- 4.39 A person who hurts someone when making an arrest can be excused from criminal responsibility for an offence. A police officer, or other person, making an arrest can use 'all necessary means' to effect the arrest. However, the use of force cannot be more than is reasonable in the circumstances, or necessary to arrest the person.<sup>83</sup> What is necessary and reasonable is to be assessed by having regard to the offence for which the person was being arrested.<sup>84</sup> The use of force by a person making an arrest that results in grievous harm or death is not specifically excluded by this defence.
- 4.40 The Penal Code and Criminal Procedure Code do not contain any provisions to cover the use of force in situations where a person who has been arrested escapes, or where other legal process (for example sentence, or warrant) is being executed.

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<sup>81</sup> Criminal Code (Aust) s 10.4, Criminal Code (NT) s 29 and s 43BD.

<sup>82</sup> See for example Criminal Code (Aust) s10.4(4) and Criminal Code (NT) s 29(5) and s 43BD (3)(b).

<sup>83</sup> Criminal Procedure Code s 10.

<sup>84</sup> Penal Code s 18.

20. **Should the excuse for use of force in making an arrest be available where the force results in death?**
21. **Should the provision also cover the use of force where someone escapes from lawful custody, or where other legal processes are being executed?**

### *Corporate responsibility*

- 4.41 Traditionally the rules of criminal responsibility were framed for individuals rather than corporations. The law has however adapted to respond to situations where the actions or omissions by a corporation have contravened the criminal law. A corporation may be held vicariously responsible for the acts or omissions of individual employees or corporate officers made within the actual or apparent scope of their employment or duties.<sup>85</sup> A corporation can also be held directly responsible for the conduct of people such as directors, managing director who are said to embody the corporation.<sup>86</sup> However at common law a corporation cannot be criminally responsible for an offence that can only be punished by imprisonment.
- 4.42 The Penal Code does not contain any specific provisions for criminal responsibility of corporations.
- 4.43 Developments in the common law and legislation in the UK and Australia have expanded the concept of criminal responsibility of a corporation. For example, under the Australian Criminal Code a corporation can be held responsible for the conduct of an employee if the board or director, or other high managerial agent, expressly, tacitly or impliedly authorises or permits the commission of the offence. A corporation may also be held responsible if it is proved that there is a corporate culture existing within the corporation that directed, encouraged, tolerated or led to non-compliance with the law, or where the corporation failed to create or maintain a corporate culture that required compliance with the law.<sup>87</sup> Legislation can also

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<sup>85</sup> Interpretation and General Provisions Act (Cap 85) s 16 provides that person includes a company, and any body of persons corporate or uncorporate.

<sup>86</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

<sup>87</sup> Criminal Code (Aust) section 12.3(2).

provide that a corporation can be found guilty of any offence, including one punishable by imprisonment.<sup>88</sup>

- 22. **Should the Penal Code contain specific rules for criminal responsibility of corporations?**
- 23. **Should the Penal Code allow a corporation to be convicted of any offence?**
- 24. **Should the Penal Code provide for corporations to be criminally responsible based on the concept of corporate culture?**

#### *Assisting the commission of offences*

- 4.44 Criminal responsibility for an offence does not only fall on a person who actually carries out the acts that make up an offence. A person who makes any omission (fails to do something) can be responsible for an offence. A person who aids or abets, counsels or procures the commission of an offence can be held responsible for the offence in the same way as someone who actually carries out the actions that make up the offence.<sup>89</sup>
- 4.45 Aid, abet, counsels and procures includes inciting, advising, giving information and supplying equipment to commit an offence. A person who aids, abets, counsels or procures need not intend to give help or assistance for a specific offence, but must know 'the essential matters which constitute that offence'.<sup>90</sup>
- 4.46 When a person 'counsels' (or incites) another person to commit an offence he or she can still be held criminally responsible even though the second person carries out a different type of offence, or the offence is carried out in a different way. This provision does not apply where the offence actually committed is not a probable consequence of the counsel or advice given by the accused person.<sup>91</sup>

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<sup>88</sup> Criminal Code (Aust) s 12.1(2).

<sup>89</sup> Penal Code s 21.

<sup>90</sup> *R v Alfred Maetia and Newton Misi*, [1993] SBHC 6; HC-CRC 042 of 1992 (Unreported, Muria AJC, 25 January 1993).

<sup>91</sup> Penal Code s 23.

- 4.47 In the UK liability for an offence by an accused who aids, abets, counsels or procures has been extended where he or she was aware of the type of offence committed by the main offender.<sup>92</sup>
- 4.48 This approach is reflected in the Australian Criminal Code. A person who aids, abets, counsels or procures is taken to have committed the offence if he or she intends, or is reckless, that his or her conduct will assist or bring about any offence of the type that is actually committed by the main offender. The conduct of the accused must also actually contribute to the commission of the offence.<sup>93</sup>

25. **Should the Penal Code specify the fault element for aiding, abetting, counseling or procuring?**
26. **Should the Penal Code specify that the conduct of someone who aids, abets, counsels or procures must actually contribute to the commission of the offences?**

#### *Common intention to carry out an offence*

- 4.49 Where a person has formed a common intention with one or more other persons to undertake some unlawful purpose, he or she can also be held responsible for the commission of any other offences that are committed by the others, if those offences are a probable consequence of the common intention.<sup>94</sup> In *Luavex v Regina* the Court of Appeal held that the term 'probable consequence' means 'might well happen.'<sup>95</sup> The question as to whether a consequence might well happen is determined objectively, and it is not necessary to prove that the accused believed that the consequence (that is, the offence) might occur. This provision is also quite broad because it refers to the intention to carry out an 'unlawful purpose' rather than offence.
- 4.50 In other jurisdictions liability for offences committed as part of a joint enterprise is assessed according to the actual intention or knowledge of the accused. The accused person must have some

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<sup>92</sup> A Ashworth, *Principles of Criminal Law* 5<sup>th</sup> edition (2006) 426.

<sup>93</sup> Criminal Code (Aus) s 11.2.

<sup>94</sup> Penal Code s 22.

<sup>95</sup> *Luavex v Regina* [2007] SBCA 13; CA-CRAC 31 of 2006 (Unreported, Lord Slynn of Hadley, McPherson JA, Ward JA, 18 October 2007).

foresight that the joint enterprise would result in the offence.<sup>96</sup> Under the Australian Criminal Code the accused person must realize that there was a substantial risk that the other person would commit the offence.<sup>97</sup>

<p><b>27. Should the law on common intention be changed?</b></p>
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*Disassociation from a joint criminal enterprise*

- 4.51 The Penal Code does not contain any provision that specifies how a person who provides some assistance for the commission of an offence, or who is involved in an agreement to commit an offence might terminate their involvement in the enterprise. The Australian Criminal Code provides a person cannot be found guilty of aiding, abetting, counseling or procuring an offence if he or she terminates his or her involvement before the offence is committed, and takes reasonable steps to prevent the commission of the offence.<sup>98</sup>

<p><b>28. Should the Penal Code have a provision on dissociation from a criminal enterprise?</b></p>
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*Accessories after the fact*

- 4.52 The Penal Code contains an offence that applies where a person assists someone who has committed an offence to escape punishment.<sup>99</sup> It does not apply to someone who assists their spouse after he or she has committed an offence, or who assists another person in the presence of and under the authority of their spouse.<sup>100</sup>

*Conspiracy*

- 4.53 An agreement between one or more people to commit an offence is a conspiracy. It is an offence under the Penal Code to conspire to commit a felony<sup>101</sup>, misdemeanour<sup>102</sup> or to effect any unlawful purpose, or lawful purpose by unlawful means.<sup>103</sup>

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<sup>96</sup> Andrew Ashworth 'Principles of Criminal Law', 5<sup>th</sup> edition 2006, 428,

<sup>97</sup> Criminal Code (Aust) s 11.2.

<sup>98</sup> Criminal Code (Aust) s 11.2 (4).

<sup>99</sup> Penal Code ss 386, 387.

<sup>100</sup> Penal Code s 386

<sup>101</sup> Penal Code s 383.

- 4.54 Conspiracy offences are sometimes criticized because they apply to agreements only, and the accused does not have to take any steps to commit the offence.
- 4.55 Under recent legislation in Australia and the UK the offence of conspiracy has been limited to conspiracy (or agreements) to commit serious offences (in Australia to offences that attract a maximum penalty of 12 months imprisonment or more).<sup>104</sup> By comparison the present law in Solomon Islands extends to agreements to carry out any unlawful purpose (not confined to criminal offences) or a lawful purpose by unlawful means. Legislation in other jurisdictions also specifies that a person can be found guilty of a conspiracy even though it is impossible to commit the offence, or the other parties to the conspiracy are not identified or charged, cannot be convicted, or are acquitted of the offence of conspiracy.<sup>105</sup>

29. **Should the provision on conspiracy be changed so that it only applies to agreements to commit serious offences?**
30. **Should there be any other changes to the offence of conspiracy?**

#### *Attempts to commit offences*

- 4.56 It is an offence under the Penal Code to attempt to commit a felony or misdemeanor.<sup>106</sup> To be found guilty of attempt a person must take some action towards committing the offence with the intention of carrying out the offence. An attempt is committed even though it is impossible to carry out the offence, or the person fails to take all of the action required to commit the offence due to circumstances beyond their control, or because they decide to not go ahead with the commission of the offence. The punishment for attempt depends on the maximum penalty for the offence. For example where it is an attempt to commit an offence that carries a maximum penalty of 14 years or more imprisonment, then the maximum penalty for attempting that offence is seven years.

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<sup>102</sup> Penal Code s 384.

<sup>103</sup> Penal Code s 385.

<sup>104</sup> Criminal Code (Aust) s 11.5, Criminal Law Act (UK) 1977 s 1.

<sup>105</sup> Criminal Code (Aust) s 11.5 (3).

<sup>106</sup> Penal Code ss 378, 379, 380.

- 4.57 In addition the Penal Code also has a number of specific attempt offences, for example attempted rape and attempted murder.<sup>107</sup>

**31. Should the Penal Code continue to have specific attempt offences, as well as a general offence of attempt?**

*Protection for health workers*

- 4.58 The Penal Code protects the actions taken by doctors and other medical workers, and excuses them from criminal responsibility where they perform a 'surgical operation' without the consent of the patient. The provision only applies if the procedure is done with reasonable care and skill, and for the benefit of the patient.<sup>108</sup> The provision also excuses a person from responsibility for performing a procedure on an unborn child for the preservation of the mother's life.

**32. Should this provision also cover medical treatment generally, including the administration of drugs and other forms of treatment?**

*Protection for judicial officers*

- 4.59 The Penal Code does not give any specific protection for judicial officers from criminal responsibility for anything done when they exercise judicial functions. Both the Western Australia and Queensland Criminal Codes protect judicial officers from criminal responsibility for acts done as part of their judicial function.<sup>109</sup>

**33. Should the Penal Code have a provision that protects judicial officers from criminal responsibility for acts done as part of their judicial function?**

*Consent to harm*

- 4.60 A person cannot give consent to another to cause their own death, or cause a maim to him or herself.<sup>110</sup> Maim means the

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<sup>107</sup> Penal Code ss 138, 215.

<sup>108</sup> Penal Code s 234

<sup>109</sup> Criminal Code Act (WA) s 30, Criminal Code (Qld) s 30.

<sup>110</sup> Penal Code s 236.



destruction or permanent disabling of any external or internal organ, member or sense.<sup>111</sup> Consent by a victim to their own death or maim does not affect the criminal responsibility of another person. This provision does not allow a person to consent to harm equivalent to a maim that arises out of contact sport, medical or dental treatment or customary practices such as scarification. Different approaches have been suggested for reform of law in this area.<sup>112</sup> One approach would allow people to consent to harmful activity, unless there was a good social or policy reason for making the consent ineffective. Under another approach, the law sets out specific situations where a person can consent to something that would otherwise constitute a criminal offence. Those situations include medical treatment, sport, customary scarification and circumcision. The MCCOC have recommended that a person should not be criminally responsible for a serious harm offence if the conduct benefits the other person, or is carried out to pursue a socially beneficial function or activity.<sup>113</sup>

**34. Should the law on consent to harm be changed? If so, how?**

*Punishment twice for the same offence, double jeopardy*

- 4.61 The Constitution protects a person from facing a criminal prosecution for an offence, following an acquittal for the same offence, or an offence for which he or she could have been convicted at the first trial.<sup>114</sup>
- 4.62 The Penal Code also has a specific prohibition on punishment twice for the same offence, except where an accused causes the death of someone. In this case a person can be convicted and punished for an offence of causing the death, as well as an offence constituted by the act or omission that caused the death. For example, a person can be convicted of the offence of

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<sup>111</sup> Penal Code s 4.

<sup>112</sup> MCCOC, *Model Criminal Code, Chapter 5 Non Fatal Offences Against The Person* Report (1998) 119.

<sup>113</sup> MCCOC, *Model Criminal Code Chapter 5 Non Fatal Offences Against The Person* Report (1998) 118.

<sup>114</sup> Constitution s 10(5).

reckless or dangerous driving,<sup>115</sup> as well as manslaughter where the accused's driving caused the death.

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<sup>115</sup> Traffic Act (Cap 131) s 39.

## 5 Homicide

### *Homicide offences*

- 5.1 This Chapter considers the offences that apply where someone causes the death of a person. The main offences are murder and manslaughter.
- 5.2 The Constitution contains a right to life which means that a person should not be intentionally deprived of his or her life.<sup>116</sup> The exception to this right is where a law specifically allows a person to use force to defend a person or property, arrest a person, stop a person from escaping from lawful custody or prevent someone from committing a criminal offence. The use of force in these circumstances that results in death must be reasonably justified. Intentionally killing someone is also allowed under the Constitution where it is the result of a lawful act of war. The Penal Code contains a provision that excuses a person who kills another in self-defence or the defence of another (see Chapter 4).

### *Murder and manslaughter*

- 5.3 Murder is committed where a person kills with malice aforethought.<sup>117</sup> It is the most serious offence that applies where someone causes the death of another, with manslaughter a lesser offence. The differences between the two offences are the fault, or moral blameworthiness of the accused, and the penalty that applies to each offence.
- 5.4 Malice aforethought is the intention, or state of mind, that must accompany the physical action of killing for the offence of murder. The Penal Code defines this state of mind as either having the intention to cause death or grievous bodily harm; or knowing that the action will probably cause death or grievous bodily harm.<sup>118</sup> The term grievous harm is used in a number of provisions in the Penal Code and means a serious or permanent injury. Several degrees of culpability are incorporated into the offence of murder because of the definition of malice aforethought.

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<sup>116</sup> Constitution s 4.

<sup>117</sup> Penal Code s 200.

<sup>118</sup> Penal Code s 202.

- 5.5 The term malice aforethought was adopted from the UK Homicide Act 1957. However, the concept as applied in the UK has been restricted by the courts to cases where a person intends to kill, or cause grievous harm.
- 5.6 The penalty for murder is mandatory life imprisonment. This means that the court has no discretion to set a lesser sentence.
- 5.7 The mandatory penalty for murder was challenged in the case of *Gerea and Others v DPP* on the ground that it was inconsistent with the Constitutional right to a fair hearing because it deprived the court of a discretion to impose a flexible sentence.<sup>119</sup> The Solomon Islands Court of Appeal held that mandatory life imprisonment was not inconsistent with the Constitution because the penalty applies equally to all people who commit the offence of murder.
- 5.8 The offence of manslaughter applies where a killing does not amount to murder but where the death is caused by some unlawful act, such as an assault, or a negligent failure to fulfil a legal duty to preserve life and health.<sup>120</sup> The Penal Code specifies the duties to preserve life and health and these are discussed later in this Chapter. The penalty for manslaughter is life imprisonment and the court can impose a lesser sentence on someone convicted of manslaughter.
- 5.9 Murder as an offence carries both a social stigma and penalty that reflects the seriousness of the offence, and the Constitutional right to life. However, compared to other jurisdictions the scope of the offence of murder in Solomon Islands is wide and catches a broad range of conduct and culpability. Under the Penal Code a person who intentionally kills someone is treated in same way as a person who kills knowing that his or her actions will probably cause grievous harm. Both are labeled a murderer, and both must receive the mandatory sentence of life imprisonment.
- 5.10 Mandatory life imprisonment may also discourage a person accused of murder from pleading guilty because the court cannot impose a sentence that reflects his or her culpability or moral blameworthiness. LRC consultation has indicated the

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<sup>119</sup> [1984] SBCA 2 [www.paclii.org](http://www.paclii.org).

<sup>120</sup> Penal Code s 199.

need to consider both the scope of the offence of murder, and mandatory life imprisonment for murder.

5.11 This table sets out the fault element and maximum penalty for murder from a number of different jurisdictions.

<i>Jurisdiction</i>	<i>Fault element</i>	<i>Maximum penalty</i>
ACT <i>Crimes Act 1900 ss12(1)(a), (b)</i>	<i>Intention to cause death or Reckless indifference to the probability of causing death</i>	<i>Life imprisonment</i>
NSW <i>Crimes Act 1900 s18(1)(a)</i>	<i>Intention to kill or inflict grievous bodily harm or Reckless indifference to human life</i>	<i>Life imprisonment</i>
Northern Territory <i>Criminal Code s156(1)(c)</i>	<i>Intention to cause death or grievous harm</i>	<i>Mandatory life imprisonment</i>
QLD <i>Criminal Code s 305</i>	<i>Intention to cause death or grievous bodily harm</i>	<i>Life imprisonment</i>
South Australia <i>Criminal Law Consolidation Act 1935 s11</i>	<i>Intention to cause death or grievous bodily harm Forseeability of death as a probable consequence of action</i>	<i>Mandatory life imprisonment</i>
Tasmania <i>Criminal Code ss 156, 157</i>	<i>Intention to cause death Intention to cause bodily harm which the offender knew to be likely to cause death Unlawful act or omission which the offender knew or ought to have known to be likely to cause death</i>	<i>Life imprisonment</i>
Victoria <i>Crimes Act 1958 s3</i>	<i>Intention to cause grievous bodily harm Forseeability of death as a probable consequence of action</i>	<i>Life imprisonment</i>
Western Australia <i>Criminal Code ss 279(2)</i>	<i>Intention to cause death or grievous bodily harm</i>	<i>Life imprisonment</i>
PNG <i>Criminal Code ss 299(2), 300</i>	<i>Willful Murder: intention to cause death Murder: intention to cause grievous bodily harm</i>	<i>Death  Life imprisonment</i>
Vanuatu <i>Penal Code ss 106(1), 106(2)</i>	<i>Intentionally cause the death</i>	<i>20 years (if not premeditated) Life imprisonment (if premeditated)</i>
UK	<i>Intention to kill or cause grievous harm</i>	<i>Mandatory life imprisonment</i>
New Zealand <i>Crimes Act 1961 s 167</i>	<i>Intention to cause death Intention to cause any bodily injury that is known to the offender to be likely to cause death Recklessly causing bodily injury</i>	<i>Life imprisonment</i>

- 5.12 A person is convicted of murder, and serving a life sentence may be released from prison by the Governor General, acting on the advice of the Committee on the Prerogative of Mercy.<sup>121</sup>
- 5.13 Under the Correctional Services Act 2007 the Minister, acting upon the advice of the Parol Board, may also set free on conditions a person who is serving a sentence of life imprisonment for murder.<sup>122</sup> However a court that sentences a person to murder in Solomon Islands cannot indicate how long a person should spend in prison before he or she can be released on parole, or released on the advice of the Committee on the Prerogative of Mercy.

#### *Reduction of murder to manslaughter*

- 5.14 Killing that amounts to murder might in some circumstances be reduced to manslaughter. These circumstances are also called the partial defences to murder because they operate to partially excuse a person from the offence of murder. Partial defences are likely to be very significant in Solomon Islands because the scope of murder is so broad and they provide an opportunity for an accused avoid the mandatory life sentence for murder.
- 5.15 The partial defences are available where the accused person kills:
- because he or she was provoked by the victim;
  - using excessive force in self defence;
  - because of a legal duty to cause the death, or do what he or she did;<sup>123</sup>
  - because he or she was suffering from a mental impairment (diminished responsibility).<sup>124</sup>
- 5.16 A mother might also be excused from murder, and convicted of an offence called infanticide if she was suffering some mental impairment caused by giving birth to her child, or breastfeeding the child. The penalty for the offence of infanticide is the same as for manslaughter, life imprisonment.<sup>125</sup>
- 5.17 The partial defences to murder were developed in recognition of human weakness so that people who killed in those

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<sup>121</sup> Constitution s 45.

<sup>122</sup> Correctional Services Act (2007) s 73.

<sup>123</sup> Penal Code s 204.

<sup>124</sup> Penal Code s 203.

<sup>125</sup> Penal Code s 206.

circumstances could avoid capital punishment and mandatory life imprisonment. The categories of provocation, diminished responsibility, excessive use of force in self-defence and the offence of infanticide were developed over many years in English law. Both the common law and legislation in other jurisdictions regarding the partial defences has changed since the Penal Code was introduced in Solomon Islands. For example, excessive self-defence is no longer recognised in the common law in Australia and the UK, and is not contained in the Criminal Codes of Queensland or PNG.

### *Provocation*

- 5.18 Provocation in the Penal Code is limited to where a person loses self-control because of something said or done by the victim. The impact of the words or actions of the victim on the accused has to be judged according to the affect that the words or actions of the victim would have on a reasonable person.<sup>126</sup> The test for provocation can take into account some of the attributes or characteristics of the accused, such as his or her age, gender and cultural background. However there is some debate about the extent and range of subjective characteristics, such as a short temper, that can be taken into account for this purpose.

### *Excessive self-defence*

- 5.19 This partial defence is called excessive self defence because self-defence, or defence of another person (discussed in Chapter 4) acts as a complete defence to murder. Under this provision the accused must be justified in causing some harm to the victim, and lose self-control because of a fear of being immediately killed or seriously injured. The concept that a person can be excused of murder, but convicted of manslaughter due to excessive force used in self control no longer exists in Australia and the UK.

### *Diminished responsibility*

- 5.20 Diminished responsibility can apply where a person has a mental impairment, disease or injury that substantially affects his or her mental responsibility. Unlike the other partial defences, and complete defences, the accused must prove that he or she should not be convicted of murder because of

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<sup>126</sup> Penal Code s 205.

diminished responsibility.<sup>127</sup> This partial defence acts as a halfway measure where a person has a mental impairment, disease or injury that affects his or her capacity to be responsible for his or her actions, but which does not meet the criteria for the complete defence of insanity.

### *Infanticide*

- 5.21 Infanticide as it is defined in the Penal Code and other jurisdictions has a biological basis. The provision operates so that a woman who would otherwise be guilty of murder of a child up to the age of 12 months can be found guilty of another offence called infanticide. A woman can be found guilty of infanticide if her mind was disturbed at the time of the killing as a result of giving birth, or breastfeeding.<sup>128</sup> An analysis of the Penal Code for compliance with CEDAW recommended that infanticide should be an alternative offence to murder where a woman is affected by environmental, social and biological stresses.<sup>129</sup>
- 5.22 Consultation by the LRC indicates that the offence of infanticide in the Penal Code allows the law to recognise the reduced culpability or moral blameworthiness of a mother who kills a child as a result of extreme poverty, social pressures or mental health problems following the birth of a child. The New Zealand Crimes Act has a separate offence for infanticide which applies where a woman kills her child because the balance of her mind was disturbed as a result of the birth, or breastfeeding, or because of any disorder caused by childbirth or breastfeeding, to the extent that she should not be fully responsible for murder or manslaughter.<sup>130</sup> It has a maximum penalty of three years imprisonment.

### *Reform of partial defences*

- 5.23 The partial defences have been considered and criticised in Australia, New Zealand and the UK. The relevance of the partial defences has been questioned where mandatory life imprisonment is no longer the punishment for murder. If the

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<sup>127</sup> Penal Code s 203.

<sup>128</sup> Penal Code s 206.

<sup>129</sup> UNIFEM, UNDP, *Translating CEDAW Into Law, CEDAW Legislative Compliance In Nine Pacific Island Countries* (2007).

<sup>130</sup> Crimes Act (NZ) s 178.



offence of murder does not carry a mandatory sentence of life imprisonment a court sentencing a person to murder can impose a sentence which recognises the particular facts of a case, the characteristics of an accused, as well as the need to protect human life as required under the Constitution.

- 5.24 The partial defences have also been criticised because they are complex, excuse intentional killing and can result in unfairness. People who have the culpability for murder might escape conviction for murder because of a partial defence, and people whose culpability falls short of murder may not fall into one of the partial defence categories. One issue is whether the scope of partial defences operates fairly for people from diverse cultural backgrounds and for different genders.
- 5.25 Issues that might arise in Solomon Islands in relation to murder and partial defences are illustrated by the case of *Loumia*.<sup>131</sup> In this case the accused, a Kwaio man, was convicted of murder. Along with other members of his group he attacked another group (the Agia) with knives, spears, bows and arrows. During the attack he saw a member of his group wounded, and another one killed. He together with others in his group then killed some people. He argued that he killed because he was provoked and had a duty under custom to kill the people who were responsible for killing his relative. Evidence was given to the court that under Kwaio custom, when a close relative is killed, the person responsible for doing that must be killed. The judge and assessors considered whether the accused was provoked by seeing his relative killed by members of the other group, but did not accept that he was provoked and he was convicted of murder.
- 5.26 The accused appealed to the Court of Appeal. The Court rejected the appeal. The court thought that the judge and assessors had properly considered the question of provocation, and that a duty to kill under Kwaio custom was inconsistent with the right to life in the Constitution, and was not part of the law of Solomon Islands.
- 5.27 The decision in the case of *Loumia* suggests consideration should be given to whether the other partial defences of provocation, infanticide and diminished responsibility can to

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<sup>131</sup> *Loumia v Director of Public Prosecutions* [1985-1986] SILR 158.

apply intentional killing because of the right to life contained in the Constitution.

- 5.28 The MCCOC has recommended that partial defences should be abolished. However, MCCOC also recommended that the offence of murder should only apply where a person intentionally or recklessly kills, and that there should not be a mandatory penalty of life imprisonment for murder.<sup>132</sup>
- 5.29 The Queensland Law Reform Commission is currently reviewing provocation. The partial defence of provocation has been abolished in the Australian jurisdictions of Tasmania, Victoria and Western Australia.<sup>133</sup> One of the reasons given for abolishing provocation in those jurisdictions is that a court can take provocation into account during sentencing. In Western Australia provocation was recently abolished, along mandatory life imprisonment for the offence of murder.<sup>134</sup>
- 5.30 Prior to the abolition of provocation as a partial defence in Victoria the Victorian Law Reform Commission recommended that provocation be abolished because it is a matter best considered during sentencing of a person convicted of murder, and intentional killing should only be justified in circumstances where a person honestly believes that his or her actions were necessary to protect himself, or herself or another person from injury.<sup>135</sup>
- 5.31 If mandatory life imprisonment for the offence of murder is not changed in Solomon Islands then some consideration needs to be given to the operation of the partial defences to murder, and the extent to which local customs and values should justify a conviction for manslaughter, rather than murder.

<p><b>35. Should the offence of murder apply to intentional killing only?</b></p>
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<sup>132</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorney-General, *Non Fatal Offences Against the Person*, (1998) Discussion Paper.

<sup>133</sup> Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper (2008) 86.

<sup>134</sup> Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper (2008) 89-90.

<sup>135</sup> Queensland Law Reform Commission, *A review of the defence of provocation*, Discussion Paper (2008) 90.

36. Should the offence of murder apply where the accused intentionally causes serious harm to the victim?
37. Should the offence of murder apply where the accused foresees that his or her action will probably cause death?
38. Should the offence of murder apply where the accused foresees that his or her action will probably causes serious harm?
39. If the scope of murder is changed should it include cases where a person kills another because he or she uses violence when committing another serious offence, even if he or she does not intend to kill the victim?
40. Should the mandatory penalty of murder be reconsidered?
41. If mandatory life imprisonment did not apply to murder should the partial defences of provocation, diminished responsibility, excessive self-defence and infanticide be abolished?
42. Should the courts have the power to indicate how much of a sentence for murder or manslaughter a convicted person must serve before he or she can be released by the Parole Board or the Committee for the Prerogative of Mercy?
43. Is the application of the partial defences to intentional killing consistent with the right to life in the Constitution?
44. If mandatory life imprisonment continues to apply to murder should the partial defences for murder be changed? If so, how?
45. Should the offence of manslaughter be changed in any way?

### *Causation of death*

5.32 To be legally responsible, and found guilty of murder or manslaughter, the actions of the accused must cause the death of the victim. Under the Penal Code a person is deemed to have caused the death of another person even though their act was not the immediate or whole cause of death. A person is deemed to have caused the death if:

- the victim was injured, and needed surgery, and died as a result of the surgery;

- the injured victim dies because he or she fails to get medical treatment;
  - the victim dies as a result of avoiding actual or threatened violence from the accused;
  - the act of the accused hastened the death of the victim who was suffering from a terminal disease or injury; or
  - the act of the accused contributed to the victim's death in combination with an act of the victim, or somebody else.<sup>136</sup>
- 5.33 The provisions in the Penal Code that deem a person to be responsible for death are lengthy and complicated. By contrast the MCCOC has recommended that to be held responsible for a death or harm a person's act must substantially contribute to the victim's death or harm.<sup>137</sup>
- 5.34 A child becomes a person capable of being killed when he or she is born alive, whether or not he or she is breathing, or has independent circulation and the navel string is severed.<sup>138</sup>
- 5.35 The Penal Code specifies that a person is not deemed to have killed the victim if the victim's death occurs more than one year and a day after the act of the accused person.<sup>139</sup> If a victim dies after this time period then the person who caused the death cannot be held legally responsible. The year and a day rule was developed in earlier times when medical science was less precise than it is now. All jurisdictions in Australia have abolished it.<sup>140</sup> Under the rule if the victim dies outside the time period the accused can only be charged with attempted murder or other offences (such as causing grievous harm).

**46. Should there be any change to the way that the Penal Code defines causation of death?**

**47. Should the one year and one day rule be abolished?**

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<sup>136</sup> Penal Code s207.

<sup>137</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorney-General, *Non Fatal Offences Against the Person*, (1998) Discussion Paper 24.

<sup>138</sup> Penal Code s208.

<sup>139</sup> Penal Code s 209.

<sup>140</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorney-General, *Non Fatal Offences Against the Person*, (1998) Discussion Paper 39.

*Attempted Murder*

- 5.36 It is an offence under the Penal Code to attempt to unlawfully kill someone; or intending to kill do something, or fail to fulfill a duty to preserve life and health, that is likely to endanger human life. The maximum penalty for attempt to murder is life imprisonment.<sup>141</sup>

*Manslaughter and duties to preserve life and health*

- 5.37 A person can be found guilty of manslaughter under the Penal Code if he or she causes the death of a person by negligently failing to fulfil a duty to preserve life and health. In these situations the accused does not have to intend to cause death or bodily harm to victim.<sup>142</sup> The level of negligence required is culpable negligence which is a higher standard than the one used in civil law proceedings. However negligence, or culpable negligence, is not specifically defined in the Penal Code.

**48. Should culpable negligence be defined in the Penal Code?**

- 5.38 The Penal Code sets out where someone has a duty in relation to life and health. The following classes of people have this duty:
- A person who has responsibility for caring for another person who is old, sick, mentally ill, or in detention (for example prison) who cannot provide for him or herself, must provide the other person with the necessities of life;
  - The head of a family has a duty to provide the necessities of life for children under the age of 15 years;
  - Employers who are required to provide food, clothing or lodging for servants or apprentices under the age of 15 years;
  - A person who does something that is or may be dangerous to human life or health must use reasonable skill and care;
  - A person who is in charge of a dangerous thing (a pot of boiling water) that may endanger the life, health or safety of someone, must use reasonable care and take reasonable precautions to avoid danger.
- 5.39 The duties in the Penal Code do not cover situations where a person volunteers or undertakes to do something, and failure to

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<sup>141</sup> Penal Code s215.

<sup>142</sup> Penal Code s 199.

do that thing would be dangerous to human life or health.<sup>143</sup> The duty to provide necessities for a child does not extend to all people who have assumed responsibility for children, such as people who operate a boarding school.

5.40 The MCCOC has made a recommendation about duties that should apply in relation to criminal offences. Its recommendation simplifies the duties, and extends the duty in relation to children to anyone who has taken responsibility for caring for the child. The recommended duties are to:

- provide the necessities of life to another person who cannot provide for him or herself, if the person has assumed responsibility for the welfare of the other person;
- avoid or prevent danger to the life, safety, or health of any child for whom the person has assumed responsibility (whether or not the child is a relative of the person);
- avoid or prevent danger to the life safety or health of another when the danger arises from the act of the person, or from something that the person has in his or her possession; or from some undertaking (agreement) of the person.

**49. Should the duty of the head of the family for children be changed so it is a duty imposed on anyone who has assumed the care of a child, whether or not they are a relative of the child?**

**50. Should the duty in relation to children be a duty to avoid or prevent danger to the life, health or safety of a child?**

**51. Should the Penal Code include a duty to avoid or prevent danger where a person undertakes or agrees to do something?**

### *Suicide*

5.41 It is an offence under the Penal Code to assist someone to commit suicide, and to assist someone to attempt to commit suicide.<sup>144</sup> The maximum penalty is fourteen years imprisonment. In the Penal Code, it is not an offence to commit suicide, or to attempt to commit suicide.

<sup>143</sup> Criminal Code (Qld) s 290, Criminal Code (PNG) s 288.

<sup>144</sup> Penal Code s219.

*Killing of unborn child*

- 5.42 Under the Penal Code it is an offence to kill an unborn child who is capable of being born alive. The offence applies where a person intentionally kills a child capable of being born alive before he or she exists independently from his or her mother. The Penal Code specifies that if the woman is pregnant for twenty-eight weeks it is presumed that the child is capable of being born alive.<sup>145</sup> The maximum penalty for this offence is life imprisonment.<sup>146</sup> A person is not guilty of this offence where the child was killed for the purpose of preserving the life of the mother.<sup>147</sup>
- 5.43 This offence was developed in English law to overcome problems with proving that a child killed during childbirth was alive in order to prove a charge of murder or manslaughter.
- 5.44 The offence has been used in other jurisdictions where a pregnant woman is attacked and her child is killed. In Queensland the offence has been extended to apply to unlawful assaults on a pregnant woman where the child is killed, seriously harmed or infected with a serious disease before birth.<sup>148</sup>

*Genocide*

- 5.45 Genocide is an offence in the Penal Code and is the intentional destruction, in whole or in part, of the members of a national, ethnical, racial or religious group. This can be done by killing, causing serious bodily or mental harm, imposing conditions on the group calculated to physically destroy the group or part of it, preventing births within a group, or forcibly transferring children to another group.<sup>149</sup> The penalty for genocide if it involves killing of any person is life imprisonment. In any other case the maximum penalty is imprisonment for 14 years. Genocide was introduced into the Penal Code in 1972.

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<sup>145</sup> Penal Code s 221.

<sup>146</sup> Penal Code s221(1).

<sup>147</sup> Penal Code s 221(1).

<sup>148</sup> Criminal Code (Qld) s 313(2).

<sup>149</sup> Penal Code s 52.

## 6 Sexual Offences

- 6.1 Sexual offences in the Penal Code cover three different categories. They are:
- offences against women and girls including rape, indecent assault, procuring women and girls, incest, prostitution, abduction, detention and buggery;
  - offences against male persons including buggery or unnatural offences (as they are referred to in the Penal Code) and indecent practices between persons of the same sex (which can also apply to women);
  - offences against children.
- 6.2 Sexual assault is a gendered crime which means that it is overwhelmingly committed by men against women and girls.<sup>150</sup> Violence against women and girls, including sexual violence, is a problem in Solomon Islands. Sexual offences experienced by women and girls include sexual abuse by an intimate partner, child abuse, commercial sexual exploitation of girls, sexual violence during armed conflict and gang rape of girls.<sup>151</sup>
- 6.3 One of the objectives for reform of sexual offences is to ensure that the criminal justice system is responsive to the needs of victims of sexual offences, while at the same time ensuring that those accused continue to receive a fair trial.<sup>152</sup> The relevant Constitutional principles are the right to equal protection of the law, the right to fair trial and non-discrimination.<sup>153</sup>
- 6.4 Solomon Islands is a signatory to a number of international conventions and instruments which are directly relevant to this area of law. They include:
- The Universal Declaration of Human Rights ('UNDHR');
  - The International Covenant of Economic, Social and Cultural Rights in particularly the right to health ('ICESCR');
  - The International Convention on the Elimination of all Forms of Racial Discrimination ('ICERD');
  - The Convention on the Rights of the Child ('CRC');

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<sup>150</sup> UNIFEM, UNDP, *Translating CEDAW Into Law, CEDAW Legislative Compliance In Nine Pacific Island Countries* (2007) 328.

<sup>151</sup> AusAID Office of Development Effectiveness, *Violence against Women in Melanesia and East Timor, Solomon Islands Country Supplement* (2007) p 2.

<sup>152</sup> Victorian Law Reform Commission *Sexual Offences* Final Report (2004) 79.

<sup>153</sup> Constitution ss 3, 10, 15.



- The Convention for the Elimination of all forms of Discrimination Against Women ('CEDAW'); in particular equality before the law, protection from discrimination including gender based violence.
- 6.5 Despite the fact that the Solomon Islands may have ratified the above conventions and treaties, local acts of parliament are needed to bring most of these conventions into operation as part of local laws. As it is, the provisions of the conventions set legal standards and guidelines that will be useful as a checklist to review existing sexual offences provided under the Penal Code. They will assist to highlight the need to reform certain aspects of the sexual offences. The conventions will assist to determine whether new and modern offences should be introduced, what the scope of these offences might be, the conduct they aim to address, and who they should cover or apply to.
- 6.6 Pacific tradition and culture often discriminates against women. In the Solomon Islands, a society which is largely patrilineal, discrimination against women is institutionalised and the same is true even in societies which are matrilineal. Institutionalised discrimination occurs in social settings, the family, land holding and inheritance systems, politics, education and religion. For example, in terms of education there are more places offered for boys than for girls in each level of secondary education.<sup>154</sup> Women continue to be unrepresented at all levels of decision-making.<sup>155</sup> At the grassroots level, women as chiefs are rare even in matrilineal societies. These factors indicate fewer choices and lesser decision-making powers for women and are a major obstacle to them seeking justice and thus the improvement of protection for violence against women.<sup>156</sup>
- 6.7 Institutionalised discrimination provides an environment in which sexual violence and sexual abuse can occur without

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<sup>154</sup> Solomon Islands: Women Confronting Violence, Amnesty International <<http://amnesty.org/en/library/asset/ASA43/001/2004/en/dom-ASA430012004en.html>>, accessed 7/4/2008.

<sup>155</sup> Currently all parliamentarians are male. The only two women have ever been elected into Parliament; the most recent was Ms Hilda Kari. She was a parliamentarian for several years until she lost her seat in the elections in December 2001.

<sup>156</sup> Solomon Islands: Women Confronting Violence, Amnesty International <<http://amnesty.org/en/library/asset/ASA43/001/2004/en/dom-ASA430012004en.html>>, accessed 7/4/2008.

reproach or reproof. During the period of civil unrest from 1999-2003, sexual assault was one of the main forms of violence used against women.<sup>157</sup> There is also a perception that due to changes in social behaviour the level of violence against women has increased.<sup>158</sup>

- 6.8 Children of both sexes are vulnerable to sexual abuse because of their age and their dependency. Often these offences are perpetrated by adults or people in authority, or those who are in positions of trust and guardianship over children. The population of Solomon Islands consists of young people many of whom are within the vulnerable age bracket.<sup>159</sup> The protection of children against all forms of sexual abuse and exploitation is therefore of paramount significance.
- 6.9 In June 2007 a report produced by the Christian Care Centre of the Church of Melanesia in Solomon Islands focused on the occurrence of commercial sexual exploitation of children in the remote Arosi region of Makira Province. The report found that child prostitution was the most prominent form of exploitation. There were various reports of children being 'sold' into marriage by their parents, a range of sexual abuse cases involving both local and foreign men and children were noted and stories of children and pornography were also recorded.<sup>160</sup> The report then highlights that the issue of commercial sexual exploitation of children in Solomon Islands was of substantial importance and required urgent attention and action.<sup>161</sup>

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<sup>157</sup> Solomon Islands: Women Confronting Violence, Amnesty International <<http://amnesty.org/en/library/asset/ASA43/001/2004/en/dom-ASA430012004en.html>, accessed 7/4/2008.

<sup>158</sup> Issue raised during informal LRC consultations in 2008.

<sup>159</sup> It is estimated that almost 50% of the Solomon Islands population is under the age of 20 years. See Solomon Islands Government Report on 1999 Population and Housing Census, Basic Tables and Census Descriptions, Statistics Office, Honiara 59.

<sup>160</sup> Tania Herbert, Christian Care Centre, Church of Melanesia *Commercial Sexual Exploitation of Children in the Solomon Islands: A report focusing on the presence of the Logging Industry in a Remote Region* (2007).

<sup>161</sup> Tania Herbert, Christian Care Centre, Church of Melanesia, *Commercial Sexual Exploitation of Children in the Solomon Islands: A Report Focusing on the Presence of the Logging Industry in a Remote Region* (2007) 6; The Solomon Islands police investigated the allegations reported by the Church of Melanesia 'Commercial Sexual Exploitation of Children, but were unable to prosecute because of an unwillingness of witnesses to come forward.

- 6.10 It appears from LRC consultations that awareness of sexual offences has generally increased in recent times. However both men and women are often unaware that under the Penal Code rape is the most serious offence after murder. Public perceptions about the seriousness of sexual offences may also be reinforced by light sentence given by courts.<sup>162</sup>
- 6.11 The low rate of reporting to police, and reluctance to cooperate with the prosecution, affects the detection and prosecution of sexual offences. Cultural taboos and barriers contribute to low rate of reporting and the reluctance of victims to give evidence in court proceedings. Cultural barriers include shame, fear of retribution, lack of support from family and communities, and the low status of girls and women. In some cases male relatives actively discourage women from reporting rape to the police, or from cooperating with prosecutions.<sup>163</sup>
- 6.12 Traditional justice can also operate as a barrier to reporting incidents to the police. The objective of customary reconciliation is the restoration of harmony and peace between members of the community who have been affected or were affected by a wrongdoing.<sup>164</sup> Customary compensation is a mechanism used to appease, dispose of matters and reconcile angry relatives. However women may not always benefit from these processes. Women victims are sometimes reluctant to report incidents of sexual assault to police because they will be blamed for the trouble, and forced to pay compensation to their male relatives, or they are reluctant to make a report where there has been reconciliation.

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<sup>162</sup> Amnesty International Solomon Islands Women Confronting Violence [3] <http://amnesty.org/en/library/asset/ASA43/001/2004/en/dom-ASA430012004en.html>, accessed 7/4/2008.

<sup>163</sup> Solomon Islands: Women Confronting Violence, Amnesty International <<http://amnesty.org/en/library/asset/ASA43/001/2004/en/dom-ASA430012004en.html>>, accessed 7/4/2008.

<sup>164</sup> Don Paterson, 'Customary Reconciliation in sentencing for sexual offences: A review of Public Prosecutor v Ben and Others and Public Prosecutor v Tarilingi and Gamma' (2006) 10 *Journal of South Pacific Law*.

*Issues general to all sexual offences*

- 6.13 A male person aged 12 is presumed under the Penal Code to be physically incapable of sexual intercourse.<sup>165</sup>
- 6.14 The term unlawful in relation to some sexual offences such as rape,<sup>166</sup> indecent assault<sup>167</sup> and defilement<sup>168</sup> means that the victim and the perpetrator are not married. This means that rape in marriage (including customary marriage) is not an offence. As well, young girls are not covered by the offence of defilement where there is a customary marriage because there is no minimum age for custom marriage.
- 6.15 Most sexual offences in the Penal Code are defined so that girls and women are victims of sexual assault, and men and boys are perpetrators of sexual assault. This means that men and boys are not protected by law in the same way as women.

**52. Should the Penal Code provide equal protection from rape and sexual abuse for boys and men?**

- 6.16 Most sexual offences in the Penal Code only cover sexual intercourse. This means that other forms of sexual assault and abuse are not covered by the criminal law other than by the less serious offence of indecent assault.

*Rape*

- 6.17 Rape is a serious felony with a maximum penalty of life imprisonment. It is committed when a person has sexual intercourse with a woman or girl without her consent.<sup>169</sup> If the consent is obtained by force, threats, intimidation or fear of bodily harm, or false representations about the nature of the act then it is not validly given.<sup>170</sup> In the case of a married woman if consent is given because she mistook the accused for her husband it is not validly given. While the offence of rape is treated very seriously in the Penal Code, Amnesty International

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<sup>165</sup> Penal Code s 14; see Crimes Act 1961 (NZ) s 127 which provides that in NZ there is no presumption that a person because of his or her age is incapable of sexual connection.

<sup>166</sup> Penal Code s 136.

<sup>167</sup> Penal Code s 141.

<sup>168</sup> Penal Code ss 142, 143.

<sup>169</sup> Penal Code s 136.

<sup>170</sup> Penal Code s 136.

reports that the tariff for rape convictions is in fact low at an average of five years imprisonment.<sup>171</sup>

6.18 A number of restrictions exist in relation to the definition and scope of rape in the Penal Code. The report, *Translating CEDAW into Law* highlights how sexual offences in the Penal Code should be changed to comply with the terms of CEDAW.<sup>172</sup> Those recommendations are:

- comprehensive laws to prevent sexual assault and to provide remedies;
- modify rape to include all forms of penetration other than penile penetration of the vagina;
- for an exhaustive list of situations where consent is not be obtained from the victim because of violence or coercion;
- review of the provisions relating to the different categories of defilement of girls below the age of 13 and girls aged between 13 and 15; the penalties for the two offences are vastly different which encourages the view that it is less serious and less harmful to assault a more mature girl.

6.19 In a number of other jurisdictions rape or sexual assault has been expanded to include all forms of sexual penetration. In PNG penetration includes penetration of the vagina, anus or mouth, by any part of the body or an object.<sup>173</sup> The Fiji Law Reform Commission Sexual Offences Report 1999 also recommended that rape should cover penetration by non-penile objects and of other bodily orifices.<sup>174</sup> During LRC consultations it was suggested that the offence of rape should include all types of penetration.

**53. Should the Penal Code expand the definition of rape so that it includes all forms of penetration?**

6.20 Rape as defined in the Penal Code is an offence that can only be committed by a man against a woman or girl.<sup>175</sup> Consent for sexual intercourse cannot be gained through threat, force,

<sup>171</sup> Amnesty International: Solomon Islands Women Confronting Violence [3] <http://amnesty.org/en/library/asset/ASA43/001/2004/en/dom-ASA430012004en.html>, accessed 7/4/2008.

<sup>172</sup> UNIFEM, UNDP, *Translating CEDAW Into Law, CEDAW Legislative Compliance In Nine Pacific Island Countries* (2007) 328.

<sup>173</sup> Criminal Code (PNG) s 6.

<sup>174</sup> Fiji Law Reform Commission, *Sexual Offences Report* (1999) 17-18.

<sup>175</sup> Penal Code s 136.

intimidation, fear of bodily harm or false representations about the nature of the act.<sup>176</sup> Otherwise the Penal Code does not try to define consent. Other jurisdictions have given more detailed legislative guidance on the meaning of consent and circumstances when consent is not lawfully given.

6.21 The PNG Criminal Code provides guidelines for determining the issue of consent for sexual offences and abduction offences. In the PNG Criminal Code, consent means ‘free and voluntary agreement’.<sup>177</sup> In addition it states that consent is not freely given:

- where a person submits because of fear of harm to a another person;
- if it is obtained through abuse of a position of trust, power or authority;
- if it is initially given but then later withdrawn;
- if it is given by a person other than the victim.

6.22 In the Victorian Crimes Act consent is defined as a ‘free agreement’.<sup>178</sup> The Act outlines six circumstances where there is no free agreement. A free agreement does not exist where a person submits because:

- of force or fear of being forced;
- they fear they might be harmed if they do not submit;
- they have been kept against their will;
- they could not freely agree to an act because they were asleep, unconscious, drunk or drugged at the time;
- they did not really understand the sexual nature of the act; or
- they mistook the act as being for a medical or hygienic treatment.<sup>179</sup>

6.23 In some jurisdictions there is a provision that children under a specified age, for example 12 years in Queensland, are incapable of giving consent to sexual activity.<sup>180</sup>

6.24 The Solomon Islands courts have been asked to address the issue of consent in sexual assault in detail on several occasions. In one case the High Court highlighted the difficulties

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<sup>176</sup> Penal Code s 136.

<sup>177</sup> Criminal Code (PNG) s 374 A.

<sup>178</sup> Crimes Act (Vict) s 36.

<sup>179</sup> Crimes Act (Vic) s 36.

<sup>180</sup> Criminal Code (Qld) s 349(3).

surrounding the issue of consent.<sup>181</sup> The issue is always more difficult where consent was originally given and then withdrawn during the sexual act. English authority suggests that where there was initial resistance followed by subsequent permission to that which was previously resisted, consent is considered as being validly given.<sup>182</sup> This approach was followed in the Solomon Islands case because the common law rule that a victim to sexual assault must show some form of resistance still operates. Evidence of injuries and torn clothing are important and would tend to show that there was resistance or force indicative of a lack of consent.<sup>183</sup>

- 6.25 Another issue is whether submission equals consent. Consent usually results in submission. However by no means does it follow that mere submission results in consent.<sup>184</sup>
- 6.26 The Victorian Crimes Act has a provision that says if the victim did not protest, physically resist, or was not injured, or there was some prior agreement to engage in a sexual act with the accused or some other person on any occasion, this does not indicate that there was 'free agreement'.<sup>185</sup>

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| 54. | <b>Should the definition of consent in the Penal Code be changed? If so how?</b>   |
| 55. | <b>Should the Penal Code provide a list of circumstances when consent is considered as invalid?</b>                      |
| 56. | <b>Should a person be guilty of rape if the victim is not capable of giving consent, for example a very young child?</b> |

- 6.27 The term 'rape' signifies a very specific offence associated with violence and aggression. Some Australian jurisdictions have replaced the term 'rape' with a more generic description.<sup>186</sup> New South Wales has replaced the term 'rape' with 'sexual

<sup>181</sup> *R v Molanisau* (unreported) Criminal Case No.21 of 1980

<sup>182</sup> *R v Molanisau* (unreported) Criminal Case No.21 of 1980, quoting Lord Hewart delivering judgment of the Court at pages 51-52 in *R v Salman* (1924) 18 Cr AppR 49.

<sup>183</sup> *R v Paul Misiata* [1999] SBHC 23 <www.pacii.org>.

<sup>184</sup> *Regina v Iroi* [2004] SBHC 30 <www.pacii.org>.

<sup>185</sup> Crimes Act 1958 (Vic) s 37AAA.

<sup>186</sup> MCCOC, *Model Criminal Code Sexual Offences Against the Person* (1999) Discussion Paper 57.

assault'.<sup>187</sup> In Western Australia rape is called 'sexual penetration without consent'.<sup>188</sup> In the Northern Territory and the Australian Capital Territory rape is referred to as 'sexual intercourse without consent'.<sup>189</sup> New Zealand employs the term 'sexual violation' which includes rape and other categories of sexual assault.<sup>190</sup> England retains the term 'rape'.<sup>191</sup> These terms sexual assault were used when offences are graded according to increasing levels of seriousness and the most serious of sexual assault is where there is penetration. In this way the offences focused on the violence perpetrated and not on the sexual aspect.<sup>192</sup> The MCCOC report on sexual offences recommended that the basic offence be renamed as 'unlawful sexual penetration'.<sup>193</sup>

**57. Should the term 'rape' in the Penal Code be replaced with some other terminology?**

- 6.28 Many years ago the English writer Hale said: 'But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself with this unto her husband, which she cannot retract.'<sup>194</sup>
- 6.29 This English rule was adopted as part of the law in Solomon Islands and the offence of marital rape does not exist in the Penal Code. The traditional presumption that a wife consents to sexual intercourse with her husband is until divorce or

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<sup>187</sup> Crimes Act (NSW) s 61I.

<sup>188</sup> Criminal Code (WA) s 325.

<sup>189</sup> Crimes Act (ACT) s 54.

<sup>190</sup> Crimes Act (NZ) s 128.

<sup>191</sup> Criminal Justice and Public Order Act (1994) s 142. This section replaces the existing provisions on rape by substituting a new s1 of the Sexual Offences (1956) Act making it an offence to rape a woman or another man.

<sup>192</sup> MCCOC, *Model Criminal Code Sexual Offences Against the Person* (1999) Discussion Paper 59.

<sup>193</sup> MCCOC, *Model Criminal Code Sexual Offences Against the Person* (1999) Discussion Paper 63.

<sup>194</sup> Pleas of the Crown 1736 Vol at 629. The rule originated at a time when marriage could only be dissolved by death or by an Act of Parliament, MCCOC, *Model Criminal Code Sexual Offences Against the Person* (1999) Discussion Paper 99.



separation.<sup>195</sup> In England and Australia the law has been reformed so that a husband can now be prosecuted and convicted of marital rape.<sup>196</sup>

- 6.30 The High Court has stated that the present law in Solomon Islands is that a husband cannot be guilty of rape upon his wife, but a husband can be found guilty of aiding and abetting the rape of his wife.<sup>197</sup> In this case, it was alleged that one of the accused who was the victim's brother-in-law was forced into having sexual intercourse with the victim as a result of the victim's husband (the second accused) swearing in custom on them. The husband was the brother in-law's brother. However the court decided that the custom swearing was not a sufficient threat enough to bring about the act, although it did accept that custom swearing can operate as a threat or force in the minds of a person in a society like Solomon Islands.
- 6.31 The Fiji Sexual Offences Report highlighted consultations in several cities in Fiji where wives expressed their desire for a law which could be used to prevent husbands from continuing with their abusive conduct.<sup>198</sup> The wives did not want their husbands to go to prison because this would mean losing their economic support. However they wanted to see that there was some improvement to their lives. The report did not recommend the introduction of marital rape, but it did recommend that non consent be defined and that this definition would include non-consensual acts during marriage. In other words the rape provision is extended to include non-consensual sexual intercourse between persons who are married.
- 6.32 The Fiji Court of Appeal made a determination on the issue in 2006 in which it upheld a lower court decision that the

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<sup>195</sup> Mark Findlay, *Criminal Laws in the South Pacific* (2000); *R v Steele* (1976) 65 Cr App R 22; See *Regina v Gwagwango & Taedola* [1991] SBHC 59 <www.paclii.org>.

<sup>196</sup> Three House of Lords decisions eventually led to the rejection of the presumption against rape in marriage. These decision were *R v J* [1991] All ER 759; *R v C* (1991) 1 All ER 755; *R v R* (1991) 4 All ER 481. It was the later decision which ensured that the continuation of the presumption ended. The Criminal Justice and Public Order (1994) Act amended the definition of rape to include rape in marriage. In every state in Australia the rule has been reversed by legislation.

<sup>197</sup> *R v Gwagwango & Taedola* [1991] SBHC 59 <www.paclii.org>.

<sup>198</sup> Fiji Law Reform Commission, *Sexual Offences Report 1999 Reform of Chapter XVII of the Penal Code* (2000) 18.

traditional common law presumption that 'a wife was deemed to have consented irrevocably to sexual intercourse with the husband and that therefore a husband could not be convicted of rape or attempted rape of his wife, is no longer law in Fiji.'<sup>199</sup>

- 6.33 During LRC consultations suggestions for the law to change in this area were met with mixed reactions. Strong views support the proposition that 'what happens in the home remains a private matter'. Others however disagree. Although the law protects the privacy of the home, the dynamics of domestic violence are an important consideration in this area. Incidents of domestic violence are prevalent in the Solomon Islands and this inevitably suggests that violence does occur in marriage.

<p><b>58. Should rape in marriage be an offence under the Penal Code?</b></p>
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#### *Attempted rape*

- 6.34 Attempted rape is a felony punishable with a maximum imprisonment period of seven years.<sup>200</sup> There is a very slim nexus separating an offence of rape from that of attempted rape in certain circumstances. In Queensland attempted rape has a maximum penalty of 14 years imprisonment.<sup>201</sup> Some jurisdictions, for example Queensland, have an additional offence, assault with intent to commit rape which attracts a maximum penalty of imprisonment for 14 years.<sup>202</sup> The offence addresses a situation where the accused commits another offence with the intention to unlawfully sexually penetrate the victim.
- 6.35 There is a huge gap between the penalties for rape, attempted rape, indecent assault (five years) and attempted sexual intercourse with a girl under 13 years of age (two years) as they appear in the Penal Code. The offences of indecent assault and attempted sexual intercourse with a girl under the age of 13 years appear as less serious sexual offences compared to attempted rape. However currently there is no offence which is able to fill in the gaps between offences which appear on the

<sup>199</sup> *Dutt v The State* [1995] FJHC 130 <www.paclii.org>.

<sup>200</sup> Penal Code s 138.

<sup>201</sup> Criminal Code (Qld) s 350.

<sup>202</sup> Criminal Code (Qld) s 351.

lower end of the scale and those which appear as more serious but fall short of attempted rape.

- 6.36 Offences may need to be re-formulated to address these gaps. For example in the Queensland Criminal Code there is rape which attracts a maximum penalty of life imprisonment, attempt to rape which is liable to 14 years imprisonment, assault with intent to commit rape which attracts a maximum of 14 years and sexual assaults which attract a sentence of 10 years.<sup>203</sup> The later offence covers conducts which would originally include indecent assault but do not involve sexual penetration. For example, where there is no assault in the traditional sense but the victim is forced to perform or to witness sexual acts being performed by other persons.<sup>204</sup> However where there is contact with sexual organs or genitalia, the gravity of the offence increases and a person may be liable to a sentence of 14 years imprisonment.

**59. Should the Penal Code contain an offence of 'assault with intent to commit rape'?**

**60. Should the penalty for attempted rape be increased?**

#### *Abduction for sexual intercourse*

- 6.37 The Penal Code contains some specific offences dealing with abduction with the intent to marry or have sexual intercourse. Abducting a woman of any age for the purposes of marriage or for sexual intercourse is a felony punishable by seven years imprisonment.<sup>205</sup> There is a separate offence of abduction of a girl below the age of 18 years which is a misdemeanor with no specific maximum penalty. However the offence is not committed if the accused has a reasonable belief that the girl was over the age of 18 years.<sup>206</sup> The penalties for these two offences are inconsistent.

**61. Should the abduction offences be replaced by general kidnapping or deprivation of liberty offences?**

<sup>203</sup> Criminal Code (Qld) ss 349 -352.

<sup>204</sup> Criminal Code (Qld) s 352(1)a.

<sup>205</sup> Penal Code s 139.

<sup>206</sup> Penal Code s 140.

*Indecent assault*

- 6.38 The offence of indecent assault deals with non consensual sexual acts that do not involve penile penetration. However lack of consent is not required for indecent assault on a girl under the age of 15 years.<sup>207</sup>
- 6.39 The offence of indecent assault is committed if someone makes some indecent act against a woman or girl, or threatens to make an indecent act against a woman or girl. This offence is a felony and has a maximum penalty of five years imprisonment.
- 6.40 The Penal Code also contains an offence of insulting the modesty of a woman or girl, which carries a maximum penalty of one year imprisonment.<sup>208</sup> This offence can be committed by making a sound, gesture or saying words.
- 6.41 Indecency is not defined in the Penal Code and its meaning depends on prevailing community standards. What is indecent is assessed objectively.<sup>209</sup> The term indecent means an act which is capable of being considered by any right minded person as being indecent.<sup>210</sup>
- 6.42 In 2006 a school principal was convicted of insulting the modesty of a girl who was his pupil.<sup>211</sup> The school principal had lured his pupil and invited her to remove her clothing so that he could teach her how the reproductive system worked. This involved indecent assault of a non-physical nature. Many indecent assault cases in the Solomon Islands occur where an accused professes to administer traditional healing to the victim.

- 62. Are the penalties for indecent assault, and insulting the modesty of women and girls adequate?**
- 63. Should there be different penalties for indecent assault of children and adults?**

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<sup>207</sup> Penal Code s 141(1).

<sup>208</sup> Penal Code s 141(3).

<sup>209</sup> MCCOC *Model Criminal Code Sexual Offences Against the Person*, (1999) Discussion Paper 105.

<sup>210</sup> *R v Goss & Goss* (1990) 90 Cr AppR 400 per Saville J at 406.

<sup>211</sup> *Lasi v Regina* [2006] SBHC 132 <[www.paclii.org](http://www.paclii.org)>.

- 64. **Should the offences apply to boys and men as well as girls and women?**
- 65. **Should there be different penalties for indecent assault where there is a relationship of trust or dependency between the victim and the accused?**
- 66. **Should the concept of 'insulting modesty' be replaced by a more modern concept, such as offensive words or conduct?**

### *Incest*

- 6.43 The Penal Code contains separate offences dealing with incest by males, and incest by females.<sup>212</sup> The law on incest prohibits sexual intercourse between people who are related to each other through lineal or blood relationships. Knowledge of the relationship is therefore vital to the commission of the offence.<sup>213</sup> Consent is no justification. A significant characteristic of the offence is the fact that both parties can be charged for the offence, but a female (who is over the age of 15) can only be charged if she allows the offence to occur. This has been criticised by the report *Translating CEDAW into Law* because it may discourage victims to report the crime for fear of being prosecuted.<sup>214</sup> Incest carries a maximum penalty of seven years imprisonment. Where the victim is under the age of 13 the maximum penalty is life imprisonment. An attempt of the offence is a misdemeanour.
- 6.44 In PNG, the law relating to incest has been amended to ensure that incest between two consenting adults is distinguished from incest involving a dependent. Incest involving a dependent is considered much more serious to incest committed between two consenting adults.
- 6.45 In Solomon Islands, the offence seems to be founded upon biological considerations.<sup>215</sup> Today, the offence of incest is most commonly used in cases of child sexual abuse, and prosecutions for adult consensual incest are rare. Often incest involves

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<sup>212</sup> Penal Code ss 163, 164.

<sup>213</sup> Penal Code s163(1); *R v Carmichael* (1940) 27 AppR 183 per Charles J at 90.

<sup>214</sup> UNIFEM, UNDP, *Translating CEDAW Into Law, CEDAW Legislative Compliance In Nine Pacific Island Countries* (2007), 328.

<sup>215</sup> See also South African Law Commission, *Sexual Offences Against Children*, Issues Paper (1997).

repeated sexual violations by a male relative of a child. The Victorian Law Reform Commission report on Rape and Other Sexual Offences highlighted that the offence needs to be updated so that it focuses on protecting children and young people from exploitation within the family rather than prohibiting sexual penetration in particular relationships.<sup>216</sup> Similarly recent amendments on incest law in PNG were decided on this basis.<sup>217</sup>

67. **Should the definition of relative be broadened for incest offences to include adopted siblings, parents and grandparents?**
68. **Should the Penal Code be changed so a child under the age of 18 years cannot be charged with incest, or so a person in a position of dependency cannot be charged with incest?**

### *Sexual abuse of children*

- 6.46 An investigation by the Church of Melanesia produced a report 'Commercial Sexual Exploitation of Children (CSEC) in Solomon Islands'.<sup>218</sup> A wide range of sexual abuse of children was recorded including: child prostitution, exposure of children to pornography, early marriage and trafficking. The report revealed that sexual abuse and exploitation is committed both by foreign workers employed by logging companies, foreign tourists, but children are most at risk in their homes and communities with people they know and trust.<sup>219</sup> The investigation by the Church of Melanesia highlighted situations where girls under the age of 15 are 'married off' to loggers in return for bride price.<sup>220</sup>

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<sup>216</sup> Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) 442.

<sup>217</sup> Criminal Code (PNG) (Sexual Offences and Crimes Against Children) (2002) Act; John.Y, Luluaki, 'Incest and Marriage Prohibitions: Implications to the recent changes to the Law against Incest under Papua New Guinea's Criminal Code', (2003) *Melanesian Law Journal* 2.

<sup>218</sup> Tania Herbert, Church of Melanesia, *Commercial Sexual Exploitation of Children: A report focusing on the presence of the Logging Industry in a Remote Region* (2007).

<sup>219</sup> Aaron Olofia, 'Task force addressing sexual exploitation of children' *Solomon Star* (Solomon Islands), Tuesday 12 February 2008.

<sup>220</sup> Tania Herbert, Christian Care Centre, Church of Melanesia, *Commercial Sexual Exploitation of Children in the Solomon Islands: A report focusing on the presence of the Logging Industry in a Remote Region* 2007.

- 6.47 There are a number of offences in the Penal Code that specifically address sexual abuse of children. Many of them only apply to girls. Under the Convention of the Rights of the Child ('CRC') there should be laws to protect children from all forms of sexual abuse.<sup>221</sup> States should also take action to abolish traditional practices that are harmful to the health of children.<sup>222</sup> The CRC Committee has recommended that Solomon Islands strengthen and expand its efforts to address child sexual abuse.
- 6.48 Specific offences currently in the Penal Code that cover children include:
- defilement of a girl under the age of 13 years, or between the age of 13 and 15 years;<sup>223</sup>
  - procuring a girl under the age of 18 years to have unlawful sexual intercourse;<sup>224</sup>
  - procuring a girl to become a prostitute, or become a 'inmate of a brothel';<sup>225</sup>
  - householder permitting defilement of a girl on their premises;<sup>226</sup>
  - detaining a girl in a brothel;<sup>227</sup>
  - disposing of minors under the age of 15 years for prostitution or unlawful intercourse;<sup>228</sup>
  - obtaining minors under the age of 15 years for prostitution or unlawful sexual intercourse.<sup>229</sup>
- 6.49 In addition, the general offences of rape and incest also apply to children.
- 6.50 The defilement offences prohibit unlawful sexual intercourse with girls under the age of 15 years. One offence, classified as a felony, applies to girls under the age of 13 years and carries a maximum penalty of imprisonment for life. An attempt to

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<sup>221</sup> *International Convention on the Rights of the Child*, Article 19.

<sup>222</sup> *International Convention on the Rights of the Child*, Article 24(3).

<sup>223</sup> Penal Code ss 142,143.

<sup>224</sup> Penal Code s 144 (1)(a).

<sup>225</sup> Penal Code s 144 (1)(d).

<sup>226</sup> Penal Code ss 146,147.

<sup>227</sup> Penal Code s148.

<sup>228</sup> Penal Code s149.

<sup>229</sup> Penal Code s150.

commit the same offence is a misdemeanor punishable only by imprisonment for two years.<sup>230</sup>

- 6.51 Another offence of defilement applies to girls between the age of 13 and 15 years, it is classified as a misdemeanor and carries a maximum penalty of five years. A prosecution for an offence committed against a girl between the age of 13 and 15 must be commenced within 12 months of the offence. It is a defence where the accused had a reasonable belief that the girl was over the age of 15 years.<sup>231</sup> Child sexual offences in Solomon Islands have also been criticised as inconsistent with CEDAW because they allow for a defence based on mistaken belief about the age of the girl.<sup>232</sup>
- 6.52 The report *Translating CEDAW into Law* suggests that the term 'defilement' similar to 'insulting the modesty' is discriminatory and suggests that girls are spoilt and damaged and does not convey a young girls right to personal autonomy.<sup>233</sup>

69. **Should the distinction in maximum penalties for the offences of defilement of girls under 13, and defilement of girls between 13 and 15 be retained?**
70. **Should there be any changes to the penalties?**
71. **Should the defence of reasonable belief that the girl was over the age of 15 be retained?**
72. **Is there a need to retain the term 'defilement'?**

- 6.53 The requirement to commence a prosecution for the offence of defilement against a girl between the age of 13 and 15 years within 12 months does not recognise the practical and social obstacles to reporting this type of violence, and the time required for a police to investigate such a report.

73. **Should the requirement that the prosecution of the offence commence within 12 months be retained?**

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<sup>230</sup> Penal Code s 142.

<sup>231</sup> Penal Code s 143.

<sup>232</sup> UNIFEM, UNDP, *Translating CEDAW Into Law, CEDAW Legislative Compliance In Nine Pacific Island Countries* (2007) 338.

<sup>233</sup> UNIFEM, UNDP, *Translating CEDAW Into Law, CEDAW Legislative Compliance In Nine Pacific Island Countries* (2007) 337.



- 6.54 A person cannot be convicted of the offence of procuring a girl for unlawful sexual intercourse, or to become a prostitute or inmate of a brothel on the evidence of one person only.<sup>234</sup> This requirement does not apply to any other sexual offences against children and is inconsistent with the CRC.

**74. Should the requirement that a person cannot be convicted of procuring on the basis of the evidence of one person be abolished?**

- 6.55 The maximum penalty for procuring offences is two years. This is unlikely to act as an effective deterrent to obtaining or dealing with children for the purpose of commercial sexual exploitation.

**75. Should the penalty for procuring be changed? If so how?**

- 6.56 Under the current law customary marriage operates as an excuse to sexual offences committed against girls under the age of 15, including defilement and disposing and obtaining girls for unlawful sexual intercourse. There is no minimum age for customary marriage so the offences cannot apply in cases of 'early marriage' under customary law.<sup>235</sup>

**76. How should the issue of sexual offences involving girls under the age of 15 who are married under customary law be addressed?**

### *Sexual touching, using a child for sexual gratification*

- 6.57 The Penal Code does not contain specific offences to deal with sexual touching (other than indecent assault) of children; using a child for sexual gratification; abusing a position of trust or authority in order to have sex with a child of up to the age of 18 years; persistent sexual abuse of a child; and taking and removing a child from care for any sexual act (not confined to sexual intercourse).
- 6.58 Sexual touching is when a person touches a child for sexual purposes.<sup>236</sup> It can also include when a person forces a child to

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<sup>234</sup> Penal Code s 144.

<sup>235</sup> The minimum age for marriage under the Islanders' Marriage Act is 15 years.

<sup>236</sup> Criminal Code (PNG) s 229B(1)(a).

touch the sexual parts of that person's body with any of the child's body parts.<sup>237</sup> Touch can be done either directly or indirectly. Usually it is more serious when the offence is committed on a very young child or if there was a relationship of trust or authority or dependence.<sup>238</sup> In PNG for example the penalty for sexual abuse on a child below the age of 12 is imprisonment for seven years. In the later case the penalty is imprisonment for a maximum of 12 years.<sup>239</sup>

- 6.59 An offence of using a child for sexual gratification can apply to the use of children to perform sexual acts. Consultations by the Fiji Law Reform Commission for its report on Sexual Offences on Children indicated that there should also be an offence of 'invitation to sexual touching'. This offence would include inviting, asking or getting a child to touch either directly or indirectly another persons body parts, or their own.<sup>240</sup>

**77. Should the Penal Code include an offences that apply to sexual touching of a child, or inviting a child to sexually touch an adult?**

#### *Abusing a position of trust or authority*

- 6.60 These offences are aimed at protecting children who can legally give consent to sexual intercourse from being forced or persuaded by someone in a position of trust or authority to engage in sexual activity. For example in PNG the offence of 'abuse of trust, authority or dependency' is aimed at protecting children between the ages of 16 to 18 years who are in a social relationship with a person who is in authority or whom they are dependent on.<sup>241</sup> The offence covers unlawful sexual intercourse and sexual touching. Consent is not a defence unless there was a reasonable belief that the child was older than 18.
- 6.61 In Vanuatu it is an offence to have sexual intercourse with a child under ones care and protection. This includes a step child, a foster child or a child living with the person as a member of

<sup>237</sup> Criminal Code (PNG) s 229B(1)(b).

<sup>238</sup> Criminal Code (PNG) ss 229B(4)), 229B (5).

<sup>239</sup> Criminal Code 1 (PNG) ss 229B(1), 229B(4), 229B (5).

<sup>240</sup> Fiji Law Reform Commission, *Sexual Offences on Children*, Report 17.

<sup>241</sup> Criminal Code (PNG) s 229E.

the person's family and who is under the person's care and protection and under 18 years of age.<sup>242</sup> The penalty for this offence in Vanuatu is imprisonment for a term of 10 years.

**78. Should the age of consent be increased to 18 years for sexual offences where the accused is in a social relationship with the victim or in a position of authority?**

*Persistent sexual abuse of a child.*

- 6.62 In numerous cases children are subject to persistent sexual abuse over a number of years. It is often difficult to prove when the first sexual encounter took place because a victim may not be able to remember when the abuse started, or how many times he or she was abused. An offence of persistent sexual abuse of a child recognises a course of conduct over a period of time rather than a single event, and it is immaterial that the sexual conduct is different over time.
- 6.63 The provisions for persistent sexual abuse of a child were introduced into all Australian jurisdictions as a response to the case of *S v The Queen*.<sup>243</sup> This case was significant for several reasons. A charge was brought for three counts of sexual assault of a 15 year old girl by her father. The victim had alleged that the accused committed several acts of incest over a period of three years. The repeated acts of sexual intercourse were indistinguishable apart from the fact that they were alleged to have occurred at different times. Because the victim could not specify when any one act occurred the prosecution could not specify this in the particulars of the charge and was unable to say which of the acts was relied on for the charge. The court therefore overturned the convictions.
- 6.64 Several problems were identified by the court in this case. Procedurally, the rules for drafting charges required that the prosecution should attempt to particularize each count within a charge. In this case the prosecution could not do this because the victim was unable to provide this information.

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<sup>242</sup> Penal Code Amendment Act 2003(Van) s 2.

<sup>243</sup> Crimes Act (Vic) s 47 A; Criminal Law and Consolidation Act (SA) s74; Crimes Act (ACT) s 92EA; Criminal Code (NT) s 321A; Criminal Code (Qld) s229 B; Criminal Code (Tas) s125A; Crimes Act (NSW) s66EA; (1989) 168 CLR 266.

- 6.65 The lack of particularity meant that the accused would be denied the opportunity to provide a defence for each of the acts which he was alleged to have committed.<sup>244</sup> He was also denied the opportunity to test the credibility of the victim's evidence by reference to precise times or surrounding circumstances.<sup>245</sup>
- 6.66 There were problems in relation to evidence. The lack of specificity meant that evidence relating to other acts of sexual intercourse or sexual conduct could not be admitted on the basis of their probative value but could only point to the tendency that the accused might have committed those acts.
- 6.67 Charging the defendant with several counts and in this case indistinguishable was also prejudicial to the defendant receiving a fair trial because this involved a trial before a jury.
- 6.68 The issues were again raised in *Pordisky v The Queen*<sup>246</sup> where the Court also highlighted the unfairness against the accused where the charge against the accused was not particularized by the prosecution. However the court also emphasised the difficulties faced by the prosecution in these types of cases.
- 6.69 The Court determined that the complainant also faced an injustice where there was clear evidence suggesting that repeated acts of sexual intercourse has taken place over a period of time.
- 6.70 Papua New Guinea has a provision for 'persistent sexual abuse of a child' the penalty of which is a maximum of 15 years imprisonment.<sup>247</sup> It is irrelevant if the repeated sexual conducts are of similar nature or were the same on each occasion.<sup>248</sup> If sexual penetration takes place on any one of these occasions, the maximum penalty will be life imprisonment. The offence must be committed by the accused on at least two separate occasions, and they must occur on separate days during the relevant period.<sup>249</sup>

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<sup>244</sup> (1989) 168 CLR 266.

<sup>245</sup> MCCOC, *Model Criminal Code Sexual Offences Against the Person* (1999) Discussion Paper, 133.

<sup>246</sup> 1990 3 WAR 128.

<sup>247</sup> Criminal Code (PNG) s229D, Luluaki, John .Y. 'Sexual Crimes Against and Exploitation of Children and the Law in Papua New Guinea' [2003] *Melanesian Law Journal* 3.

<sup>248</sup> s229D (2) Criminal Code (PNG)

<sup>249</sup> s229D (5)a Criminal Code (PNG)

- 6.71 There are cases where victims have been subject to a course of conduct indicative of persistent sexual abuse. However because such an offence does not exist, perpetrators are charged with other offences in the Penal Code.<sup>250</sup> The offence of 'persistent sexual abuse of a child' addresses situations where the sexual conduct with a child occurs repeatedly and over a period of time. The offence thus aims to address the repeated nature of the offending especially where young children are involved and the difficulties in prosecuting such cases.

**79. Should the Penal Code include an offence of persistent sexual abuse of a child?**

*Sale of Children and Child Prostitution*

- 6.72 Several newspapers have recently reported on attempts by persons to sell babies on the streets of Honiara. The Penal Code contains an offence of child stealing but this offence does not capture acts whereby a child may be sold or bartered for financial or economic reward or gain whether immediate or over a period of time. In Fiji, there are a few incidents of children being sold. However there are reports of children being adopted out of the country who later find themselves in sexually exploitative or sexual abuse circumstances. Reports highlight that a weak system regulating adoption in Fiji provides a potential for children to be sold and trafficked out of Fiji by unscrupulous individuals.<sup>251</sup>
- 6.73 The offence of procuration in the Penal Code addresses some circumstances where a woman or girl is obtained or recruited for the purposes of sexual intercourse or to become a common prostitute or to be a member of a brothel. However there are many other aspects of child prostitution not covered by offences in the Penal Code.
- 6.74 Child prostitution is the 'use of a child in sexual activities for remuneration or any other form of consideration.'<sup>252</sup> Solomon

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<sup>250</sup> *Fuiloirentino v R* [2008] SBHC 47 <www.pacii.org> ; *Roko v R* [1990] SILR 270.

<sup>251</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography*.

<sup>252</sup> *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.

Islands' obligations under CEDAW require that it take measures to suppress the exploitation of women and prostitution.<sup>253</sup> Children who become involved in the sex trade and in prostitution face many perils.

- 6.75 The offences regarding child prostitution (i.e. procurement and obtaining or disposing of a child for unlawful sexual intercourse or prostitution) carry very low penalties; do not apply to cases involving early marriage and marriage under custom without the consent of the girl; and do not comply with CEDAW.<sup>254</sup> The offence uses archaic terminology (common prostitute) and does not cover sexual acts other than sexual intercourse or 'common prostitution'. It is unclear what is covered by common prostitution.<sup>255</sup>
- 6.76 In PNG, child prostitution is defined in the criminal code as 'the provision of any sexual service by a person under the age of 18 years for financial or other reward, favour or compensation, whether paid to the child or some other person'. The Code contains the offences of obtaining the services of a child prostitute;<sup>256</sup> offering or engaging a child for prostitution;<sup>257</sup> facilitation or allowing child prostitution;<sup>258</sup> receiving benefit from child prostitution;<sup>259</sup> permitting premises to be used for child prostitution.<sup>260</sup> It is a defence to the charge of obtaining the services of a child prostitute or facilitating or allowing child

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<sup>253</sup> *International Convention on Elimination of All forms of Discrimination Against Women* art 2.

<sup>254</sup> Legislative Compliance in Solomon Islands. UNIFEM, Translating CEDAW into Law. pp330

<sup>255</sup> The term common prostitute first appeared in English statute in the Vagrancy Act of 1824. It still appears in English law in section 1 of the Street Offences Act 1959 which states "it shall be an offence for a common prostitute to loiter and solicit in a street or public place for the purpose of prostitution". Thus apparently creating an offence which only applied to those designated as 'common prostitutes' and not to others. In the case of *Director of Public Prosecutions v Bull* [1994]158 J.P 1005, it was determined that the term only applied to females and not to male prostitutes. The terms is regarded as offensive, archaic and stigmatises. However numerous attempts to remove it have been unsuccessful. In the UK in 2007, legislation was introduced to remove this and create an offence that can be committed not only by special classes of persons.

<sup>256</sup> Criminal Code (PNG) s 229K.

<sup>257</sup> Criminal Code (PNG) s 229L.

<sup>258</sup> Criminal Code (PNG) s 229M.

<sup>259</sup> Criminal Code (PNG) s 229N.

<sup>260</sup> Criminal Code (PNG) s 229O.

prostitution if the accused believed that the child prostitute was over the age of 18.<sup>261</sup>

- 6.77 Under the Vanuatu Penal Code, an ‘act of child prostitution’ means any sexual service, whether or not involving an indecent act provided by a child for cash or kind or any other form of consideration;<sup>262</sup> or that aims to bring sexual arousal or sexual gratification of a person or persons other than the child.<sup>263</sup>

**80. Should the child prostitution offences be reconsidered? If so how?**

### *Sexual Servitude of Adults*

- 6.78 The current offence of procuring (recruiting or obtaining) for unlawful sexual intercourse, or to become a prostitute applies to both girls and women. The issue of child prostitution is addressed above and this section considers offences that apply to procurement of adults.
- 6.79 Under the Penal Code a person is guilty of procuration if he or she procures or attempts to procure any woman to become a common prostitute. It is also an offence to procure or attempt to procure a woman for sexual intercourse using by threats, intimidation, fraud or by giving her drugs.<sup>264</sup> The Penal Code also contains an offence of detaining a woman in a brothel, or detaining her for the purpose of her having sexual intercourse, against her will.<sup>265</sup> More contemporary formulations of these offences cover a broader range of sexual activity (not just sexual intercourse) and broader range of circumstances where people can be coerced or forced to engage in a sexual act.
- 6.80 These offences are misdemeanors and carry a maximum penalty of two years imprisonment. This maximum penalty is very low, compared to Queensland where it is 14 years. The term procure is defined in Queensland and it includes knowingly enticing or recruiting a person or persons for the

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<sup>261</sup> Criminal Code (PNG) s 229.

<sup>262</sup> Penal Code (Van) s 101A (a).

<sup>263</sup> Penal Code (Van) s101A (b).

<sup>264</sup> Penal Code s 145.

<sup>265</sup> Penal Code s 148.

purposes of sexual exploitation.<sup>266</sup> The Penal Code does not define procure.

- 6.81 A person cannot be convicted of procuration on the evidence of one witness alone, unless the witness's evidence can be corroborated by other evidence which implicates the offender. This means a person cannot be convicted on the basis of evidence only from the victim of the offence. The policy underlying this rule is unclear. It may be connected to the old common law rule that treated the evidence of women and children regarding sexual offences as inherently unreliable. It is now understood that rules like this discriminate against women.
- 6.82 The offences only apply to women and do not protect men. The offences do not include circumstances where a person is forced to perform sexual acts which do not involve sexual penetration, such as masturbation or oral sex, or commercial exploitation outside of a brothel.

**81. Should there be a broader offence addressing situations of servitude for sexual purpose and commercial exploitation?**

*Sexual offences against people with intellectual impairment*

- 6.83 It is also an offence under the Penal Code to have unlawful sexual intercourse with any 'female idiot or imbecile' knowing that she was an idiot or imbecile. The terminology for this offence is archaic and insulting, and the offence only applies to sexual abuse females who have an intellectual impairment. Lack of consent is not required and it carries a maximum penalty of five years.<sup>267</sup>
- 6.84 One of the underlying aims of laws creating sexual offences is to protect freedom of choice in sexual relations.<sup>268</sup> The law must balance two competing interests. Firstly that of protecting people with impaired mental functioning from sexual exploitation and secondly giving maximum recognition to their

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<sup>266</sup> Criminal Code (Qld) s 217.

<sup>267</sup> Penal Code s 143.

<sup>268</sup> MCCOC, *Model Criminal Code Sexual Offences Against the Person*, (1999) Discussion Paper 175.



sexual rights.<sup>269</sup> These laws may fall short where they do not provide adequate protection for adults who cannot make proper and well-informed choices about sexual matters because of a mental impairment.<sup>270</sup> Although provisions for all sexual offences may be adequate to cover persons with impaired mental capacity, it must also be borne in mind that these persons are particularly vulnerable to sexual exploitation because they depend on other people for care and support for their daily lives.<sup>271</sup>

**82. Should there be a separate offence that applies to sexual abuse of people with a mental or physical impairment?**

### *Child pornography*

- 6.85 The Penal Code does not contain any provisions regarding the possession, distribution and production of child pornography. Solomon Islands has not ratified the Optional Protocol to the Convention on the Rights of a Child on the Sale of Children, Child Prostitution and Child Pornography. However, the Optional Protocol contains very useful legal standards for prohibiting such offences. It recommends that measures need to be developed and undertaken by state parties that guarantee protection for children from exploitation whether for financial gain, economic purposes, or unlawful sexual practices and sexual exploitation.
- 6.86 The Penal Code does have some offences which deal with indecent material, such as trafficking in obscene materials, and possession of obscene video tapes and photographs.<sup>272</sup>
- 6.87 The growing availability of child pornography on the internet and other evolving forms of information technology calls for the criminalisation of the intentional possession, production,

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<sup>269</sup> MCCOC, *Model Criminal Code Sexual Offences Against the Person* (1999) Discussion Paper 177.

<sup>270</sup> MCCOC, *Model Criminal Code Sexual Offences Against the Person* (1999) Discussion Paper 175.

<sup>271</sup> Law Reform Commission of Victoria, *Sexual Offences*, Final Report, (2004), p321.

<sup>272</sup> Penal Code s173, 174.

distribution, exportation, transmission, importation, and advertising of child pornography.<sup>273</sup>

- 6.88 The Optional Protocol defines child pornography to include any representation, by whatever means, of a child engaged in real or stimulated explicit sexual activities or any representation of the sexual parts of the child for primarily sexual purposes.<sup>274</sup>
- 6.89 Other jurisdictions have offences of exposing a child to pornography for the purposes of making the child open to sexual contact with adults.
- 6.90 Some Pacific jurisdictions have developed laws to address child pornography. These include PNG, Fiji, Vanuatu and Tonga. Offences also include filming and photographing children for indecent purposes as other manifestations of the offence.<sup>275</sup>

<p><b>83. Should there be specific offences introduced to cover child pornography?</b></p>
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### *Homosexuality*

- 6.91 The Penal Code contains several offences which relate to homosexual conduct. These are referred to as indecent practices, or unnatural offences. Buggery, whether with another person male or female, or with an animal, is a felony which can attract a maximum sentence of 14 years imprisonment.<sup>276</sup> These offences are referred to as unnatural offences. An attempt to commit an indecent assault upon a male is also a felony and the maximum penalty is 7 years imprisonment.<sup>277</sup>
- 6.92 Indecent practices between persons of the same sex whether in public or in private is prohibited and is an offence under the Penal Code. Whether a person commits the act, simply attempts to procure another person of the same sex to commit

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<sup>273</sup> *Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.*

<sup>274</sup> *Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.*

<sup>275</sup> See Criminal Code (PNG) Division 2A, ss 229J, 229R, 229S, 229T, 229U, 229V; Fiji Juveniles Amendment Act (1997) Section 62A; Tonga Criminal Offences Amendment Act (2003); Vanuatu Penal Code Amendment Act 2003.

<sup>276</sup> Penal Code s 160.

<sup>277</sup> Penal Code s 161.

the act, or attempts to procure its commission is guilty of an offence.<sup>278</sup>

- 6.93 Homosexual conduct is not allowed by law in Solomon Islands and the prohibition applies both to conduct between adults and children of the same sex. In other pacific countries it is also prohibited but not to the same extent. In Fiji for example the 1997 Constitution prohibits discrimination based on 'sexual orientation'. However the Fijian Penal Code prohibits 'acts against the order of nature'.<sup>279</sup> In 2005 a case went on appeal to the High Court of Fiji when two men were charged for having consensual sex and taking photographs of themselves.<sup>280</sup> They argued that private consensual acts between individuals should not be the subject of state scrutiny. They claimed it was a breach of their privacy, and their right to equality and freedom from degrading treatment under the Constitution. It was decided that private consensual acts between two persons of the same sex was not prohibited.
- 6.94 In PNG a person who assaults a person to commit an unnatural act is an offence punishable by 14 years.<sup>281</sup> The offence of indecent assault upon males however is a misdemeanour for which a person can be sentenced to a maximum of 3 years imprisonment.<sup>282</sup>
- 6.95 In Vanuatu it is a criminal offence to commit a homosexual act with a person of the same sex under the age of 18 years. Whether the person agrees to the act or not is irrelevant and the penalty for the offence is 2 years imprisonment.<sup>283</sup> Gross indecency in public is also an offence.<sup>284</sup> This indicates that consensual homosexual activity in private between adults is permitted in Vanuatu.
- 6.96 In Cook Islands it is an offence to keep a place where homosexual acts can take place and the penalty for the offence

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<sup>278</sup> Penal Code s 160.

<sup>279</sup> Penal Code (Fiji) s 175.

<sup>280</sup> *McCosker v The State* [2005] FJHC 500, HAA 0085 and 0086 2005 (26 August 2005).

<sup>281</sup> Criminal Code (PNG) s 210(1).

<sup>282</sup> Criminal Code (PNG) s 337.

<sup>283</sup> Penal Code (Van ) s 99.

<sup>284</sup> Penal Code (Van) s 100.

is a maximum of 10 years.<sup>285</sup> Indecent acts between a woman and a girl, indecent acts between a man and a boy, and indecent assault on a male are offences.

**84. Should homosexual activity which is consensual and done in private be prohibited?**

### *Sexual harassment*

- 6.97 Sexual harassment is unwelcome sexual behaviour that makes the victim feel intimidated, humiliated or offended. It can consist of words or actions, and include showing pornography and making sexual demands.
- 6.98 There are currently no laws protecting persons from sexual harassment in the Solomon Islands. Sexual harassment is a form of discrimination in the workplace especially when directed towards women.<sup>286</sup>
- 6.99 The concept of sexual harassment is broader than the offences of indecent assault and molestation that are currently contained in the Penal Code. Given the vulnerability of girls and women to this type of abuse, and the disadvantages that they are likely to experience as a result of sexual harassment in the areas of education and employment there may be some consideration to include sexual harassment as an offence in Penal Code.

- 85. Should sexual harassment be criminalised? If so what should be the scope of the offence?**
- 86. Should the offences be limited only to conducts that occur within the classroom or workplace?**
- 87. Should sexual harassment be dealt with separately from the criminal law, or should there be other avenues for dealing with these kinds of behaviour in conjunction with the Penal code?**

<sup>285</sup> Crimes Act 1969 (CI) s 159; See also Crimes Ordinance 1961 (Sam) s 58J.

<sup>286</sup> UNIFEM, UNDP, *Translating CEDAW into Law CEDAW Legislative Compliance In Nine Pacific Island Countries* (2007) 331.

## 7 Personal Harm

- 7.1 This Chapter considers the offences that protect people from harm or injury, and apply to behaviour that threatens the life, safety or liberty of people. The Constitution contains a number of rights that are relevant to this area. The most important ones are the right to personal liberty, the right not to be subjected to torture, inhuman or degrading punishment or treatment and the right not to be held in slavery or servitude.<sup>287</sup>
- 7.2 The offences in the Penal Code are based on the UK *Offences Against The Person Act, 1861* which in turn was a consolidation of the English common law and statutes that had developed over time.<sup>288</sup> As with other jurisdictions that have based their criminal laws on the English model there is considerable overlap between the different personal harm offences in Penal Code, as well as inconsistencies between offences and penalties. Some offences are limited and specific in their scope. For example, the endangering life offence in the Penal Code covers only specific circumstances where human life might be put at risk.
- 7.3 This area of law has been extensively reviewed in Australia and the UK. The Australian Model Criminal Code Officers Committee (MCCOC) and the UK Law Commission have both produced reports and model legislation that take a similar approach in relation to reform of personal harm offences.<sup>289</sup> In Australia this approach has been adopted in two jurisdictions.<sup>290</sup> These recommendations are considered in more detail later in this Chapter.

### *Violence against women*

- 7.4 Violence against women, in the home and in society, is a significant problem in Solomon Islands. Domestic violence against women is also understood to be a serious and

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<sup>287</sup> Constitution ss 5,6, 7.

<sup>288</sup> MCCOC, *Model Criminal Code Chapter 5 Non Fatal Offences Against the Person*, Report (1998) 1.

<sup>289</sup> The Law Commission, *Criminal Law Legislating the Criminal Code, Offences Against the Person and General Principles* (1993), MCCOC, *Model Criminal Code Chapter 5 Non Fatal Offences Against the Person* Report (1998) 5.

<sup>290</sup> Crimes Act (Vict), Criminal Code (Aus).

significant problem in Solomon Islands.<sup>291</sup> Domestic violence can include physical, sexual or emotional abuse by a husband, boyfriend or other family member.

- 7.5 Violence against women breaches their Constitutional and human rights and has a serious impact on the health of women and their families. It can also have serious social and economic consequences for the whole community. Domestic violence affects the ability of a woman to properly care for her children and home, look after her garden and produce food, participate in church and community activities, study or find and keep paid employment.
- 7.6 Under CEDAW violence against women is a form of discrimination and CEDAW requires states to take legislative measures to prohibit discrimination against women, and protect women from discrimination.<sup>292</sup> This means that the criminal law must effectively prohibit violence against women. In order to do the penalties for personal harm offences should reflect the seriousness of violence against women and the scope of personal harm offences should address the forms of violence used against women.
- 7.7 The aim of the criminal law is to punish people who have committed offences. Other kinds of law can also be used to prevent the continuation or repetition of domestic violence. In Solomon Islands a court can make a protective order under the Affiliation, Separation and Maintenance Act for a married person who can demonstrate that his or her husband or wife has threatened or used violence against him or her, or a child of the family. A protective order can also require the spouse who has used threats or violence to leave the family home, and stop him or her from going to the family home.<sup>293</sup>
- 7.8 Many jurisdictions now use both protective law and criminal law to address domestic violence. Some jurisdictions have tried to improve the coordination between these two areas of law by giving courts dealing with a criminal case of domestic violence

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<sup>291</sup> AUSAID, *Violence Against Women in Melanesia and East Timor: Building on Global and Regional Promising Approaches, Solomon Islands Country Supplement* (2008).

<sup>292</sup> *Convention on the Elimination of All Forms of Discrimination Against Women* art 2.

<sup>293</sup> Affiliation, Separation and Maintenance Act s 22.

a power to make a protective order when the accused is found guilty of an offence.

- 7.9 The Penal Code does not have any specific offence that addresses domestic violence. The offences of assault, assault causing bodily harm and intimidation and molestation are the main offences that would apply to domestic violence. However these offences have low maximum penalties (three years for intimidation and molestation, one year for common assault, five years for assault causing bodily harm) and the offence of intimidation and molestation doesn't cover all of the situations where a woman might be harassed or intimidated.
- 7.10 Under the current law cases of domestic violence that are prosecuted by police can be diverted out of the court system. The Magistrates' Court Act allows a court to stop criminal proceedings in cases of common assault, or in cases of a 'personal or private nature' if the court is satisfied that reconciliation or compensation has occurred.<sup>294</sup> This would apply to many cases of domestic violence because violence against women is often seen as a private matter. While it is important for courts to recognise local customary practices of reconciliation, there is a risk that those processes will not always benefit or protect victims of domestic violence. It can also reinforce attitudes that domestic violence is not a serious matter. Under the law there is no requirement for the victim to be happy with the reconciliation or terms of the compensation, or be satisfied that she will be safe from further violence.

<p><b>88. Does this provision operate fairly for victims of violence?</b></p>
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*Personal harm offences in the Penal Code*

- 7.11 The table below sets out most of the personal harm offences that are currently in the Penal Code, together with the injury or risk of injury that must be proved for each offence, and the maximum penalty for each offence. The table progresses from the most serious offences, to less serious offences.

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<sup>294</sup> Magistrates' Court Act (Cap 20) s 35.

Section	Offence	Injury or risk of injury	Maximum penalty
224	Acts intended to cause grievous harm, or prevent arrest	Physical injury, or serious or permanent physical injury	Life
226	Cause grievous harm	Serious or permanent physical injury	14 years
	Poisoning with intention to injure or annoy	Life endangered, or grievous harm	14 years
217	Making written threats to kill someone	Physical injury not required	10 years
245	Assault causing bodily harm	Hurt, disease, disorder, does not have to be permanent	5 years
229	Wounding	Breaking of skin	5 years
245	Assault causing bodily harm	Hurt, disease or disorder, does not have to be permanent	5 years
230	Poisoning with intention to injure or annoy	No harm required	5 years
235	Cruelty to children	Risk of unnecessary suffering or injury to health	5 years
232	Failing to provide necessities to someone	Danger to life, risk of permanent injury	3 years
231	Intimidate or molest someone	Injury to person, reputation or property, or threat of injury	3 years
237	Acts that endanger human life, or likely to cause harm	No need for any harm – action has to be likely to cause harm	misdemeanor
240	Endanger the safety of people traveling by aircraft, vehicle or boat	Danger to safety	misdemeanor
242	Knowingly or negligently convey someone in an unsafe or overloaded boat	Danger to safety	misdemeanor
244	Assault	No harm required	One year
238	Negligent acts that cause harm	Hurt, disease, disorder, does not have to be permanent	6 months

## Assault

7.12 Assault is not defined in the Penal Code. The courts in Solomon Islands have adopted a definition of assault from English criminal law. Assault is where a person intentionally or recklessly causes another person to fear immediate and unlawful personal violence.<sup>295</sup> There is no requirement for any injury, although the offence can apply where injury is caused to the victim. It is unclear whether words alone amount to an assault, or whether the victim must be aware of the threatening

<sup>295</sup> *Regina v Fataga, Kiusi and Niudenga* HC-CRC 3 of 2003, citing with approval *Fagan v Metropolitan Police Commissioner* (1968) 3 All E.R. at 445.



behaviour (for example where the victim is asleep), or whether conditional threats amount to an assault.

- 7.13 As a result of these uncertainties a number of jurisdictions have introduced definitions of assault. In Queensland<sup>296</sup> PNG<sup>297</sup> and Western Australia<sup>298</sup> the Criminal Codes define assault as where someone strikes, touches or applies force to another person without his or her consent. It also includes attempts, or threats made by action or gesture to apply force when the person making the threat appears to be able to carry out the threat. Force includes applying heat, light, electrical force, gas, odour or any other substance or thing to cause injury or personal discomfort.
- 7.14 The Penal Code has more serious penalties for assaults that are committed on certain classes of people, or in particular circumstances. A maximum punishment of two years applies if:
- the assault is done while the accused is committing a serious offence or resisting arrest;
  - the assault occurs during unlawful industrial action;
  - the assault is on someone seizing property under a court order;
  - the assault is committed on a police officer; or
  - the assault is on someone carrying out a duty under the law.<sup>299</sup>
- 7.15 There is a further category of serious assault on particular classes of people that involves striking or wounding magistrates, police officers and persons protecting wrecks. The maximum punishment for assaults on those persons is seven years imprisonment.<sup>300</sup>
- 7.16 The system of penalties for assault in the Penal Code does not recognise or take into account assaults that are carried out on weak or vulnerable people such as children and women, or where a weapon is used. The MCCOC has recommended that more serious penalties for personal harm offences should apply where the offence:
- involves the use of a weapon;
  - is done during torture;

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<sup>296</sup> Criminal Code (Qld) s 245.

<sup>297</sup> Criminal Code (PNG) s 243.

<sup>298</sup> Criminal Code (WA) s 222.

<sup>299</sup> Penal Code s 247.

<sup>300</sup> Penal Code s 246.

- involves a public official;
- is committed on a person involved in judicial proceedings (including witnesses);
- is committed against a child under the age of 10 years; or
- is committed against a person to whom the accused was in a position of trust or authority.<sup>301</sup>

*Wounding, causing bodily or grievous harm*

- 7.17 The more serious offences in the Penal Code deal with wounding, and causing bodily or grievous harm to a person. Grievous harm is defined by the Penal Code as bodily harm, disease or disorder that is serious or permanent.<sup>302</sup> However, these offences do not cover harm such as pain, loss of consciousness, disfigurement, mental harm or injury to mental health. Other jurisdictions such as Queensland<sup>303</sup>, Western Australia<sup>304</sup> and PNG<sup>305</sup> now define harm in their Criminal Codes as any bodily injury which interferes with health and comfort. The Northern Territory Criminal Code defines harm as physical harm or harm to person's mental health whether temporary or permanent.<sup>306</sup>
- 7.18 Recommendations by the MCCOC and the UK Law Commission on personal harm offences specify that harm includes all forms of physical harm including pain, unconsciousness, disfigurement, infection with disease as well as impairment of mental health.<sup>307</sup>
- 7.19 The offence of intentionally causing grievous harm to a person is one of the most serious personal harm offences in the Penal Code, and carries a maximum penalty of life imprisonment.<sup>308</sup> However the scope of the offence is not confined to situations

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<sup>301</sup> MCCOC, *Model Criminal Code Chapter 5 Non Fatal Offences Against the Person* Report (1998) 110.

<sup>302</sup> Penal Code s 4.

<sup>303</sup> Criminal Code (Qld) s 1.

<sup>304</sup> Criminal Code (WA) s1.

<sup>305</sup> Criminal Code (PNG) s1.

<sup>306</sup> Criminal Code (NT) s1.

<sup>307</sup> MCCOC, *Model Criminal Code Chapter 5 Non Fatal Offences Against the Person* Report (1998) s 5.1.1, UK Law Commission, *The Law Commission Criminal Law Legislating the Criminal Code, Offences Against the Person and General Principles* (1993) Draft Bill clause 18.

<sup>308</sup> Penal Code s 224.

where harm is actually caused to a victim. It covers situations where a weapon is used, or explosives are used, with the intention to cause grievous harm, even though no harm is actually caused.

### *Threats and intimidating behaviour*

- 7.20 There are some restrictions in relation to the offences in the Penal Code that deal with threats, and threatening behaviour. The offence of threat to kill is only committed if the threat is made in writing. The intimidation and molestation offence can also apply in circumstances where threats are made however the threats must be to cause an unlawful injury to the person, property or reputation of the person, and must be intended by the accused to cause alarm. Threats to subject a woman to sexual assault or to confine her against her will, would not fall within the category of unlawful injury, and are therefore not covered by the intimidation and molestation offence.

### *Stalking*

- 7.21 Some Australian jurisdictions have introduced an offence known as stalking in order to cover some gaps in the law on personal harm and threats. Stalking is repeated behaviour, that by itself is not obviously threatening or intimidating, but when the surrounding circumstances are taken into account it causes intimidation or harassment. It can cover behaviour such as repeatedly following a person, sending him or her articles or messages, telephoning a person or waiting for the person outside of his or her house, or the place where he or she works. There are differences in the stalking offences that have been introduced in Australian states. The main difference between the different kinds of stalking offences is whether the accused actually intends his or her behaviour to harass, threaten or intimidate the other person, or whether the accused should be have been aware that his or her behaviour would have that affect.

### *Endangering human life and negligently causing harm*

- 7.22 There are a number of different offences in the Penal Code that deal with acts that are likely to cause harm or danger to human life or safety, and negligently causing harm. The offence of endangering human life addresses behaviour that puts human

life at risk and there is no requirement that the accused must actually causes harm to a victim.

- 7.23 These offences are contained in a part of the Penal Code that has the title 'Criminal Recklessness and Negligence' however the descriptions of the offences themselves do not specify the fault element, or state of mind of the accused, that has to go with the accused's acts. The terms recklessness and negligence are also not defined in the Penal Code.
- 7.24 The offence of endangering life only applies to specific situations, for example, where the accused drives a car or navigates a boat, or is doing something with fire and does not take proper precautions and creates a risk.<sup>309</sup> The maximum penalty for this offence is relatively low (it is a misdemeanour).
- 7.25 The offence of negligently causing harm applies where someone fails to fulfill a duty in relation to life and health. It has a maximum penalty of six months imprisonment.
- 7.26 The Penal Code sets out where someone has a duty to in relation to life and health. The following classes of people have this duty:
- A person who has responsibility for caring for another person who is old, sick, mentally ill, or in detention (for example prison) who cannot provide for him or herself, must provide the other person with the necessities of life;
  - The head of a family has a duty to provide the necessities of life for children under the age of 15 years.
  - Employers who are required to provide food, clothing or lodging for servants or apprentices under the age of 15 years.
  - A person who does something that is or may be dangerous to human life or health must use reasonable skill and care.
  - A person who is in charge of a dangerous thing (a pot of boiling water) that may endanger the life, health or safety of someone, must use reasonable care and take reasonable precautions to avoid danger.
- 7.27 The duties in the Penal Code do not cover situations where a person volunteers or undertakes to do something, and failure to do that thing would be dangerous to human life or health.<sup>310</sup>
- 7.28 The MCCOC has made a recommendation about duties that should apply in relation to criminal offences. Its

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<sup>309</sup> Penal Code s 237.

<sup>310</sup> Criminal Code (Qld) s 290, Criminal Code (PNG) s 288.

recommendation simplifies the duties, and extends the duty in relation to children to anyone who has taken responsibility for caring for the child. The recommended duties are:

- Duty to provide the necessities of life to another person who cannot provide for him or herself, if the person has assumed responsibility for the welfare of the other person;
- Duty to avoid or prevent danger to the life, safety, or health of any child for whom the person has assumed responsibility (whether or not the child is a relative of the person);
- Duty to avoid or prevent danger to the life safety or health of another when the danger arises from the act of the person, or from something that the person has in his or her possession; or from some undertaking (agreement) of the person.

**89. Should the duty of the head of the family for children be changed so it is a duty imposed on anyone who has assumed the care of a child, whether or not they are a relative of the child?**

**90. Should the duty in relation to children be a duty to avoid or prevent danger to the life, health or safety of a child?**

**91. Should the Penal Code include a duty to avoid or prevent danger where a person undertakes or agrees to do something?**

#### *Intentional transmission of disease*

7.29 The Penal Code contains an offence of unlawfully or negligently spreading a disease dangerous to life. It is a misdemeanour.<sup>311</sup> The offence of cause grievous harm might also be used in a situation where someone intentionally or recklessly infects another person with a serious or life threatening disease.

7.30 Following increasing public awareness of HIV/AIDS some states introduced specific offences for intentional exposure or transmission of HIV. International guidelines for legislation on HIV/AIDS recommends that any transmission or exposure offences should be general, and apply to all serious diseases (such as Hepatitis C, or Asbestosis which is caused by exposure to asbestos).<sup>312</sup>

<sup>311</sup> Penal Code s 185.

<sup>312</sup> UNAIDS, IPU, *Handbook for legislators on HIV/AIDS, Law and Human Rights* (1999).

- 7.31 It is argued that specific legal offences for transmission of HIV/AIDS are not needed where general offences can apply because specific offences distract from measures that are more effective in preventing the spread of HIV, and they stigmatise people who have HIV or people who are perceived as people likely to have HIV. Most cases of HIV transmission occur where the infected person does not know he or she is actually infected.<sup>313</sup>
- 7.32 The MCCOC recommended that the criminal law should cover a situation where a person intentionally or recklessly exposes another person to the risk of catching a disease that may lead to a danger of death or serious harm. The Committee made this recommendation to overcome problems with proving that a person's conduct caused another to become infected, or was likely to cause another person to become infected, with a disease such as HIV (but not limited to HIV). The criminal law is directed here at the behaviour of the accused, rather than the actual harm caused to another person.

#### *Reform of personal harm offences*

- 7.33 The table below sets out personal harm offences recommended by the MCCOC and the UK Law Commission. These recommendations have been adopted (with some variation) in the Australian Criminal Code and Victorian Crimes Act. The aim of the reforms recommended by MCCOC and the UK Law Commission is to clarify personal harm offences according to culpability (or responsibility of the accused) and the harm or risk of harm to the victim.
- 7.34 The recommendations also provide definitions for the terms harm, serious harm, recklessly and negligently. Harm includes physical harm, or harm to mental health, and includes unconsciousness, pain, disfigurement or infection with a disease.<sup>314</sup> Serious harm includes any harm that endangers, or is likely to endanger a person's life, or is significant and longstanding harm.<sup>315</sup>

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<sup>313</sup> UNAIDS, IPU, *Handbook for legislators on HIV/AIDS, Law and Human Rights* (1999).

<sup>314</sup> MCCOC, *Model Criminal Code, Chapter 5 Non Fatal Offences Against the Person*, Report (1998) s 5.1.1.

<sup>315</sup> MCCOC, *Model Criminal Code, Chapter 5 Non Fatal Offences Against the Person*, Report (1998) s 5.1.2.

7.35 Recklessly causing harm means causing harm without the consent of the victim, knowing there is a substantial risk of harm, and it is unjustifiable in the circumstances to take the risk.<sup>316</sup> A person is negligent if his or her conduct involves such a great falling short of the standard of care that a reasonable person would take in the circumstances, there is a high risk of serious harm (or death) and the conduct merits criminal punishment.<sup>317</sup>

MCCOC (Australia)	MCCOC	UK Law Commission
	<i>Maximum Penalties</i>	
<i>Intentionally cause serious harm</i>	20 years	<i>Intentionally cause serious injury</i>
<i>Recklessly cause serious harm</i>	15 years	<i>Recklessly cause serious injury</i>
<i>Negligently cause serious harm</i>	10 years	
<i>Intentionally cause harm</i>	10 years	<i>Intentionally or recklessly cause injury</i>
<i>Recklessly cause harm</i>	7 years	<i>Assault – intentionally or recklessly apply force or cause an impact without the consent of the victim, or with consent where act is likely to cause injury.</i>
<i>Threat to kill (threat can be by words or conduct)</i>	10 years	<i>Threat to kill</i>
<i>Threat to cause serious harm</i>	7 years	
<i>Threat to cause harm</i>	2 years	
<i>Recklessly endangering life</i>	12 years	
<i>Recklessly endangering serious harm</i>	7 years	

7.36 The UK Law Commission also recommended an offence of torture which is intentional infliction of pain or suffering by a public official, or someone acting with the consent or agreement of a public official.<sup>318</sup>

- 92. Should the personal harm offences in the Penal Code be reformed in line with the recommendations of MCCOC and the UK Law Commission?**

**93. Should the offence of assault be retained? If so, how should it be defined?**

<sup>316</sup> Criminal Code (Aust) s 5.4

<sup>317</sup> Criminal Code (Aust) s 5.5.

<sup>318</sup> The Law Commission, *Criminal Law, Legislating the Criminal Code, Offences Against the Person, Draft Criminal Law Bill (1993)* clause 10.

- 94. **Should the Penal Code include an offence such as stalking to deal with harassing or intimidating behaviour?**
- 95. **Should the Penal Code have offences that apply to making threats to kill, or cause serious harm? If so should the offences apply to threats made in any way (words as well as conduct)?**
- 96. **Should there be more serious penalties for personal harm offences when they are committed with a weapon, on a child, on a dependent person, on any other vulnerable person, on a person involved in judicial proceedings or other public official?**
- 97. **Should the Penal Code contain an offence of torture by a public official?**

*Cruelty to children, corporal punishment*

- 7.37 The Penal Code contains an offence of cruelty to children which carries a maximum penalty of imprisonment for five years. It only applies where harm or neglect is intentionally caused by someone who is over the age of 15 years. The offence is not committed if a parent, teacher, or other person having the lawful control of a child, is giving reasonable punishment to the child.<sup>319</sup>
- 7.38 Parents, people acting in the position of parents and teachers who use corporal punishment on children might also be excused from the offences of assault, and assault causing bodily harm, because the excuse of punishment of children is also recognised under the common law. The punishment must be reasonable.
- 7.39 The excuse of reasonable punishment was considered by the High Court of Solomon Islands prior to ratification of the CRC by Solomon Islands. The Court had to decide whether corporal punishment was inconsistent with the Constitutional right not to be subjected to torture or inhuman treatment.<sup>320</sup> The Court decided that corporal punishment itself was not a violation of this right, it was a matter of degree, but that degrading forms of

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<sup>319</sup> Penal Code s 233(4).

<sup>320</sup> Constitution s 7.



corporal punishment (in this case corporal punishment in front of other people) would be inconsistent with the Constitution.<sup>321</sup>

- 7.40 The United Nations CRC Committee has considered the issue of corporal punishment of children in some detail.<sup>322</sup> The Committee argues that corporal punishment in any setting (school, institution, home) is inconsistent with the human rights of children, in particular right to dignity, physical integrity and equality, and cannot be justified on the basis of the 'best interests of the child' or religious beliefs. It recommends that states should prohibit corporal punishment, and reform legislation and common law that permit the use of force as a way of punishing children.
- 7.41 Corporal punishment has not been prohibited in Australian jurisdictions or the UK. Some jurisdictions have changed their law to provide some clearer guidance about who can use corporal punishment on children, what types of punishment are acceptable, and whether it is an excuse for all personal harm offences.
- 7.42 In the UK a defence of reasonable punishment of a child is no longer available for personal violence offences that involve some sort of harm or injury to the child, or the offence of cruelty to children.<sup>323</sup>
- 7.43 The MCCOC has recommended that reasonable punishment of a child should be clarified by legislation so that harm or pain to a child that lasts for more than a short period, or discipline that involves the use of stick or object is not permissible.<sup>324</sup>

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| 98.  | <b>Should the offence of cruelty to children be retained?</b>   |
| 99.  | <b>What should the Penal Code say about corporal punishment or discipline of children?</b>                          |
| 100. | <b>Should a defence to personal harm offences based on corporal punishment be available for parents, as well as</b> |

<sup>321</sup> *Regina v Rose* [1987] SILR 45.

<sup>322</sup> Committee on the Rights of the Child, *General Comment No 8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment*.

<sup>323</sup> Children Act 2004 (UK) s 58.

<sup>324</sup> MCCOC, *Model Criminal Code Chapter 5 Non Fatal Offences Against the Person*, Report 130.

**people who are in the position of parents? Should it be available for teachers?**

### *Kidnapping and abduction*

- 7.44 The Penal Code contains some offences that address kidnapping and abduction. Kidnapping occurs where a person is taken outside Solomon Islands without his or her consent, and abduction is where a person is forced to go from any place.<sup>325</sup> It is an offence to kidnap a person, which carries a maximum penalty of seven years.<sup>326</sup> It is also an offence to kidnap or abduct a person with the intention to secretly confine the person. This offence has a maximum penalty of seven years.<sup>327</sup> It is also an offence to kidnap or abduct knowing that the person is likely to be seriously hurt, or subjected to slavery or sexual abuse. This carries a maximum penalty of 10 years imprisonment.<sup>328</sup>
- 7.45 The MCCOC of Australia recommended that the offence of kidnapping should apply where someone is taken or detained without the person's consent in order to hold the person for ransom or as a hostage, or to send the person out of the country, or to commit a serious offence on the person. The maximum penalty for this offence would be 15 years imprisonment. Where the accused takes a child he or she is treated as though the child did not consent.<sup>329</sup> The advantage of this recommendation, compared to the existing provisions in the Penal Code, is that one offence can replace a number of offences, and apply to a broader range of situations where someone is taken or detained without his or her consent.

**101. Should the offences of kidnapping and abduction in the Penal Code be replaced with one offence of kidnapping?**

### *Stealing of a child*

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<sup>325</sup> Penal Code s 248.

<sup>326</sup> Penal Code s 249.

<sup>327</sup> Penal Code s 250.

<sup>328</sup> Penal Code s 251.

<sup>329</sup> MCCOC, *Model Criminal Code Chapter 5 Non Fatal Offences Against the Person*, Report 88.

- 7.46 The Penal Code has specific offences that apply to stealing of a child under the age of 14 years<sup>330</sup>, and abduction of unmarried girls under the age of 15 years.<sup>331</sup> The offence of child stealing has a maximum penalty of seven years imprisonment while the other offence of abducting an unmarried girl under the age of 15 years is a misdemeanor. The offence of child stealing does not apply to a person who claims in good faith to have the right of possession of a child, or the mother, or the father of an illegitimate child.
- 7.47 It is not clear why there should be two separate offences, with different ages, and different penalties for situations for where a girl child is taken away from her parents without consent.

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| 102. | <b>Should there be one offence that applies to taking or detaining a child (child stealing) without the consent of a parent?</b>                       |
| 103. | <b>Should the offence of child stealing apply to children under the age of 18 years?</b>   |
| 104. | <b>Who should be excused from the offence? For example should all parents, including a child born outside of marriage be excused from the offence?</b> |

### *Unlawful detention*

- 7.48 The offence that applies where a person is confined against his or her will is relatively minor and carries a maximum penalty of imprisonment for one year, or a fine or \$400. By comparison the MCOCC recommended that the offence of unlawful detention should have a maximum penalty of imprisonment for six years.<sup>332</sup>

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| 105. | <b>Should the penalty for confining or imprisoning someone against his or her consent be increased in line with the MCOCC recommendation?</b> |
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### *Slavery*

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<sup>330</sup> Penal Code s 253.

<sup>331</sup> Penal Code s 254.

<sup>332</sup> MCCOC, *Model Criminal Code Chapter 5 Non Fatal Offences Against the Person*, Report 90.

- 7.49 There is no offence for slavery in the Penal Code, other than kidnapping for the purpose of slavery.<sup>333</sup> The Constitution states that no one should be held in slavery or servitude, or required to perform forced labour.<sup>334</sup> Slavery is where someone has rights of ownership over another person. This issue is also addressed in Chapter 6 on Sexual Offences.

**106. Should the Penal Code contain an offence of slavery? Should the offence cover involvement in financial or business transactions that involve slavery?**

### *Abortion*

- 7.50 Abortion or unlawfully causing a miscarriage is an offence in the Penal Code and carries a maximum penalty of imprisonment for life.<sup>335</sup> It is an offence for both a pregnant woman to cause her own miscarriage and for another person to cause a miscarriage to a pregnant woman. The offence can be committed by giving a drug or using force to cause a miscarriage. An abortion that involves a surgical procedure can be lawfully performed to save the life of the woman.<sup>336</sup> It is also offence to supply drugs or instruments to bring about a miscarriage.<sup>337</sup> The criminal law on abortion in Solomon Islands is based on English law from the 19<sup>th</sup> century.
- 7.51 Under the provisions of CEDAW women should have access to health care services, including family planning services. A report on legislative implementation of CEDAW in Solomon Islands criticises the offences of abortion in the Penal Code because they deny woman access to safe medical facilities for abortion, encourages the use of unsafe methods of abortion, and restricts women's autonomy and right to choose if and when they have children. The serious penalty for the offence also fails to take into account the social, health and economic reasons why women may choose to have an abortion.<sup>338</sup>

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<sup>333</sup> Penal Code s 251

<sup>334</sup> Constitution s 6.

<sup>335</sup> Penal Code ss 157, 158.

<sup>336</sup> Penal Code s 234.

<sup>337</sup> Penal Code s 159.

<sup>338</sup> UNIFEM, UNDP, *Translating CEDAW into Law, CEDAW Legislative Compliance in Nine Pacific Island Countries* 348-349.

- 7.52 Lack of access to safe and lawful abortion can have implications for the physical and mental health of women where there is limited access to contraception and family planning services. For example, the mental health (or even life) of a young girl might be seriously compromised if she falls pregnant as a result of incest (sexual abuse by a family member) and she has to continue with the pregnancy. A woman subjected to domestic violence (including sexual assault) may not be able to make a free choice about when she falls pregnant, or how many children she has. The health or life of a woman can be seriously threatened if she turns to informal or 'backyard' services for an abortion.
- 7.53 Some other comparable jurisdictions continue to have abortion as an offence, while a few have removed abortion as a criminal offence, unless the abortion is done by someone who is not a doctor. The offences in New South Wales and Queensland are similar to the offences in Solomon Islands and based on the same old English legislation. Some jurisdictions, including the UK, have legislation that specifically sets out when an abortion can be lawfully performed, and when it is an offence.
- 7.54 The courts in Australian jurisdictions that have similar offences to those in the Penal Code have developed and adopted rules to define when an abortion is not unlawful. An abortion by a doctor can be lawful if he or she believes on reasonable grounds that it is necessary to preserve the woman from a serious danger to her life or her physical or mental health which continuance of the pregnancy would entail; and in the circumstances it is not out of proportion to the danger to be averted. The woman must also consent to the abortion.<sup>339</sup>
- 7.55 In other Australian jurisdictions, and the UK, the statute law sets out when an abortion can be lawfully performed. Abortion can be lawfully performed up to a certain stage of the pregnancy (24 weeks in the UK) with the consent of the woman, where continuing with the pregnancy would cause greater harm or risk of harm to the physical or mental health of the pregnant woman, than an abortion. In addition the law allows for an abortion where there is a substantial risk that if the child

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<sup>339</sup> *R v Davidson* [1969] VR 667, *R v Wald* (1971) 3 DCR (NSW) 25, *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47, *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Rep 8.

was born it would have a serious handicap.<sup>340</sup> Abortion is also lawful at any stage during the pregnancy the save the life of the woman.

- 7.56 The offence of child destruction remains in jurisdictions where abortion can be lawfully performed. The Penal Code contains a similar offence of killing an unborn child which is discussed in Chapter 5.<sup>341</sup> This offence applies to intentionally killing an unborn child that is capable of being born alive.

<p><b>107. Should the Penal Code specify when an abortion can be lawfully done to avoid harm, or risk of harm, to the physical or mental health of a woman or girl?</b></p>
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<sup>340</sup> For example Criminal Law Consolidation Act 1935 (SA) s 82A, Medical Services Act (NT) s 11.

<sup>341</sup> Penal Code s 221.

## 8 Corruption

- 8.1 Justice Pratt, a Justice of the Supreme Court of Papua New Guinea when commenting on corruption in *Yabara*,<sup>342</sup> stated that if bribery became anything more than an extreme rarity it would utterly destroy the very structure of Government and the Rule of Law. It is like cancer, once it spreads through society it is hard to stop. By the time the State mobilises to deal with it, the action is often too little and comes too late. Honest business persons cannot remain competitive if other business persons acquire competitive advantages through corruption. The easy money floating about in a corrupt society intoxicates many honest men tempted by the easy access to wealth, but it is the public in general that bears the consequence with the breakdown in public services such as efficient public transport systems, health care services, education system.
- 8.2 Transparency International ranks Solomon Islands as the 109<sup>th</sup> least corrupt country out of 180 countries in its Corruption Perception Index, with a score of 2.9 out of 10 (a score of 0 means highly corrupt, and a score of 10 means highly clean).<sup>343</sup> According to Transparency International one major contributing factor to corruption in the Solomon Islands is political interference in the administrative matters within the public service.<sup>344</sup>
- 8.3 The Penal Code only criminalises some forms of corruption. The main offences in the Penal Code are official corruption and corrupt offences.<sup>345</sup> In addition there are some specific offences that cover situations where a person in the public service takes money or some other reward, or takes money to show favour to another person or does arbitrary acts in abuse of his or her office.

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<sup>342</sup> *Robert Yabara v. The State* [1984] PNGLR 378.

<sup>343</sup> [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2008](http://www.transparency.org/policy_research/surveys_indices/cpi/2008)  
(Accessed 9 Oct 2008)

<sup>344</sup> Transparency International Country Study Report – Solomon Islands 2004.

<sup>345</sup> Penal Code ss 91, 374.

*What is Corruption?*

- 8.4 Transparency International defines corruption as a misuse of entrusted power for private gain.<sup>346</sup>
- 8.5 Under the Leadership Code misconduct in office is where a leader asks for or takes a benefit in relation to any action in the course of his or her official duties, or by reason of his or her official status. The penalty for a leader convicted of misconduct is a fine of \$1000 or one year imprisonment or both.<sup>347</sup>
- 8.6 The United Nations Convention Against Corruption does not define corruption but it sets out things that states should do to address corruption. They include adopting criminal offences to deal with:
- bribery of national public officers;
  - bribery of foreign public officials and officers of public international organisations;
  - appropriation or other diversion of property by public officers;
  - trading in influence by public officers;
  - abuse of functions to get a personal gain by public officers,
  - significant increase in assets by public officials with no reasonable excuse; and
  - bribery and embezzlement in the private sector.<sup>348</sup>
- 8.7 Solomon Islands has not ratified the Convention Against Corruption but it provides a useful standard to assess the effectiveness of the current law regarding corruption. The Convention can provide guidance on how the criminal laws on corruption need to be improved. Some countries in the Pacific region have ratified the Convention including Australia<sup>349</sup> and Papua New Guinea.<sup>350</sup>

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<sup>346</sup> [http://www.transparency.org/news\\_room/faq/corruption\\_faq](http://www.transparency.org/news_room/faq/corruption_faq) (accessed 12 August 2008)

<sup>347</sup> Leadership Code (Further Provisions) Act ss 8, 25.

<sup>348</sup> *United Nations Convention Against Corruption* art 15, 16, 17, 18, 19, 20, 21, 22.

<sup>349</sup> On the 7 December 2005.

<sup>350</sup> On the 7 December 2007.



*Official Corruption*

- 8.8 Official corruption is a felony and carries a maximum penalty of imprisonment for seven years. The offence of official corruption occurs where a person employed in the public service corruptly asks for or receives a benefit in exchange for doing something, or not doing something in connection with his or her official duties. The term employed in the public service is defined in the Penal Code, and includes people appointed or nominated to an office under an Act, people elected to office and people employed by any Department of the Government or a Local Council.<sup>351</sup>
- 8.9 The courts in Solomon Islands have taken different approaches to the term person employed in the public service. This is significant because it affects the scope of the offence of official corruption and who can be convicted of the offence of official corruption. The policy underlying corruption offences should be that everyone who is entrusted with power that must be exercised for the public good is subject to the criminal law on corruption.
- 8.10 In one case the High Court decided that the offence did not apply to a member of Parliament.<sup>352</sup> In a more recent case the High Court accepted that the offence could apply to a government Minister.<sup>353</sup>
- 8.11 The official corruption offence in the Fiji Criminal Code is similar to the offence in the Penal Code. In its Bribery and Corruption Report the Fiji Law Reform Commission recommended the introduction of a general bribery offence that would apply to everyone regardless of their status.<sup>354</sup>
- 8.12 Some jurisdictions have introduced specific corruption offences that apply to Government Ministers and members of Parliament that carry more serious penalties than other corruption offences. The New Zealand Crimes Act contains separate offences of bribery and corruption for judges and magistrates;<sup>355</sup>

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<sup>351</sup> Penal Code ss 91, 4.

<sup>352</sup> *Zama v Regina* [2007] SBHC 113 [www.pacii.org](http://www.pacii.org).

<sup>353</sup> *Rojumana v Regina* [2008] SBHC 23 [www.pacii.org](http://www.pacii.org).

<sup>354</sup> Fiji Law Reform Commission, *Report on Bribery and Corruption* (2003) 34, 35.

<sup>355</sup> Crimes Act (NZ) ss 100, 101.

Government Ministers;<sup>356</sup> members of Parliament;<sup>357</sup> and law enforcement officers.<sup>358</sup> The maximum penalties that apply to the bribery offences in relation to judges, magistrates and Government Ministers are significantly higher (14 years imprisonment) than the penalties that apply to the other offences (seven years imprisonment).

- 8.13 Other jurisdictions have specifically applied corruption offences to any person undertaking a public function. The Western Australia Criminal Code uses the term 'public officer' in its offences dealing with corruption and abuse of office and defines public officer as including police officer, Government Minister, a member of Parliament, person exercising authority under a written law as well as someone employed in the public service.<sup>359</sup> The official corruption offence in the Queensland Criminal Code is almost identical to that in the Solomon Islands Penal Code but the offence covers people who are employed in the public service or hold public office.<sup>360</sup>
- 8.14 The scope of offences in other jurisdictions regarding corruption by Government Ministers or members of Parliament is also broader than the offence of official corruption in the Penal Code. The offence of official corruption covers anything done, or not done, in the discharge of his or her duties of office. In the Queensland Criminal Code the offence regarding bribes taken by a member of Parliament covers any understanding that the vote, opinion, judgment or action in Parliament or on a Committee by the member will be influenced, or given in a particular way, or given for a particular side because of the bribe.<sup>361</sup>
- 8.15 The intention of the provisions adopted in New Zealand, Western Australia and Queensland is to provide clarity and ensure that the offences cover people who undertake public functions, as well as those who are employed by the public service.

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<sup>356</sup> Crimes Act (NZ) s 102.

<sup>357</sup> Crimes Act (NZ) s 103.

<sup>358</sup> Crimes Act (NZ) s 104.

<sup>359</sup> Criminal Code (WA) s 83.

<sup>360</sup> Criminal Code (Qld) s 87.

<sup>361</sup> Criminal Code (Qld) s 59.

- 108. **Should the offence of official corruption apply to everyone who performs a function or role for the benefit of the public, including leaders?**
- 109. **Should the Penal Code have offences that apply where a member of Parliament is offered, given or receives a bribe on the understanding that his or her vote, opinion, judgment or action will be influenced, or given in a particular way?**
- 110. **Should the maximum penalty for official corruption by an elected public officer be more serious than the penalty for someone employed in the public service?**

### *Corrupt Practices*

- 8.16 The Penal Code also criminalises corrupt practices in the Solomon Islands.<sup>362</sup> A person commits the offences if he or she takes a bribe to act to the detriment of someone he or she works for, or carries out duties for.<sup>363</sup> The offence applies to employees and elected public officials.<sup>364</sup> The offence also applies to people who give the bribe. The maximum penalty is two years imprisonment or a fine of \$600.
- 8.17 The offence of corrupt practices is more serious if it is committed in relation to a contract or a proposal for a contract with the Government, any Government department or Local Council. In these cases it carries a maximum of seven years imprisonment. However this provision does not cover all situations of government corruption, for example where a public officer corruptly gives out a licence or permit.
- 8.18 It is not clear whether the offence of corrupt practices would cover all situations where a person has responsibility for making decisions, or commercial arrangements on behalf of others. For example, it is not clear whether it would apply to representatives of customary land owners who negotiate a logging contract on the behalf of the customary land owners.
- 8.19 The Penal Code contains a presumption that applies to the offence of corrupt practices. Where it is proved that a person received money or any other benefit from someone who has or

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<sup>362</sup> Penal Code s 374(a).

<sup>363</sup> Penal Code s 374(a).

<sup>364</sup> Penal Code s 373.

wants to get a contract from a Government then it is presumed that the money or benefit was taken for a corrupt reason or purpose.<sup>365</sup> This provision may be inconsistent with the right contained in the Constitution for a person charged with a criminal offence to be presumed innocent until he or she is found guilty.<sup>366</sup>

- 111. Who should the offence of corrupt practices apply to? Should it apply broadly where someone has a responsibility to act in the interests of others?**
- 112. Should the offence of corrupt practices be more serious (have a higher penalty) if it involves corruption in governments, and public authorities?**

### *Defining 'corruptly'*

- 8.20 A vital element in the offences of official corruption and corrupt practices is that the act of asking, giving or accepting the benefit or bribe has to be done corruptly. The courts in the Solomon Islands have not considered what meaning should be given to the term corruptly although the term is widely used in other jurisdictions, and has been considered by courts outside Solomon Islands.
- 8.21 In Fiji, where there are similar provisions, the courts have considered the meaning of the term corruptly. In the case of *State v Aisake* the Court drew references from a number of authorities and held that corruptly does not mean dishonestly but to purposefully do an act which the law forbids as tending to corrupt.<sup>367</sup> The Court also referred to an East African Court of Appeal definition indicating that corruptly means that the corrupt purpose or motive must be in the mind of the person acting corruptly irrespective of whether the other party to the conversation, communication or transaction has a corrupt motive or not.<sup>368</sup>
- 8.22 The Fiji Law Reform Commission has criticised the offences of official corruption and corrupt practices as confusing. It has also identified two competing judicial approaches to

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<sup>365</sup> Penal Code s 376.

<sup>366</sup> Constitution s 10(2)(a).

<sup>367</sup> *State v Aisake* [1993] FJHC 35 <www.pacii.org>.

<sup>368</sup> *Gopal Krishna Gounder v R* 12 FLR 141.

interpreting the term corruptly. One approach defines it as an act which the law forbids as tend to corrupt. The other defines corruptly as a dishonest intention to weaken the loyalty of an agent towards his or her principal.<sup>369</sup> The existence of such contrasting approaches creates some difficulty in ascertaining the meaning of corruptly.

- 8.23 The Fiji Law Reform Commission considered replacing the term 'corruptly' with 'improperly' as done in South Australia.<sup>370</sup> This would change the test from 'corruptly' (subjective test) to 'improperly' (objective test) which is an easier test to apply and that could increase the success rate in the prosecution of these offences.
- 8.24 The Fiji Law Reform Commission concluded that the objective standard arising out of the use of the term 'improperly' does not alleviate the problems arising out of the use of the word corruptly. In their view it is pointless to search for a substitute or attempt to define the term corruptly. They believe that the law would be better served by presuming that certain types of behaviours are corrupt and thereby shifting the onus to disprove it on the accused who would be the person best able to discharge the evidential onus. They recommended deleting the term 'corruptly' and extending the presumption of corruption to cover all cases.
- 8.25 The offences of bribery that apply to members of Parliament in the Criminal Code of Queensland, and the offences of bribery that apply to members of Parliament and public officers in the Criminal Code of WA do not use the term corruptly. The offence is committed if a person offers or gives a bribe to a politician in order to influence the politician, or if a politician asks for or takes a bribe on an understanding that his or her action will be influenced.<sup>371</sup>

**113. Should the term corruptly be used in the corruption offences in the Penal Code?**

**114. Should the Penal Code have offences of bribery of public officer, and bribery of members of Parliament?**

<sup>369</sup> Fiji Law Reform Commission, *Report on Bribery and Corruption* (2003) 29-34.

<sup>370</sup> Statutes Amendment and Repeal (Public Offences) Act 1992.

<sup>371</sup> Criminal Code (Qld) ss 59, 60, Criminal Code (WA) ss 60, 61.

*Public officers trading in influence and having financial interests*

- 8.26 The Penal Code has an offence that applies where a person employed in the public service takes a benefit on the understanding he or she will favour the person who gave the benefit. It is a misdemeanor and carries a maximum penalty of imprisonment for six months.<sup>372</sup>
- 8.27 It is also an offence under the Penal Code for a public officer with judicial or administrative duties in relation to property of special character, or trade or business, to have private interests in those areas. The maximum penalty for this offence is one year imprisonment.<sup>373</sup>
- 8.28 The wording of both of these offences is complex. The offence of corruption in the Criminal Code of WA is simpler, covers a broader range of corrupt activity by public officers and carries a higher maximum penalty of seven years imprisonment.<sup>374</sup> It covers situations where a public officer:
- acts on knowledge gained from his or her office to get a benefit;
  - acts in official matters where he or she has private interests to get a benefit; or
  - acts corruptly in the performance of his or her duties to get a benefit.

**115. Should the Penal Code have an offence of corruption of public officers that includes using knowledge, acting in matters where he or she has private interests or acting corruptly, for private gain? What should be the maximum penalty?**

*Penalties*

- 8.29 The Penal Code sets the maximum penalty for official corruption at seven years, and a maximum imprisonment term of two years or a fine of 600 dollars for a corrupt practices conviction. The Penal Code does not expressly provide any special penalties for people holding high positions.
- 8.30 The Fiji Law Reform Commission in its report on corruption made no recommendations concerning the maximum penalties

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<sup>372</sup> Penal Code s 93.

<sup>373</sup> Penal Code s 94.

<sup>374</sup> Criminal Code (WA) s 83.

awarded for the offences of official corruption and corrupt practices. However the maximum penalties available for the two offences in Fiji has been criticised by the courts as being too low and not reflecting the seriousness of the offence. The maximum penalties in Fiji are the same as those in the Penal Code.

- 8.31 In New Zealand, the maximum penalties for corruption offences range from seven years to 14 years imprisonment. The maximum penalty depends on the office or position held by the convicted person. For example, a Minister or Member of the Executive Assembly who corruptly accepts or obtains any gain is liable to imprisonment for a term not exceeding 14 years.<sup>375</sup> Everyone else who is convicted under the same section is liable to imprisonment to a term not exceeding 7 years.
- 8.32 In Queensland, anyone convicted for official corruption is liable to a maximum penalty of seven years imprisonment. Where the person convicted is a Government Minister the maximum penalty is 14 years imprisonment and a fine.<sup>376</sup>

- 116. Should the penalties for 'official corruption' and 'corrupt practices' be amended? If so, how?**
- 117. Should criminal punishment for corruption include disqualification from public office?**

### *Gifts and custom*

- 8.33 Another issue raised by the Fiji Law Reform Commission is the giving of gifts under the Fijian custom and matters pertaining to corporate hospitality and small value gifts.<sup>377</sup> The Fiji Law Reform Commission recognised that in the Fijian context the line between culture and corruption is often blurred. They considered the position of customary gifts in two different jurisdictions. In Malawi a casual gift is not considered as corrupt as long as it does not exceed a certain ceiling set by legislation. Hong Kong also has a culture of giving gifts for appreciation. In Hong Kong legislation has been passed to the

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<sup>375</sup> Crimes Act (NZ) s 102.

<sup>376</sup> Criminal Code (Qld) s 87.

<sup>377</sup> Fiji Law Reform Commission, *Report on Bribery and Corruption* (2003) 36-38.

effect that gifts given as a matter of custom can not be used as a defence to corruption offences.

- 8.34 In the Solomon Islands the Penal Code does not contain any exception to the corruption offences for gifts. Under the Leadership Code (Further Provisions) Act minor gifts are permitted. Receiving gifts is not treated as misconduct if the gift is given by the spouse or children of the leader or is worth less than \$50, or is a minor gift given as a gift at a ceremony or social occasion attended by the Leader.<sup>378</sup>
- 8.35 Some problems may arise if customary gifts are allowed as an exception to the offences of corruption in the Penal Code. Gifts under the guise of customary or social ceremony may be presented with the intention to corrupt or bribe people, for example, gifts used to buy votes for a candidate running for elections. Moreover, there will be an uncertainty concerning the value of customary gifts if a ceiling is to be employed.

<p><b>118. Should the Penal Code incorporate an exception regarding gifts into corruption offences?</b></p>
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<sup>378</sup> Leadership Code (Further Provisions) Act s 14.



## 9 Property

- 9.1 The Solomon Islands Constitution recognises the need for the law to protect the privacy of a person's home and other property.<sup>379</sup>
- 9.2 Customary rights and interests in property are a fundamental part of local culture and village life, approximately 90 percent of the land in the Solomon Islands is held under customary land tenure. In a culture where communal ownership of property is common, the recognition of customary rights and interests under the Penal Code could complement customary law in protecting the interests of those whose rights and interests may be compromised.
- 9.3 The offences in the Penal Code are based on the Larceny Act of 1916 from the United Kingdom. In the UK this legislation was replaced in the late 1960's by a new Theft Act which brought about changes in the criminal law regarding stealing and dishonesty. These changes were later adopted by the Australian Capital Territory,<sup>380</sup> New Zealand,<sup>381</sup> and Victoria.<sup>382</sup>
- 9.4 LRC consultations have identified the need to reform a number of the property offences in the Penal Code and to consider introducing new offences to deal with dishonest activities that are not currently covered. For example the Penal Code does not cover all situations where someone fraudulently obtains property or a financial benefit from another.
- 9.5 Property is generally classified into two main categories: tangible and intangible property. Tangible property has a physical body, for example, a fine mat or a traditional basket. Intangible property has no physical body, such as a song or shares in a company; however, they are portrayed usually by some physical means to provide some form of possession, which is a significant aspect when proving ownership. So, for example, a song captured on a cassette or a share certificate.

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<sup>379</sup> Constitution ss 3, 9.

<sup>380</sup> Criminal Code (ACT) s 308

<sup>381</sup> Crimes Act (NZ) s 219.

<sup>382</sup> Crimes Act (Vic) s 72.

*Stealing*

- 9.6 The Penal Code contains a general offence of stealing as well as about twenty different stealing offences that deal with different types of property (for example, dog, electricity or fish);<sup>383</sup> or different classes of people who steal (for example, tenant, lodger, clerks or servant).<sup>384</sup>
- 9.7 The Penal Code defines theft or stealing as when someone fraudulently takes and carries away something capable of being stolen, without the consent of the owner and with the intention to permanently deprive the owner of the property.<sup>385</sup> The term 'fraudulently' is not expressly defined in the Penal Code and the courts in Solomon Islands have used cases decided under the old UK Larceny Act to determine what it means.<sup>386</sup>
- 9.8 The Penal Code also defines what property or things are capable of being stolen. This includes every inanimate thing which has value and is owned by any person; and things that can be severed from land (like trees).<sup>387</sup> Both these definitions do not include land. Moreover, this definition does not include some intangible things such as electricity.
- 9.9 The Penal Code does not deal with the subject of ownership. By comparison the New Zealand Crimes Act says that a person is regarded as an owner of property if he or she has possession or control of the property; or any interest in the property; or the right to take possession or control of the property.<sup>388</sup>
- 9.10 The Penal Code contains a separate offence that applies where someone is entrusted with property but then fraudulently deals with the property (sells, or uses the property as their own) in a way that is inconsistent with the rights of the true owner of that property.<sup>389</sup>
- 9.11 Under the reforms made by the UK Theft Act the range of larceny offences in the Larceny Act (1916) were combined into a single offence defined as 'theft' in the Theft Act. A person is

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<sup>383</sup> Penal Code ss 275, 277.

<sup>384</sup> Penal Code ss 272, 273.

<sup>385</sup> Penal Code s 258.

<sup>386</sup> *Director of Public Prosecutions v Toritelia* [1986] SBHC 2 <[www.paclii.org](http://www.paclii.org)>.

<sup>387</sup> Penal Code s 257.

<sup>388</sup> Crimes Act 1961 (NZ) s 218.

<sup>389</sup> Penal Code s 278.

guilty of theft if they dishonestly appropriate property belonging to another person with the intention of permanently depriving that person of the property. The focus of the theft offence is on interference with interests or rights in property, rather than on the physical act of taking the property of another person. The UK reforms also saw the replacement of the fault element of fraudulent by the fault element of dishonesty. Dishonesty is assessed by reference to the standards of the community.

- 119. Should the Penal Code have one offence for stealing that has clearly defined terms?**
- 120. Should the fault element for stealing be dishonesty?**
- 121. Should the Penal Code specifically state that collective ownership of property is not a defence to stealing?**

*Unlawful use, possession or control*

- 9.12 In a situation where a person unlawfully appropriates a car, uses it and then abandons it, the Penal Code does not contain any applicable provisions to prosecute the person. The offence in the Penal Code only applies to the unlawful use of a vessel or an animal, and any one convicted is liable to imprisonment for six months or a fine of 200 dollars or both.<sup>390</sup>
- 9.13 Under the Traffic Act it is an offence to take or drive a vehicle without the consent of the owner. The maximum penalty is six months imprisonment or a fine of \$500, or both, in the High Court, or in the Magistrates Court the maximum penalty is a \$200 fine or imprisonment for 3 months.
- 9.14 By contrast, the Queensland Criminal Code contains offences relating to 'unlawful use, possession or control of a motor vehicle aircraft or vessel', carrying a maximum penalty of seven years.<sup>391</sup>

- 122. Should the Penal Code contain an offence of unlawful use of a motor vehicle, aircraft or vessel?**
- 123. If so, what should be the maximum penalty?**

<sup>390</sup> Penal Code s 292.

<sup>391</sup> Criminal Code (Qld) ss 171, 172, 175.

*Robbery and extortion*

- 9.15 Robbery is taking property by force or threat of force. The Penal Code contains a number of robbery offences with different penalties depending on whether a weapon or personal violence was used at the time of the robbery.<sup>392</sup> The Penal Code does not define robbery, and the description of the offence creates some confusion about what the offence entails, and the penalties that might apply.
- 9.16 By contrast, robbery is defined in other jurisdictions as where a person steals using force or threats.<sup>393</sup> Robbery can range from pushing a person in order to take a bag, to using a dangerous weapon such as a gun to steal something. Generally the punishment for robbery offences is different according to whether a weapon is used, or whether the accused committed the offence with other people.
- 9.17 In Queensland, the maximum penalty for robbery is 14 years imprisonment and if a person uses a weapon or was in the company of others when committing the robbery then the maximum penalty will be increased to life imprisonment.<sup>394</sup>

**124. Should robbery be defined in the Penal Code?**

**125. Should there be a distinction between the maximum penalties for robbery, robbery with others, robbery with a weapon and robbery resulting in bodily harm?**

*Extortion*

- 9.18 The Penal Code criminalises extortion, which is demanding property or money using threats.<sup>395</sup> It contains three different offences dealing with the matter.
- 9.19 The first offence criminalises written demands for property or money, or demands to sign or execute a valuable security. It also covers the situation where someone accuses, or threatens to accuse a person of committing a serious offence with the intention of extorting or claiming something from the person. This offence also includes demands to force another person to

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<sup>392</sup> Penal Code s 293.

<sup>393</sup> Theft Act (UK) s 8, Criminal Code (Qld) s 412.

<sup>394</sup> Criminal Code (Qld) s 411.

<sup>395</sup> Penal Code ss 294, 295, 296.

commit buggery. The maximum penalty for this offence is life imprisonment.<sup>396</sup> The wording of this offence is complex.

- 9.20 The second offence criminalises demands for property and carries a maximum penalty of imprisonment for five years.<sup>397</sup>
- 9.21 The third offence applies where a person publishes a lie or threatens to publish a lie about a person in order to gain property or money, or to induce the person to give them some appointment or position.<sup>398</sup> This offence is a misdemeanour and has a maximum penalty of imprisonment for two years.
- 9.22 The provisions are confusing, overlap with each other and are also quite restrictive in their operation. The penalties for the offences are also inconsistent.
- 9.23 Upon the recommendation of the English Criminal Law Revision Committee the offences of extortion were abolished by the UK Theft Act and replaced by a new blackmail offence.<sup>399</sup> The offence of blackmail applies where a person makes unwarranted demands with menaces (threats) to gain a benefit or cause a loss to someone else. It has a maximum penalty of imprisonment for 14 years. The MCCOC has also recommended a general blackmail offence with a maximum penalty of imprisonment for 12 ½ years.<sup>400</sup>
- 9.24 The reform of extortion provisions may be particularly relevant in Solomon Islands due to concerns about unwarranted demands for customary compensation.

**126. Should the Penal Code have a general offence of blackmail? What should be the maximum penalty?**

### *Fraud*

- 9.25 Fraud, or obtaining property or financial advantage through deception, is addressed inadequately in the Penal Code. Some offences only apply to actions by people who hold positions of

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<sup>396</sup> Penal Code s. 294.

<sup>397</sup> Penal Code s. 295.

<sup>398</sup> Penal Code s. 296.

<sup>399</sup> Theft Act (UK) s 21; MCCOC, *Model Criminal Code Chapter 3 Theft, Fraud, Bribery and Related Offences* (1995) 263.

<sup>400</sup> MCCOC, *Model Criminal Code Chapter 3 Theft, Fraud, Bribery and Related Offences* (1995) s 18.1, 198.

trust.<sup>401</sup> The offence of obtaining property by false pretence does not apply to all instances where a person might dishonestly obtain a financial advantage.<sup>402</sup> LRC consultation has indicated the need to replace these offences with offences that would generally apply to obtaining property or financial advantage through deception.

- 9.26 The MCCOC recommended an offence of dishonestly obtaining property belonging to another by deception, with the intention of permanently depriving the other person of it with a maximum penalty of 10 years imprisonment.<sup>403</sup> The MCCOC also recommended an offence of dishonestly obtaining financial advantage by deception with a maximum penalty of imprisonment for 10 years.<sup>404</sup> Deception means any misleading behaviour including the manipulation of a computer system or machine to make a response that the offender is not authorised to do.<sup>405</sup>
- 9.27 In the local context, the scope of these MCCOC provisions could operate to address some developments in the Solomon Islands. The MCCOC provisions would cover the situation where a person dishonestly gets money from an Automatic Teller Machine (ATM) by using another person's access card or a person dishonestly uses another person's credit card to acquire property or obtain a loan.

<p><b>127. Should the Penal Code have new offences of obtaining property or a financial advantage by deception?</b></p>
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### *Forgery*

- 9.28 The Penal Code contains a number of forgery offences that deal with making and using false documents to deceive or defraud. For example, forgery of a will or bank notes. The more serious offences of forgery to deceive or defraud applies to specific

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<sup>401</sup> Penal Code ss 304, 305.

<sup>402</sup> Penal Code s 308.

<sup>403</sup> MCCOC, *Model Criminal Code Chapter 3 Theft, Fraud, Bribery and Related Offences* (1995) s 17.2.

<sup>404</sup> MCCOC, *Model Criminal Code Chapter 3 Theft, Fraud, Bribery and Related Offences* (1995) s 17.3.

<sup>405</sup> MCCOC, *Model Criminal Code Chapter 3 Theft, Fraud, Bribery and Related Offences* (1995) s 17.1.

kinds of documents such as a will, banknote or birth register.<sup>406</sup>

A general and less serious offence applies to forgery of documents that are not otherwise specified in the more serious offence.<sup>407</sup> Separate offences apply to using a forged document to deceive or defraud.<sup>408</sup>

9.29 The penalties for forgery offences cover a broad range from: seven years for forging court records,<sup>409</sup> fourteen years imprisonment for forgery of a register of births,<sup>410</sup> to life imprisonment for the forgery of a register of births, baptisms, marriages or deaths.<sup>411</sup> The general offence of forgery to defraud or deceive is a misdemeanour. The offences make a distinction between public and private documents but there is no strong policy reason for maintaining such a distinction.

9.30 Victoria has replaced forgery with offences of possessing, making or using a false document with the intention to make another person accept it as genuine, in order to do something prejudicial to the person or another. The offence has a maximum penalty of 10 years imprisonment.<sup>412</sup>

**128. Should the forgery offences in the Penal Code be replaced with offences of possessing, making or using a false document to do something prejudicial to a person? If so what should be the maximum penalty?**

### *Currency Offences*

9.31 In the late 18th and early 19th century, counterfeiting of currencies was used to win wars.<sup>413</sup> Recently counterfeiting has

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<sup>406</sup> Penal Code s 336, 337, 338, 339, 340.

<sup>407</sup> Penal Code s 341.

<sup>408</sup> Penal Code s 343, 344, 345.

<sup>409</sup> Penal Code s 338.

<sup>410</sup> Penal Code s 337(2).

<sup>411</sup> Penal Code s 339.

<sup>412</sup> Crimes Act (Vic) s 83A(1).

<sup>413</sup> Great Britain did this during the Revolutionary Wars to reduce the value of the Continental dollar. The United States used this during the American Civil War. The Nazis attempted to do a similar thing to the Allies (Britain and America) during the WWII but could not put their plan into action. The North Korea used counterfeit US dollars (called superdollars because of their quality) to finance the government.

been employed to de-stabilise economies in India.<sup>414</sup> The Penal Code has a large number of offences that deal with counterfeit currency and defacing or altering currency.<sup>415</sup> However, many of the offences are out of date and there are discrepancies between the penalties for different offences that do not reflect modern conditions. For example, a number of offences in the Penal Code refer to the gilding of silver filings and the altering and impairing of gold or silver coins.

**129. Should the currency offences be modernised?**

*Arson and Damage to Property*

9.32 Arson is an offence under the Penal Code. It is the intentional burning of a building, vehicle, aircraft, vessel, mine or vegetable crops and the maximum penalty is life imprisonment.<sup>416</sup> Any person who attempts to commit arson, or intentionally sets fire to something and it is likely that one of the things described in the arson offence will catch fire is liable to a maximum penalty of imprisonment for 14 years.<sup>417</sup> The offence of arson applies where a person deliberately sets fire to his or her own property in order to defraud (for example make a claim for insurance).

**130. Should the offence of arson apply to intentionally setting fire to other things, for example, storage of fuel?**

**131. Should the Penal Code have an offence of threatening to carry out the offence of arson?**

9.33 It is an offence under the Penal Code to intentionally set fire to cultivated crops, hay or grass under cultivation or trees or shrubs under cultivation. This offence has a maximum penalty of 14 years imprisonment.<sup>418</sup> It is also an offence to attempt to set fire to any of those things, or to set fire to something where

<sup>414</sup> In 2006 the Pakistani government printing press was accused of counterfeiting large quantities of Indian currency to de-stabilise the Indian economy.

<sup>415</sup> Penal Code ss 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366.

<sup>416</sup> Penal Code s. 319.

<sup>417</sup> Penal Code s. 320.

<sup>418</sup> Penal Code s 321.



it is likely that one of those things will catch fire. This offence has a maximum penalty of 7 years imprisonment.<sup>419</sup>

**132. Does this offence adequately cover intentional destruction by fire of resources on customary land?**

9.34 There are specific offences in relation to damaging boats or ships. Under the Penal Code it is an offence to cast away or destroy a boat or ship, or intentionally to anything that leads to the immediate loss or destruction of a boat or ship in distress. It is also an offence to interfere with a navigation light, mark or signal with the intention of bringing a boat or ship into danger. The maximum penalty for these offences is 14 years imprisonment.<sup>420</sup> An attempt to do any of these things is also an offence with a maximum penalty of seven years.<sup>421</sup>

**133. Should the Penal Code have an offence for damaging aircraft, and for sending dangerous things on an aircraft?**

9.35 The Penal Code contains a general offence of intentionally and unlawfully damaging or destroying property. It has a maximum penalty of two years imprisonment.<sup>422</sup> The provision also specifies more serious penalties for damage or destruction to specific kinds or property, or specific circumstances as follows:

<i>Damage caused by an explosion in a house, ship or boat if a person is inside, or if person's life endangered</i>	<i>Life imprisonment</i>
<i>Damage to bank of river, canal and damage causes inundation</i>	<i>Life imprisonment</i>
<i>Destruction of a bridge over a highway or canal</i>	<i>Life imprisonment</i>
<i>Damage to bridge with intention to make it dangerous or impassable, and the bridge is made dangerous or impassable</i>	<i>Life imprisonment</i>
<i>Damage or destruction of a will, register for births, baptisms, land title, marriages, death or burials</i>	<i>14 years</i>
<i>Damage or destruction of wrecked or stranded boat or ship</i>	<i>Seven years</i>
<i>Destruction of vessel</i>	<i>Seven years</i>

<sup>419</sup> Penal Code s 322.

<sup>420</sup> Penal Code s 323.

<sup>421</sup> Penal Code s 324.

<sup>422</sup> Penal Code s 326.

<i>Damaging vessel with intention to destroy or make it useless</i> <i>Damage or destruction of a sea navigation aid</i> <i>Damage or destruction of river bank, dock or place for loading goods on ship</i> <i>Damage to bridge with intention to make it dangerous or impassable</i> <i>Destruction of agriculture or manufacturing things</i> <i>Damage or agriculture or manufacturing things with intention to destroy or make useless</i> <i>Damage to mine</i> <i>Destruction of ropes/chain/tackle at mine or damage to ropes/chain/tackle with intention to destroy or make useless</i> <i>Damage or destruction of bore, dam, bank, wall, or floodgate of millpond or pond</i>	
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**134. Are these penalties for damage to property relevant to Solomon Islands? Are there other kinds of property where damage should attract a specific penalty?**

9.36 It is also an offence under the Penal Code to put an explosive in a place with the intention to destroy or damage property. This has a maximum penalty of 14 years imprisonment.<sup>423</sup>

**135. Should Penal Code have an offence for putting or leaving explosives in a place in circumstances where it might cause damage to property?**

### *Burglary*

9.37 Burglary is entering a building without the consent of the owner with the intent to steal property or to commit some other offence in the building.

9.38 The Penal Code criminalises the breaking and entering into a dwelling house with the intention to commit a felony at night.<sup>424</sup> It also criminalises breaking out of a dwelling house after entering to commit a felony or after entering with the intention to commit a felony in the house.<sup>425</sup> The maximum penalty for the offence of burglary under the Penal Code is life imprisonment.

<sup>423</sup> Penal Code s 327.

<sup>424</sup> Penal Code s. 299(a).

<sup>425</sup> Penal Code s. 299(b).

- 9.39 The Penal Code contains related offences of housebreaking and committing a felony (maximum imprisonment term of 14 years)<sup>426</sup> and housebreaking with intent to commit a felony (maximum imprisonment term of seven years).<sup>427</sup>
- 9.40 The Penal Code also contains an offence of possession of housebreaking equipment at night. Any person convicted of this offence is guilty of a misdemeanour and is liable to a maximum imprisonment term of five years. However, if the offender had been convicted before of the same offence the maximum penalty is 10 years.<sup>428</sup>
- 9.41 The distinction between burglary and housebreaking offences in the Penal Code is consistent with the position in common law. Burglary applies only to break-ins committed at night-time, whereas break-ins that take place at daytime are punishable by the lesser offence of housebreaking.<sup>429</sup> The only difference is the time the act of breaking in happens.
- 9.42 In the Crimes Act of Victoria the distinction between burglary and housebreaking offences has been removed by the introduction of a general provision which does not refer to a time of day. The requirement for 'breaking and entering' has been replaced with the concept of trespassing. That is, a person is guilty of burglary in Victoria if he or she enters a building as a trespasser with the intent to steal or to commit an offence.<sup>430</sup> A person guilty of burglary in Victoria is liable to imprisonment for a maximum term of 10 years.

**136. Should the distinction between breaking and entering into premises during the day and during night be abolished?**

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<sup>426</sup> Penal Code s. 300.

<sup>427</sup> Penal Code s. 301.

<sup>428</sup> Penal Code s. 302.

<sup>429</sup> S Bronitt and B McSherry, *Principles of Criminal Law* (2005) 692.

<sup>430</sup> Crimes Act (Vic) s. 76.

## 10 Administration of justice

- 10.1 The Penal Code contains offences that are intended to protect the justice system from corruption, and maintain public confidence in judicial processes.
- 10.2 One group of offences is concerned with false statements made on oath. Another group of offences applies to conduct that interferes with witnesses and judicial processes.

### *Perjury and false statements*

- 10.3 A person commits the offence of perjury (lying on oath) if she or he intentionally makes a false statement on oath in judicial proceedings, and the false statement is material in those proceedings.<sup>431</sup> Judicial proceedings includes court proceedings, inquiries conducted by the Leadership Commission as well as inquiries any other commission of inquiry that has the power to take evidence on oath.<sup>432</sup> The offence also covers interpreters in judicial proceedings who intentionally make a false statement on oath. The Leadership Code (Further Provisions) Act specifically states that a witness before the Commission who intentionally gives false evidence is liable for prosecution for perjury under the Penal Code.<sup>433</sup>
- 10.4 Perjury can also be committed outside of court proceedings if a witness (or potential witness) makes a false statement on oath for the purpose of judicial proceedings.<sup>434</sup> The offence of perjury is classified as a misdemeanour and carries a maximum penalty of seven years.
- 10.5 A separate, and less serious offence, is available where a witness makes two or more inconsistent or contradictory statements in judicial proceedings. This offence has a maximum penalty of six months imprisonment.<sup>435</sup>
- 10.6 The Penal Code also contains other offences that apply to the making of false statements outside of judicial proceedings. It is

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<sup>431</sup> Penal Code s 102.

<sup>432</sup> Commissions of Inquiry Act.

<sup>433</sup> Leadership Code (Further Provisions) Act s 19(5).

<sup>434</sup> Penal Code s 102.

<sup>435</sup> Penal Code s 111.

an offence to make a false statement on oath for any purpose<sup>436</sup>. The maximum penalty for this offence is seven years, similar to perjury.

- 10.7 A separate offence applies where a person knowingly and intentionally makes a false statement in a statutory declaration, or in a document (such as balance sheet or certificate) that the person is authorised, or required to make or verify, under an Act. This offence also applies to oral statements or answers that a person is required to make under an Act. The maximum penalty for this offence is three years imprisonment.
- 10.8 There are also separate offences for making false statements in relation to the registration of births, deaths and marriages, or making false statements for the purpose of obtaining a marriage licence or certificate, or withholding consent to marriage. The maximum penalty for these offences is seven years imprisonment, which is significant compared to other offences that apply to providing false information or statements.<sup>437</sup>
- 10.9 It is an offence to make a false declaration, or produce false information, to obtain a registration to carry out an occupation or profession. This offence carries a maximum penalty of 12 months imprisonment.<sup>438</sup>
- 10.10 One feature of all of these offences (save for the offence of making inconsistent or contradictory statements) is that a person cannot be convicted solely on the evidence of one witness regarding the falsity of the statement made by that person<sup>439</sup>. This is derived from a requirement for corroboration from the common law offence of perjury. However, the requirement for corroboration in the Penal Code applies not only to perjury (false statements in judicial proceedings) but also to a broader range of offences, such as making a false statement other than in judicial proceedings.
- 10.11 Legislation in some jurisdictions has altered the scope of the offence of perjury, and removed the requirement for more than

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<sup>436</sup> Penal Code s 103.

<sup>437</sup> Penal Code ss 104, 105.

<sup>438</sup> Penal Code s 107.

<sup>439</sup> Penal Code s 109.

one witness before a person can be found guilty of perjury<sup>440</sup>. For example in South Australia the offence covers any false statement made on oath and in New South Wales the offence applies to false statements made on oath in connection with judicial proceedings.

10.12 Queensland and New South Wales have also introduced laws that allow for a finding of guilt for perjury where the accused has made two irreconcilable statements, and one of the statements is found to be false.<sup>441</sup>

- 137. Should the offences of making false statutory declarations, and false statements in specific circumstances, be replaced with one general offence of making a false statement or declaration when information is required under the law, or given in compliance with the law?**
- 138. Should there be a requirement for corroboration before a person can be convicted of perjury, or any other offence that involves giving false information on oath?**
- 139. Should the offence of perjury include giving a false statement on oath in connection with, or to start, judicial proceedings?**

### *Interfering with judicial proceedings*

10.13 The Penal Code contains a number of offences that apply to interfering with witnesses and court processes. They include:

- Fabricating evidence to mislead any judicial proceeding (maximum penalty 7 years);<sup>442</sup>
- Deceiving witnesses in order to affect their evidence (misdemeanour);<sup>443</sup>
- Removing or destroying evidence required in a judicial proceedings (misdemeanour);<sup>444</sup>
- Conspiring with another to falsely accuse someone of a crime, or to defeat the course of justice (misdemeanour);<sup>445</sup>

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<sup>440</sup> Criminal Code (Qld) s 204, Crimes Act (NSW) s 327, Criminal Law Consolidation Act (SA) s 242. Western Australia repealed a requirement for corroboration in 1988.

<sup>441</sup> Criminal Code (Qld) s 204(4), Crimes Act (NSW) s 331.

<sup>442</sup> Penal Code s 110.

<sup>443</sup> Penal Code s 114.

<sup>444</sup> Penal Code s 115.

- Dissuading, hindering or preventing a person a witness to obstruct the course of justice (misdemeanour);<sup>446</sup>
- Obstructing, interfering with, or preventing the execution of any legal process (misdemeanour);<sup>447</sup>
- Bribery of any person to defeat the course of justice, or to stop them doing their duty in connection with the course of justice (misdemeanour);<sup>448</sup>
- Injury, damage or threats to someone (or a member of their family) to defeat the course of justice, or to stop someone doing their duty in connection with the course of justice, or for having given evidence (misdemeanour);<sup>449</sup>
- Advertising for stolen property with the offer that no questions or legal action will be taken (misdemeanour);<sup>450</sup>
- Corruptly taking money to help someone recover stolen property (maximum penalty imprisonment seven years).<sup>451</sup>

10.14 The Penal Code also contains offences of compounding felonies, and compounding penal actions.<sup>452</sup> These offences apply where a person is injured or harmed by a felony, or brought a prosecution for a felony, and he or she agrees not to prosecute the felony, or give any evidence about the felony, in return for some benefit.

10.15 The Penal Code does not contain any offences that apply specifically to bribery of judicial officers, other than the general offence of bribery to obstruct the course of justice, or to stop a person doing their duty in connection with the course of justice.<sup>453</sup> The Penal Code does contain offences dealing with official corruption, which includes bribery of people employed in the public service.<sup>454</sup> Issues in relation to these offences are discussed in Chapter 8 of this paper.

10.16 By comparison the Criminal Code of Queensland contains an offence that specifically deals with bribery in relation to judicial

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<sup>445</sup> Penal Code s 116(a).

<sup>446</sup> Penal Code s 116(b).

<sup>447</sup> Penal Code s 116(c).

<sup>448</sup> Penal Code s 122.

<sup>449</sup> Penal Code s 123.

<sup>450</sup> Penal Code s 119.

<sup>451</sup> Penal Code s 120.

<sup>452</sup> Penal Code ss 117, 118.

<sup>453</sup> Penal Code s 122, classified as a misdemeanor.

<sup>454</sup> Penal Code Part X.

officers. It has a maximum penalty of imprisonment for 14 years.<sup>455</sup>

**140. Should the Penal Code contain offences that specifically deal with bribery in relation to judicial officers? What should be the maximum penalty be for such offences?**

*Conspiring and attempting to obstruct justice*

10.17 While the Penal Code contains a number of offences directed at behaviour that seeks to obstruct the course of justice they are limited to circumstances described in the offences. For example, there are separate offences for fabricating evidence, conspiring with another to falsely accuse someone of a crime or conspiring with another to defeat the course of justice, hindering or preventing a person from giving evidence as a witness, bribery to defeat the course of justice and injury or threats of injury to defeat the course of justice. These offences are classified as misdemeanors and carry a maximum penalty of imprisonment for three years.

10.18 By comparison other jurisdictions such as Queensland and Australia, have general offences of conspiring to obstruct justice, or attempting to obstruct justice, that are intended to capture a range of broad and unspecified conduct that would potentially interfere with, or corrupt, proceedings in the criminal justice system.<sup>456</sup> For example, these offences would cover conduct that interferes with a police investigation, or prevents a person from making an application to a court, or commencing legal proceedings. Conduct might include the use of authority over someone, or a family relationship, to influence justice processes. This range of conduct may not be covered by any of the existing offences in the Penal Code.

10.19 The maximum penalties for general offences of conspiracy to defeat justice, or attempting to defeat justice, in other jurisdictions, are higher than the penalties in the Penal Code for offences that deal with the obstruction of justice. The maximum penalty for these offences in the Australian Criminal Code are five years, while the Queensland Criminal Code sets a

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<sup>455</sup> Criminal Code (Qld) s 120.

<sup>456</sup> Crimes Act (Aust) ss 42, 43, Criminal Code (Qld) ss 211, 212.



maximum penalty of seven years for the offence of conspiring to obstruct justice and 14 years for attempt to obstruct justice.

**141. Should the Penal Code contain offences of conspiring to obstruct justice, and attempting to obstruct justice? What should be the maximum penalties for such offences?**

10.20 The Penal Code does not contain any offence regarding retaliation against a judicial officer, or assessor, or witness for anything lawfully done by that person in judicial proceedings. Section 23 of the Penal Code, which deals with threats or attempts to injure a person in relation to judicial proceedings, only applies to witnesses that have given evidence in a judicial proceeding. The Queensland Criminal Code contains an offence that covers threats, injury or detriment against a judicial officer, juror or witness because of the things done by the person in judicial proceedings. The maximum penalty for this offence is seven years imprisonment.<sup>457</sup>

**142. Should the Penal Code have an offence that covers retaliation against judicial officers, assessors and witnesses for things done by them in judicial proceedings?**

10.21 The Penal Code does not contain any general offences that might apply where a person disobeys a court order, or an order made under an Act, or where a person conspires with another to stop the enforcement of an Act.<sup>458</sup> It does contain offences that cover removing, concealing or disposing of property contrary to a court order<sup>459</sup>, or obstructing a person who is executing an order of a court.<sup>460</sup>

**143. Should the Penal Code contain a general offence of disobeying a lawful order of a court, or person authorised under an Act to make an order?**

10.22 A group of less serious offences apply more specifically to the conduct of judicial proceedings.<sup>461</sup> These offences deal with

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<sup>457</sup> Criminal Code (Qld) s 119B.

<sup>458</sup> For example see Criminal Code (Qld) ss 224, 225.

<sup>459</sup> Penal Code s 127.

<sup>460</sup> Penal Code s 128.

<sup>461</sup> Penal Code s 121.

matters such as disrespectful behaviour, failure or refusal by a witness to attend court and give evidence, obstructing or disrupting court proceedings and disobeying orders given in the proceedings. They carry a maximum penalty of imprisonment for three months. Some of these offences, such as failing to attend court proceedings after being summoned to give evidence, will be obsolete with the introduction of the new Evidence Act.

### *Escape from custody*

10.23 The Penal Code also contains a number of offences that cover rescues from lawful custody (such as imprisonment),<sup>462</sup> violently resisting arrest or escaping from arrest,<sup>463</sup> and helping a prisoner to escape from lawful custody. The first two offences are classified as misdemeanours, and the offence of aiding a prisoner to escape has a maximum penalty of imprisonment for seven years.

<b>144. Should any changes be made to these offences?</b>
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<sup>462</sup> Penal Code s 124.

<sup>463</sup> Penal Code s 125.

## 11 Public Order Offences

- 11.1 Public order offences are used to control the behaviour of people in public places and to promote public safety. This group of offences needs to be assessed to make sure that freedom of speech and freedom of assembly are fairly balanced against the objective of public safety.
- 11.2 The Constitution guarantees the protection of the right to liberty, freedom of expression, freedom of assembly and association and freedom of movement.<sup>464</sup> However, these freedoms are not absolute and in the case of freedom of expression and freedom of assembly and association they can be limited by laws made in the interest of public order, public safety, public morality and public health that are also reasonably justifiable in a democratic society.<sup>465</sup> The right to freedom of movement can be limited by laws that impose restrictions on movement or residence that are reasonably required in the interests of defence, public safety or public order, where those laws can also be reasonably justified in a democratic society.<sup>466</sup> These rights, and the way they can be limited, are particularly important when considering offences that deal with rioting, and behaviour such as begging and being drunk in public.
- 11.3 One feature of public order offences is that, unlike many other offences contained in the Penal Code, they often do not involve any immediate harm to any person, or any interference with property rights.
- 11.4 The Penal Code contains a range of offences that aim to protect the safety and security of the public and the government. They include offences that deal with treason, organisations that use violence, riot, nuisance, behaviour in public such as begging, drunkenness and soliciting prostitutes. The Penal Code also contains public health offences that deal with issues such as rubbish, animals and causing pollution.
- 11.5 Since the Penal Code was introduced provincial and local government have been established in Solomon Islands.

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<sup>464</sup> Constitution Chapter II.

<sup>465</sup> Constitution ss 12(2), 13(2).

<sup>466</sup> Constitution s 14(3).

Provincial Assemblies (depending on the exact terms of the relevant devolution order made by the Minister) have the power to make laws (or ordinances) about waste disposal, rest and eating houses, vagrancy, public nuisances, markets, keeping of domestic animals, pollution of water and local licensing of professions, trades and businesses.<sup>467</sup> Under the Local Government Act local councils (depending on the terms of the warrant given to the council) can make by-laws about animals, public nuisances, to control the movement of beggars and vagrants in public spaces and public health.<sup>468</sup> The Environmental Health Act and Environmental Health (Public Health Act) Regulations also contain provisions about public nuisance, protection of water supplies and offences in relation to the sale of food.

### *Treason*

- 11.6 The offence of treason in the Penal Code is defined by direct reference to the law of England, so that a person is guilty of treason if he or she does anything that would be treason under the law of England. The maximum penalty for treason is life imprisonment.<sup>469</sup> The Penal Code contains a provision so that any person who encourages a foreigner to invade Solomon Islands is guilty of treason.<sup>470</sup> The Penal Code also contains another offence that deals with deposing the Queen, levying war against the Queen or instigating a foreigner to invade 'Her Majesty's dominions.'<sup>471</sup>
- 11.7 Treason is based on very old English law that is complicated as well as out of date. The offences regarding treason have not been updated to reflect the independence of the Solomon Islands. The law on treason was originally designed to protect the monarchy and succession to the throne. The objective of treason laws now should be the protection of the state from instability. While the Queen is still the head of state of Solomon Islands it is necessary to ensure that treason also captures acts against the state of Solomon Islands. Consideration needs to be given to the type of conduct that will create instability and

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<sup>467</sup> Provincial Government Act s 28(3) and Schedule 5.

<sup>468</sup> Local Government Act s 45.

<sup>469</sup> Penal Code s 48.

<sup>470</sup> Penal Code s 49.

<sup>471</sup> Penal Code s 51.

threaten the Constitution. This conduct should be the target of treason laws.

- 11.8 In New Zealand and Australia (independent countries where the head of state is the Queen) the offence of treason covers acts that cause the death, harm or restraint of the head of state (the Queen) as well as the Governor-General and Prime Minister, and acts that assist an enemy at war with the state, or the use of force for the purpose of overthrowing the Government.<sup>472</sup>

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| <p><b>145. Should the offences regarding treason in the Penal Code be replaced with one new offence of treason?</b></p> <p><b>146. Should the offence of treason include the use of force to overthrow Governments (national or provincial), and the use of force to change government policies and actions?</b></p> <p><b>147. Should the offence of treason cover harm to the Governor-General, the Speaker of Parliament and Prime Minister, or any other office?</b></p> |
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- 11.9 The Penal Code does not contain any offences that cover acts or behaviour intended to interfere with democratic functions or authority. For example, the Queensland Criminal Code contains offences that deal with interference with the functions of the Governor, Ministers and the Parliament.<sup>473</sup> It also contains an offence that covers the taking of weapons to Parliament.<sup>474</sup> Under the Queensland Criminal Code it is also an offence to make demands on the Government, its Ministers or its agencies, for things to be done or given, on the threat of harm to the Government or the public.<sup>475</sup>

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| <p><b>148. Should the Penal Code contain offences that address interference with the functions of the Governor-General, Ministers and Parliament?</b></p> <p><b>149. Should the Penal Code contain an offence of taking weapons to Parliament?</b></p> |
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<sup>472</sup> Crimes Act (NZ) s 67, Criminal Code (Aus) s 80.1.

<sup>473</sup> Criminal Code (Qld) ss 54, 55.

<sup>474</sup> Criminal Code (Qld) s 56B.

<sup>475</sup> Criminal Code (Qld) s 54A.

**150. Should the Penal Code have an offence that covers any interference with the political duty or responsibility of another person?**

*Unlawful societies and false rumours*

11.10 Under the Penal Code it is an offence to manage or be a member of an unlawful society.<sup>476</sup> A person guilty of managing an unlawful society is liable to imprisonment for seven years and a person guilty of being a member of an unlawful society is liable to a maximum penalty of three years imprisonment. The offences do not cover other forms of support for an unlawful society such as financial support.

11.11 The Malaita Eagle Force and Guadalcanal Revolutionary Army were declared unlawful societies in 2000. There have been a number of prosecutions under these provisions in the Solomon Islands for offences committed during the ethnic tensions.

11.12 An unlawful society is defined as a group of 10 or more people formed to:

- levy war or encourage or assist any person to levy war on the Government or people of Solomon Islands;
- kill or injure, or incite the killing or injury of any person;
- destroy or injure or incite others to destroy or injure any property;
- subvert or promote the subversion of the Government or of its officials;
- commit or incite acts of violence or intimidation;
- interfere with, or resist, or incite to interference with or resist the administration of the law;
- disturb or incite the disturbance of peace and order in any part of Solomon Islands;
- or declared by the Governor-General to be an unlawful society.<sup>477</sup>

11.13 The Penal Code also says that any person who has any of the insignia, banners, arms, books, papers, documents or other property belonging to an unlawful society, or wears any of the insignia, or is marked with any mark of the society is presumed to be a member of the society.<sup>478</sup> In order to avoid being

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<sup>476</sup> Penal Code ss 67, 68.

<sup>477</sup> Penal Code s 66.

<sup>478</sup> Penal Code s 69.

convicted of the offence of being a member of an unlawful society an accused person, found with any of these things, would have to prove to the court that they were not a member of the society. This presumption may be inconsistent with the Constitutional provision that every person charged with a criminal offence shall be presumed innocent until he is proved or has pleaded guilty.<sup>479</sup>

11.14 Under the Australian Crimes Act a court has the power to declare that an association is unlawful.<sup>480</sup>

11.15 The Penal Code has a separate offence that deals with making or spreading rumours to cause public alarm, or disturbing the public peace by encouraging hatred or contempt for any class of persons. It is a misdemeanour and carries a maximum penalty of imprisonment for one year or a fine of \$200.<sup>481</sup>

**151. Is the maximum penalty for this offence adequate? Should the offence extend to inciting hatred or contempt of any class of persons?**

11.16 Solomon Islands has agreed to be bound by the International Convention on the Elimination of Racial Discrimination (ICERD). Under the ICERD discrimination means any distinction, exclusion, restrictions, or preference based on race, colour, descent or national or ethnic origin. The Convention requires states to penalise the dissemination of ideas based on racial superiority or hatred, acts of violence against a race or people of another ethnic origin or incitement of acts of violence against those groups of people.<sup>482</sup> The UN Committee that monitors ICERD has recommended that states should take action on organised violence based on ethnic origin, and the political exploitation of ethnic violence.<sup>483</sup> This includes spreading ideas based on racial or ethnic superiority or hatred. The definition of unlawful society contained in the Penal Code does not include an association formed to spread ideas based on racial and ethnic superiority or hatred.

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<sup>479</sup> Constitution s 10(2)(a).

<sup>480</sup> Crimes Act (Cth) ss 30A, 30AA

<sup>481</sup> Penal Code s 63.

<sup>482</sup> *International Convention on the Elimination of Racial Discrimination* art 4.

<sup>483</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No 15*.

- 152. Should the unlawful society offence include organisations that are formed to spread ideas based on racial and ethnic superiority or hatred, or incite racial or ethnic hatred?**
- 153. Should the Penal Code contain a presumption about membership of an unlawful association?**
- 154. Should the High Court have the power to declare that an association is unlawful?**

### *Unlawful assembly and riot*

11.17 The objective of criminal laws on unlawful assembly and riot is the protection of the safety of the community, taking into account the Constitutional right of people to take part in peaceful meetings and protests.

11.18 The Penal Code contains a number of offences to address groups or assemblies that threaten public safety. There are separate offences in the Penal Code for taking part in an unlawful assembly, and taking part in a riot.<sup>484</sup> These offences are classified as misdemeanours. An unlawful assembly is defined as three or more people gathered for the purpose of committing an offence, or behaving in a way that might lead to a 'breach of the peace.'<sup>485</sup> Breach of the peace is not defined in the Penal Code. According to the Penal Code a riot takes place when an unlawful assembly begins to carry out its purpose. There is a further offence of rioting after a proclamation. This occurs where 12 or more people riot after a magistrate or senior police officer tells a group of people that they must disperse. It carries a maximum penalty of 5 years imprisonment.<sup>486</sup>

11.19 The Penal Code contains separate offences that apply where rioters destroy a building or machinery, damage a building or machinery or riotously interfere with an aircraft, vehicle or vessel.<sup>487</sup> There is a significant difference between the maximum penalties that apply to these offences. The offence of rioters destroying a building has a maximum penalty of life imprisonment, the offence of rioters damaging machinery or a

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<sup>484</sup> Penal Code ss 74, 75.

<sup>485</sup> Penal Code 73.

<sup>486</sup> Penal Code s 78.

<sup>487</sup> Penal Code ss 80, 81, 82.



building carries seven years imprisonment while the offence of riotously interfering with a vehicle is a misdemeanour.

11.20 The law on rioting, as in many other jurisdictions, is based on old English statute law. In the UK this law has been reformed by the Public Order Act 1986 which contains two offences of riot and violent disorder.<sup>488</sup> The offence of riot is the most serious one and carries a maximum penalty of 10 years imprisonment, while violent disorder carries a maximum penalty of five years imprisonment. There is no requirement for a proclamation to be made before a person can commit the most serious offence of riot. The offence of riot covers unlawful violence by someone in a group of at least 12 people who are using or threatening violence. The offence of violent disorder covers the threat or use of unlawful violence by someone in a group of at least 3 people who are using or threatening violence.

11.21 The UK Act also contains a separate offence of 'affray' which is committed when someone acts on their own and threatens or uses unlawful violence against another person.<sup>489</sup> Violence is defined very broadly to include behaviour that is intended to cause physical harm, or behaviour that might cause harm.<sup>490</sup>

11.22 In order to be convicted of any of these offences under the Public Order Act it must be shown that the behaviour of the accused person would have caused a person of reasonable firmness to fear for his or her personal safety.

**155. Should the offences on riot and unlawful assembly be reformed?**

*Being armed in public*

11.23 The Penal Code contains an offence of being armed in a public place in a way that causes fear to any person. It is a misdemeanour.<sup>491</sup>

11.24 The Penal Code also contains a provision that allows the Minister to restrict places where people can carry weapons, including bushknives, guns and clubs. Once an area is

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<sup>488</sup> Public Order Act 1986 (UK) ss 1, 2.

<sup>489</sup> Public Order Act (UK) s 3.

<sup>490</sup> Public Order Act (UK) s 8.

<sup>491</sup> Penal Code s 83.

restricted a person cannot carry a weapon in that place without reasonable excuse. If the person does not have a reasonable excuse they have committed a misdemeanour.<sup>492</sup> It appears that only Honiara has been declared a restricted area under this law.

### *Nuisance*

11.25 Under the Penal Code causing a nuisance is an offence and carries a maximum penalty of one year imprisonment. Any person who does an act not authorised by law, or fails to carry out a legal duty, and causes injury, danger, annoyance to someone, or obstructs or causes inconvenience to the public commits the offence.

11.26 Under the Queensland Criminal Code the offence of nuisance applies where a person, without lawful justification or excuse, does any act, or fails to do anything in relation to property under his or her control, that causes danger to the lives, health or safety of the public, or danger to the property or comfort of the public, or obstructs the public and causes an injury to someone.<sup>493</sup>

11.27 Provincial governments and local government councils also have the power to make laws about nuisance.

11.28 The Environmental Health Act also contains provisions that are meant to control public nuisance however the provisions in this Act operate in a different way to the one contained in the Penal Code. The Environmental Health Act prohibits people from causing a nuisance, and provincial governments and local governments are also responsible for taking action to stop nuisances. If someone causes a nuisance the local authority or health inspector can take the person to court, and the court can make an order about stopping or dealing with the nuisance. If the person fails to obey the court order he or she commits an offence and is liable to a \$40 fine.<sup>494</sup>

11.29 The Penal Code also contains a nuisance offence that covers many specific circumstances or situations that might occur in public such as:

- slaughtering animals;

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<sup>492</sup> Penal Code s 84.

<sup>493</sup> Criminal Code (Qld) s 230.

<sup>494</sup> Environmental Health Act Part IV.

- throwing rubbish from houses and onto footpaths;
  - dangerous and rabid dogs;
  - damaging signboards;
  - placing stones or timber on roads and footpaths;
  - blasting rocks without permission;
  - writing or drawing indecent or obscene words;
  - using threatening, abusive or insulting words;
  - careless driving; and
  - obstructing the public.
- 11.30 There is a separate offence that addresses making noise in a town area that reasonably annoys or disturbs the public.<sup>495</sup> For the purpose of this offence a town area needs to be declared by an order made by the Prime Minister.
- 11.31 Provincial and local governments also have the power to make laws on these types of matters.
- 11.32 The Penal Code contains an offence covering pollution or obstruction of a source of water including a pump or watercourse.<sup>496</sup> It carries a maximum penalty of \$40 or imprisonment for two months. The Environmental Health Act also contains an offence of knowingly or willfully polluting any river, lake, pond or reservoir, which has a maximum penalty of \$40. Neither of these offences is likely to deter pollution caused by commercial activities because of the low level of the penalty. The offence in the Environmental Health Act applies to a broader range of places.
- 11.33 The Penal Code also contains an offence that covers air pollution<sup>497</sup> and an offence regarding dangerous dogs or animals.<sup>498</sup>

- 156. Should the offences regarding nuisance be retained in the Penal Code? Or should they be changed?**
- 157. Should the criminal laws regarding noise, animals, rubbish and signs be made by Provincial Governments and Local Government?**

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<sup>495</sup> Penal Code s 180.

<sup>496</sup> Penal Code s 181.

<sup>497</sup> Penal Code s 186.

<sup>498</sup> Penal Code s 183.

**158. Should the Penal Code retain the offence of polluting a watercourse, or a more general offence of pollution? Or should the Environmental Health Act address this? Should the penalty for intentional or reckless pollution be increased?**

### *Status offences*

- 11.34 The Penal Code contains offences of being idle and disorderly, or being a rogue or a vagabond.<sup>499</sup>
- 11.35 One feature of these offences is that in addition to imposing a fine or imprisonment as punishment for the offence, a court can also order that the person go to their village or home province and stay there for up to three years.
- 11.36 The offence of being 'idle and disorderly' carries a maximum penalty of a \$20 fine or imprisonment for two months. Anyone who has no visible means of support, or insufficient lawful means of support, begs, or gets a child to beg, is drunk and disorderly in public, does an indecent act or solicits for sex in a public place can be found guilty of this offence.
- 11.37 Some aspects of this offence can be criticised because it imposes criminal sanctions on behaviour that does not cause immediate harm to anyone, or to the property of anyone, and it criminalises poverty. The offence applies to adults as well as children which is contrary to the principle contained in the Convention on the Rights of the Child that legislation should be consistent with the best interests of children.<sup>500</sup>
- 11.38 Other aspects of the offence, such as doing an indecent act in a public place do have the potential to cause harm to people, or the community.

**159. Should any of this behaviour be an offence under the Penal Code? Should there be a separate offence of indecent behaviour in public**

- 11.39 The more serious offence of being a 'rogue or a vagabond' applies to someone who has previously been convicted of being 'idle and disorderly', or who collects for charity under false pretences. The offence carries a maximum penalty for three

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<sup>499</sup> Penal Code ss 175, 176.

<sup>500</sup> *Convention On The Rights of The Child* art 3.

months for a first offence, and one year for a subsequent offence.

- 11.40 This offence also applies where someone is 'found wandering or loitering' in such circumstances that lead to the conclusion that the person is there for an illegal or disorderly purpose. The ambit of this part of the offence is very wide because it can apply where the accused person has not actually done anything. Disorderly is not defined for the purpose of the offence, and the conclusion that the person was there for an illegal or disorderly purpose does not have to be made on an objective basis. This offence might also be criticised because it imposes criminal sanctions on behaviour that does not cause any immediate harm.

<b>160. Should this type of behaviour be an offence under the Penal Code?</b>
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- 11.41 Under the Penal Code being drunk and incapable in a public place is an offence. A police officer can arrest a person without warrant for this offence, and it carries a maximum penalty of \$10 fine or imprisonment for one month.
- 11.42 Consultation by the LRC indicates that consideration should be given to decriminalising being drunk in a public place. The offence imposes criminal sanctions on behaviour that alone does not cause any immediate harm. While it is true a person affected by alcohol may be more likely to behave in a threatening, violent or offensive way and cause harm to individual or community interests, where this does occur the person can be charged with another offence that reflects this more serious behaviour. The resources used by police and courts to deal with people charged with this offence are reasonably significant and might be better used to deal with more serious offences. Being drunk in a public place has been decriminalised in most Australian jurisdictions, New Zealand and in the UK. In some jurisdictions the offence of drunkenness has been replaced by a power that allows police to take a person into protective custody when he or she is significantly affected by alcohol or other drugs. The person affected by drugs or alcohol is taken somewhere safe, and is not charged with any criminal offence.

**161. Should the Penal Code retain an offence of being drunk in public? Should it be replaced with a power to take someone who is drunk in public into protective custody without any criminal charge?**

### *Obscene articles*

11.43 It is an offence under the Penal Code to possess obscene publications for the purpose of distribution or public exhibition. The offence also covers public exhibition of obscene publications, carrying on a business that deals in obscene material, advertising obscene publications and exhibiting an indecent show or performance 'tending to corrupt morals'. It has a maximum penalty of two years imprisonment or a fine of \$200.<sup>501</sup>

11.44 The Penal Code does not define obscene. The common law definition of obscene is material that tends to deprave or corrupt. In Australia the High Court has said that it is material that transgresses the generally accepted bounds of decency.<sup>502</sup> The definition does not encompass other forms of material or content that might be considered offensive or degrading, such as material that depicts extreme violence or torture, or material that shows violence. For this reason some jurisdictions have legislated to prohibit the production and distribution of material that shows extreme violence, torture or cruelty, or violence to force someone to have sex, where it would cause serious offence to a reasonable adult.

11.45 Under the Penal Code if a person has an obscene video or photograph in circumstances where it is reasonable to assume that it was imported into Solomon Islands then it is assumed that the person possessed the items for the purpose of distribution or public exhibition.<sup>503</sup> Any other person with the accused is treated as though he or she was also in possession of the material.<sup>504</sup> This provision is designed to assist with proving that the accused possessed the obscene material for the purpose of distribution or public exhibition. In practice it may be difficult to prove that an obscene video or photography was

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<sup>501</sup> Penal Code s 173.

<sup>502</sup> *Crowe v Graham* (1968) 121 CLR 375.

<sup>503</sup> Penal Code s 174.

<sup>504</sup> Penal Code s 174.

imported into Solomon Islands, and the presumption might therefore be of limited use. The presumption is also limited because it only applies to obscene video or photographs.

- 11.46 The offence in the Penal Code has not been updated since the introduction of the Penal Code and it does not cover all types of media that might now be used to store or depict images, words and sounds. The offence is limited to obscene writings, drawings, prints, printed matter, pictures, posters, emblems, photographs, films or other obscene objects tending to corrupt morals. The scope of the offence does not extend to digital data stored on computers, flash drives, mobile telephones or other devices that store digital information.
- 11.47 Most pornography or obscene material is now distributed through the internet, other digital information networks (such as mobile telephone networks), and through the use of computers and other devices that can store digital information. Pornography and other types of obscene material are also exchanged on a non-commercial basis. The offence and presumption in the Penal Code regarding possession of obscene material does not reflect the way pornography and obscene material is now distributed. The presumption about obscene video or photographs imported into Solomon Islands would not apply to material that is downloaded from the Internet.
- 11.48 There is no offence of producing obscene material in the Penal Code.
- 11.49 The Penal Code does not contain any defence to possession of obscene material where the material has a beneficial purpose, such as scientific research, or a work of art. This means that cultural objects, such as carvings, might be caught by the offence.

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| 162. | Should Penal Code have an offence that addresses the production of obscene material?                                      |
| 163. | Should the Penal Code criminalise the, distribution and exchange of obscene material?                                     |
| 164. | Should the offences in the Penal Code on obscene material include material that that depicts extreme violence or torture? |

**165. Should the Penal Code have a defence to offences regarding obscene material where the material has a beneficial purpose?**

*Prostitution offences*

11.50 The offences regarding prostitution in the Penal Code penalise

- soliciting in a public place;
- living off money earned by a prostitute;<sup>505</sup>
- managing a brothel or allowing premises to be used as a brothel;<sup>506</sup> and
- procuring (recruiting or obtaining) someone for prostitution.

11.51 The offences regarding procuring are considered in Chapter 6.

11.52 Like many other countries the actions of buying or selling sex for money is not prohibited by the criminal law in Solomon Islands but activities associated with prostitution are illegal.

11.53 The prohibition of prostitution in criminal law is criticised because it criminalises a form of work that some adults might freely choose, and it is ineffective in stopping sex work. It criminalises activity that does not lead to harm (where a sex worker is an adult who chooses the work) and it is counterproductive to public health strategies to control the spread of sexually transmitted disease, including HIV/AIDS. The use of criminal law to control sex workers also overlooks the fact that the decision by an adult to engage in sex work is made for economic rather than moral reasons, particularly where people (typically women) have poor economic opportunities. An evaluation of Solomon Islands laws against the provisions of CEDAW has recommended that soliciting offences should not apply to sex workers, who are mainly women, because of the obligation to protect women from exploitation.<sup>507</sup> Prohibition of sex work through criminal laws may drive the activity 'underground' so that it becomes associated with other illegal activities and organised crime, or it leads to criminal or corrupt activity in government areas such as police and immigration.

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<sup>505</sup> Penal Code s 153.

<sup>506</sup> Penal Code s 155.

<sup>507</sup> UNIFEM, UNDP, *Translating CEDAW into Law CEDAW Legislative Compliance in Nine Pacific Island Countries* 341.



11.54 However, prostitution does have the potential to be harmful to individuals and the community, particularly where children are involved or people carry out sex work under exploitative circumstances. Many jurisdictions seek to control prostitution through various laws for these reasons. Examples of these measures include:

- Offences that target the use of children in sex work;<sup>508</sup>
- Offences that target situations where adults are forced to do sex work;<sup>509</sup>
- Laws that put limits on where sex work might occur, for example offences that prohibit soliciting or loitering in public places in a way that harasses or distresses a person;
- Laws that require sex workers to be registered;
- Laws that target the customers or clients of a sex workers, for example, offences which prohibit a customer from soliciting a sex worker;
- Laws that target brothels, for example offences that directed at keeping, owning, managing a brothel, or the offence of allowing premises to be used as a brothel;
- Offences that prohibit children being allowed at brothels;
- Offences directed at people who exploit sex workers, for example offences regarding living off the earnings of a sex worker.

- 166. What activities associated with prostitution should be the subject of offences in the Penal Code?**
- 167. Should buying or selling sex for money (prostitution) itself be an offence?**
- 168. Should having an interest in a place where prostitution occurs be an offence?**
- 169. Should there be offences about brothels? Or where sex work can occur?**
- 170. Should soliciting in public for commercial sex services, or anywhere, be an offence?**

<sup>508</sup> These offences are discussed in Chapter 6.

<sup>509</sup> These offences are discussed in Chapter 6.

*Criminal Trespass*

11.55 Under the Penal Code it is an offence to go onto property, or remain on property, that is in the possession of another person, with the intention to commit an offence, or to intimidate or annoy someone. The offence also covers the situation where a person persistently goes on to a property after being warned not to, or after being told to get off the property. A person convicted of criminal trespass is guilty of a misdemeanour and may be imprisoned for a maximum period of three months, or one year where the property has a house or place of worship on it.<sup>510</sup> It is unclear whether trespass would protect customary rights over land, particularly where those rights can't be categorised as a right to possession.

11.56 There is a further offence of going into any house, or land around a house without a lawful excuse at night time. This offence is a misdemeanour, and has a maximum penalty of imprisonment for one year.

**171. Should the offence of trespass be retained in the Penal Code? Should it specifically incorporate interference with customary rights over land?**

*Alcohol and kwaso*

11.57 Other than the offences of being drunk in public, or being drunk and disorderly in public the Penal Code does not have any offences that deal with the sale or supply of illegal alcohol or kwaso. There is a perception in Solomon Islands that issues of public safety are connected with the production and use of alcohol, including kwaso.

11.58 The Liquor Act regulates the production, sale and distribution of alcohol and contains offences that address the sale of alcohol without a licence, and the sale of alcohol to children under the age of 21 years. It is an offence to make alcohol without a licence<sup>511</sup> or to sell alcohol without a licence.<sup>512</sup> There is also an offence that covers carrying about, offering or exposing for sale alcohol without a licence.<sup>513</sup> These offences carry a penalty of a

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<sup>510</sup> Penal Code s 189.

<sup>511</sup> Liquor Act s 50.

<sup>512</sup> Liquor Act s 57.

<sup>513</sup> Liquor Act s 59.

fine of \$200 for a first offence, and a fine of \$400 or imprisonment for one years or both for a second or subsequent offence. These offences may not apply to all situations where kwaso is offered for supply, or supplied. The offence of selling to children (people under the age of 21 years) applies to people who have a licence under the Liquor Act, or to people who supply alcohol at licensed premises.<sup>514</sup> The offence does not apply to someone who does not have a licence under the Liquor Act to supply or sell kwaso to someone under the age of 21 years.

11.59 Under the Liquor Act police have a power to seize any equipment, ingredients to make illegal alcohol or kwaso, or the alcohol itself, from someone who is making illegal alcohol. However, anything that is seized is forfeited only if the person is convicted of an offence under the Liquor Act. This is likely to be unworkable in many places because of delays in court proceedings and difficulties with transport and storage of items that are seized.

**172. Should the Penal Code contain any offences regarding the production, supply or sale of kwaso?**

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<sup>514</sup> Liquor Act s 72.

## 12 Religion and Marriage Offences

### *Religion*

- 12.2 The Penal Code contains a small number of offences regarding religion. The aim of these offences is to prevent behaviour that might seriously offend sections of the community and could lead to community unrest and violence. These offences do not specify any particular religion, and religion is not defined in the Penal Code.
- 12.3 One offence applies where a person destroys, damages or 'defiles' a place of worship with the deliberate intention of insulting the religion, or knowing that it is likely to insult the religion, of a group of persons. This offence is classified as a misdemeanour.<sup>515</sup>
- 12.4 Another offence, also a misdemeanour, applies where a person says or writes something, or makes some sound or gesture, or places an object within the sight of someone, with the intention of deliberately wounding the religious feelings of any other person.<sup>516</sup>
- 12.5 It is also an offence (misdemeanour) to intentionally cause a disturbance to a group of people engaged in worship or religious ceremony.<sup>517</sup>
- 12.6 Other offences protect burial places and burial. It is an offence to trespass at any burial place, or to cause a disturbance at a funeral ceremony, with the intention of wounding the feelings of any person or insulting the religion.<sup>518</sup> It is an offence to unlawfully hinder the burial of a dead person, or to disinter, dissect or harm a body without lawful authority. This offence extends to failing to bury someone when a person has a responsibility to bury a body.<sup>519</sup>

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<sup>515</sup> Penal Code s 131.

<sup>516</sup> Penal Code s 135.

<sup>517</sup> Penal Code s 132.

<sup>518</sup> Penal Code s 133.

<sup>519</sup> Penal Code s 134.

**173. Do these offences fulfil the objective of preventing offensive behaviour that is likely to lead to community unrest and/or violence?**

### *Marriage*

- 12.7 The Penal Code contains a number of offences aimed at regulating marriage. Statute law (as opposed to customary law) regarding marriage in Solomon Islands is also found in the Islanders' Marriage Act.<sup>520</sup>
- 12.8 Offences covering bigamy are contained in both the Penal Code and the Islanders' Marriage Act, although there are some differences between the two offences. Bigamy means getting married when a person is already married to another person.
- 12.9 Under the Penal Code bigamy carries a maximum penalty of seven years. This offence is committed if a person has been married and they go through a subsequent void marriage. The offence can apply where the first marriage was not a marriage under the Islanders' Marriage Act. However, the offence specifically does not apply if the first marriage was a custom marriage, unless that marriage was registered under the Islanders' Marriage Act.<sup>521</sup> The Islanders Marriage Act allows for registration of custom marriage. Both husband and wife have to apply for registration.<sup>522</sup> It is unlikely that the offence of bigamy in the Penal Code is committed where the second marriage is a custom marriage.
- 12.10 The offence under the Islanders' Marriage Act has a maximum penalty of five years. It is committed when a person married under the Islanders' Marriage Act marries another person, whether under the Islanders' Marriage Act, the Pacific Islands Civil Marriages Order in Council or by custom.<sup>523</sup> Like bigamy in the Penal Code the offence is not committed if the first

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<sup>520</sup> The Islanders' Marriage Act only applies to Islanders, defined in section 17 of the Interpretation and General Provisions Act as a person whose parents are or were indigenous Solomon Islanders, or a person with at least one parent who is or was an indigenous person of any island in Melanesia, Micronesia or Polynesia.

<sup>521</sup> Penal Code s 170.

<sup>522</sup> Islanders' Marriage Act s 18.

<sup>523</sup> Islanders' Marriage Act s 14.

marriage is a custom marriage that has not been registered under the Islanders' Marriage Act.

- 12.11 The policy underlying the offences of bigamy in both the Penal Code and the Islanders' Marriage Act favours marriage under statute law over customary marriage. Under the Penal Code customary marriage, unless the marriage is registered under the Islanders' Marriage Act, is not recognised for the purpose of the offence of bigamy. This is inconsistent with other areas of law where marriage under custom is recognised as a valid form of marriage.<sup>524</sup> There may be some issues in assessing when a marriage under customary law has been finished because the Islanders Divorce Act does not apply to marriage that is not registered, and the rules for finishing a marriage under custom may be different from region to region.

**174. Should the Penal Code retain an offence of bigamy? Or should it be regulated by statute law dealing with marriage?**

**175. Should custom marriage be treated as a valid form of marriage for the purpose of the offence of bigamy?**

- 12.12 It is also an offence to fraudulently cause a woman to believe she is married and to cohabit or have a sexual relationship with her,<sup>525</sup> or to dishonestly or fraudulently go through marriage ceremony knowing it is not lawful.<sup>526</sup> These offences are directed at preventing sham or pretend marriages. It is not clear whether these offences apply to all marriages, including custom marriages.

**176. Are these offences necessary? If these offences are retained in the Penal Code should they apply to men as well as women? Should they apply to customary marriage?**

<sup>524</sup> *Balou v Kolcosi* [1982] SILR 94.

<sup>525</sup> Penal Code s 169, carries a maximum penalty of 10 years imprisonment.

<sup>526</sup> Penal Code s 171, carries a maximum penalty of 5 years imprisonment.

### 13 Criminal libel

#### *What is criminal libel?*

- 13.1 The offence of criminal libel is committed when a person publishes defamatory information about another person, with the intent to defame the other person. The offence is a misdemeanour.<sup>527</sup> The Penal Code also defines a number of situations where criminal libel is excused.
- 13.2 Defamatory information is defined as ‘matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation.’<sup>528</sup> Defamatory information, or matter, can consist of print, writing, painting, effigy or any other means except for information or matter that consists only of gestures, spoken words or other sounds.<sup>529</sup>
- 13.3 A person publishes defamatory material if he or she causes it to be known to the person defamed, or any other person. The circumstances in which the information is published and also contribute to the defamatory meaning of the information, so it is not necessary that the information itself directly defame the person.<sup>530</sup> The offence of criminal libel in the Penal Code is not restricted to defamatory statements of living people, so the offence might be committed with respect to someone who is dead.

#### *Defences to criminal libel*

- 13.4 An accused might be excused from criminal libel if:
- The defamatory information is true, and it was published for the benefit of the public; or
  - The information is privileged by the Penal Code.<sup>531</sup>
- 13.5 Privileged information includes:
- Information published by the Governor-General or at the order of the Governor General, Cabinet or Parliament, or any official document or proceeding;

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<sup>527</sup> Penal Code s 191.

<sup>528</sup> Penal Code s 192

<sup>529</sup> Penal Code s 191.

<sup>530</sup> Penal Code s 193.

<sup>531</sup> Penal Code s 194.

- Information published in Parliament or Cabinet by the Prime Minister, a Minister or a member of Parliament;
  - A fair report of anything said, done or published in Cabinet or Parliament;
  - Evidence and submissions in court proceedings, and decisions by magistrates and judges;
  - Information about a person subject to naval or military discipline;
  - Information a person is legally obliged to publish.<sup>532</sup>
- 13.6 Publication of defamatory information can also be excused if the information is conditionally privileged. Information is conditionally privileged if a person is under a legal, moral or social duty to provide the information, or has a legitimate personal interest in publishing the information, as long as the publication is reasonably sufficient for the occasion.<sup>533</sup>
- 13.7 This exception also covers fair reporting of court proceedings, opinions given in evidence in court, opinions regarding the merit of a book, work of art or performance, complaints to public officials responsible for receiving and investigating complaints and expressions of opinion regarding judicial officers or public officials.<sup>534</sup>
- 13.8 A person is not protected from publishing information that is conditionally privileged if the information was not true, and the person publishing the information knew that, or did not take reasonable care to ascertain whether it was true or false, or the person publishing intended to injure the person to a substantially higher degree than was reasonably necessary.<sup>535</sup>

#### *Civil law of defamation*

- 13.9 Compensation for damage to reputation is available under the civil law. A person can make a claim in court under civil law for compensation for defamatory statements. The offence of criminal libel in the Penal Code is very similar to the law that applies in civil claims for compensation.
- 13.10 However the offence of criminal libel in the Penal Code is broader than the civil law covering defamation. Under the civil

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<sup>532</sup> Penal Code s 195.

<sup>533</sup> Penal Code s 196.

<sup>534</sup> Penal Code s 196.

<sup>535</sup> Penal Code s 197.



law a defendant can avoid all liability for compensation for defamation by proving that the defamatory information is true, while under the Penal Code an accused may only be excused from the offence of criminal libel where the information was true, and it was in the public benefit for the information to be published.<sup>536</sup>

*Freedom of speech, right to a fair trial, protection of reputation*

- 13.11 Criminal libel in the Penal Code reflects the common law offence of libel. The offence of criminal libel under the common law developed to control statements or information that might cause violence or public disorder.<sup>537</sup> The law in this area developed before the widespread acceptance of values such as freedom of speech, and the development of modern democracies.
- 13.12 Criminal libel has been criticised because it potentially threatens or inhibits freedom of expression, deters public comment, and is inconsistent with the principles of fair trial, and presumption of innocence.<sup>538</sup>
- 13.13 In a trial for criminal libel the prosecution does not have to prove that the defamatory information was untrue, and the accused bears the burden of proving that the statement or information was true as part of their defence to the charge.
- 13.14 Freedom of expression is protected by the Constitution, including the freedom to receive ideas and information without interference.<sup>539</sup> Criminal libel laws are one example of laws that restrict the right of freedom of expression. The Constitution allows laws that deal with public order or the protection of reputation, rights or freedoms of other people to limit or restrict the enjoyment of the right of freedom of expression. Laws that restrict the right of freedom of expression must be 'reasonably justifiable in a democratic society'.<sup>540</sup> A democratic society is generally understood to be one that recognises and values

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<sup>536</sup> Penal Code s 194.

<sup>537</sup> The Law Commission Ireland, *Consultation Paper on the Crime of Libel* (1991) [44].

<sup>538</sup> The Law Commission Ireland, *Consultation Paper on the Crime of Libel* (1991) Chapter 6.

<sup>539</sup> Constitution s 12.

<sup>540</sup> Constitution s 12(2).

human rights such as those contained in the Constitution. Under international interpretive principles that apply to human rights such as the right of freedom of expression, a limitation on the right to protect the reputation of others should not be used to protect the government and its officials from public opinion or criticism.<sup>541</sup>

- 13.15 Laws that restrict a Constitutional right such as freedom of expression must also be consistent with other guarantees and rights contained in the Constitution such as the guarantee that a person charged with a criminal offence is entitled to a fair hearing, and is presumed to be innocent until proved guilty.<sup>542</sup>

### *Reform of criminal libel*

- 13.16 Arguments in favour of retaining an offence of criminal libel include the need for the law to send a message that serious libel, where the person knows that the information is false, is not acceptable, and the need to retain an offence to deter and punish the most serious kinds of defamation.<sup>543</sup> The prospects or risk of a court order for compensation following a civil action for defamation may not adequately deter some people, who have no property or money, from making false and defamatory statements.
- 13.17 Criminal libel is rarely prosecuted in Solomon Islands and most other common law jurisdictions such as Australia and in the United Kingdom. Law reform bodies in the United Kingdom, Australia, Canada and New Zealand have considered criminal libel.<sup>544</sup> Options for reform of this area of law include:
- Abolition of criminal libel, as civil action for defamation provides an adequate remedy for people whose reputation is damaged by defamatory statements.<sup>545</sup>
  - Retention of the offence, in a more restricted form.<sup>546</sup>

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<sup>541</sup> United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Right* UN Doc. E/CN.4/1985/4, Annex (1985).

<sup>542</sup> Constitution s 10.

<sup>543</sup> The Law Commission Ireland, *Consultation Paper on the Crime of Libel* (1991) [180].

<sup>544</sup> The Law Commission Ireland, *Consultation Paper on the Crime of Libel* (1991) [182 -187].

<sup>545</sup> Law reform bodies in New Zealand, Canada and South Australia have recommended abolition of the offence.

- 13.18 Those law reform bodies in support of retaining the offence have recommended that the offence be restricted to serious cases of defamatory statements that are false, and where the statements are made to a third party. This approach balances the right to freedom of expression with the need to punish and deter people from making defamatory statements that are false.
- 13.19 For example, in New South Wales criminal libel is restricted to statements or information made about living people, that is published with the intent to cause someone serious harm, and where it is probable that the publication will cause serious harm.<sup>547</sup>

177. **Should the offence of criminal libel be retained or abolished?**
178. **If the offence is retained should it only apply to statements or information that are false, as well as defamatory?**
179. **If the offence is retained should it be changed in any other way? For example, should the definitions of publish and defamatory material be changed? Should the offence continue to apply where the person defamed is dead? Should the offence apply to gestures and spoken words, as well as written words and images?**

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<sup>546</sup> The Australian Law Reform Commission, the Law Commission Ireland and Law Commission England have recommended retention on a restricted basis.

<sup>547</sup> Defamation Act (NSW) s 50(1).

## Appendix 1 – Prosecutions that require consent of DPP

<b>Offences against Public Order</b>		
Genocide	s 52	Intentional destruction, in whole or in part, a national, ethnical, racial or religious group as such by killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; or imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.
<b>Unlawful assemblies, riots and other offences against Public tranquillity</b>		
Managing unlawful society	s 67	Manage or assist in the management of an unlawful society.
Being member of unlawful society	s 68	Member of society, or allow a meeting of any such society to be held in any house, building or place belonging to or occupied by him or over which he has control.
<b>Corruption and Abuse of Office</b>		
Officers charged with administration of property of a special character or with special duties	s 94	A person employed in the public service and charged with special duties to deal with certain types of property as well as business discharges such duties to protect his or her interests.
False claims by officials	s 95	A person employed in the public service, charged with the making of returns and statements for any monetary payments make a false return or statement.
Abuse of Office	s 96	A person employed in the public service abuses his or her office for gain or to cause prejudice to another person's rights.

Threat of injury to persons employed in public service	s 101	Threats to a person employed in the public service to induce him or her to do something.
<b>Offences against Morality</b>		
Incest by males	s 163	A male has sexual intercourse with his granddaughter, daughter, sister or mother commits incest.
Incest by females	s 164	A female person above the age of fifteen years has sexual intercourse with her grandfather, father, brother or son.
<b>Nuisance and other miscellaneous offences</b>		
Traffic in Obscene Publication	s 173	Distribution of obscene material, importing, exporting obscene material, exhibit indecent show or performance.
<b>Fraud by trustees and person in a position of trust and false accounting</b>		
Conversion	s 304	Conversion by a trustee with intent to defraud.
<b>Forgery, Coining, Counterfeiting and similar offences</b>		
Defacing and uttering defaced coins	s 362	Defacing or using defaced coins.
<b>Secret Commission and Corrupt Practices</b>		
Corrupt Practices	s 374	Giving a bribe to an agent, or an agent taking a bribe, to not do something or do something in relation to his or her principal's affairs.

## Appendix 2 – Table of offences and maximum penalties

OFFENCE	PENAL CODE SECTION	MAXIMUM PENALTY
<i>Murder</i>	200	<i>Mandatory life imprisonment</i>
<i>Manslaughter</i>	199	<i>Life imprisonment</i>
<i>Attempted murder</i>	215	<i>Life imprisonment</i>
<i>Killing of an unborn child</i>	221	<i>Life imprisonment</i>
<i>Rape</i>	136	<i>Life imprisonment</i>
<i>Incest by male of female under 13 years old</i>	163	<i>Life imprisonment</i>
<i>Defilement of a girl the age of 13 years</i>	142,	<i>Life imprisonment</i>
<i>Acts intended to cause grievous bodily harm</i>	224	<i>Life imprisonment</i>
<i>Abortion</i>	158, 157	<i>Life imprisonment</i>
<i>Robbery and Extortion</i>	293	<i>Life imprisonment</i>
<i>Forgery</i>	336	<i>Life imprisonment</i>
<i>Arson</i>	319	<i>Life imprisonment</i>
<i>Rescue or attempt to rescue person who is charged or sentenced for an offence punishable with life imprisonment</i>	124 (a)	<i>Life imprisonment</i>
<i>Treason</i>	48	<i>Life imprisonment</i>
<i>Instigating invasion</i>	49	<i>Life imprisonment</i>
<i>Treasonable felonies</i>	51	<i>Life imprisonment</i>
<i>Rioters demolishing buildings</i>	80	<i>Life imprisonment</i>
<i>Buggery</i>	160	<i>14 years imprisonment</i>
<i>Causing grievous harm</i>	226	<i>14 years imprisonment</i>
<i>Poisoning with intention to injure or annoy</i>	228	<i>14 years imprisonment</i>
<i>Aiding, abetting, counseling or procuring suicide</i>	219	<i>14 years imprisonment</i>
<i>Genocide</i>	52	<i>14 years imprisonment</i>
<i>Attempt to commit arson</i>	320	<i>14 years imprisonment</i>
<i>House breaking and committing felony</i>	300	<i>14 years imprisonment</i>
<i>Making written threats to kill someone</i>	217	<i>Ten years imprisonment</i>
<i>Kidnapping or abducting to subject person to grievous bodily harm or slavery</i>	251	<i>Ten years imprisonment</i>
<i>Fraudulent pretence of marriage</i>	169	<i>Ten years imprisonment</i>
<i>Incest by male of female</i>	163	<i>Seven years imprisonment</i>
<i>Attempt to commit unnatural offence and indecent assaults</i>	161	<i>Seven Years imprisonment</i>
<i>Stealing of a child</i>	253	<i>Seven years imprisonment</i>
<i>Kidnapping</i>	250	<i>Seven years imprisonment</i>

Official corruption	91	Seven years imprisonment
Conspiracy to commit a felony	383	Seven years imprisonment
Attempt to commit offence	378, 379, 380	Seven years imprisonment
Attempted rape	138	Seven years imprisonment
Abduction of woman of any age for sexual inter course	139	Seven years imprisonment
Conversion by trustees	304	Seven years imprisonment
House breaking with intent to commit felony	301	Seven years imprisonment
Perjury	102	Seven years imprisonment
Giving false statement on oath	103	Seven years imprisonment
Giving false statement with reference to marriage	104	Seven years imprisonment
Giving false statements with reference to births and deaths	105	Seven years imprisonment
Fabricating evidence	110	Seven years imprisonment
Corruptly taking a reward	120	Seven years imprisonment
Rescue or attempt to rescue person who is charged or sentenced for an offence not punishable with life imprisonment	124(b)	Seven years imprisonment
Managing unlawful society	67	Seven years imprisonment
Rioters injuring buildings and machineries	81	Seven years imprisonment
Bigamy	170	Seven years imprisonment
Assault causing bodily harm	245	Five years imprisonment
Wounding	229	Five years imprisonment
Cruelty to children	233	Five years imprisonment
Rioting after proclamation	78	Five years imprisonment
Indecent assault	141	Five years imprisonment
Defilement of a girl between the age of 13 and 15, female idiot or imbecile women	143	Five years imprisonment
Stealing	258	Five years imprisonment
Being found at night armed or in possession with house breaking implements	302	Five years imprisonment
Unlawful marriage	171	Five years imprisonment
Failing to provide necessities to someone	332	Three years imprisonment
Intimidate or molest someone	231	Three years imprisonment
Aid prisoner to escape	126	Three years imprisonment
Member of unlawful society	68	Three years imprisonment
Receiving and assisting another to escape punishment	386	Three years imprisonment
Attempt by male to commit incest of female under 13 years old	163(3)	Two years imprisonment
Trafficking obscene material	173	Two years imprisonment
Acts that endanger human life, or likely to cause harm	237	Two years imprisonment
Endanger the safety of people traveling by aircraft, vehicle or	240	Two years imprisonment

boat		
Knowingly or negligently convey	242	Two years imprisonment
Abduction of an unmarried girl	254	Two years imprisonment
Resisting arrest and escape from lawful custody	125	Two years imprisonment
Abduction of woman below 18 years old for sexual intercourse	140	Two years imprisonment
Procuring or attempts to procure a girl under the age of 18 years to have unlawful sexual intercourse;	144(a)	Two years imprisonment
Procuring or attempt to procure a girl to become a prostitute, or become a 'inmate of a brothel	144(b)	Two years imprisonment
Detaining a girl in a brothel	148	Two years imprisonment
Disposing of minors under the age of 15 years for prostitution or unlawful intercourse	149	Two years imprisonment
Obtaining minors under the age of 15 years for prostitution or unlawful sexual intercourse	150	Two years imprisonment
Making false statutory declarations	106	Two years imprisonment
Deceiving witnesses	114	Two years imprisonment
Destroying evidence	115	Two years imprisonment
Conspiracy to defeat justice and interfere with witnesses	116	Two years imprisonment
Bribery to obstruct justice	122	Two years imprisonment
Rescue or attempt to rescue person in any other cases	124(c)	Two years imprisonment
Rioters interfering with aircraft and vehicles	82	Two years imprisonment
Going armed in public	83	Two years imprisonment
Possession of a weapon	84	Two years imprisonment
Living off earnings of prostitute, soliciting	153	Two years imprisonment
Keep or manage a brothels	155	Two years imprisonment
Insult religion	131	Two years imprisonment
Disturb religious assemblies	132	Two years imprisonment
Trespass on burial places	133	Two years imprisonment
Hinder burial of dead body of person	134	Two years imprisonment
Libel	191	Two years imprisonment
Conspiracy to commit a misdemeanor	384	Two years imprisonment.
Obstructing court officers	128	One year imprisonment
Making false declaration to obtain registration	107	12 months imprisonment
Inconsistent or contradictory statement	111	Six months imprisonment
Idle and disorderly person	175	Six months imprisonment
Rogues and vagabonds	176	Six months imprisonment
Offences relating to judicial proceedings	121	Three months imprisonment



<i>Dangerous dogs and animals</i>	<i>183</i>	<i>One month imprisonment</i>
<i>Shouting in town</i>	<i>180</i>	<i>One month imprisonment</i>